A NON-LAWYER'S GUIDE TO NEW JERSEY

# ESTATE ADMINISTRATION & PLANNING

M. Brian Hall, Esq. &
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Understanding the Process and Potential Pitfalls

WARD, SHINDLE & HALL | ATTORNEYS AT LAW

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## UNDERSTANDING THE PROCESS AND PITFALLS

WARD, SHINDLE AND HALL,
ATTORNEYS AT LAW

This book is dedicated to our loving, supportive, and eternally patient families:

Rachel, Jackson, Evan, Bryce, & Barkley
by M. Brian Hall, Esq.

Megan, Jack, & Kirby
by John Shindle, Esq.

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*... but in this world, nothing can be said to be certain, except death and taxes.*

Benjamin Franklin

# INTRODUCTION

**PLANNING FOR AND DEALING WITH** the aftermath of one's inevitable passing is generally an uncomfortable experience. Few people enjoy thinking about losing their independence, their eventual death, or that family members might fight and bicker over their life savings. One may try to plan for the imperfections in life, people, and the world, but things do not always pan out as intended.

As attorneys, we often deal with worst-case scenarios and situations where the planning goes awry or trusted people fail to fulfill their duties. These scenarios occur much more often than people realize, and often bring to mind the cliché that the deceased loved one must be "rolling over in their grave." If that is the case, there is a good chance the decedent did not plan properly, or chose the wrong person to trust as a fiduciary. Luckily, in many cases such issues can be resolved as long as

action is taken in a timely fashion, namely, when concerns begin to arise.

We write this book as attorneys who have spent years representing individuals and families as they go through their most difficult times, but also as individuals who have dealt with the passing of friends and family ourselves. This book cannot cover every single estate related issue we have come across, but it does provide a framework for the various types of issues that arise with estate administration and planning. The book is intended to educate you about your rights as a beneficiary, duties as a fiduciary, and your ability to plan for your golden years.

Each case is unique, but rest assured we have almost certainly dealt with whatever issue or concern you may have regarding an estate administration, estate planning, dispute over a trust, or claim by a beneficiary. When possible, we hope this book provides you the guidance and information to resolve such issues on your own, but if not, we are a mere phone call or email away. While our practice is primarily limited to New Jersey, we can always provide an attorney referral to those dealing with estate and trust issues in other states.

# FOREWORD

**IF EITHER OF THESE** two separate fictional stories reminds you of your real-life situation, this book might be for you.

## JIM – THE EXECUTOR

Jim is in his early 50s with a wife and kids. His father, a successful businessman from New Jersey, recently passed away. Jim finds himself as the executor of his father's estate. He is absolutely dreading dealing with his step-siblings in administering the estate.

Jim and his wife just left the church after the funeral. Eulogizing his father was agonizing for Jim. He loved his dad and is in disbelief that he is gone. He gets into his SUV with his wife to drive to the catering hall for the funeral reception with family and friends. He is looking forward to catching up with some old friends

and family members that he hasn't seen in years who have come to town.

Then he gets a text message from his sister, Tammy. "I want to see a copy of the Will. I know dad made you the executor. I want my money, Jimbo."

Jim is instantly furious. He can't believe it. Actually, he can. Tammy was always the black sheep of the family and was a constant attention seeker. It was always strange she seemed to get the most attention for all the wrong reasons. Jim secretly (or not so secretly) was upset with Tammy for the stress and difficulty she created for his parents. Why should Tammy get anything at all? She has been a taker her whole life.

Jim wanted to go to the reception and see his friends and family to commemorate his father's life. But now his stomach is already in knots and he is seeing red thinking about dealing with Tammy. As if being an executor isn't enough unwanted work and stress, he is annoyed that he is already thinking about Tammy and her nonsense on the day of his father's funeral.

He has no idea where to begin as an executor. He has never done this before, and he needs help. He needs someone to help him navigate the probate world and more importantly to shield him from Tammy. He doesn't need Tammy breathing down his neck and questioning everything he does in administering dad's estate. He wants to do everything by the book so that no one, especially Tammy, can accuse him of any wrongdoing.

## ROSE – THE CARETAKER

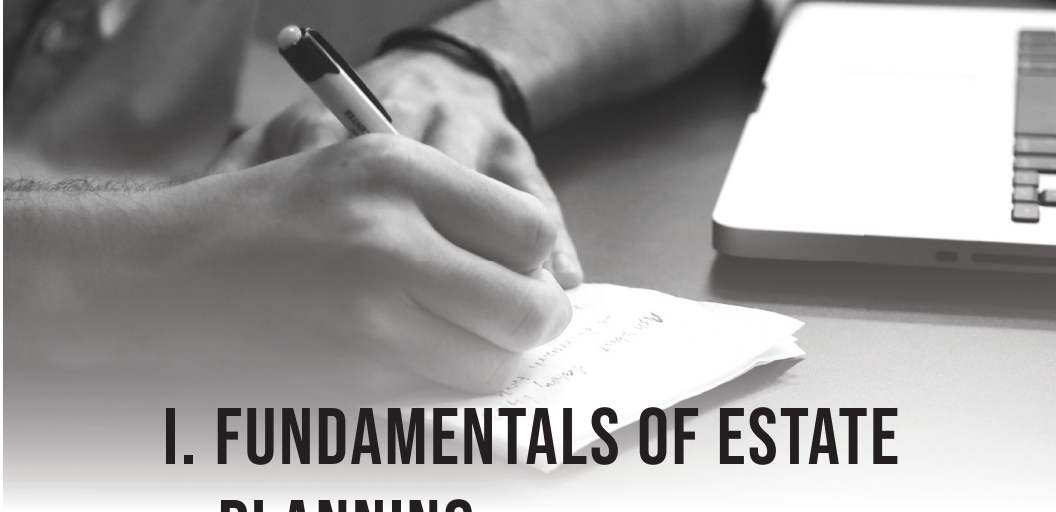
As the oldest and one who had cared for Mom for months prior to their passing, Rose knew she was the most trustworthy of her four siblings. Her other siblings had moved away from New Jersey and had rarely, if ever, visited or helped with Mom. Being the oldest and having been Dad's executor, she was certain she was going to be the Executor for her mom's estate. Trouble began when her brother Tommy, who was always out of work and borrowing money, came back to New Jersey and moved back in with Mom after Dad passed away.

Rose always knew that Tommy was angling for whatever would get him additional money from their parents. They had loaned him money so many times over the years. Tommy would want to be in charge and tell everyone how it was going to be. That was a favorite pastime of his. Tommy is right, and everyone else is wrong.

Mom and Dad had worked hard their whole lives and owned their home and a property at the Jersey Shore. When Mom finally passed, Rose was shocked to find out a new Power of Attorney and Will were drafted and executed for their mom, naming Tommy as the POA, Executor, and main beneficiary under the Will. This was hard to believe as their mom had been dealing with dementia and memory issues for months prior to the new power of attorney. Tommy was apparently living in Mom's house and Rose knew that he would refuse

to leave voluntarily. Rose had no clue how she would go about evicting Tommy from the house. On top of that, the shore house had been transferred by deed into Tommy's name, only days before Mom had passed.

Rose is furious and concerned that she has never dealt with the probate process before. She does not know how to demand an accounting of Tommy's actions, or how to ask the Court to void all the things Tommy had done to take advantage of their mom. Rose is going to need someone to help her stand up to Tommy and make sure that Mom's true wishes are met. She hopes she can join forces with her other siblings to challenge the documents which very suspiciously only benefit Tommy and clearly were the result of him unduly influencing their mom.



# I. FUNDAMENTALS OF ESTATE PLANNING

## WHAT IS ESTATE PLANNING?

When a person dies owning anything, it must be transferred to someone, somehow. (We will use the terms "property" and "assets" interchangeably. These words refer to everything–real estate, tangible items, both large and small, as well as all manner of financial accounts. We will sometimes refer to the loved one who has passed as the "Decedent" because this term appears on legal forms and in online articles.)

An estate plan provides an orderly, legal means of making property transfers in a way that minimizes taxes and recognizes your wishes and the needs of your family and perhaps a partner, friends, or charity. An

estate plan almost always involves a Will, but there are other aspects to it as well.

The way you hold title to property, beneficiary designation forms on life insurance, retirement and other financial accounts, planning for disability, the late stages of life, and a variety of other considerations are all included in the process of "estate planning." (These "other aspects" are not the focus of this book, but they can be critically important. We will be happy to advise and assist you with them, if requested.)

Here's the bottom line: If a person dies without legally setting out who is going to be in charge and what is supposed to happen, state law will take over. The decedent's true wishes are then unlikely to be fulfilled. Conflict and problems among loved ones become more likely, as multiple people may feel entitled to be in charge of the Estate.

Maybe you will be lucky, and things will work out just fine. But there is a good chance that you are reading this book because someone was planning to have that luck, but things have not worked out as hoped.

In this stressful time, we briefly discuss the important elements of proper planning to give you a better understanding of the way things should be done. We do this recognizing that the state of affairs and scheme of property distribution left by a loved one who has just passed away may be incomplete or less than ideal. We

cannot change past errors, but we can prevent future errors for you and your family's estates.

If you are administering an estate, this understanding will help you navigate and explain to others what happens next. If you are a beneficiary of an estate, this knowledge will enable you to determine whether things are being handled correctly.

Often it is frustrating, ***but everyone must realize there are rules and legal obligations that must be adhered to in administering an estate, whether the Decedent has planned properly or not***. Having an attorney who "knows their stuff" and has your back will allow everyone involved to "breathe easy."

## THE DOCUMENTS USED IN ESTATE PLANNING

All of the components discussed here—customized to suit one's unique situation—are part of a proactive solution to the disputes and other problems that are all-too-likely without them. Together, they create a plan for the distribution of a person's assets upon death, as well as the management of one's property and affairs in case of disability.

(**NOTE:** You often see advertising for simple online estate planning at some low rate. However, if you look hard enough, most document preparation websites have a disclaimer: They are NOT your lawyer and are NOT giving you legal advice.)

For your general information, we'll begin with a very brief look at two types of documents of much importance to you in planning your own affairs, but of less importance now that your loved one has passed.

## THE DURABLE POWER OF ATTORNEY

The Durable Power of Attorney addresses the management of your legal and financial affairs by someone else, ***only while you are alive***. (You are referred to as the "Principal.") It gives your "Attorney in Fact" (who need not be an actual lawyer) authority to serve as your "Agent." Your Agent can be given as much authority as you choose over every aspect of your financial and legal affairs.

