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A GUIDE TO THE PROBATE PROCESS

What is the probate process?

The probate process begins immediately after death. The first thing that any executor should do upon the death of a loved one or relative after the funeral is to contact an affordable and experienced probate lawyer.

Many people erroneously believe that the probate process is long and expensive. This is a myth. In reality, the probate process in New Jersey offers a solid legal framework for an orderly distribution of a deceased loved one's estate. Moreover, in the majority of cases the probate process is rather affordable.

Probate is designed to create a final accounting upon death, and it is also intended to wrap up one's affairs on earth. The term probate simply means "proving up" a will. When a person dies leaving assets in his name alone or in joint names with another person other than a spouse, then it will be necessary to present the will to the Surrogate for probate. The will is presented to the Surrogate in the county wherein the decedent resided at the time of death.

After the death of a loved one, the executor will then need to present the original will, a certified copy of the death certificate, and a list of names and addresses of the closest next of kin to the County Surrogate. Thereafter, the legal papers are prepared by the court and signed by the executor. The legal review of the documents by the surrogate is called the probate of the will. If all of the legal requirements are satisfied, the will is then admitted to probate. Thereafter, certificates are issued to the executor. These certificates allow the executor to execute documents formerly done by the decedent such as transfer automobiles, bank accounts, investment accounts, etc.

The original will is retained by the Surrogate and filed and recorded in the Surrogate's Court. The will then becomes a public record and is listed in the general index.

Probate is the process whereby a will is proved to be valid by a Surrogate, who has the authority to determine the authenticity of such a document. It also involves appointing an individual for an Estate when someone dies without a will.

Probate is performed when someone dies with assets in their name alone. The individual named in the will as the executor/rix (hereinafter referred to as the personal representative) would come to the office of the Surrogate with the original will and a certified copy of the death certificate.

The application for probate is made to the Surrogate of the County where the decedent resided at the time of death. If the will is self-proving (language added to the will that allows the document to prove itself), then no further proof or testimony will be necessary to probate the will. If the will is not self-proving, then proof of one of the witnesses is necessary to complete the probate.

Certain qualification forms need to be signed by the personal representative. No probate can be completed until the day following the tenth day after death. Fees will be charged as set forth by the New Jersey legislature. Probate is a relatively inexpensive process. If someone dies without a will, an individual can make application to be appointed as administrator/rix (also hereinafter referred to as the personal representative) to represent the estate. After signing qualification papers, the administrator/rix would need to post a bond that represents the full value of the estate and file renunciations from any individual that has a prior or equal right to be appointed.

The Surrogate, as part of the process, will issue letters and certificates evidencing the appointment of the individual to the Estate which will allow them to access and transfer assets such as bank accounts, stocks, bonds, etc. Once the probate is complete, the personal representative of the Estate has sixty days in which to notify the heirs at law, next of kin and beneficiaries that application was made for probate.

Could you please summarize the basic steps of the probate process?

Probate has gotten a bad "rap" over the years. However, this harsh reputation is not warranted. Depending on the complexity of the estate and the thoroughness with which the accounting has been carried out before death, probate can be a relatively reasonable task. To summarize the process, probate can be broken into six basic steps:

- The validation of the will
- Appointing an executor
- Taking an inventory of the estate
- Paying the claims against the estate
- Paying all estate taxes
- The distribution of any remaining assets

Could you please provide a more thorough breakdown of the major steps of the probate process?

- **Obtain Probate Papers and Qualify as an Executor**

Upon the death of the testator or testatrix, the will is probated. This is the legal process which establishes the genuineness of the will. It is done by the surrogate or the Superior Court in the county where the testator or testatrix resides at the time of death.

The executor, executrix, or personal representative is appointed by going to the Surrogate Court with the original will, certified death certificate, and if the will is not self-proven, at least one of the witnesses who signed the will must prove his or her signature on the will.

If the will, for any reason is not properly executed, then the Surrogate's court can advise the executor or personal representative as to the proper procedure in order to allow the will to be admitted to probate.

- **Inventory**

The next step in the probate process is to take an inventory of the estate. This inventory must define a fair market value for all assets in the estate. The executor will generally be able to take care of valuing the items of lesser value, but assets such as homes, stocks,

real estate or valuable art and collections should be appraised and valued by professionals either appointed or certified by the court.

