

**HOW TO PROBATE A LAST WILL &
TESTAMENT IN THE
BERGEN COUNTY SURROGATE’S COURT**

**Michael R. Dressler
Bergen County Surrogate**

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Special thanks to the Bergen County Bar Association and the Elder Law Committee for their invaluable assistance in the preparation of this booklet.



**Michael R. Dressler, Esq.
Bergen County Surrogate**

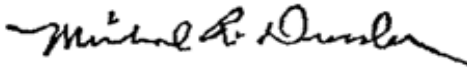
It is my privilege and pleasure to address you as Judge of the Surrogate's Court of Bergen County. The many duties of the Surrogate's Court include probating a decedent's Last Will & Testament, appointing estate administrators, supervising the appointment of guardians and administering adoptions.

This booklet offers an introductory and general overview of issues I believe are important to you and your family, including the importance of having a Last Will & Testament, the probate process, powers of attorney, advance directives for health care (living wills) and health care proxies (medical powers of attorney).

The principle governing my staff and me is that during periods of grief and family uncertainty the Surrogate's Court is available to listen, help and guide. If you have questions regarding any topic referred to in this booklet or involving the Surrogate's Court, please contact my office. The Surrogate's Court is located on the Fifth Floor of Two Bergen County Plaza, Suite 5000 in Hackensack, NJ 07601. The telephone number is (201) 336-6700.

We are here to serve you.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael R. Dressler". The signature is fluid and cursive, with a long, sweeping underline.

Michael R. Dressler
Surrogate of Bergen County



HOW TO PROBATE A LAST WILL & TESTAMENT IN THE BERGEN COUNTY SURROGATE'S COURT

Introduction

Probate is often assumed to be a complicated and expensive process that must be avoided. It is not. In New Jersey, and particularly in Bergen County, probate is relatively simple and inexpensive. In Bergen County, an individual can probate a decedent's Last Will & Testament in the Surrogate's Court, with or without the assistance of a lawyer, in usually under an hour. You need not make an appointment; just appear between 8:30 a.m. and 4:30 p.m. on any business day with certain information and documents, as described hereafter. The Surrogate's Court will work with you in completing the probate process. The cost is generally \$100 to \$200.

PROBATE

Probate is the process which permits an executor to transfer assets as directed by a decedent in their Last Will & Testament (the decedent who made the Last Will & Testament is called a “testator”) to the beneficiaries (recipients) according to the testator’s Last Will & Testament.



A Last Will & Testament can be probated by the Bergen County Surrogate if the testator resided in Bergen County or if an out of state resident owned property exclusively in Bergen County at the time of his or her death.

ASSETS UNDER A LAST WILL & TESTAMENT

What are Probate Assets and What are Not

Not all assets must go through probate to be transferred to a beneficiary. Some assets pass automatically (by operation of law) to other persons (beneficiaries) without the need for probate. Whether a particular asset to be transferred must go

through probate or not depends on how ownership (title) to the asset is held.

**If Title to an Asset is Held
in the Testator's Name Alone**

Real estate and personal property, such as bank accounts, stocks, bonds, motor vehicles, etc. held in the testator's name alone, and monies owed to the testator, are "probate property" which are transferred in accordance with the testator's Last Will & Testament. These assets cannot generally be transferred without going through the probate process. However, some brokerage firms provide beneficiary designation forms which may transfer these accounts without probate.

**If Title to an Asset is Held by the Testator
Jointly with a Right of Survivorship**

Assets held by the testator and another person jointly, with a right of survivorship, are said to be held as "Joint Tenants with Right of Survivorship" (JTWROS); and pass by operation of law at the testator's death to the surviving joint tenant. Bank accounts, securities and real estate are often held in joint tenancy. Assets that are titled this way are not subject to probate. The name on the bank or securities account application and the deed for real estate may read: "John Smith and Jane Doe, as Joint Tenants with Right of Survivorship." Be careful changing title to existing assets because there can be tax and other consequences.