With this in mind, your choice of Agent must be a person in whom you place the utmost trust. Although your Agent has the highest duty under the law to manage things ***solely*** for your benefit, as a practical matter, this person is in a position to potentially take advantage of you and misuse your property. So, he or she must not only be loyal, but also competent to handle the job.

Most people anticipate that the Agent will only act when they are incapacitated or disabled. But in most circumstances, it is best to give the Agent authority to act immediately, i.e., before any disability. In other words, do not make it necessary for a court or a doctor to declare you incapacitated in some way before the Agent can step in. Such a Power of Attorney would be referred to as a "Springing Power of Attorney" as it only springs into effect upon your incapacitation.

As a Springing Power of Attorney requires written doctors' opinions as to your incapacity, delay and problems will almost surely result. Either the court will have to make a ruling (a very involved process), or a doctor will have to make a judgment call in a legal situation. Doctors are often uncomfortable doing that for fear of liability. Again, we emphasize that your Agent must be trustworthy beyond reproach so you do not have to rely upon the Springing Power of Attorney.

The Power of Attorney is an important document that deserves a great deal of attention when you plan your own affairs. Bear in mind, the Agent's power ends immediately upon the death of the Principal. Therefore, it is not of large significance to you at this point as we address the administration of your Decedent's estate. The only issue that may arise, is if there are concerns over how a Power of Attorney handled assets, in the months or years prior to the passing. This can often be brought into estate litigation, as the Estate may be suing the power of attorney for any misuse, neglect, or outright fraud prior to the Decedent's passing.

## ADVANCE MEDICAL DIRECTIVES

There are two types of Advanced Medical Directives and you can have both: the Instructive Directive (also called a Living Will) and the Proxy Directive (also called a Durable Power of Attorney for Health Care).

In an Instructive Directive, you make certain choices as to the life-sustaining treatments you want or do not

want if you are unable to communicate your wishes in various serious end-of-life situations.

In a Proxy Directive, you name a healthcare representative to make decisions for you if your physician has determined that you are unable to understand your diagnosis and treatment options or communicate your wishes to your doctor.

The directives can be combined into a single document, to ensure all medical decisions and appointments, are clear.

While medical directive documents are important in planning, they are obviously unrelated to the administration of a Decedent's estate.

## THE WILL

A valid Will is the cornerstone of almost every estate plan. It identifies your property and should specify ***clearly*** how you want it to be distributed. This is crucial to avoid a frequent source of disputes. (When you prepare your Will, this should be a major focus of attention. For the administration at hand, however, we must deal with whatever your loved one has left for you to work with.)

Having a conversation with your family and beneficiaries in advance regarding the wishes expressed in your Will is recommended. Ideally, there will be no surprises after you pass—so keep everyone up to date if your plans change. Be mindful of even small but sentimental items. We have found that the distribution of

jewelry, silverware, and the like may be a surprisingly big deal to one's survivors. Discussing this with them in advance is often worth considering.

To answer a common question: A divorce revokes any bequest made to your former spouse. If your Will names your former spouse as Executor, that appointment is also revoked. In all other respects the Will is still effective. How that might shake out in any particular situation depends on the Will, and any divorce decree or settlement agreement, so it's best to consult your lawyer. Some Will revisions are likely to be recommended. This probably won't be a costly or time-consuming process—as long as you've decided what your goals are with your new situation.

Divorce also revokes the naming of a former spouse on beneficiary designation forms—as in a life insurance policy, for example—or Transfer on Death accounts. But beware: A former spouse could argue that there was a legally binding agreement to keep them on the account for some reason. It's best to change these forms upon divorce, and to ensure compliance with any divorce order or settlement agreement.

You can often avoid family strife and hurt feelings when your loved ones understand why you have made your decisions. Perhaps, for example, you have left less to a child who has been more financially successful than another who simply needs the money more—not because you love one child less than the other. If you explain that prior to your passing, most people will

readily understand. But if you say nothing in advance, bitterness and resentment may result. Whether you tell your beneficiaries in advance is a case-by-case analysis, and is often worth discussing with your attorney.

If the Decedent has not communicated any unequal treatment under the Will, and you have come to us after the passing of a loved one, we can help you try to mend a fractured relationship by explaining the situation and making sure that everyone is treated fairly under the law.

If no Will exists—or if it is found legally invalid—your assets will be distributed according to New Jersey's law of "intestacy." That term intestacy means without a will and the law is different in every state. The intestacy law sets in stone "who gets what" if a resident dies without a Will. The intestacy statute is fairly inflexible, and thus without a will, the statute controls.

New Jersey's intestate distribution law is complicated, but we understand it thoroughly, and can explain and advise when it comes into play. Simply put, it depends on who your survivors are. The law calls for your property to be given in various percentage shares and/or amounts to those with whom you have a legal relationship, e.g., a spouse, child, legal partner, etc.

***The distribution scheme provided by the intestate statute might not align with what you want, and if it does not—to put it bluntly—that's what will happen if you pass without a Will. That's why having a Will and keeping it in line with your current wishes is so important.***

For a Will to be valid, the "Testator" (i.e., the Will-maker) must have "legal capacity," i.e., be "of sound of mind" and not under "undue influence." This is a common basis of disputes that we will examine later. Being of sound mind does not mean the Testator must pass an IQ test or be "as sharp as a tack."

However, it does mean the Testator is capable of making his or her own informed decisions and is not just following somebody's instructions or being coerced in some way. If the Testator understands the nature of his or her property and the purpose of the Will they are signing, a court will generally consider the Testator of sound of mind and legally competent to make a valid Will. The idea of "fairness" is also not a defense or reason for invalidating a will, and thus people are allowed to write people out of a will, for what may seem like petty or unfair reasons.

As we will see, "probating" the Will, i.e., taking it to the Surrogate's Court and having it declared valid, is the first formal step in estate administration. A Will must be signed and dated by the person making it. But how does one prove that?

To avoid costly, time-consuming disputes, it is universally recommended to make one's Will "self-proving." It's a simple way to allow the Surrogate to take one look and say, "Okay. This Will is 'admitted to probate.' It's good to go."

A self-proving Will has a standard blurb after the Testator's signature signed by two witnesses stating

that they witnessed the Testator sign the Will, and that the Testator was at least 18 years old and of sound mind. The entire Will is then notarized. Note that the witnesses to a Will can be complete strangers. None of them need to read or know anything about the Will. In fact, it is highly recommended that no beneficiary of the Will be a witness or notary to the Will. This will avoid another source of contention due to a potential conflict of interest, or the potential claim of undue influence.

Another extremely important function of a Will is to name an Executor. Your Executor will be granted "Letters Testamentary" (also known as a "Short Certificate")—a badge of authority—signifying formal ***appointment*** by the court. The Executor is the person with legal authority to administer the Estate. It is unwise to force the court to ***select*** this person by failing to name an executor (or failing to draft a Will). After all, the judge has no idea who's best suited and there may be a dispute over who wants the position. It's important to name alternates as well, in case your first choice as executor is unable to take on the job.

It's important above all that the Executor be trustworthy and reliable. In many ways, he or she will serve as a referee trying to follow the rules, ensure your wishes are met, all while trying to keep order in the family. The law imposes on your Executor the duty to administer your estate as the Will directs and with the expectation it is handled in a timely manner.

You can choose to have an attorney or other licensed professional act as Executor; however, this can often be at a higher cost. Most people choose a family member, or trusted friend, for the position.

Your lawyer can help you make a wise choice as to who should be executor and explain it to others. as people can be hurt that they are not chosen. Certainly, geographical proximity to the Surrogate Court and the Decedent's property (especially real estate) are legitimate factors to consider. (They can also serve to justify your choice to others if that serves your purpose.)

The Executor may hire lawyers, accountants, realtors, and other professionals who are paid with estate funds for their professional assistance. Likewise, laborers and others may be hired for cleanup and property maintenance. But fees and other costs can be saved if the Executor or family members are available and able to do some of the "legwork" themselves for free or at a reduced cost.

A common point of contention is that the Executor or Administrator is entitled to a commission per statute. As with many jobs in life, others won't always appreciate the mental effort or time you'll be spending as Executor, even with the assistance of counsel. There is a formula provided by statute pursuant to which the executor is paid. Your lawyer can explain how this works and advise you on keeping track of your time if you are completing any work that would otherwise be a cost to the Estate, such as a clean out of a property.

The Executor fee arrangement should *definitely* be discussed with the beneficiaries, even though most Executors, perhaps including you, would just as soon not be bothered with that conversation. The fee provided under the law might be perceived as fair. Alternatively, it might be perceived as unfairly high and cause ill-will in some family situations. This is an issue to keep on the Executor's radar screen as the administration process goes on. In our experience, many Executors start by saying they do not want the commission, but after months of work, difficult family members, and the thankless job of being a fiduciary, most Executors realize the commission is well-deserved and should be taken.

In a nutshell, the Executor "wraps-up" the Decedent's affairs, pays debts and taxes, then distributes the property to beneficiaries per the terms of the Will.

For the moment, however, remember to ***make sure your Executor knows where to find your original fully executed Will*** and all the tangible property, account paperwork, and anything else needed to carry out your instructions!! This includes permission in your Will to access all your social media and online financial accounts. (Don't include passwords in your Will but be sure your Executor knows where to find them.)

## A WORD ABOUT TRUSTS

This topic must be presented in any discussion of estate planning. There is an almost endless variety of Trusts and uses for them. The topic is so vast that it cannot be covered thoroughly here. A Trust might be an important part of your personal planning. Many are established by folks while they are very much alive. The "trust maker" is called the Grantor (or Settlor, or Trustor).

For the moment, we'll offer just a few basics. A Trust is a legal concept in which one party—the Trustee—has legal ownership of any form of property that has been transferred to him, her or "it" (e.g., a bank) by the person establishing the Trust ("the Grantor or Settlor").

Once property—known as the Trust "principal," or "corpus"—is formally transferred into the Trust, these Trust assets are invested and/or managed by the Trustee for the benefit of one or more beneficiaries. Sometimes, the Grantor also wears the hats of Trustee and beneficiary.