- **Pay Claims of the Estate**

As part of the inventory process, the liabilities as well as assets must be discovered and valued. The executor is responsible for sending out notices to all creditors. This notice will state that a certain person has died, and that any party with a claim against their estate should submit that claim to the probate court within a certain time period. As claims are submitted, the executor will accept or reject each claim. If it is accepted, it is paid out of the estate. In extreme cases where a settlement is not reached in probate court, creditors can bring suit to collect their claim. Once all claims against the estate have been settled and the final inventory completed, the inventory is submitted to the probate court, where it is reviewed and affirmed by the probate court.

- **Death and Taxes**

After the inventory of the estate has been prepared and submitted to the court, all applicable tax forms must be completed and sent to the IRS, and estate taxes must be paid. The IRS requires the 706 tax form for estate taxes to be completed within 9 months of death, unless an extension is granted. Also, a final 1040 must be completed for the deceased for the year of death, as well as 1041 forms for any trusts the deceased may have left behind.

Contingent upon the final inventory of the estate and completion of the necessary tax forms, the taxes are paid out to the IRS. Once the IRS has received the estate taxes, they will issue a closing letter stating that all estate taxes have been paid. This can take as long as 1-2 years after death. An attorney with experience in probate and estate planning handles the preparation and filing of these important 706 tax forms and coordinates with a CPA for the preparation of the 1040 and 1041 tax forms. A qualified probate attorney can minimize the expense and time necessary for this important step, as well as help to avoid errors that can cause severe tax consequences.

- **Final Accounting**

After all claims and taxes are paid out, a final accounting is done to summarize the affairs of the estate for the court. This accounting includes the initial inventory, all earnings, sales, and bills and taxes paid. All payouts to heirs are itemized prior to payout, which takes place once the final accounting is approved by the court. Copies of this final accounting are sent to all beneficiaries, who must approve and sign off on this accounting. If there is a dispute about the accounting or the affairs of the estate, the beneficiaries may challenge the executor before the court.

- **The Last Round Up**

Once all beneficiaries have approved and signed off, the final accounting is submitted to the court for approval. The court will then issue an order that affirms the final accounting and the proposed distribution. At this time, the heirs are paid out according to the orders contained in the will. If the deceased has died intestate, then the heirs are paid according to the laws of intestacy.

- **Distribution**

All beneficiaries must sign a release and refunding bond before the estate will send out a check to any beneficiary.

Why is it important to have a will?

A will is defined as an instrument, that comes into effect upon death, by which a person makes a disposition of property both real (land and buildings) and personal (bank accounts, stocks, and personal items). Without a will, an individual's assets be distributed according to New Jersey law.

A properly drawn will should name an executor/rix and alternate in case the individual first named is unable to serve. If applicable, it should name a trustee if a trust is created in the Will and a Guardian if there are minor children who will need to have someone appointed to handle their affairs.

The will should provide that anyone named not be required to post a bond for their position. It should state specific bequests and determine how the rest or residuary of the estate will be distributed.

Anyone over the age of eighteen can have a will. It should be signed and witnessed by two individuals who are at least eighteen years of age and if properly worded, will become self-proving with the addition of signatures by the same witnesses and the signature of a notary public.

Whether your estate is large or small, it is beneficial to have a properly drawn will. A minor mistake may invalidate your good intentions. It is suggested you seek the services of an attorney as the risk of problems are too great. Not having the will properly drafted or executed can cause delays, great expense and may force the will to be probated in the Superior Court.

Remember that after the will is executed, any changes to the document should be done through a codicil (a separate document that changes certain parts of a will) or by a new will. If markings, cross-outs, or handwritten changes exist on the will, the Surrogate will be unable to act, forcing probate in the Superior Court.

The person named in the will as the personal representative will have the responsibility to:

- Locate and inventory all of the assets of the estate
- Pay the outstanding debts
- File the appropriate inheritance or income tax returns
- Have the necessary paperwork prepared for the transfer of all real and personal property
- Pay all administrative, funeral and legal fees
- Open and maintain an estate checking account
- Disburse the estate funds to the named beneficiaries and file the appropriate refunding bonds and releases (documents that show someone received their inheritance)

What happens if I die without a will?

When a person dies without a will, there are two types of legal procedures which may occur.