If an Asset Provides for a Beneficiary Designation

“Beneficiary designation property” is generally non-probate property which passes in accordance with beneficiary designations assigned by the testator. Life insurance proceeds, 401(k) plans, IRA’s, employee death benefits (e.g., pension, profit-sharing, etc.) and accounts titled “Payable on Death” (POD) and/or “In Trust For” (ITF) are typical beneficiary designation property. Generally, the insurance company, pension plan administrator, or employer will have the beneficiary’s name in their records, or a copy of a form signed by the owner of the property indicating the beneficiaries. Language in the policy or plan may also be important.

LAST WILL & TESTAMENT

A Last Will & Testament is a legal document which allows you to determine how your assets (i.e., estate) will be distributed; who, when, and/or in what manner beneficiaries may receive those assets. A Last Will & Testament also permits you to choose fiduciaries such as executors (who manage the estate), trustees (who manage trusts under your Last Will & Testament) and, in the event there are minor children, who shall serve as their guardian. Without a Last Will & Testament, the laws of the state of New Jersey determine who receives your assets. These laws are known as “laws of intestacy.” In addition, without a Last Will & Testament, the Surrogate’s Court, based on the law,

will appoint the guardian of your minor children and an administrator of your estate.

Requirements

Any person, at least 18 years old and of sound mind may make a Last Will & Testament. In order to be valid in New Jersey, a Last Will & Testament must be in writing; signed by the person (testator) making the Last Will & Testament and the signing must be witnessed by at least two people over the age of 18. The act of the testator signing the Last Will & Testament is identified as executing the Last Will & Testament.

A handwritten Last Will & Testament, known as a holographic Last Will & Testament, may be valid if it can be proved that the signature and the important provisions are in the same handwriting, and that the handwriting is the testator's. This handwritten document must be probated in Superior Court rather than Surrogate's Court. Consequently, this is a very expensive document to probate which is why a typewritten, formally signed Last Will & Testament, is always preferable.

General Considerations; Self Help

Computer software programs and websites now offer "do-it-yourself" Last Will & Testament kits. Many of these programs are not specific to individual states or to any person's personal or family circumstances. Instead, these programs offer

general Last Will & Testament language which may or may not create a valid Last Will & Testament in New Jersey. Even those programs which claim to customize the document to individual states may create an invalid Last Will & Testament if there is a mistake in its preparation or in the circumstances surrounding the signing of the document. While self-help programs and websites can educate you, and thereby help you save professional fees, they are rarely a substitute for professional guidance.

Updating Your Last Will & Testament

It is important to review your Last Will & Testament about every three (3) years, as well as any time there is a significant change in your circumstances, in order to ensure that it continues to reflect your wishes and complies with current law. Even though the laws can automatically make some changes for you, it is best to keep your documents current. For example, if you should divorce and not change a Last Will & Testament that leaves the assets to your ex-spouse, those assets will be distributed as if your ex-spouse predeceased you. The result could alter your expectation as to how distribution would otherwise occur. This may or may not be what you want.

Remember, it is important that you do not make handwritten changes to your Last Will & Testament after it has been signed by you and your witnesses.

Care of Your Last Will & Testament

It is also important never to mark up or change a signed Last Will & Testament because this may compromise its validity. If you wish to change any provisions of your Last Will & Testament, it can be done through a properly executed amendment. An amendment to a Last Will & Testament is called a “codicil.” Codicils can be used for simple changes and are hence a part of the Last Will & Testament. Significant changes are best made by making a new Last Will & Testament. With the common use of word processing computer programs, signing a new Last Will & Testament can often be as inexpensive as signing a codicil. A new Last Will & Testament avoids any risks of inconsistencies that could occur among, and from having several codicils.

An original Last Will & Testament should be kept in a safe, fireproof place. A photocopy of the Last Will & Testament should also be kept with your other important papers including instructions as to where the original has been stored. A safe deposit box is an appropriate place to keep a Last Will & Testament. A bank employee should be present as the box is opened. If the Last Will & Testament is contained in the box, it may be released to the named executor. An alternative is to have the named executor and the successors sign the signature card for the safe deposit box. Because a Last Will & Testament may not be located immediately after, nor can it be probated until ten

(10) days subsequent to a death, it is best not to rely on a Last Will & Testament for burial instructions. Those instructions ought to be specified in a private letter, or a living will, or a funeral directive.