Your loved one might have decided to create a Trust through his or her Will. (These are called ***testamentary*** Trusts.) If so, part of the Executor's job in estate administration involves participating in setting up the Trust. This is almost surely something you won't want to handle on your own. An attorney can be a great help to you here by navigating the legal steps and your duties, as

well as the annual requirements for the trust, including filing an income tax return and annual reporting

Think of a testamentary Trust as an empty bucket into which the Testator's Will "pours" property to be managed by the Trustee—who might or might not be the Executor. Like an Executor, a Trustee has the highest of legal obligations and fiduciary duty to manage the property and see that it is used only in the manner and for the purposes established in the Trust document.

One example of a common use of Trusts is to manage money for the benefit of young children or others who are incapable of doing so. Trusts might also be used for tax savings by large estate owners. This often relates to the federal estate tax. Fortunately, and at least for the time being, there is no New Jersey estate tax (but there is an inheritance tax).

We reiterate: Since they are created in the Decedent's Will, Testamentary Trusts require that the Will be probated by the Executor. Moreover, these Trusts might then be accountable and have to report to the Court, under New Jersey law—unlike living Trusts (created by the Grantor while alive.)

# II. WHAT HAPPENS WHEN YOUR LOVED ONE PASSES?

**BE REALISTIC.** When a person dies, certain matters have to be taken care of by someone—usually family—whether there is a Will, Trust, or no estate planning documents at all. New Jersey law provides for a 10-day waiting period before a Will can be taken to the Surrogate Court for probate and for appointment of the Executor.

This means the family is unavoidably in a state of limbo for a time. Meanwhile, funeral arrangements must be made, people must be notified, and a dwelling might have to be secured. The needs of survivors like infirm spouses or young children might be immediate priorities. Everyone is likely grieving, confused, and uncertain what to do.

Yet everyone's life must go on while all this is happening. Hopefully there are family members or a close

friend who can step up to help. As a practical matter, if there is a Will, the (soon to be) Executor is often the person the family turns to get things moving. If you reach out, we can help you (and them) get organized and prepared for your first steps. For simplicity, we'll assume for right now that there is a Will that has named an Executor.

## THE ESTATE EXECUTOR

Finally, we arrive at the central issue you probably had in mind when you began this Guide. Even though you've been ***named*** as Executor in the Will, the Surrogate Court must still formally ***appoint*** you as such.

(Again, note that if there is no Will, the Surrogate Court must first ***choose*** an Administrator, and only then appoint him or her. We'll discuss that process later.)

***Keep in mind, however, that the roles of Executor and Administrator are the same***. Either one is often referred to as your "Personal Representative," or "PR." That is the term we'll often use here, unless a distinction is necessary. **Although we're assuming for the moment that you've been appointed Executor, if you are or about to be an Administrator, this applies to you too.**

The Surrogate Court is governed by New Jersey statutes and is the court responsible for the duties and functions related to Wills and the property and affairs

of those who pass without a Will. (By the way, when we refer to the "Surrogate," or "Surrogate Court," we are always talking about a specialized Court and a judge who handles a particular a particular type of cases, including estates.)

***Again, always be mindful that a Personal Representative–whether an Executor or Administrator–has the highest of legal duties–a "fiduciary duty"–to carry out the instructions and distributions called for in the Will or under state law if there is no Will.*** We will help you do what you need to do and communicate the realities as to time and expense with beneficiaries or those who perhaps incorrectly thought they were beneficiaries.

Your job will be easier if we look at the high-level view of the Executor's role before looking at your step-by-step tasks. (Remember, we're referring to the Administrator's role, too.)

Although the job entails effort and serious responsibilities, the personal difficulties and liabilities of the Executor should not be overblown, either. Note that–absent negligence or wrongdoing–the Executor is not personally liable for claims or lawsuits against the Decedent or the estate itself.

The Executor is not normally liable for a poor return on estate investments, so long as they act quickly and prudently. An Executor normally should consider liquidating any volatile assets, such as stocks, to avoid any potential losses. If there is a desire to keep "in

kind" stocks, or keep investments the same, then the Executor should have in writing consent from the beneficiaries. It is an extra level of protection, in the event there is a severe, or unexpected economic downturn. The recent COVID crisis and stock market "crashes" in the past twenty years are perfect examples.

## FIRST STEPS

The first and saddest task the family will likely perform is notifying every one of your loved one's passing and making funeral arrangements. At this important moment, the "Executor" likely has no formal authority because they may not have been appointed yet. The Decedent may have named a "Funeral Agent" via New Jersey's approved form, created by the Attorney General's Office. But if not, deference should be given to the surviving spouse and/or whomever the family dynamics suggest is most appropriate to undertake the decision making at this time of grief. It is worth noting that the person who is in charge of planning the funeral is often asked to personally guarantee the cost of the funeral and burial. This is due to the Estate not yet being opened and the Decedent potentially not have a pre-paid funeral or funeral insurance policy.

The next key step is appointment of the personal representative. An Executor cannot be appointed until the 11th day after death, but as a practical matter, he or

she is often the go-to person in the family for making arrangements and immediate decisions.

Obviously, it is best if things are handled by consensus and with the participation of all who are willing to help. It is at this early stage—before any legal forms have been filed or "official" steps have been taken—that family relations can go south in a hurry. You are able to retain counsel even if not yet appointed, as the attorney would represent you personally, as the fiduciary. Often if counsel is involved, they can act as a buffer for many of the financial and often touchy subjects.

You will need an original death certificate to bring to the Surrogate Office. The funeral home can help you obtain those. We suggest you get about 10—you'll need them for various purposes and they're easier to get now rather than later. If there is an error or issue with the death certificate, there are options for requesting revisions or amendments.

One of the Executor's first and most important jobs—as a practical matter—is to take stock of estate assets and household property, and to secure the assets. A formal inventory may have to be filed later, so starting with a simple written inventory from the start, with pictures or video, is always a good idea. For the moment, however, try to tactfully make sure that nothing "disappears." Again, the goal here is to avoid family ill-will.

More importantly, and along the same lines, the Executor should maintain your loved one's homeowner's insurance and auto insurance so there is no lapse

in coverage while the dust is settling in the immediate aftermath of the Decedent's death. (Hopefully, your loved one had their financial paperwork and bills organized and has spared you the hassle of a scavenger hunt for these things.)

A worst-case scenario illustrates how important this can be: If estate funds were available, the Executor might well be held liable to the beneficiaries if he negligently failed to pay a fire insurance bill and the Decedent's house burned down. Of course, an "Executor" who has not been officially appointed can argue he or she did not yet have authority.

This raises an important point: Of course, an Executor cannot ignore the limits of the role. But if you are doing the right thing, it's usually better to act quickly to deal with potential problems first and get your authority a short time later.

If you have personal funds to pay an insurance premium, for example, and choose to do so, keep accurate records and get reimbursement from the Estate once you have access to estate funds. You are ***not*** legally required to do this, but if you can prevent loss by doing so, it's worth considering.

If the Decedent owned a business that depends heavily on him or her, it hopefully has not been dropped in the Executor's lap. The value of the enterprise—and a significant portion of family wealth—could be ruined literally overnight if no plan exists to replace the deceased business owner in carrying on day-to-day operations.

If you as Executor find yourself in this position, you'll may have to do your best to keep the business running. This can include dealing with current management and employees. Hopefully others in the family can pitch in, but it varies on the size and type of business. An often-overlooked part of estate planning is business succession planning, which all business owners should have in place, regardless of their age. By having a business succession plan clearly established, it benefits the business, the owners, and it provides a smoother transition, whether by a required sale or by new management taking over.

## AN OVERVIEW OF THE EXECUTOR'S FORMAL RESPONSIBILITIES

Painting with a ***very*** broad brush, the Executor's formal job description is fairly straightforward. As is often the case, the devil is in the details, which we'll get into later.

The Executor should take an inventory of estate assets as soon as possible. Note that these assets do ***not*** include financial or retirement accounts or life insurance policies that have ***beneficiary designation forms*** associated with them. (Commonly known as "non-probate assets"). The Executor should notify beneficiaries if they discover the accounts have a designated beneficiary, or at least forward any documentation for making a claim as a beneficiary.

***Non-probate accounts go directly to the person(s) named as beneficiary. The Will has absolutely no control over those assets where there is a named beneficiary.*** They are not part of the administration of the estate or the Executor's responsibility. (If, however, there is no named beneficiary, or if the beneficiary is "my estate," then these accounts are, indeed, part of the probate estate. Then, the Will ***does*** control what happens to these assets.)

**It's wise to share the Will and general information with everyone involved. People want to know what's going on. In the absence of accurate communication, rumors and false assumptions can arise. That being said, beneficiaries need to understand the complexity and time restraints on completing an Estate. That understanding is often easier to provide through counsel.**

There is no maximum time limit set in stone for finalizing an estate, but generally an estate is not finalized for at least a year. The complexity of the estate, disputes and litigation can extend the time required to several years. (Hopefully, your departed loved one has planned properly and arranged his or her affairs to avoid this. If not, we will know how to help resolve things.)

***But no matter what, there is a minimum legal waiting period of nine months before estate asset distribution should occur, because creditors have nine months from the date of death to file a Proof of Claim. (That's New Jersey law. Each state has***

***its own time limit.) This should be explained to all beneficiaries, who probably expect their money immediately.***

The law reads substantially as follows:

Creditors of the Decedent must present their claims to the PR of the estate "in writing and under oath," specifying the amount claimed and the particulars of the claim, within nine months from the date of the Decedent's death. If a claim is not presented within nine months, the Personal Representative shall not be liable to the creditor . . ..

In other words, ***nine months after a loved one's death, you, as the PR–whether Executor or Administrator–can finally begin transferring estate property to beneficiaries if all other issues are handled***.

A written accounting or at a minimum, the bank statements of the Estate account should be shared with beneficiaries showing what came into the Estate, and what remains after all expenses were paid. When all this is done, the Executor can request the court to be legally discharged from his or her position.

Naturally, there is plenty of paperwork involved in the estate administration process, but dealing with this is our day job, so you won't have to quit yours to take care of it.

Now let's get into some details.

## THE EXECUTOR'S FIRST *OFFICIAL* STEP

Now it's time for the Executor-to-be to actually do something. First, find your loved one's ***original*** Will. Hopefully, this has all been discussed so you know where the Will is.

If there is no Will, there won't be an Executor. Instead, somebody must ask the Court to be appointed as Administrator. This is discussed below. But if you are that person, almost all of this applies to Administrators too, so, it is worth continuing to read.

