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EXECUTOR'S LEGAL SURVIVAL® GUIDE

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EXECUTOR’S LEGAL SURVIVAL® GUIDE

The purpose of this guide is to assist you in naming a good executor in your will; explain to executors their duties and responsibilities and inform estate beneficiaries of the role of the executor in the probate process.

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I. EXECUTOR FAQs

Q What is probate?

A Probate is the process of proving that the will of a deceased person (testator) is in fact his or her will and reflects his or her wishes. The purpose of probate is to prove the validity of the will, have the executor appointed and administer the estate. A will may not be probated unless the Surrogate's Court is satisfied as to the genuineness of the will and the validity of the execution (signing) of the will. A will must be probated to be valid. A will is not operative until it is admitted to probate by the Surrogate's Court. Admission to probate requires establishing, upon due notice to all required persons, that: (1) the will is the will of the decedent; (2) that it has been signed and witnessed and otherwise executed as required by law; (3) that at the time of its execution the decedent was of sound mind; and (4) that it, indeed, was the last will and testament of the decedent. The execution of a subsequent will revokes an earlier will. When the court is satisfied that the above conditions have been established, the will is admitted to probate and is effective for all purposes, including the transfer of the title to real property. Until such admission to probate, the will has no force and effect and the named executor has not authority.

Q What qualities and abilities should an executor have?

A When you write a will as testator, it is especially important to choose competent and trustworthy executors and alternate executors. Otherwise, even careful estate planning may be rendered useless. The executor can be any person or institution that you choose. However, an executor should be:

- experienced and competent in business matters;
- familiar with your business, finances and property;
- able and willing to act as your executor;
- able to spend the time necessary to perform his or her duties;
- able to work with the estate's attorney and accountant; and
- able to provide for the continuation of your business.

Q What are the executor's responsibilities?

A A will names an executor who has the power to petition the Surrogate's Court to probate a will. An executor is the "personal representative" and fiduciary of the decedent and as such must administer the estate. The executor must ensure that the will is carried out. In general, the executor must:

1. Handle funeral arrangements and pay for the funeral;
2. Pay any outstanding bills of the estate;
3. Collect and preserve assets;
4. Pay debts, taxes and administration expenses of the estate; and
5. Distribute estate assets according to the terms of the will.

Q Where is the will probated?

A A will is probated in the Surrogate’s Court of the county where the deceased lived at the time of death.

Q How much are filing fees?

A The Surrogate’s Court charges fees for probating a will according to the following statutory fee schedule which is based on the value of the probate estate:

<u>Value of the Estate</u>	<u>Fee Rate</u>
Less than \$10,000	\$ 45.00
\$10,000 but under \$20,000	\$ 75.00
\$20,000 but under \$50,000	\$ 215.00
\$50,000 but under \$100,000	\$ 280.00
\$100,000 but under \$250,000	\$ 420.00
\$250,000 but under \$500,000	\$ 625.00
\$500,000 and over	\$1,250.00

Q How much does the executor get paid?

A An executor is paid a commission for all sums of money and all property that he or she receives and pays out, including the estate assets (less any specific bequests or items of real or personal property left by the testator to a specific individual), and income plus all the reasonable and necessary expenses paid by him or her in order to probate the will based on this statutory rate schedule:

- 5% for receiving and paying out up to \$100,000.
- 4% for receiving and paying out the next \$200,000.
- 3% for receiving and paying out the next \$700,000.
- 2 ½% for receiving and paying out the next \$4,000,000.
- 2% for receiving and paying out sums above \$5,000,000.

However, the will may specify different provisions for paying the executor based on a previously agreed rate or fixed amount. It may be more advantageous for an executor who is also a beneficiary under the will to receive a disposition rather than an executor’s fee. A disposition is not taxable, whereas executor fees are taxable as income. If the value of the probate estate is more than \$300,000, each executor up to a total of two is entitled to be paid a full commission. If more than two executors are named, they must split two full commissions unless the decedent has specifically provided otherwise in the will. Even though a testator can specify in the will that the executor must waive a commission in order to be eligible to serve, this is recommended only if the executor is a beneficiary or a very close personal friend, since being an executor is very time consuming. Banks and trust companies may charge more for their services as executors and trustees and particularly as money managers.

Q What are the steps in probating a will?