The Need for a Last Will & Testament

Many people have the mistaken notion that if they die without a Last Will & Testament their spouse will always inherit their entire estate. In New Jersey pursuant to N.J.S.A. 3B:5-3, the surviving spouse will inherit the entire estate only if no descendant or parent of the decedent survives the decedent; or all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent.

Another example for needing a Last Will & Testament is if there are special considerations for you or your family, such as a special needs child, minor or adult, who receives government benefits which may be compromised or eliminated if he or she receives an inheritance outright, provisions can be made in your Last Will & Testament to protect that family member's government benefits (such as SSI and Medicaid) while still allowing them to benefit under your Last Will & Testament.

When to Probate the Last Will & Testament

A Last Will & Testament cannot be probated until ten (10) days following the death of the testator. However, you may begin the process

with the Surrogate's Court within this ten (10) day period. If you do so, the Surrogate's Court simply will not admit the Last Will & Testament to probate until after the ten (10) days have lapsed.

If you are appointed under the Last Will & Testament to manage, that is, to be the executor of the estate you must first probate the Last Will & Testament at the Bergen County Surrogate's Court. To do this you must bring the following with you to the Surrogate's Court: (1) the **original** Last Will & Testament (bearing original signatures, not unstapled nor tampered with), the **original** of which remains with the Surrogate's Court; (2) a certified copy of the death certificate (obtained from the Board of Health in the municipality where the testator died) which also remains with Surrogate's Court; (3) **all** the full names and most current addresses of the immediate degrees of kindred (i.e., surviving spouse, surviving family and next of kin) including those who are not beneficiaries in the Last Will & Testament; and (4) cash **or a check (drawn upon a New Jersey bank bearing a New Jersey address)**, certified check, or money order for probate statutory fees that are generally \$100 to \$200. You should not fill in the check until your meeting at the Surrogate's Court.

In addition, if a Last Will & Testament is not "self-proving," meaning it does not include a sworn statement containing statutory wording, then a person who signed the Last Will & Testament as a witness or a "bystander witness" (one who

witnessed the testator and the two witnesses sign the Last Will & Testament, but they themselves did not sign the Last Will & Testament) must also come to the Surrogate's Court to authenticate the witnesses' signatures. Conversely, a self-proving Last Will & Testament is one where the testator and two witnesses sign the Last Will & Testament in front of a notary public, or New Jersey attorney, and includes a sworn statement containing statutory language required by New Jersey law. That statement is called a "self-proving affidavit." If a Last Will & Testament is self-proving (must have the sworn statement containing the statutory language), there is no need for a witness to its execution to come to the Surrogate's Court because the notary public, or New Jersey attorney, before whom the testator and witnesses signed the Last Will & Testament, effectively attests to the authenticity of the testator's and witnesses' signatures. A Last Will & Testament executed on forms made after 1979 are most often self-proving. If in doubt, ask the probate clerk at the Surrogate's Court or an attorney.

How the Process Works

When you arrive at the Surrogate's Court, a probate clerk will review the original Last Will & Testament to ensure that it has been properly drawn, signed and witnessed. It is important that you do not make handwritten changes to your Last Will & Testament after it has been signed by you and your witnesses. If there are no problems with the Last

Will & Testament or with the items you have brought (the original Last Will & Testament and the certified copy of the death certificate will stay with the Surrogate's Court), you will sign qualification papers to become the executor, pay the statutory fee, and be deemed "qualified." Shortly thereafter a Judgment of Probate will then be issued, followed by Letters Testamentary that complete your appointment as executor.

The probate clerk will ask you how many certified copies of the Letters Testamentary (also known as a "Surrogate's Certificate") you will need. Letters Testamentary is the formal document appointing the executor. You will generally need one certified copy, bearing a raised seal, for each asset to be transferred from the testator to a beneficiary. Therefore, depending on the estate, you will need several Surrogate's Certificates, especially if the assets are being held by several banks, brokerage firms, pension plans and insurance companies. Surrogate's Certificates will also be needed to sell or transfer any real estate. The cost is \$5.00 each.