If you check the "obvious" places and have no luck finding the Will, try the Decedent's safe deposit box. In many cases, people give the family copies and keep the original there.

Banks have different policies, so call and ask ahead of time. If you are next-of-kin but unable to show that you are the Executor, you can probably arrange to open the box ***solely to retrieve documents*** like a Will or insurance policies—accompanied by a bank representative. If you can't work that out, we can help you get an order from the Court allowing you access.

With the original Will in hand, it's time to head to the Surrogate Court in the county where your Decedent lived. It is worth confirming place of death information on the Death Certificate, as that is normally the deciding factor as to the County Surrogate who will have authority. You should call ahead to make an appointment and complete documents in advance. You can do

that any time after the death occurs, but you won't be able to complete your business with the Surrogate until the eleventh day after death. If we are asked to represent the Estate, our process is to assist with the scheduling and handling probate with the Surrogate Court to get the Estate started as soon as legally possible.

You can find all the necessary information online, but we're happy to arrange the appointment and advise you on what will happen.

You will need to bring the following to the Surrogate:

- The ***original*** Last Will and Testament
- The ***original*** Death Certificate. (This should have a raised seal.)
- The addresses of all beneficiaries named in the Will, as well as the names and addresses of all immediate next of kin. (There's likely to be overlap in these two lists.) For this purpose, next of kin includes your loved one's:
  - Spouse or domestic partner
  - Children
  - Parents
  - Brothers and sisters
  - Children, if any, of a child of the Decedent who predeceased him or her (i.e., grandchildren)
  - Nieces and nephews
- Your own government ID
- A list and value of all assets in the ***Decedent's name alone***. (Don't include assets that are

transferable or payable on death to someone else.) Use your best estimate as to value.

- Last, but not least, of course, bring your wallet. The filing fee is currently $100 for a two page Will. The everyday low price for each additional page is $5.

You should request from the Surrogate one "Short Certificate"–the Executor's (or Administrator's) badge of authority–for each asset you'll be transferring according to the Will. They generally cost five dollars each. It's a good idea to get some extras (10 total is recommended). We can help you with this. (For example, unless family relations are tense, a Short Certificate is not necessary to just hand deliver jewelry to the Decedent's daughter if the Will says so.)

Note that there are expedited procedures for estates under $50,000. Personal Representatives of those estates will probably find it more cost effective to handle things without ongoing legal help. (There are plenty of legal forms and instructions available on each Surrogate's website. Be sure to confirm you are using the forms for the Surrogate of the county where the Decedent resided.) Even with smaller estates, retaining an attorney is not a bad idea for you as the "PR" of a small estate. That is a reasonable and proper expense of the estate.

Let's digress here briefly for the benefit of those whose loved one died without a Will. Those Decedents'

estates need a Personal Representative similar to the Executor, called an Administrator.

## APPOINTMENT OF ADMINISTRATOR IF THERE IS NO WILL

When there is no Will, an Administrator takes the job of Personal Representative (PR) to administer the Decedent's estate. The job is the same as that of an Executor who is named in a Will. The Administrator is appointed by the Surrogate of the Decedent's county. When appointed, the Surrogate issues "Letters of Administration" to the Administrator, which are the equivalent of an Executor's "Letters Testamentary."

Like someone asking for appointment as an Executor (see above), the would-be Administrator has to provide a certified death certificate, a list of assets, an estimate of the Decedent's debts and liabilities and contact information for the next of kin.

The law provides a pecking order from which the Surrogate Judge appoints the Administrator: A surviving spouse or domestic partner has the first right to apply for the position. If there is no spouse, or if he or she just doesn't want to handle the job, adult children are next in line. The Decedent's parents and siblings are in line after that.

Once the surviving spouse and/or the children/siblings—the usual situation—have made a choice, everyone besides the chosen administrator must file a very simple "*Renunciation*" form available from the county Surrogate's Office. It basically says, "I'm

entitled under the law to be the Administrator, but I don't want the job. Please appoint my brother/sister, _____." The Surrogate will then officially appoint the Administrator.

As you can see, however, if there is no spouse or domestic partner, more than one person (usually, the Decedent's children) might be equally eligible for appointment. This situation can be easily resolved in some families, or it can lead to World War III in others. So, we'll say in the strongest terms, ***it is very much to the family's advantage to agree on who will serve as Administrator.*** (While not normally recommended, it is also possible to have Co-Administrators).

Also keep in mind that whoever winds up serving as Administrator will have a legal duty to be fair and open to the others about what is going on. If he or she fails to do that, the rest of the family can ask the Court to remove and replace the Administrator. So, if everyone is willing to accept one sibling—even reluctantly—as Administrator, they know he or she will not have carte blanche. Any misconduct or shirking of responsibility can be cause for filing a complaint to remove the Administrator.

Most people appearing in court prefer to have a lawyer representing them and are better off having one. Certainly, we have done this many times before and will serve you well. As attorneys, however, we also have a fiduciary relationship with our clients. We are legally bound to act only in your interests, not our own. And it

is (almost) ***never*** in the family's interests to fight over this. We are scrupulously fair, honest, and open in our billing. But we don't work for free. Fighting in court costs money and takes time. There's never a guarantee what the judge will do. If the Judge actually had time to spend all day listening to each family member speak their piece, the choice of Administrator might be as obvious as it is to you.

The judge will ***not,*** however, spend all day with your family, except in the most unusual of circumstances. They don't have time. They are not privy to family history or goings on, so they will make a decision based on limited information. The judge might very well say, "If you folks can't get along, I'm not going to appoint any of you. Instead, I'll appoint an unbiased local attorney who must be paid by the estate." That's just one reason why allowing a Judge to choose your Administrator is a last resort. The writers of this guide have themselves been appointed as Administrators in such cases. It is also something the family can choose to agree on, knowing there is an extra cost, but a lot more security in a licensed attorney representing the Estate, and ensuring everything is handled properly.

The Order appointing the Administrator will typically require the Administrator to post a ***surety bond***. A surety bond is like an insurance policy for the estate. It protects the beneficiaries and others who are owed money by the estate against losses if the Administrator fails to do the job properly.

There are insurance companies and banks that issue surety bonds. The cost of the bond premium is an expense of the estate as the Administrator doesn't pay it out of pocket. The amount of coverage provided by the bond (the amount of "insurance") will generally be calculated based on the value of the Decedent's assets. The bond premium is charged annually and is an estate expense or reimbursed to the administrator who pays the premium.

Once all estate debts have been paid, assets have been distributed, and the estate is officially closed, the Administrator asks to be released from the surety bond. There is a form known as a release and refunding bond that must be signed by every beneficiary of the estate and filed with the Surrogate. This form releases the Administrator from any and all claims against the estate. (The need for these signatures is another reason to be fair and maintain good family relations.)

The surety bond is something Executors generally don't have to worry about; Wills prepared by an attorney do away with the bond requirement ***unless*** the Will-maker doesn't have full confidence in the Executor.

At this point, the Decedent's Personal Representative (PR) has been appointed—whether an Executor or Administrator—and we can examine his or her next tasks.

## PROVIDING NOTICE OF PASSING

### NOTICE TO ESTATE BENEFICIARIES AND NEXT OF KIN.

This is required by law. The law tries to be fair—and final. So, everyone with a potential claim to the estate needs to be aware that probate proceedings have commenced, whether or not there is a Will, if they potentially have a claim to the Estate, or if they could possibly be the Administrator.

There may be individuals you prefer not to give notice as you predict they will cause problems , but the law ensures everyone their opportunity to be on notice and potentially file with the Court. It is best to put everyone on notice initially as no one wants to deal with parties crawling out of the woodwork later claiming they are entitled to something but never knew what was going on.

Your county Surrogate's website provides instructions for the notice procedure. Basically, within 60 days of the date of probate, you must mail a formal written notice stating that:

- The Will (if there is one) has been probated;
- The place of and date of probate or administration;
- Your name and address as the Personal Representative, and
- A statement that a copy of the Will shall be furnished upon request.

The county Surrogate's Office has a Notice of Probate form you may choose to use. There is another form—the Proof of Mailing form—that must be mailed back to the Surrogate (with a $10 filing fee) after you have sent the Notice of Probate form to everyone. The Proof of Mailing and a copy of the Notice of Probate must be filed with the Surrogate within 10 days of mailing.

But who is "everyone?" Beneficiaries are simply anyone (or a charity) named in the Will. "Next of kin" has a legal definition that probably matches what most people would assume. It includes the Decedent's:

- Spouse or domestic partner
- Children
- Parents
- Brothers and sisters
- Children, if any, of a child of the Decedent who predeceased him or her (i.e., grandchildren)
- Nieces and nephews

If you are unable to locate a beneficiary or one of the next of kin, you must publish the Notice of Probate in a "newspaper of general circulation" in the county of the Surrogate you are dealing with (i.e., where your loved one lived). The point is to identify anyone who has a possible "interest" in the probate estate. Those who need to be notified can vary greatly, including depending upon multiple marriages, adoptions, step-children, divorces, and earlier deaths of family.

**KEY POINT**—For New Jersey estates, if a charity or nonprofit is a beneficiary under the Will, the Executor/Administrator must notify the Attorney General's Office,. There are additional requirements, so it is important to confirm if any beneficiaries in the Will are charities or nonprofits.

Finally, note that as the PR of the estate, you step into the Decedent's shoes for the purpose of maintaining or defending against any lawsuits the Decedent was already involved in. You may also initiate or defend against any lawsuits that might arise on behalf of the Decedent subsequent to his or her death. For example, he or she might have been sued over a car accident a few months before death. Conversely, perhaps your loved had grounds for a business-related suit but had not yet filed.

Please be sure to contact an attorney immediately if a lawsuit is ongoing or appears possible. ***Legal deadlines for such lawsuits are absolutely rigid and there is a statute of limitations that may apply to any claims***.

## THE PERSONAL REPRESENTATIVE'S NEXT STEP—GATHERING ASSETS

***Keep in mind that you will normally only be concerned with property in your loved one's name alone AND which does not have a beneficiary designation on it.*** That means that PRs often have few, if any, financial assets or accounts to handle. After all, life insurance (almost always) has a named beneficiary—so

it's not probate property. Same with IRAs, 401(k)s, and pensions. People are wise to hold their other financial accounts jointly or with a "Transfer on Death" (TOD) designation on it. However, depending on the relationship, there may be inheritance tax due even for those non-probate assets. Many of those financial institutions will not release the funds without an inheritance tax waiver, which normally needs to be submitted for and obtained by the Estate.