- **Affidavit**

If there is a surviving spouse and the property (real and personal) owned by the decedent alone does not exceed \$20,000, an Affidavit of Surviving Spouse may be issued to dispose of such property without the necessity of formal Administration.

If there is no surviving spouse, but there are heirs and there is property owned by the decedent alone which does not exceed \$10,000, an Affidavit of Heir may be issued to one of those individuals closest in kinship to the decedent without the necessity of formal Administration. Consents from certain individuals may need to be filed.

If all procedures are performed properly, the Surrogate will issue either an Affidavit of Surviving Spouse or an Affidavit of Heir which will enable the individual to act with the same power as the decedent over the property reported on the Affidavit. The documents cannot be issued until the sixth day after death.

- **Administration**

If there is a surviving spouse and the property owned by the decedent alone exceeds \$20,000, the spouse may be appointed Administrator/rix of the estate. A bond will be posted by the surviving spouse for the full value of the estate, if there are others who are entitled to inherit.

If there is no surviving spouse and the property owned by the decedent alone exceeds \$10,000, then an heir who is next in line may be appointed Administrator/rix of the estate. A bond will be required to be posted that represents the full value of the estate. Renunciations may need to be filed.

For an Administration, the Surrogate's Court requires a certified copy of the death certificate and qualification papers signed by the applicant(s). Once completed, Letters of Administration and certificates will be issued. These documents are not issued until the sixth day after death after all requirements are met.

- **Heirs—Who May Be Appointed**

To properly understand who can be appointed under an Affidavit or Administration, the following relationship should be explained.

Children of the decedent are equally entitled to act. Normally, one child can act in such capacity. Therefore, if a decedent has four children, three would renounce in favor of the fourth. In the alternative, they may be appointed as Co-Administrators.

If no child survives the decedent, but there are grandchildren, one may be appointed where the others renounce, or they may be appointed Co-Administrators.

If no child or grandchild survives, but the decedent is survived by parents, one parent may renounce in favor of the other, or they may be appointed Co-Administrators.

If no child, grandchild or parent survives, but the decedent is survived by brothers and sisters (siblings), one may be appointed where the others renounce, or they may be appointed Co-Administrators.

If no child, grandchild, parent, or sibling survives, but the decedent is survived by nieces or nephews, one may be appointed where the others renounce, or they may be appointed Co-Administrators.

If none of the above survive the decedent, next in line are the decedent's grandparents, followed by aunts and uncles, then cousins, etc., (the grandparents' descendants).

Finally, if none of the above relatives survive, but the decedent is survived by stepchildren (not adopted), one may be appointed where the others renounce, or they may be appointed Co-Administrators.

Remember that in both Affidavit and Administration applications to the Surrogate's Court, renunciation or consent forms will be required to be filed from the appropriate individuals.

How is my estate distributed without a will?

New Jersey law provides how your estate will be distributed if you do die without a will. The property referred to in this section deals with assets in the decedent's name alone.

- If you die leaving a spouse and children of the same marriage, the spouse will inherit the entire estate. (i.e., no stepchildren or children of a prior union)
- If you die leaving a spouse and children of a prior union, the spouse will inherit the first 25% of the estate, but not less than \$50,000 nor more than \$200,000, plus one-half of any balance of the estate. Your children take the balance equally. Grandchildren will take the share of their deceased parent.
- If you die leaving a spouse, child or children and a stepchild, or stepchildren, the spouse will inherit the first 25% of the estate, but not less than \$50,000 nor more than \$200,000, plus one-half of any balance of the estate. Your children take the balance of the estate equally. Grandchildren will take the share of their deceased parent.
- If you die leaving a spouse and no children, but are survived by parents, the spouse will inherit the first 25% of the estate, but not less than \$50,000 nor more than \$200,000 plus three-fourths of any balance of the estate. Your parents take the balance equally.
- If you die leaving a child or children but no spouse, children will inherit equally. Grandchildren will take the share of their deceased parent.
- If you die leaving no spouse, children or grandchildren, your parents take all. If no parent survives, your brothers and sisters will take equally. Nieces and nephews will take their deceased parent's share.
- Where there is no immediate family, your property may go to more distant relatives (grandparents, aunts, uncles, cousins, etc.), then to stepchildren, or even revert to the State.

How is jointly owned property handled in the probate process?

