



## The Probate Process: What to Do Following a Death

**ElderLawAnswers**

The Law Offices of Brian A Raphan, P.C.  
7 Penn Plaza, New York, NY 10001  
(7th Ave/31st St) 212-268-8200  
[info@RaphanLaw.com](mailto:info@RaphanLaw.com)  
[www.RaphanLaw.com](http://www.RaphanLaw.com)

# The Probate Process: What to Do Following a Death

Manage an estate with a minimum of anguish

At the Law Offices of Brian A. Raphan, P.C.  
we can help you with all or any parts of Probate.  
Our reasonable rates and hands-on approach helps  
ease the burden for you and your family.

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## ▶ FIRST STEPS

The emotional trauma brought on by the death of a close family member often is accompanied by bewilderment about the financial and legal steps the survivors must take. The spouse who passed away may have handled all of the couple's finances. Or perhaps a child must begin taking care of administering an estate about which he or she knows little. And this task may come on top

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of commitments to family and work that can't be set aside. Finally, the estate itself may be in disarray or scattered among many accounts, which is not unusual with a generation that saw banks collapse during the Depression.

Here we set out the steps the surviving family members should take. These responsibilities ultimately fall on whoever was appointed

executor or personal representative in the deceased family member's will. Matters can be a bit more complicated in the absence of a will, because it may not be clear who has the responsibility of carrying out these steps.

First, secure the tangible property. This means anything you can touch, such as silverware, dishes, furniture, or artwork. You will need to determine accurate values of each piece of property, which may require appraisals. Later, you will distribute the property as the deceased directed. If property is passed around to family members before you have the opportunity to take an inventory, this will become a difficult, if not impossible, task. Of course, this does not apply to gifts the deceased may have made during life, which will not be part of his or her estate.

Second, take your time. You do not need to take any other steps immediately.

While bills do need to be paid, they can wait a month or two without adverse repercussions. It's more important that you and your family have time to grieve. Financial matters can wait.

When you're ready, but not a day sooner, meet with an attorney to review the steps necessary to administer the deceased's estate. Bring as much information as possible about finances, taxes and debts. Don't worry about putting the papers in order first; the lawyer will have experience in organizing and understanding confusing financial statements. Just bring all the information and papers you have to the meeting.

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## THE PROBATE PROCESS

Probate is the process by which a deceased person's property (the "estate") is passed to his or her heirs and legatees (people named in the will). Strictly speaking, "probate" only includes property owned by the deceased in his or her individual name, not joint property, living trusts, life insurance or retirement accounts that pass automatically at death. But the term is often used to encompass the entire estate, including both probate and non-probate property. While the legal process, supervised by the probate court, usually takes about a year, substantial distributions from the estate can be made in the interim.

The exact rules of estate administration differ from state to state. In general, they include the following steps:

- 1. Filing the will and petition** at the probate court in order to be appointed executor or personal representative. In the absence of a will, next of kin must petition the court to be appointed "administrator" of the estate. In many states in the absence of a will, not only family but any "interested party," including creditors, may be appointed.

- 2. "Marshaling," or collecting, the assets.** This means that you have to find out everything the deceased owned. You need to file a list, known as an "inventory," with the probate court. It's generally best to consolidate all the estate funds to the extent possible. Bills and bequests should be paid from a single checking account, either one you establish or one set up by your attorney, so that you can keep track

of all expenditures. The account needs to be a new account in the name of the estate, not the continuation of an account previously owned by the decedent.

**3. Paying bills and taxes.** A federal estate tax return generally must be filed if the estate exceeds the estate tax exemption equivalent applying in the year when the individual died. Many states have lower taxation thresholds. The return must be filed within nine months of the date of death. If you miss this deadline and the estate is taxable, severe penalties and interest may apply. If you do not have all the information available in time, you can file for an extension and pay your best estimate of the tax due. In any case, estate tax returns should be prepared by an experienced probate attorney.

**4. Filing tax returns.** You must also file a final income tax return for the decedent and, if the estate holds any assets and earns interest or dividends, an income tax return for the estate. If the estate does earn income during the administration process, it will have to obtain its own tax identification number in order to keep track of and properly report such earnings.

**5. Distributing property to the heirs and legatees.** Generally, executors do not pay out all of the estate assets until the period runs out for creditors to make claims, which can be as long as a year after the date of death. But once the executor understands the estate and the likely claims, he or she can distribute most of the assets, retaining a reserve for unanticipated claims and the costs of closing out the estate.

**6. Filing a final account.** The executor must file an account with the probate court listing any income to the estate since the date of death and all expenses and estate distributions. Once the court approves this final account, the executor can distribute whatever is left in the closing reserve, and finish his or her work.

Some of these steps can be eliminated by avoiding probate through joint ownership or trusts. But whoever is left in charge still has to pay all debts, file tax returns, and distribute the property to the rightful heirs. You can make it easier for your heirs by keeping good records of your assets and liabilities. This will shorten the estate administration process and reduce the legal bill.

## ► SHOULD YOU AVOID PROBATE?

The answer is “yes.” But don’t worry too much about it. Lawyers and others selling “living” and “loving” trusts paint a grim picture of the horrors of probate. While the stories are no doubt true, they are not typical. The probate process involves some expense and can take up to a year, or even longer in some cases. It involves the probate court, which can be cumbersome. And your finances become a public record. These are the downsides. The upside is that court supervision can help make certain that your estate is passed on properly as you direct.

While probate is not usually the nightmare predicted by some, it is an added expense and burden for your heirs that can be avoided. If you have more than one child, the best mechanism to avoid probate is a revocable trust, often referred to as a “living” trust. There is some expense to establishing the trust, and it provides no benefit unless you actually go to the trouble of retitling your assets so that the trust is funded. If you want one heir to receive everything, and you are not concerned that he or she may abscond with your funds (and there’s no risk of bankruptcy, divorce or need for financial aid), you can simply put his or her name on your accounts and real estate as a joint owner.

Additional advantages of a revocable trust are that they provide for management of your assets if you become incompetent and they can continue for the benefit of one or more of your heirs if you do not think it wise to give them funds outright.

For more information or to find out  
about our additional practice areas  
contact us at :

The Law Offices of Brian A Raphan, P.C.  
7 Penn Plaza, New York, NY 10001  
(7th Ave/31st St) 212-268-8200  
[info@RaphanLaw.com](mailto:info@RaphanLaw.com)  
[www.RaphanLaw.com](http://www.RaphanLaw.com)