As the PR, you are likely to be asked by TOD account payees, for example, what they should do. Though it is not your legal responsibility, you might as well try to be helpful. That means suggesting they simply call the account institution for next steps and to submit the appropriate beneficiary forms. As always, we're happy to help with these types of matters.

Hopefully, the Decedent has titled his or her accounts as described above. If they have not (and if there is no joint owner, like a spouse), then those assets are, indeed, part of the probate estate and under your control as the PR. It is also beneficial if the Decedent has made his or her "Transfer to" designations as they actually intended their wealth to be distributed, i.e., after careful thought, not haphazardly or because of any undue influence.

Sometimes we see a portfolio of financial accounts with Transfer on Death designations that result in massive disparities in what the Decedent's children receive. In many situations it appears this was not fully

thought through and the result is not what your loved one really wanted.

If you as the Executor, or as a beneficiary believe there may have been changes to beneficiary designations or transfer on death designations that were due to some type of foul play or undue influence, the quicker you take action the better.

In almost all cases, you should open an Estate checking account and perhaps an ultra-safe interest-bearing account if there is more cash than will be needed immediately. There will be a variety of estate expenses from lawn mowing to furniture appraisal, insurance, utilities, etc. For larger Estates, you may want to consider multiple accounts or guaranteed insurance accounts, because of the $250,000.00 FDIC limit on insuring bank accounts per institution.

***You should never use your personal account to hold estate funds, even for a minute!*** That is called "co-mingling" funds. You might as well carry a sign saying, "Please Sue Me."

The estate is a distinct entity for tax purposes, so you must request an Employer Identification Number (EIN) to use in opening estate accounts. (Never mind there probably won't be any employees of the estate as that naming convention is just an IRS procedure.) Fortunately, obtaining the EIN is very easy to do online. Be sure to utilize the new Estate EIN when opening the estate bank account. Do not use your SSN or the Decedent's SSN.

It is the PR's responsibility to transfer stocks, bonds and accounts that were ***not*** *jointly owned or* designated "Transfer (or Pay) on Death" into the estate bank account. Hopefully, your loved one left a list of financial accounts, or hopefully his or her paperwork (e.g., monthly statements) will be easy to find. Obviously, you have to figure out what institutions to contact by doing your best investigative work.

The institution holding the account (e.g., XYZ Investments) will have its own procedures and should be notified promptly of your Decedent's passing, even if you already have access to their accounts. The procedures are different everywhere, so you'll just have to call to get specific directions and documentation.

Many people, of course, engage in much or all their financial and investment activity online. Hopefully, your loved one made their login credentials easy to find. If not, New Jersey has a law that can help you: The Fiduciary Access to Digital Assets Act.

Fortunately, there is almost always a department at every institution that deals with recently deceased client accounts every day. The first person you talk to should know where to direct your call. At a minimum, you'll need a death certificate, Short Certificate or Letters Testamentary (or Letters of Administration) and your loved one's social security number.

From there, just follow instructions. Without too much time or effort you should be able to assume control of these accounts and assets on behalf of the

estate. Of course, feel free to call us if you hit any snags.

***Do not***, however, automatically sell your loved one's financial assets (e.g., stocks, etc.) and plop the proceeds in a money market or other cash account. The decision to sell such assets deserves some expert thought, from a number of angles.

There might be significant tax implications that are triggered by liquidating certain assets. Beneficiaries might have a preference as to inheriting cash sale proceeds versus inheriting a stock directly ("in kind"), for example. If there is a Will it might have specific instructions on what to do. So, make sure that all financial assets and accounts are in the name of the Decedent's estate before taking next steps. We can help with this and can also recommend other professionals if the situation calls for them.

As we have noted, you also need to make an inventory of your loved one's tangible personal property, such as furniture, vehicles, jewelry, and the like. A value should be assigned to each item. The detail required varies from family to family. If there is harmony, it might be okay for you to list "jewelry," and use a best guess approach to value.

On the other hand, if there is distrust and bickering, you might have to list every item individually and obtain a formal expert appraisal. That way, the final value of distributions can be made with greater accuracy and everyone can be satisfied that you've acted fairly.

## YOUR LOVED ONE'S RESIDENCE

Your loved one's home should be secured and access limited to ensure that all contents are protected until you can inventory and ultimately distribute or sell them. Dealing with this can be a very touchy issue depending on family dynamics. There are a multitude of possible scenarios, depending on the people and relationships involved. It's impossible to give much useful general advice, but we are ready to help you navigate any choppy waters that develop.

The sale of real estate is likely the most difficult chore you must handle as Personal Representative. Most folks are familiar with this burden from their own experience. The basic process is much the same when selling estate property (with some additional paperwork and signatures required). But this can be an especially tedious and pressure-packed experience if others in the family bombard you with advice and/or criticism. Sometimes it seems everyone in the family has an opinion to share.

Expect that both your proposed sale price and method of sale (e.g., using a realtor) will be hot topics. Yes, as PR you have broad discretion under the law to make these choices independently. We typically recommend the PR obtain an appraisal of any property to be sold.

Experience shows, however, that it's wise for you to listen and be mindful of everyone's point of view. Who

knows, it might even be possible to please everyone! But even if you can't, people want to be heard and have their opinions considered. Making decisions by consensus, or at least with advance notice, may limit discord down the line.

## PAYMENT OF THE DECEDENT'S DEBTS– CLAIMS AGAINST THE ESTATE

As you might expect, this step comes before the beneficiaries are able to receive their full distribution. Funeral expenses take priority, then costs of administration.

A word about child support obligations when that is an issue: the Executor and Administrator are expected to complete child support judgment searches, **before** releasing any distributions. This is covered in more detail later in the guide.

Child support judgments are potential liens against the proceeds of an estate. The law allows you to pay other debts of the Decedent, but you cannot pay an inheritance to anyone before getting a certification from a private judgment search company stating whether or not each beneficiary owes child support.

There is a lot of legal authority allowing New Jersey courts to recognize child support as an obligation of the estate, just like any other debt. In other words, it is probably wise to simply pay off any support arrearage. You would be wise to get our professional advice

on how to handle the situation if your loved one had a child support obligation.

### UP NEXT? EVERYONE'S FAVORITE—TAXES.

Keep in mind that almost everyone has the same obligation, even after passing away, to pay taxes. You as PR are responsible for those taxes, specifically filing a Decedent's final federal and state income tax returns.

You have undoubtedly heard about taxes due upon one's death. Accountants and lawyers refer to them as "death taxes." The good news is that the vast majority of Decedents' estates will not have to deal with the worst of them (federal), and many or most won't have to worry about any at all (state ***or*** federal). The bad news is that if death taxes are, in fact, owed, the rate can be high and the tax returns are often complicated.

Almost all death tax returns call for professional assistance. Just take a look at the tax forms and instructions and you will be convinced! We are here to answer any of your questions or prepare any necessary return(s).

The basic tax facts you need to know are simple, but there are a few of them. There are also important details, and the tax return forms are fairly confusing. There are even "tax waiver" forms that need to be prepared to show banks, for example, that no tax at all is owed!

The bottom line is that if you are not a tax professional, you'll probably be anxious to let someone else take care of the tax questions and filings.

We'll give you some basics, because the family is likely to ask you about this. (If you happen to be talking to people who've dealt with estate administration in other states, remind them that all states are different. That might not be clear while you are—without a doubt—getting all sorts of unsolicited or free tax and legal advice from laymen!)

Consider one's estate as a whole pie. An "estate tax" is payable—if any is due—on a portion of the pie. One piece that is not taxable are the expenses, such as a funeral or attorney's fees. Those are exempt and thus no tax is owed. The taxes that are due, are paid by you as the PR. New Jersey has no such estate tax anymore, but there is a federal estate tax for larger estates.

Consider one's inheritance as a slice of that pie. (New Jersey does have an inheritance tax, but many people are exempt.) An "inheritance tax" is payable—if any is due—on the size of the slice given to certain beneficiaries whose inheritance is subject to inheritance tax. Depending on how the Will was drafted, the PR may pay the inheritance tax out of the beneficiary's slice or out of the entire estate. Consult an attorney if you have questions about which it should be.

So, here's our New Jersey tax summary, at least at the time of publication of this guide

There IS a **Federal *Estate*** Tax. But there is NO **federal *inheritance*** tax.

There is NO **New Jersey *Estate*** tax. But there IS a **New Jersey *Inheritance*** Tax.

***There are very important exemptions to both taxes!***

- If your estate is worth less than $13.6 million in 2024 (double that for a married couple), **the Federal Estate Tax is likely of no concern to you**. (Depending on political developments in 2025, that amount might be reduced to $7 million per person in 2026.) The tax laws can always change and it is important to confirm with a tax professional or estate attorney, to ensure you are complying with the current tax laws that apply to the estate and any inheritance you may be receiving as a beneficiary.
- Federal estate tax planning is beyond the scope of this guide. However, we are knowledgeable about it and happy to discuss and design individualized tax-saving strategies for larger estate owners.
- The Decedent's closest family is exempt from New Jersey Inheritance Tax: ***Spouses and Domestic Partners, parents, children, and grandchildren are exempt from inheritance tax***. Charitable beneficiaries are also exempt.

Before we get to the distribution of property, we must cover a major detail. Looking at the scheme above, it's common that zero New Jersey Inheritance Tax will be due in your family's situation. (E.g., The entire estate often passes to a spouse and/or children.) But you still

may need to obtain an ***Inheritance Tax Waiver*** that officially says so. Financial institutions and others normally request such documents before they can transfer the entirety of financial assets owned by your loved one, even if there is a named beneficiary.

As we noted, it's possible to handle this on your own, but it can be a significant amount of work and if something does go wrong, expect your family may never let you hear the end of it.

## DISTRIBUTING ESTATE PROPERTY

It's worth repeating here that you can be liable for estate debts if you give all the estate's property to the beneficiaries before known and valid debts are paid**.** Again, that is the 9-month time period provided under the law for those to whom the Decedent owed money, i.e., creditors, to present their claims to either you or the Surrogate Court.

By the time nine months has passed, you should have gathered all financial assets into a separate estate account. You can calculate the total value of these assets with certainty on the day of distribution. By that time, you may almost be ready to start writing checks and/or transferring stock, etc., to the beneficiaries.