- A**
1. The executor must notify all individuals and guardians of children or incompetent persons who may benefit for the estate, and other parties.
 2. The court reviews the following documents:
 - a. Original will.
 - b. Petition for a decree of probate and appointment of an executor
 - c. Death certificate.
 - d. Affidavits of attesting witnesses to the will signing.
 - e. Waivers from heirs.
 3. The Court issues a decree for probate and letters testamentary which is the official decree of the Surrogate's Court giving authority and appointment to the executor to carry out his/her duties. Local court rules may require additional documents.

Q Should a family member be named as executor?

A Not necessarily. Usually each spouse names the other as executor and a child who lives nearby as the alternate executor. If the survivor is elderly, he or she may be unable to properly handle this important and technical task. If the estate administration is expected to be complicated or there is family disharmony, a bank trust department or attorney can be named as executor. The surviving spouse can receive reports from the corporate executor or attorney/executor and be kept advised of all the activities in the estate-settlement process without having to become involved with the details of carrying out the various tasks of estate settlement. Nonetheless, many clients still prefer to use family members as the executor of their estates.

Q What death or survivor benefits are available from Social Security?

A If the deceased has paid on Social Security for at least forty (40) quarters, death benefits and survivor benefits may be available. A death benefit of \$255 for funeral expenses is available to eligible spouses or dependent children. The survivor can complete the necessary forms at the local Social Security office or the funeral director may complete the application and apply the payment directly to the funeral bill. Survivors benefits are available for a spouse age 60 or older; disabled surviving spouse age 50 or older; spouse under 60 who cares for dependent children under 16 or disabled children; and disabled children under the age of 18.

Q What Veterans benefits are available to the survivors?

A If the deceased was a veteran who received a discharge letter other than dishonorable, survivors may get \$300 for burial and funeral expenses and \$300 for a plot. There is a burial allowance of \$2,000 for Veterans who die of service-related causes. Burial in a national cemetery is free to veterans, spouse, and dependent children. Veterans are also eligible for a burial flag and headstone or grave marker. The surviving spouse and dependent children of disabled veterans may also be entitled to a lump sum death benefit, monthly payments, such as educational assistance and medical care.

Q What benefits are available from the decedent's employer?

A Many employers provide life, health, or accident insurance. The deceased may be due a final paycheck for vacation or sick leave. Contact all past employers to see if there are death benefits, continued health insurance coverage for the family, or payments from an annuity or pension plan. If the deceased belonged to a union or professional organization, check to see if death benefits are available for members. Also find out about any credit union balances.

Q What assets are considered to be non-probate assets?

A Jointly owned property, property in trust and assets with a designated beneficiary such as life insurance, pension, IRA and 401-k plans do not go through the probate process.

Q Is the executor personally responsible for payment of the estate debts?

A The executor is personally responsible for payment of all debts and taxes to the extent of the estate's assets. Therefore, if the estate's assets are distributed to anyone other than the decedent's creditors and beneficiaries, the executor can be held personally liable. The executor should not distribute the assets to the beneficiaries until the will is probated because a later will could be located, a surviving spouse could exercise his or her right of election or an objection to probate could be made.

Q Is the executor required to file a bond?

A Generally, an executor is no longer required to file a bond with the court unless the will requires it. If required, a bond is purchased by the executor from a bond company. The executor pays for the bond with assets from the estate. The bond secures the amount of the value of the estate which protects the beneficiaries if the executor steals the estate's assets. Unless the will specifically provides otherwise, an executor will be required to file a bond if he or she is not a resident of New York State, is not sufficiently responsible, or is required to hold, manage or invest real or personal property for the benefit of another person.

Q Who can be an executor?

A Any U.S. citizen over the age of eighteen (18) years who has not been convicted of a felony can be named executor of a will. Some people choose a lawyer, accountant or financial consultant because of his or her expertise. Others appoint a spouse, adult child, relative or friend, especially if the estate is small. Because of the many responsibilities involved, it is prudent to ask the named executor if he or she is willing to serve as executor.

Q What should the executor do if the decedent was leasing real property?

A If the decedent had a lease, the executor is required to find another tenant. The executor should request that the landlord consent to assignment of the lease or to the subletting of the premises. The request must be accompanied by a written consent of any co-tenant or guarantor of the lease and state the name, business and home address of the proposed assignee or sub-lessee. Within ten (10) days after the mailing of the request, the landlord may ask the sender for additional information.