Many executors find it easier to get extra Surrogate's Certificates to avoid the need to purchase more at a later date. Surrogate's Certificates are generally valid for one (1) year from the date of issuance. However, some financial institutions may require that the Surrogate's Certificates be issued within a certain period of time. Most brokerage firms require your Surrogate's

Certificates be dated within 30 to 60 days of issuance. You will receive in the mail the Letters Testamentary (and the quantity of Surrogate's Certificates requested while you were meeting with the probate clerk), a copy of the decedent's Last Will & Testament, together with a general information brochure concerning the New Jersey Inheritance and Estate Tax, and a copy of the court rule regarding the "Notice of Probate of Will," from the Surrogate's Court about seven (7) business days later.

Once the judgment for probate and the Letters Testamentary have been issued, the Last Will & Testament is deemed "probated." As described in the copy of the court ruling governing "Notice of Probate of Will" that is sent to the executor with the Letters Testamentary, the law requires that the executor notify all beneficiaries and next of kin (including those next of kin who are not beneficiaries in the Last Will & Testament) that the Last Will & Testament has been probated, the place and date of probate, that a copy of the Last Will & Testament is available upon request, and that they be informed of the name of the executor. This must be done within 60 days from the date the Last Will & Testament was probated. This should generally be done by certified mail, return receipt request. Copies of each letter and the certified mail receipts proving that each person has received notice must be saved. The executor must then file a "Proof of mailing of the Notice of Probate of Will" with the Surrogate's Court together with a fee of

\$5.00 for each page of the proof of mailing of the “Notice of Probate of Will.”

What Comes Next

Following probate, the executor begins the process of settling the decedent’s financial affairs and estate. It is the executor’s duty to collect the assets, (e.g., apply to insurance companies for proceeds if the estate is the beneficiary) manage them during administration, such as temporarily investing cash, keep records (copies of all bills, check register, statements, etc.), pay debts and expenses, compute and pay estate, income, inheritance and any other taxes, then distribute the estate’s assets to the person or persons entitled, under the terms of the Last Will & Testament. If necessary, the executor performs these duties with the help and advice of professionals such as an attorney and sometimes an accountant, investment counselor, and/or real estate consultant. Also, the executor generally coordinates and assists beneficiaries of non-probate assets with the collection (e.g., IRA’s, life insurance, etc.) of these assets as well as other successors in interest of those assets, especially when the non-probate assets affect the death taxes that the executor is responsible for computing, reporting and paying. Simply because an asset is not part of the probate estate does not mean that it is not taxable. In effect, the executor steps into the shoes of the testator in collecting, managing and distributing the testator’s assets during the period of administration.

Executor Commissions

The executor is entitled to a fee for services performed. Under New Jersey law, the executor of an estate is generally entitled to the following commissions (**remember, executor commissions are only allowable on “probate assets” and on real estate which comes into the hands of the executor**):

- a. 6.0% on all estate income;
- b. 5.0% of the estate up to \$200,000;
- c. 3.5% on excess above \$200,000 up to \$1,000,000;
- d. 2.0% on excess over \$1,000,000 or such other percentage as the Superior Court may determine

There are different rules for commissions when there is more than one executor, or when the executor has rendered unusual or extraordinary services. In some cases, family members may choose not to accept (i.e., waive) fees. However, a decision to waive fees should be made only after careful consideration of the distribution of the estate’s assets, and tax consequences of not taking the deduction for payment of the commission.

Release & Refunding Bond

Once debts and taxes of the estate are paid and the executor is ready to make final distribution, the executor must have each beneficiary sign a “Release & Refunding Bond.” By executing a Refunding Bond, the beneficiary is agreeing that, in

the event the assets distributed to him or her are needed at a later time to pay any debt of the estate, the beneficiary will return (i.e., refund) part or all of the assets received as needed to pay estate debts. This provides the executor with security in the unlikely event claims are subsequently made against the estate. The “Release” is proof that the executor has made distribution and that the beneficiary has received his or her bequest. The Surrogate’s Court provides a free sample form of a combined Release and Refunding Bond. The executed Release and Refunding Bond (as executed in front of a notary public) should then be filed with the Surrogate’s Court with the statutory fee for the filing. It is essential that the executor obtain and file with the Surrogate’s Court, either an executed Release or combined Release & Refunding Bond from each beneficiary of the testator’s estate.