Again, keep in mind that ***accounts with a beneficiary designation or "transfer on death" form*** **associated with them, can be payable immediately after your loved one's death to the person named.**

***They are not part of the probate estate***. The same is true of accounts and other property such as real estate that is ***owned jointly***. If the joint owner is still living, the Decedent's share of jointly owned property passes by operation law to the survivor outside the probate process.

Since you, as PR, are probably considered the family's "go to" person, beneficiaries might ask you about such property. Of course, any help you care to offer could promote good relations amongst the beneficiaries. But you have no formal control over this property. There is a catch to that last statement as it pertains to divorced spouses of the Decedent, however.

Divorce automatically revokes all bequests to the former spouse in a Will in New Jersey, although the rest of the Will remains valid. Additionally, New Jersey is among about half the states in which a divorce ***automatically excludes*** ex-spouses from receiving TOD ("transfer on death to" accounts. The same goes for ex-spouses who are designated as life insurance beneficiaries.

***But if there are no alternate payees of these assets, they become part of the probate estate*** and therefore you ***are*** responsible for distributing them.

Of course, the default legal rules might have been modified by agreement in the divorce decree, in an effort to divide property fairly at that time and avoid future litigation. This is very common. If you are administering the estate of a divorced loved one, we

can help you stay out of hot water by recognizing when Federal law (regarding some retirement accounts) is involved and in honoring any other obligations the divorcing spouses had agreed upon. This situation can be a trap for the unwary. Seeking legal advice early on can help you avoid the pitfalls that are so common in estate administration.

***In theory***, distributing estate property is simple; After all, unless there is a Will giving you the authority to dole out property as you, please—a very uncommon situation—you are required to simply honor the distributions called for in the Will. If there is no Will, you are bound by the distribution scheme mandated by the fairly complex New Jersey law of intestacy.

The intestacy distribution scheme is based on the legal relationships between the decedent and those relatives who survive. There are too many possible family scenarios to explain them all here. But if there is no Will, you can honestly tell everyone that you really have no discretion as to the amount received if the estate consists only of "financial assets" like stocks, bonds or cash.

People get what they get. That might be a percentage of the Decedent's financial assets specified by Will or New Jersey law, or it might be a set dollar amount—if there is enough money available. There might be some who are disappointed by what they receive, but they should understand that your hands are tied.

***In practice***, however, the distribution of property is a frequent source of family disagreements. That's

particularly true when dealing with your loved one's tangible possessions.

Many Wills specify who is to receive things like jewelry, silverware, sentimental items, etc. Your job is easy when the decedent leaves behind a clear list directing distribution of tangible personal property. Again, there might be someone who is disappointed by that distribution scheme. Unfortunately for them, the PR has no discretion to change what the decedent specified.

Normally, after debts and taxes are paid, and specific gifts are distributed, a Will refers to the distribution of "***the rest and residue of my estate***." In other words, the residue (or remainder) is everything that's left over—money and/or personal household items.

Here, your job can get difficult. You have broad discretion in distributing these residual items, but the law requires you to be absolutely fair. Unfortunately, sometimes there are several ways to do that. Family consensus in this distribution process is ideal. It's well worth trying to achieve it.

We know of a harmonious family situation where this worked, and we'll use it as an example of one possible scenario: Mom had died several years before Dad. She had left everything to him in her Will—a very common arrangement.

Upon Dad's passing, "the rest and residue" of his estate went to his three children, "in equal shares, *per stirpes.*" (*Per stirpes (Latin for "by the branch")* means that if a child had tragically died before Dad, that

child's share would have gone to his or her children, i.e., to Dad's grandchildren).

All three children survived Dad, and the eldest son was named Executor. As Dad's child, he was obviously also a beneficiary—i.e., he wore two hats. It's important to note that the Executor son honored Dad's confidence in him—he did not take advantage of his Executor position in dealing with his brother and sister.

Money in financial accounts was easy to divide equally. But there was $90,000–$95,000 of personal tangible property included in "the rest and residue" of Dad's estate. This kind of property, of course, has no documents of title (except for Dad's car), so it was transferred informally. Dad's three children met and agreed on a distribution plan. (Remember, consensus is always desirable.)

One son loved to build furniture and tinker with cars, so the children agreed to let him have all of Dad's many expensive tools.

The daughter wanted Dad's (formerly Mom's) crystal, jewelry, silverware, furniture, and some other sentimental items. (The sons had no use for any of it.) The Executor son wanted Dad's wristwatch and Mom's ankle bracelet as remembrances of his parents. He also happened to need a car and Dad's was perfect. All three adult children agreed to distribute this property—the "rest and residue" of Dad's estate—accordingly.

The monetary value of each share was probably not equal, but the siblings were close, and all were happy

with that distribution. There was no jealousy and none of them quibbled about the precise value of each share. No appraisals were needed. This was a "best case" scenario. Everyone was satisfied and simply walked away with their property. (The transfer of the car involved some Motor Vehicles Commission paperwork and will be discussed later.)

How else could the Executor son—or you (as the Decedent's PR, whether Executor or Administrator)—have handled the distribution? One option would be a public auction or yard sale with whatever division of the proceeds was dictated by the Will or by the law of intestate distribution—probably an even division in either case. This results in a completely neutral and fair distribution of the estate, but it often leaves someone unhappy.

Another option is a "round robin" alternating selection of each piece of property (i.e., "daughter picks something, brother picks something, Executor son picks something, and so on and so forth").

Ultimately, the PR has broad discretion in determining how the rest and residue of the estate is distributed. The key thing to remember, and to communicate is that if the beneficiaries can't agree on the value of bigger ticket items like artwork or jewelry, or how to distribute you might have to hire an expert appraiser at estate expense and sell all the items, and distribute what cash remains after the sale.

If you are a beneficiary of the estate as well as the

PR (like the Executor son above), or if there is distrust among beneficiaries, a professional appraisal should ease concerns that estate property is being valued correctly during whatever distribution method is chosen.

Although family agreement, or at least communication is a good idea, you, as the PR, can sell property without getting all the beneficiaries to approve. Our firm can assist you in this process and dealing with any objections or complaints by family or beneficiaries.

Let's revisit the handling of your loved one's real estate. In some families, when the second parent passes, a child might be living in the deceased parent's house and want to stay there—or one of the children might simply wish to buy the house. This will involve some intra-family negotiations and an appraisal of the value of the home.

If it is agreed that one child is to receive the house, the transfer of the property to that child will be credited against that child's share of what he or she is entitled to receive from the estate. Sometimes the math will require a "side deal" in which the child must "buy out" his siblings if the value of the house exceeds the child's share of the estate. Such situations always involve numerous factors and personal family considerations. The services of a lawyer can be highly useful—and probably essential—in reaching an outcome that is fair to all.

We have noted that a divorce operates as a revocation of any bequest made to the decedent's former spouse. Arrangements were probably made in divorce court

for dealing with property jointly owned by your loved one and his or her former spouse. But if the divorced spouse remains as a ***joint owner*** of the property (probably due to a mistake or oversight on the deed), his or her financial interest in the property cannot be ignored. The former spouse must be paid off before any transfer of the house to anyone. You will almost surely need an attorney to assist you with this type of issue.

## VEHICLES

Transferring title to a car (whether to the estate or to an estate beneficiary) involves some paperwork and time waiting in line at the DMV. This is legwork that does not always require a lawyer. A vehicle registered in the name of a Decedent may be operated for 30 days after the date of death. Consult the New Jersey Motor Vehicles Commission website for the office nearest you for the latest instructions. You will surely need the title, a copy of the death certificate, a notarized Affidavit (Form BA-62) and a small fee.

For future reference, be aware that New Jersey now allows transfer-on-death registration for vehicles**. *A 2023 law authorizes the owner of a car to designate a beneficiary to receive the vehicle upon the owner's death***. That way, the car can be transferred without going through Surrogate Court.

(Side Note: A TOD deed is still not permitted for real estate in New Jersey, although that is a growing trend in other jurisdictions. As of July, 2024, New York

authorizes TOD deeds, PA does not. Stay tuned for further developments.)

### CHILD SUPPORT

As mentioned previously, you will want a lawyer to assist with a child support judgment search of both the Decedent and the beneficiaries. You are responsible for completing a ***Child Support Search*** prior to distributing more than $2,000 to any beneficiary. The intent of the law is to ensure none of the beneficiaries have a child support judgment against them, and that if they do, the Estate pays the child support judgment first and foremost.

## WRAPPING IT ALL UP

It's a good idea for you to submit at least an informal accounting and inventory to the beneficiaries so they can have peace of mind that things have been handled fairly and properly. The beneficiaries can waive this accounting if they are already satisfied. But it's wise to submit at least a brief accounting to cover yourself in case questions are raised later. It need not be overly detailed if family relations are good.

An informal report or accounting indicates the assets over which you had control, i.e., the probate estate. It lists the value of the assets on the date of death. That might be an exact financial account balance or your best guess as to a piece of furniture or jewelry—again, it

depends on what the beneficiaries demand. At a minimum, the report can be a summary of all your financial transactions during the probate proceedings.

The final report also lists the estate's administrative expenses (e.g., property maintenance, appraisal fees, attorney's fees, etc.) and payment of the Decedent's final bills, as well as any taxes you had to pay. Finally, it will show the PR's commission earned for serving as the personal representative, as well as the final distributions to the beneficiaries. Of course, we are very experienced in this and would be happy to assist you.

If one or more of the beneficiaries demands a more detailed accounting, you must provide it. (The Court might also require it, especially if the estate is being administered without a Will.) A demand for an accounting might be made, for example, if a beneficiary believes that you have misappropriated property or is otherwise suspicious of the way you have managed things. If you must take the formal accounting route, you'd be wise to let us or an accountant help you. Should there be a complaint filed that demands an accounting, the sooner you retain counsel the better, as we may be able to come to settlement terms and avoid the need for an expensive trial or a formal accounting (which requires going through Court for approval).

Hopefully, all the beneficiaries are reasonable and fine with an informal accounting. If so, they will sign waivers ("release and refunding bonds") releasing you from further liability. It is important to remember that

until the releases are filed, the Estate is technically still open. Once you file the releases with the Surrogate, the estate will technically and legally be resolved. If any beneficiary refuses to sign the release, you can first try to discuss the situation. Sometimes they need to have their own attorney, or receive a formal explanation that if they don't sign, the expenses of filing a formal accounting with the Court result in them receiving less in the long run. Emotions can run very high with these matters, but often when the cost of litigation is fully appreciated by the objector, most people become more reasonable.