Q Will the executor have to pay federal and state estate taxes?

A New York State estate taxes will only have to be paid if the gross estate exceeds \$1 million dollars. Federal estate taxes will have to be paid only if the gross estate (probate and non-probate assets) exceeds \$5 million dollars.

II. EXECUTOR'S CHECKLIST

A. Make burial and funeral arrangements.

1. Check the will/health care proxy for directions regarding funeral arrangements and organ donation.
2. Meet with the funeral director, cemetery representative and clergy to make burial and funeral arrangements.

B. What Documents to Collect. Collect the following documents in order to establish insurance, pension, social security and ownership rights:

1. Will
2. Birth Certificate
3. Marriage Certificate from the County Clerk
4. Death Certificate from the funeral director or city or town clerk
5. Social Security number
6. Citizenship papers
7. Insurance policies (life, health, credit, accident & property)
8. Bank books and statements to determine name of bank, account numbers, balance and names on account
9. Deeds
10. Leases and tenant information
11. Car title and registration – license number and vehicle identification number
12. Income tax returns (IRS Form 4506)
13. Veterans Discharge Certificates
14. Disability claims
15. Property tax bills and receipts
16. Credit card information
17. Trusts
18. Names and Addresses of relatives and beneficiaries
19. Title search
20. Property Survey
21. Stocks – broker name, company name, number of shares and date of death value
22. Bonds – serial number, issue date and date of death value
23. Employment death benefits
24. Separation agreements, prenuptial agreements and divorce decrees
25. IRS form 712 from each life insurance company

C. Who to notify:

1. Creditors (e.g. credit card companies, mortgage company)
2. Banks/Credit Unions
3. Stockbrokers/Financial Planners

4. Church or synagogue
5. Post office
6. Relatives
7. Employer
8. Insurance agents: life, annuity, auto, health and disability
9. Religious, fraternal, civic, veterans, professional and alumni organizations
10. Unions
11. Newspapers regarding death notices
12. Attorney
13. Accountant
14. Beneficiaries
15. Social Security Administration
16. Veterans Administration
17. IRS Form 56: Notice Concerning Fiduciary Relationship
18. Landlord
19. Trustees
20. Defense Finance and Accounting Service, 800-269-5170 (military service retiree receiving benefits)
21. Office of Personal Management, 888-767-6738 (if decedent is a retired or former federal civil service employee)
22. U.S. Citizenship and Immigration Service (if decedent was not a U.S. citizen)
23. State Department of Motor Vehicles (if decedent had a driver's license or state ID)

D. Preserve Estate Property

1. As a precautionary measure, have a witness present when you handle estate property.
2. Order an appraisal of the personal and real property of the estate.
3. Review insurance coverage.
4. Change locks on residence.
5. Cancel credit cards.
6. Arrange for security at decedent's place of business.
7. Install an alarm system or change the existing alarm system codes, or hire security service if warranted by value of assets.
8. Notify police if the house is vacant.
9. Take photographs of the house, rooms, jewelry, etc., to document contents.
10. Notify insurance carriers (home, auto and life) of decedent's death. Make sure policies have appropriate coverage (additional coverage may be necessary if home will be vacant), adequate limits to fully covers estate property and estate fiduciaries and that premiums are paid on time.
11. Advise anyone who has power of attorney that the power has terminated and that they are no longer authorized to act.
12. Advise family members and beneficiaries not to take tangible personal property from the decedent's residence and not to open any safe deposit boxes.

E. Notify Credit Reporting Agencies. Notify all three of the following national reporting agencies of the death and instruct them to list all accounts as “Closed. Account Holder is Deceased.” Request a credit report in order to obtain a list of all creditors and to review recent credit activities.

1. Experian, 888-397-3742, P.O. Box 9701, Allen, Texas 75013
2. Equifax, 800-525-6285, P.O. Box 105069, Atlanta, Georgia 30348
3. TransUnion, 800-680-7289, P.O. Box 6790, Fullerton, California 92834

F. What Advisors to Hire:

1. Retain a local attorney for probate and an out-of-state attorney for ancillary probate. The attorney will determine whether there is a need for preliminary letters or letters of temporary administration.
2. Real estate and personal property appraisers.
3. Real estate broker to sell the house or sublet the apartment.
4. Investment advisors.
5. Certified Public Accountant to prepare the estate, individual and fiduciary returns and to check with the IRS and state tax authorities for back taxes or unfiled returns.
6. Insurance agent for the executor’s bonds and to obtain proper coverage.