Property, both real and personal, may be transferred through joint ownership. Real estate owned by husband or wife, as tenants by the entirety, becomes the sole property of the survivor.

If two or more persons other than husband and wife own real estate together, each owns an individual share as tenants in common, unless the deed states that they own as joint tenants with rights of survivorship.

An interest in real estate owned as tenants in common passes to the heirs of the deceased while joint tenants with rights of survivorship will pass to the survivor when the other joint tenant dies.

Personal property, where owned jointly, will become the property of the survivor upon death.

How is life insurance handled in the probate process?

Life insurance policy is a contract between the policy holder and the company. The proceeds are paid according to the terms of each contract. It is not considered an asset of the estate unless paid to the estate. It is important to verify that your primary and alternate beneficiaries are named on your designation form.

How is social security, pension and veteran affairs handled in the probate process?

The Social Security Act provides for survivor's benefits to the family and other benefits to eligible persons. Benefits may include monthly payments and a lump sum death payment.

Upon the death of a person who may be entitled to benefits, a member of the family or interested party should contact the local Social Security office for further information.

If applicable, a widow, minor children or family members may be eligible for pension benefits. Contact the appropriate pension company official for further information.

If the decedent was a Veteran, the Veteran's Administration should be contacted to inquire about burial or death benefit information.

What is the purpose of having a letter of last instructions?

Few persons expect to die and relatively few leave their affairs in perfect order. Those who administer an estate often find themselves without necessary information.

To ease their job, it is advisable to leave your personal representative a letter of last instructions. This document, outside of your will, will act as an information source as well as an indication of how your affairs will be handled.

The document may contain the following information:

- Names and addresses of those individuals you would want contacted upon your death
- A list of family members and their relationships
- A statement as to where your will can be located

- Instructions as to funeral and burial arrangements
- Where your important papers may be located such as marriage/ divorce, automobile title, discharge from military, etc.
- Cemetery plot information
- Location of safe deposit box
- List and location of insurance policies
- List and location of all bank accounts, checking and savings
- List of information on pension, trusts, etc.
- Location of all stocks, bonds, securities, etc.
- Statement of all real property with location of mortgages, deeds, etc.
- Location of all income tax returns for previous five years
- Current bills, debts and cancelled checks for five years.

How do I transfer assets during the probate process?

In order to make a transfer of an asset belonging to the decedent at death, the personal representative will usually need to perform the following functions:

- Acquire from the Surrogate certificates or the proper Affidavit
- File with the New Jersey Inheritance Tax Bureau in Trenton for a tax waiver. A tax waiver is a document issued by the State of New Jersey which releases the property from any inheritance tax claim which could be asserted by the State.

To determine if a waiver is necessary, use the following formula:

- **Personal Property**

If money belonging to the decedent at death is in a joint bank account in the name of a decedent and their spouse, parent, grandparent, child, stepchild, legally adopted child or their issue, the bank will release the funds to the surviving owner upon the execution of an affidavit of waiver or L-8 form, which can be obtained from the respective bank. No tax waiver is necessary.

If the money belonging to the decedent is in the decedent's name alone, but will go by will or by law to the spouse, parent, grandparent, child, stepchild, legally adopted child or their issue, the bank will release the funds to the personal representative of the estate with a Surrogate's certificate and an affidavit of waiver or L-8 form. No tax waiver will be necessary.

If money belonging to the decedent at death is in a bank account in the name of the decedent alone, the bank will freeze the account, but will allow withdrawal of one-half of the funds upon receipt of a Surrogate's certificate. The balance can be released when the appropriate tax waiver is received by the bank.

In order to acquire a tax waiver, all inheritance taxes due to the state of New Jersey must be paid. Even if no tax is due, a form may still have to be filed to demonstrate to the Inheritance Tax Bureau that the property is exempt.

Upon evidence that the estate is exempt from taxes and/or payment of any taxes due, the bureau will issue a tax waiver. This waiver when presented to the bank will release the frozen funds.

- **Real Property**

Real property, if in the decedent's name alone, will pass according to the terms of the will or if no will, then by the laws of intestacy.

If the property is owned jointly with rights of survivorship, it will pass to the surviving owner.

If owned as tenants by the entirety as husband and wife, the property will pass automatically by operation of law to the surviving spouse.