The whole estate administration process can take 12 to 18 months (best case) to (seemingly) forever if there are genuine legal issues to be resolved. (Such a situation would be ideal for mediation, discussed below.)

In sum, the goal of every estate accounting is to satisfy everyone sufficiently so they will release you from liability. This largely depends on family relationships. Since filing a formal accounting can be expensive and time-consuming, an informal accounting is desirable. Sometimes, unfortunately, an informal accounting just won't be sufficient for one or more of the beneficiaries involved.

But at some point, all debts will have been paid, assets have been distributed and at least an informal report has been shown to the beneficiaries. Hopefully this happens without the involvement of the Court.

At this point, you will want the estate to be closed

so that your job is over and you are ***officially*** released from responsibility as the Personal Representative. As a practical matter—even if the beneficiaries have waived it—you must file documents with the Surrogate Court and ask that the estate be formally closed.

## (*ANOTHER*) WORD ABOUT FAMILY DISPUTES

We talk about the importance of communication and family harmony for a good reason: Family infighting is the best way to drag out the probate process indefinitely and run up the estate's (and everyone else's) legal tab. For that and other reasons, financial and estate planners almost always advise arranging one's affairs so that as little as possible is subject to probate.

That way, one can spare his or her family from costs and time required when going through the Surrogate Court. We have discussed beneficiary designations and Transfer on Death accounts. ***If done thoughtfully*** by the Decedent, this saves a lot of time and simplifies things by reducing the size of the estate that must go through probate. That is, unless family "issues" arise.

Then things can get complicated. But you as the PR and all the beneficiaries of estates small and large, should ask themselves: Is the price of legal warfare justified when a $2 trinket is at issue? When such a dispute happens, the only benefit goes to the lawyers. Unfortunately, sometimes it seems like people reserve their worst judgment for probate court.

If things are not handled properly, however, somebody might actually have a valid legal complaint large enough to be worth fighting over. We look at one of them here:

## TRYING TO DISINHERIT A SPOUSE

Under New Jersey (and every other state's) law, a spouse cannot be fully disinherited. Of course, it is possible to draft a Will that simply fails to give anything to a spouse.

But we're also referring to a deceased spouse who tries to shortchange the surviving spouse by leaving everything to others though non-probate arrangements, like TOD accounts, or naming others as designated beneficiaries of pensions, life insurance, etc. Though these assets have named beneficiary designations which would ordinarily be honored, they are still part of what is called the Decedent's "***augmented estate***."

Quite simply, a decedent cannot rely on these types of transfers if they leave the surviving spouse (assuming the spouses are living together) with little or nothing. A surviving spouse—and ***only*** he or she—can reject and challenge the Will on this basis.

In that situation, a surviving spouse can choose an "***elective share***" or one third of the augmented estate. This is provided by statutory law. The rules, exceptions and calculations pertaining to elective shares are quite complex. But the law in these situations provides a means for a disinherited spouse to go after assets that

the Decedent–and beneficiaries–might have believed were beyond the reach of the surviving spouse. It is very important to know that there is a time period to notify the Executor or Administrator that you are claiming the elective share, specifically six (6) months after the Estate is opened.

In many cases involving second marriages, we find that a prenuptial agreement was signed in which each spouse gave up his or her right to claim the "elective share." (i.e., The spouses agreed in advance: "What's mine is mine, what's yours is yours." Such an agreement is perfectly legal–unless it is grossly unfair under certain circumstances.)

So, if you are administering an estate and see that the surviving spouse is not a beneficiary, you would be wise to determine why not. In this way, you can spot a potential issue early and deal with it.

## THE ROLE OF MEDIATION IN RESOLVING PROBATE DISPUTES

Mediation is a way of avoiding costly and divisive formal litigation. This Guide presents numerous scenarios which can result in legal warfare, either within the Decedent's family or with third parties, which is a situation the Decedent likely would not have wanted. Sometimes the Court will order the opposing parties to engage in mediation, while in other cases, the parties voluntarily enter into mediation.

Mediation can be helpful in a multitude of situations. Maybe, for example, one or more of the parties believes that the deceased loved one intended to leave a financial asset or piece of property in a particular way but failed to do so in the Will. Maybe some other provision in the Will was worded in a confusing manner. Alternatively, one of the parties might believe that property such as, "my household belongings" was not distributed fairly among the beneficiaries by the Executor.

Perhaps there is an honest disagreement about the Decedent's mental capacity when creating and signing their Will. Mediation can also useful when a person passes away without leaving a Will, but the parties recognize that the rigid law of intestate distribution is not what their loved one would have wanted.

Mediation is a desirable way of resolving differences if you want to maintain good relationships and avoid a possibly everlasting division within the family. During mediation, the differing parties negotiate with the assistance of a trained and neutral third-party professional. The mediator can be a retired judge or other attorney. There is a cost to mediation, but often it is a much lower cost than lengthy litigation and trial where there is no guarantee of success for either party.

The mediator will try to identify everyone's underlying interests and concerns. Often, the mediator can help the parties realize there is quite a bit they can actually agree on. The mediator cannot force a resolution, but he or she can attempt to reach a compromise solution

by finding common ground. Mediation does not always work, but if the dispute is based on beliefs and viewpoints held in good-faith, it is generally worth a try.

Note that the lawyers in our firm ***are not*** neutral mediators. We are advocates for the most favorable possible "big picture" outcome for our clients. That includes factoring in your time and cost to pay us for potential court battles that might not be worth it in the end. We have a great deal of courtroom experience, but compromise through mediation can often be the best and most cost-efficient approach.

As in most negotiations in life, usually neither side receives 100% of what they wanted, but both sides should feel satisfied they have been heard and that a fair compromise has been reached. Our firm can assist you in evaluating your options and advising you during mediation.

## COMMON ISSUES THAT CAN LEAD TO ESTATE LITIGATION

***All the problematic situations presented below must be brought to court and resolved by a judge***– unless the parties choose mediation. Considering the time and money involved in litigation, all parties should certainly consider mediation as an alternative.

No clear, general answers can be provided here because the Court's decision will depend on the very particular factual circumstances at hand. Some of the

scenarios below are when an attorney is often worth retaining.

### 1. PROBATING A COPY OF A WILL (ORIGINAL HAS GONE MISSING)

If no original can be located, the Court will generally take the position and assumption that the Decedent ***intentionally destroyed*** his or her original Will. If no original can be found, this means the Court will presume that the Decedent therefore died without a Will. Therefore, if you come forward with only a copy, its validity must be proved to the judge by "clear and convincing evidence." In other words, you must clearly prove from all the circumstances that the Testator (the Will-maker) simply misplaced the original rather than revoked it, and that the copy is a true copy of the original depicting the Testator's actual last wishes.

If, however, all interested parties agree that a copy of the Will should be probated, the Court may agree to probate the copy as well. But "interested parties" might include those who would receive nothing if the copy is probated. In that case, these parties might benefit if the Court rejects the copy and moves forward under the law of intestacy. Thus, there is no guarantee as to what the Court will decide.

It is important to understand that even if there is an agreement between the beneficiaries, a verified Complaint likely needs to be filed in the Superior Court for the copy of the Will to be admitted to probate.

### 2. PROBATING A WILL THAT IS NOT "SELF-PROVING"

We have previously explained that Wills prepared by attorneys include a provision that it is signed by two witnesses, under oath, and before a Notary. This self-proving provision states that the Testator signed the document in the presence of the witnesses who attest to the Testator's competency. Such Wills are "self-proving." Some "do-it-yourselfers," however, fail to include this important legal blurb.

If a Will is not self-proving, you must come forward with the witnesses who must testify or otherwise aver they saw the Testator personally execute the Will. This process can be a major problem. The witnesses might have been employees at the Decedent's bank or lawyer's office, for example, and therefore difficult to reach. There is also the possibility the witnesses have moved far away or passed on themselves.

If you present such a Will but cannot produce the witnesses, you must somehow prove the Decedent did, in fact, execute the Will while of sound mind. Again, there is no assurance as to whether the Court will be convinced.

### 3. PROBATING A HANDWRITTEN ("HOLOGRAPHIC") WILL

Strictly speaking, handwritten Wills (usually without witnesses) are acceptable in New Jersey, but they are generally a bad idea. There is more likelihood that an informal and handwritten document will be challenged.

There is also a greater likelihood that portions might be illegible or that the Testator's wishes will be imprecise and difficult for the Court to understand.

### 4. NO RESIDUARY CLAUSE

A Will must include a "residuary" clause, meaning a catchall for the residue or remainder, of an Estate. Many times, a Will that is prepared by an individual, or a friend or family member, fails to include this clause. That omission often prevents the Will from being admitted to probate and thus requiring the filing of a Verified Complaint. It can also create disputes between beneficiaries as to how any remaining assets are distributed.

### 5. "UNDUE INFLUENCE"

This is among the most frequently used claims in Will challenges. A classic example is a Testator who signs a Will giving everything to his personal 24-hour caretaker and omits all his children. We can state here fairly simply what the courts have said about undue influence, but it can be a ***very*** tough argument to prove.

New Jersey courts have declared that: "Undue influence is 'mental, moral, or physical' exertion sufficient to preclude the Testator's exercise of free will, by preventing them 'from following the dictates of their own mind,' and succumbing to 'the domination and influence of another,' in dividing their estate."

When the claim of undue influence is brought, the Court will look at all the relationships involved. Did the Testator, "by reason of ... weakness or dependence" place trust in the particular beneficiary? In the example above, the Testator was, indeed, highly dependent on his caretaker, so he or she was therefore in a position to "unduly influence" and take advantage of the Testator.

As a general rule, the burden of proving undue influence is on whomever is challenging the Will by making that claim. Yet the courts have also ruled that if the Will benefits someone who had a close relationship to the Testator and if there are additional ***"suspicious circumstances***," the burden shifts to the party who had the relationship with the Testator. In our example, that would be the caretaker who is now receiving the entirety of the Estate.