These comments are necessarily only a general overview of the probate process. Should you have any questions, the Bergen County Surrogate’s Court is here to help. It may also be appropriate to seek the advice of an attorney, accountant, or other professionals to help guide you through the probate procedures.

Assets Passing Under a Last Will & Testament

Any property passing under a Last Will & Testament is called a “probate asset.” Not all assets are controlled by a Last Will & Testament. Property held (owned) in joint names with a right of survivorship, as well as bank accounts held in joint

names, will automatically pass to the surviving joint owner(s). In addition, property held by married couples as “tenants by the entirety” will automatically pass to the surviving spouse. Life insurance policies, IRA’s, annuities and 401(k)’s are examples of assets that designate beneficiaries through a beneficiary designation form and are, therefore, not controlled by a Last Will & Testament. Many brokerage firms have created forms to designate a beneficiary for a regular brokerage account. Only assets held in your sole name or with another as “tenants in common” and that do not pass under a contract will pass under the terms of your probated Last Will & Testament. This fact must be addressed in planning to assure that your wishes are carried out even though your Last Will & Testament may only control the distribution of some of your property. Be sure to keep a copy of every completed beneficiary designation form with important records. Banks and brokerage firms have occasionally lost them.

Settling the Estate

The process of settling an estate in New Jersey is similar whether a person dies with or without a Last Will & Testament. A personal representative must go to the Surrogate’s Court of the county where the decedent resided to take charge of the estate. If there is a Last Will & Testament, the executor named in the Last Will & Testament is the personal representative. If there is no Last Will & Testament, the personal

representative, who is usually a family member, is called an administrator. Under New Jersey law, if there is a surviving spouse then he or she is the first person in line to serve as administrator, followed by children, grandchildren, parents and siblings. This may lead to family quarrels, as more than one person including estranged family members may have equal right to serve as administrator. For example, all children of a decedent have an equal right to serve in that capacity, so renunciations must be obtained from all those who will not be serving. This is yet another reason why it is always advisable to take the time to have a Last Will & Testament properly and professionally prepared.

The Surrogate must qualify the administrator. While a Last Will & Testament may provide that no “surety bond,” (also referred to as a bond) be required for the executor, an administrator may be required to purchase a surety bond. A surety bond is a financial arrangement in which the executor or administrator pays an annual fee (i.e., premium) to a company specializing in these arrangements. That company then insures the heirs against certain wrongful acts of the executor or administrator. It is yet another way the Surrogate and state law endeavor to protect heirs. The price of the bond’s annual premium, which can be hundreds of dollars, is determined by the size of the estate. The bond premium often costs more than the fee for having a Last Will & Testament prepared. The surety bond must remain in effect and renewed yearly until the estate is settled. Providing that no

bond is necessary, known as “waiving the bond requirement,” for an executor is a major advantage to having a Last Will & Testament.

There are many good reasons to have a Last Will & Testament; they include tax planning, avoiding the cost of a bond’s annual premium, and planning for family members entitled to government benefits. The best reason for having a Last Will & Testament is peace of mind; knowing that you have provided for your loved ones and that by your planning, the distribution of your estate becomes a smoother, easier process for them.

TAX PLANNING

Importance of a Last Will & Testament, Taxes and More

Decedents’ estates in New Jersey may be subject to federal and New Jersey estate taxes. In addition, beneficiaries inheriting from those estates may be subject to a New Jersey inheritance tax. A properly drafted Last Will & Testament with included trusts may help reduce tax liabilities. Tax laws are complex and ever changing; therefore, I recommend your Last Will & Testament, trusts, and estate plans be prepared by experienced counsel.