G. Pay the following:

1. All valid debts including funeral costs.
2. Fees and expenses incurred in administration.
3. Estate taxes.
4. Income and other taxes.
5. Medical bills.
6. Utilities.

H. What Benefits to Apply for:

1. Social Security.
2. Insurance.
3. Veterans Administration.
4. Obtain employer identification number by completing IRS Form SS-4.

I. What Records to Maintain

1. Assets
2. Income
3. Disbursements
4. Open estate checking, savings and/or investment accounts

J. File an Inventory of Assets with the Surrogate's Court within six (6) months of your appointment. The inventory consists of the following:

1. Cash and cash equivalents.
2. Insurance proceeds.
3. Death benefits payable to the estate.
4. Tax refunds.
5. Medical insurance payments due to the decedent.
6. Real estate.
7. Stocks and bonds.
8. Business interests.

K. Estimate the Estate's Cash Needs

1. Funeral expenses.
2. Cash legacies.
3. Filing fees.
4. Accounting and legal fees.
5. Estimated commissions and guardian ad litem expenses.
6. Payment of decedent's debts.
7. Cost of safeguarding and maintaining assets.
8. Cost of selling assets.
9. Estimated gift, income and estate taxes.

L. Distribute money and property in accordance with the will and make the final settlement at least seven (7) months after being appointed as executor.

1. Ascertain if any assignments are on file, pay legacies, and deliver specific bequests according to the will.
2. Obtain releases from beneficiaries and discharge from the court.
3. In distributing assets from the residuary estate, choose a date that will result in income tax economy for the beneficiaries as well as for the estate.
4. Prepare information for final accounting, including all assets, income and disbursements.
5. Set-up trusts created by the will and arrange for payment of any regular remittances to trust beneficiaries.

III. WEB RESOURCES

- A. For further information and forms visit LegalSurvival.com which is recommended by *Fortune Magazine* as a notable site on estate planning.
- B. For state-specific information on how to obtain birth, death, marriage and divorce records, visit www.cdc.gov/nchs/howto/w2w/w2welcome.htm
- C. Regulations of the Federal Trade Commission on funeral homes can be found at <http://www.ftc.gov/bcp/edu/microsites/funerals/>
- D. Social Security benefits are explained at www.ssa.gov/pubs/10084.html
- E. Information about Veterans burial benefits, military funeral honors, burial flags and survivors' benefits can be found on the VA site at www.cem.va.gov/burial.htm
- F. IRS information on the steps needed to file final tax returns for decedents can be found at irs.gov

Executor's Legal Survival® Guide is published as a public service by Friedman & Ranzenhofer, P.C., Attorneys, with offices in Akron, Buffalo, Batavia, Rochester, West Seneca, Wheatfield and Williamsville/Clarence, New York. The firm, founded in 1955, practices estate planning, real estate, personal injury, criminal, traffic, marital, family, bankruptcy, business, municipal, corporate, debt collection, landlord/tenant and elder law. Your comments are always welcome. For further information or to obtain permission to reprint the contents of this guide, call Robert Friedman at (716) 631-9999, visit the Legal Survival web site at www.legalsurvival.com or e-mail to rfriedman@legalsurvival.com.

While a great deal of care has been taken to provide accurate and current information, the ideas, suggestions, general principles and conclusions presented in this guide are subject to local, state and federal laws and regulations, court cases and any revisions of same. The reader is thus urged to consult legal counsel regarding any points of law – this guide should not be used as a substitute for competent legal advice.

The purpose of this guide is to give the reader a general understanding of the law – not provide specific advice. Every effort has been made to achieve accuracy. The law constantly changes and is subject to differing interpretations. Always consult with your attorney and act only on his or her advice. Friedman & Ranzenhofer, P.C., shall not be responsible for any damages resulting from any inaccuracy or omission. This guide is designed to provide accurate and authoritative information in regard to the subject matter covered. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. Certain portions of this guide may be applicable only to New York State law.

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