The finding of "suspicious circumstances," is fact specific and there is no guarantee a Court will find them to exist. On the one hand, especially if the Testator was frail in mind and body, the caretaker certainly was in a position to take advantage of him. But on the other hand, what if the Testator's children ignored him, while the caretaker was especially kind and attentive to his needs during his final illness? These fact sensitive possibilities require discovery, including review of financial records, emails and phone calls, and likely depositions of family and the parties in the dispute.

Maybe the Testator was genuinely grateful to his caretaker and deeply disappointed in his own children.

In that case, the Testator might have decided—for a quite legitimate reason and with a sufficiently sound mind—to reward the caretaker and show his displeasure about the way his kids treated him. If ***that*** were the case, the Testator would be well within his rights to dispose of his estate as he chose. He had no legal obligation to leave anything at all to his children.

Court rulings on allegations of "undue influence" are particularly dependent on the relationships and detailed facts of the situation. If you are involved in administering an estate and a challenge to the Will is raised based on undue influence, you would be wise to retain a lawyer, and to do so quickly. This type of case can take a long time to resolve and the sooner an attorney is involved, the sooner you can analyze the strengths and weaknesses of the claims and possible defenses.

### 6. MULTIPLE COMPETING WILLS

If there are multiple Wills, there might be a question as to which is the "right" one. The most recently dated Will (to which an original copy exists) is typically accepted by the Court, but sometimes this involves an expensive court battle.

Those who put forward an alternative Will quite often attempt to show that any other Will(s) were signed by the Testator while he or she was not of sound mind. They might try to show that the Decedent had limited cognitive function or was so ill that he or she

did not understand what they were doing in signing the other Will. This situation might also involve a claim of undue influence, discussed above, or testamentary capacity, discussed below. All of these potential situations may require formal legal representation and complicated litigation.

### 7. LACK OF "TESTAMENTARY CAPACITY" BY THE TESTATOR

This is a "catch all" argument used to challenge a Will. As we have discussed, the Testator is required by law to be of "sound mind." But that does not mean he or she must be "sharp as a tack" or aware of the latest news or world affairs.

The definition of "testamentary capacity" is fairly broad and does not require someone to be at 100% awareness. Court cases have made it clear that only a fairly reasonable degree of mental capacity is required of a Testator. To rule that the Testator had adequate testamentary capacity, the Court will ask:

Did the Testator ***generally*** understand the purpose and meaning of what a "Will" is and that he or she was about to sign a plan for the distribution of their property after death? Did the Testator ***generally*** understand the nature and extent of their property? Was the Testator able to identify the beneficiaries under the Will and understand his or her relationship to them? Did the Testator know who their next of kin were?

If the answer to those questions is "yes," the Court will probably find that the Testator had adequate

testamentary capacity. On the other hand, as an extreme example, if it can be proved that the Testator was experiencing an insane delusion when the Will was signed, the Court would likely not find adequate testamentary capacity. This is another fact sensitive situation that requires months, or possibly years, to litigate and resolve.

To further complicate the evaluation of testamentary capacity, we all know that the elderly often have "good" days and "bad" days. If the Testator signs his or her Will on a "good" day, it could be ruled valid, even if that "good" day came among a period of "bad" days.

If you are involved in an estate or Will dispute where lack of capacity is an issue, we have experience handling those scenarios and can help you evaluate your options and assist if litigation is necessary.

### 8. WRONGFUL DEATH AND SURVIVOR CLAIMS

These scenarios do not neatly fit among the situations we have discussed above. In all of those, someone is challenging the validity of the Will. In wrongful death and survivor claims, by contrast, ***you*** are the one standing in the shoes of your loved one. You are ***suing*** someone because you believe your loved one has died as a result of another party's negligent or reckless conduct–an auto accident or medical malpractice, for example.

Wrongful death and survivor lawsuits are similar but complicated types of claims. Basically, the combination

of these two claims seeks compensation on behalf of the Decedent himself or herself, as well as his or her survivors.

Between them, these lawsuits can include claims for the Decedent's medical treatment and funeral expenses, compensation for the pain and suffering inflicted on the Decedent before he or she passed, and the pain and suffering the loss caused survivors.

The largest claim in many of these suits is often a request for the Decedent's lost lifetime income and financial support to his or her dependents. Sometimes this is a highly speculative estimated claim, such as in the tragic death of a young person who died before starting a career. Alternatively, it can be calculated a bit more reliably when the Decedent was mid-career with regular income.

If the Decedent had a Will, the Executor is the one responsible for filing the wrongful death lawsuit. If the Decedent had no Will, an Administrator must be appointed to wrap up the estate, as we have discussed. But if there is a wrongful death claim, the Court must ***also*** appoint an "*administrator ad prosequendum*" for the specific purpose of filing the suit. That might or might not be the same person.

If you find yourself in this situation, despite your grief, you would be wise to contact an attorney quickly. This is not a "do-it-yourself" matter. It can be critical to begin gathering evidence immediately. Also keep in mind there is an ***absolute deadline for filing a***

***lawsuit two years after your loved one's death***. If you file your lawsuit one day late you are likely out of luck–and the case will be dismissed.

## RIGHTS AND REMEDIES OF BENEFICIARIES AND OTHER INTERESTED PARTIES

What are the rights of estate beneficiaries and heirs (next of kin) in New Jersey Courts? In a nutshell, these parties have the right to be kept informed by the Personal Representative about his or her actions and the estate's affairs–its assets, debts, and the sale of property, for example. Beneficiaries have the right to inspect the estate's records after a certain time period.

There are two broad courses of action available to parties with a legal interest in a Decedent's estate.

### CAVEATS

First, there is the filing of a "caveat" in the Surrogate's Court–an immediate objection to the admission of a Will to probate. This might happen if an interested party challenges the Will's authenticity, or for a variety of other reasons, some of which have been previously discussed: Undue influence or coercion, lack of mental capacity, fraud or forgery, improper formalities of signing, etc.

A caveat is simply a short, signed statement that someone objects the probate of a Will. A caveat does not even need to specify a reason. Once a caveat is

filed–before it is even ruled upon–the Will cannot be probated by the Surrogate . Instead, the person who came forward with the disputed Will (usually the would-be Executor) must file a verified complaint in the Superior Court to have the Will admitted to probate. What happens next, as well as the resulting delay, depends on the circumstances and the legitimacy of the objection. A caveat must be filed before the Will is probated, so it is advisable to file your caveat within 10 days of the passing to ensure the Will is not probated.

## COMPLAINT AND ORDER TO SHOW CAUSE

Once a Will has been admitted to probate, however, filing a caveat is no longer the correct procedural move for a party who feels they have been aggrieved. Instead, the party should file a Complaint in the Superior Court, accompanied by a request for an Order to Show Cause ("OSC"). An OSC is a request that the Court issue an order directly to party to come forward and explain ("show cause") why the Judge should or should not do something.

In the context of estates, this often involves a request to disqualify the PR for some reason. A valid reason might broadly include alleged mismanagement, neglect or refusal to do the job in some way, or a failure to communicate with the beneficiaries. The Court will take especially serious a claim that the PR has engaged in the neglect of responsibilities resulting in a loss of

estate value, favoritism among beneficiaries, or outright embezzlement.

At a minimum, the Court will likely order some form of accounting from the Estate. In the meantime, the Court may order that all estate accounts be frozen, or that no distributions be made, unless the Court specifically permits particular transactions. As with a caveat, once this sort of unfortunate litigation starts, there is no telling how many months or even years it might last before being resolved.

Ultimately, the Judge will order whatever corrective action he/she feels is appropriate. If the Court removes a person as PR, that person may be forced to forfeit his or her commission that would have been paid for their service in that role.

## PERSONAL REPRESENTATIVE AND LEGAL FEES IN ESTATE ADMINISTRATION—A LOOK AT YOUR OPTIONS

### YOUR FEE AS EXECUTOR OR ADMINISTRATOR

New Jersey law provides for a graduated percentage fee payable to the PR (also called a commission) depending on the value of the estate that is administered. That fee or commission starts at 5% of the first $200,000 of estate value.

The fee decreases to 3.5%, then to 2.5% as the value of probate assets increases. But if an unusually large amount of time and/or effort is required, you may request—and the Court may allow—a larger commission.

The PR is also entitled to a 6% commission on any income (e.g., interest or dividends, etc.) received by the estate. The PR's commission is considered taxable income to the PR, so it is important to notify your tax preparer of the commission once it is received.

## ATTORNEY'S FEE FOR LEGAL SERVICES ASSISTING YOU IN ESTATE ADMINISTRATION

It is important to note that attorney's fees to represent you as an Executor or Administrator, are considered estate expenses. Many times, individuals will advance the retainer cost for legal counsel, and then be reimbursed once the Estate is established. Ward, Shindle & Hall has a wide variety of experience in representing Executors, Administrators, and beneficiaries, as well as litigating all of the various topics discussed in this guide. While it is preferable to have legal counsel from the start, it is possible to realize months into an Estate, that it may be best to retain an attorney. It is a difficult task to be an executor or administrator, and having an attorney involved can limit and usually prevent many expenses and headaches that we see many other estates suffer.

# CONCLUSION

**THIS GUIDE IS *NOT* INTENDED** as a do-it-yourself manual for those who wish to undertake estate administration without legal assistance. Rather, we have tried to give you a general overview of what you can expect and where you may need to perform additional research or seek guidance to resolve issues that may arise.

If needed, the lawyers at Ward, Shindle and Hall have a great deal of experience in dealing with the issues and procedures presented here. We welcome the opportunity to be of service to you and your family–both to help you upon the passing of a loved one and to help you plan your personal affairs, with the goal of avoiding the pitfalls described in this book.

We look forward to hearing from you and offer one final piece of advice: Whether you ultimately choose us or another law firm, begin your search for help now. Time is not your friend in these situations. Of course,

the death of a loved one is among life's worst moments. We realize some of the topics we discuss here are not easy to deal with, but they are unavoidable, and your options only become more limited and the chance of errors increase, the longer you wait.

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This book is designed to assist executors, administrators, and beneficiaries of estates in New Jersey who may find themselves facing challenging situations. Whether you are an Executor or Administrator unsure of your duties and where to begin, a beneficiary uncertain of the information you are entitled to, or someone who has been ignored by an Executor, this guide provides clarity. It also addresses concerns such as undue influence or lack of testamentary capacity in estate planning, legal action against Executors or Administrators, delays in receiving inheritances, disputes over disinheritance, and removal of unwanted occupants from estate property. Whatever your New Jersey estate-related issue, this book offers the guidance you need.

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