Potential Tax Liability

There are three distinct tax liabilities to which New Jersey decedents’ estates and beneficiaries may be subject. The federal estate,

New Jersey estate and New Jersey inheritance tax are the three taxes mentioned. Both the federal estate and New Jersey estate tax are imposed upon the value of a decedent's estate. The New Jersey inheritance tax is assessed against and based upon the blood relationship, if any, of the decedent to who inherits or if it is an entity inheriting under the estate. It must be noted, tax laws are complex and fluid; therefore, I recommend the use of estate attorneys and accountants in the preparation of a Last Will & Testament, trusts, estate tax returns and estate planning.

Federal Estate Tax

With the December 31, 2012 expiration of the 2010 Tax Relief Act, the American Taxpayer Relief Act of 2012 (i.e., 2012 Taxpayer Relief Act) was signed into law on January 2, 2013. Without this law, federal estate taxes were set to revert to 2003 and pre-2001 levels (such as a total applicable exclusion of \$1,000,000 and a maximum tax rate of 55%, respectively). An outcome of the 2012 Tax Relief Act, as it affects federal estate taxes, makes permanent certain features, previously temporary, and extends others that former legislation had caused difficulty for long term estate tax planning.

One feature scheduled to sunset that the new law makes permanent is the concept of portability of the deceased spousal unused exclusion (DSUE) amount. This is a feature available between spouses only. Portability of the DSUE is an election made by the estate of a decedent who is survived by a

spouse that gives the surviving spouse the authority to apply the decedent's unused exclusion amount to their own transfers during their life and at the death of the surviving spouse.

Additionally, the 2012 Taxpayer Relief Act continues the deduction for state estate, inheritance, legacy or succession taxes. It also retains many of the Generation-Skipping Transfer (GST) tax-related requirements, otherwise set to expire. Conversely, the act repeals the five percent (5%) surtax on estates larger than ten million dollars.

Passage of the 2012 Taxpayer Relief Act kept the estate and gift tax rates and exemption amounts unified. The result was to reset the federal estate tax exemption amount to \$5,000,000 and to raise the maximum tax rate to 40%. In addition, the exemption amount is to be adjusted for inflation annually beginning in 2014 based upon the standard formula of Internal Revenue Code section 1(f). Regarding the GST the act also provides for a top tax rate of 40% and an exemption amount of \$5,000,000.

Federal and New Jersey estate taxes are each due nine (9) months after the decedent's death. Those taxes are collected and due from estates with a net value (the estate's value after taking all allowable deductions) at the time of a decedent's death that exceeds the applicable exemption. The law is actually much more complex than these statements indicate. For example, if you gave away your house while alive, but retained the right to live

there, known as a “life estate,” the value of your house will be included in your estate. There are a host of other rights which most people would not consider to be assets, which the tax laws may consider part of your estate and subject to estate tax.

Applicable exemption amount and top tax rate refer to those amounts in effect in the year of the decedent’s death. Since these numbers change in accordance with the law people with substantial estates, I suggest exceeding \$1,000,000, should consult with an attorney and/or accountant who specializes in estate taxes. In a similar manner, executors of estates which appear to be below the applicable exemption are cautioned to at least consult with an estate attorney or tax accountant to determine if the estate they are administering is in fact subject to federal estate tax.

Because of this federal tax, as well as the legal and personal complexity which accompany most larger estates, every individual with (or couple with combined) net assets that might possibly exceed \$1,000,000 (including the net value of your house, life insurance, pension and all other assets) should consult with a New Jersey attorney or accountant who specializes in estate tax planning. A proper estate tax plan can range in cost from \$1,000 to \$3,000 and up, depending on the complexity and the size of the estate. However, this fee can be very cost effective in offsetting estate tax. Individuals in this asset category can face large estate tax liability which can be reduced by having a properly drawn

Last Will & Testament, durable power of attorney with gift provisions, and other planning steps.

Recognizing the uncertainty of the law as it now stands, every executor should consider at least having a consultation with a tax professional to ascertain the status of the law at the time of any decedent's death.