- **Motor Vehicles**

Title held jointly in the name of the decedent and their spouse becomes the property of the sole owner upon death of the other spouse. No Surrogate's certificate or Affidavit is required. The title can be changed by the survivor upon them appearing at a Motor Vehicle office and executing a proper Affidavit.

If the title is in the decedent's name alone or jointly with another person other than the decedent, the personal representative or co-owner must show a Surrogate's certificate or Affidavit together with the original title, registration, and insurance identification card.

- **Stocks, Bonds, and other Securities**

Examination of the stock certificate should be done first to determine who is the registered or transfer agent. It will then be necessary to contact that individual to ascertain the company requirements for the transfer of the stock.

Normal requirements include a transfer agent's transmittal form, an affidavit of domicile, certified copy of death certificate, Surrogate's certificate, the original stock certificates and if a New Jersey corporation, a tax waiver or affidavit of waiver.

Stock that is owned by the decedent and another individual may have the same requirements as indicated above in order to transfer the stock to the surviving owner.

- **Clearing Title and Transferring Property**

Unpaid inheritance taxes are a lien on New Jersey real estate and shares of stock of corporations and financial institutions organized under laws of New Jersey.

The New Jersey Inheritance Tax Bureau sends waivers that are required to clear title to the land and transfer ownership of bank accounts or securities. If there is a tax, a bill is submitted and the waivers sent when the tax is paid.

To clear title to the real property, a tax waiver is filed with the County Clerk in the county where the land is located. Land held by husband and wife as tenants by the entirety need not be reported and may be transferred without a waiver.

To transfer stocks, shares and securities of financial institutions and New Jersey Corporations, the personal representative will need waivers to obtain assets. The waivers will be sent from the New Jersey Inheritance Tax Bureau to the particular bank, institution or individual.

What type of taxes are due during the probate process?

The New Jersey Inheritance Tax is a tax on the right to receive an inheritance or property at the time of someone's death and is determined on the relationship of the beneficiary to the decedent.

There is currently no tax imposed on a transfer to a spouse, child, adopted child, stepchildren, grandchildren, parent, or grandparent.

On a transfer to a brother or sister of the decedent, a wife, or widow of a son of the decedent or husband or widower of a daughter of the decedent, the first \$25,000.00 is exempt. Any amount over that up to \$1,075,000.00 is currently taxed at 11%.

Any other transferee, distributees or beneficiaries (other than those entirely exempt such as charities or educational institutions) will be currently taxed after the first \$499 at the rate of 15% up to \$700,000 and 16% on anything over that amount.

Depending on the size of the Estate, Federal Estate Tax may apply. It is suggested you seek the guidance of an attorney, accountant or estate planner to address those concerns.

What type of trusts should be set up during the probate process?

A trust created under a will can be established for minor children, adults or any other designated beneficiary. It can be done for any number of reasons including tax savings, the ability of a beneficiary to handle finances or particular distribution of one's assets.

The trust created under a paragraph in the Will appoints a Trustee. The trustee administers and invests the funds for the Trust and pay income and/or principal from the Trust as set forth under the terms of the trust in the will.

What is a guardianship for minors?

A guardian for a minor can be named in a will or the Surrogate can appoint a guardian if a minor receives an inheritance or proceeds from a lawsuit.

Normally, the money is deposited in the County Surrogate's Office Intermingled Minor Account and held until the minor reaches the age of eighteen.

As an alternative, the guardian would post a bond and invest the monies themselves on behalf of the minor. If the minor owns any real property and the Guardian wishes to sell it, they must first obtain court permission.

What is a power of attorney?

A power of attorney is a written document in which another adult person is authorized to act on your behalf regarding real property, bank accounts and other financial and legal matters.

It is generally used when someone is unable for some physical or mental reason to carry out his or her affairs. With this instrument, a spouse, friend or family member, called an agent, can act on behalf of you, the principal.

There are generally two kinds of power of attorney: limited and general. The limited power of attorney gives a person authority to act for a specific purpose. An example is

the sale of a house when the owner cannot be present. The agent with the power of attorney can sign the documents in the principal's absence.

With a general power of attorney the agent has the authority to act on anything and everything for the principal if he or she becomes disabled or mentally incompetent. Most general powers of attorney will have a provision that will allow the agent to act even in the event of the disability of the principal. A power of attorney automatically ends at the death of the principal.