New Jersey Estate Tax

IMPORTANT NOTE: According to the New Jersey Division of Taxation, "... the New Jersey Estate Tax exemption will increase from \$675,000 to \$2 for the estates of resident decedents dying on or after January 1, 2017, but before January 1, 2018." Further, "New Jersey Estate Tax is not imposed on transfers of estates of resident decedents dying on or after January 1, 2018."

New Jersey Inheritance Tax

In addition to the aforementioned New Jersey estate tax, New Jersey also has an inheritance tax. An inheritance tax means that when a New Jersey resident dies his or her assets will be taxed on the basis of who inherits those assets.

No Tax on Most Inheritances

For most estates, there will be no tax. If a decedent's estate goes to a spouse, child, grandchild, parent, grandparent or stepchild, no tax

is due. These beneficiaries are called “Class A” beneficiaries. If a decedent leaves money to a charity, an educational institution, a church, a hospital, a library or the state of New Jersey or its political subdivisions, no tax is due. In addition, transfers of decedent’s property less than \$500 are exempt from inheritance tax.

Recipients That Pay Tax

If property is given to other family members, such as the decedent’s brother, sister, son-in-law or daughter-in-law the first \$25,000 is not taxed (an exemption applies). The balance of the inheritance is presently taxed at 11% for the next \$1,075,000 and thereafter at rates that range from 13% to 16%.

All other beneficiaries (persons not included in the above definitions of family) are presently taxed at 15% for the first \$700,000 and at 16% on amounts over that figure.

Approvals Required to Transfer Certain Assets – Forms

Some assets (real estate, stocks and bank accounts) require the written consent of the director of the New Jersey Division of Taxation before they can be transferred. This consent is commonly known as a “tax waiver.” Tax waivers (or waiver) are not generally required to transfer cars, personal property such as household goods and jewelry and most employee benefits.

In most cases for decedents dying after December 31, 2001 leaving estates valued at less than \$675,000 to “Class A” beneficiaries (spouse, child, parent, grandchild, grandparent or stepchild) may transfer bank accounts, stocks and bonds by utilizing a “Self-Executing Tax Waiver,” form L-8. The self-executing waiver is filed with the bank, financial institution or broker where the asset is located.

Real Estate

For “Class A” beneficiaries of decedents dying after December 31, 2001 leaving estates valued at less than \$675,000 the transfer of real estate can normally be effectuated by the filing of form L-9, “Real Property Tax Waiver.” The L-9 form must be filed with the Individual Tax Audit Branch, Inheritance and Estate Tax office in Trenton. If a husband and wife own real estate as tenants by the entirety, the surviving spouse need not file a form L-9; the property may be transferred at any time.

Inheritance Tax

If a decedent does not leave all assets to a “Class A” beneficiary, a formal inheritance tax return will have to be filed. All of the necessary forms for filing the inheritance tax return can be obtained from the NJ Division of Taxation – Inheritance and Estate Taxes at their website: www.state.nj.us/treasury/taxation/inheritance.shtml.

In addition, their address is: Individual Tax Audit Branch, Inheritance and Estate Tax, P.O. Box 249, Trenton, New Jersey 08695-0249. They can be reached by telephone at (609) 292-5033.

If a formal inheritance tax return is required, it is important to remember that you will need to attach a copy of the decedent's Last Will & Testament and any amendments (codicils), a copy of the decedent's last full year's federal income tax return (form 1040), and a certified check for any tax due. Formal inheritance tax returns are due *eight (8) months* after the decedent's death. If the inheritance tax is not paid within eight months, interest will accrue and no tax waivers will be issued until payment is received. Caution: this is one (1) month earlier than the federal and New Jersey estate tax returns are due.

Who Should Pay the Taxes

A Last Will & Testament can also allow the testator to decide whether any taxes owed should be paid from the assets of the estate before distribution to the beneficiaries or whether the tax should be paid proportionally from each beneficiary's share. This is particularly important for those individuals who are leaving property to brothers and sisters and/or nieces and nephews.

Tangible Personal Property

A Last Will & Testament may make separate provisions for tangible personal property.

Tangible personal property is comprised of assets like jewelry, furniture and art. Stocks and bonds are **not** considered tangible personal property. Pursuant to New Jersey law, the Last Will & Testament may state that you will leave a list of instructions as to how tangible personal property, that is not required to be registered, should be distributed. Registered tangible personal property such as an automobile cannot be disposed of on such a list. This list, which should be kept with your Last Will & Testament, may be changed as often as you like without an attorney or witnesses. To avoid confusion, discuss with an attorney how the list should be handled to assure that the most current list is the one used.

LIFETIME PLANNING

Most people recognize the importance of having an estate plan in place to handle the legal problems that arise upon one's death. However, many individuals fail to engage in "lifetime planning" to deal with the serious legal and management problems that may result from aging, illness or incapacity, including the potential need for long-term care.

Power of Attorney

Advance planning for possible future incapacity or absence (e.g., extended business trip) may include a durable power of attorney to authorize a designated person to handle legal, tax and financial matters for you. Such a power can be

general, permitting the “attorney-in-fact” (also known as the “agent”) to handle all financial matters, or it may be limited in any way the grantor of the power (called the “principal”) wishes. A durable power of attorney expressly continues in its function in the event of the future incapacity of the grantor. It may be structured to only take effect in the event of such incapacity. It is revocable, and is effective only during the principal’s lifetime.

If properly drafted, a durable power of attorney should eliminate the need for any costly future court proceedings to declare the principal mentally incapacitated. If there is no properly drafted durable power of attorney, it may be necessary to seek court appointment of a person as guardian to act on behalf of a mentally incapacitated adult. In addition to saving time and money by avoiding court proceedings, a power of attorney ensures that the principal can choose the person or persons who will act on his or her behalf, rather than the person or persons who would be selected by New Jersey statutes and the court.

Several cautionary notes need to be sounded about durable powers of attorney. The powers granted to the agent (attorney-in-fact) in a power of attorney are extremely broad, and the opportunity for misuse or abuse is correspondingly high. The person selected by the principal to serve as attorney-in-fact must be deemed completely and unequivocally trustworthy by the principal. Due consideration should also be given to selecting a

successor attorney-in-fact, in the event the principal's first choice is unable to act. Of course, the successor attorney-in-fact must be equally trustworthy and competent.

Finally, many institutions, such as banks, require the power of attorney document to make specific mention of the power to manage assets. Specific language, as set forth in Section 2 of P.L. 1991, Chapter 95 (N.J.S.A. 46:2B-11) must be included in the power of attorney document. Otherwise, the financial institution is not required to honor the document. For this reason, the document should have language granting the attorney-in-fact each and every power the principal intends for them to exercise. For example, the powers to convey real estate, to buy and sell government securities, to access the principal's safe deposit box, to create trusts, to make gifts and to file federal and state income tax returns must be specified.

It should be noted that the extent of the gift giving powers the principal wishes to give to the attorney-in-fact, should be finalized only after a full discussion of the adverse financial and tax consequences that may attend unlimited gifting. Many people opt to have the power to make gifts limited to specific people or specific amounts to avoid the risk of considerable sums of their assets being given away. In addition, the possibility of gifting powers to preserve assets, in the event government benefits may be required in the future

or to avoid unnecessary estate and inheritance taxes, must be fully explored.

Another important caution is in order. Many powers of attorney permit an agent to change the beneficiary of your retirement accounts, insurance and other assets. This could enable the agent to undermine most of your estate plan. Be certain to understand the implications of each power you give the agent. Signing a form because it is “standard” could be an invitation to disaster.

A durable power of attorney should be witnessed and the principal’s signature notarized. The witness should not be related to the principal or agent by blood or marriage, nor be a beneficiary of the principal’s estate through or pursuant to the principal’s Last Will & Testament.

ADVANCE DIRECTIVES **FOR HEALTH CARE**

Medical Directives

All adults have the fundamental right to control their own medical care, including the decision to utilize or terminate artificial, extraordinary or heroic medical treatments that only prolong the process of dying. This right is normally exercised by competent patients giving (or withholding) consent for treatment when such treatment is proposed by their physicians or the facility in which they are receiving care.

Unfortunately, many patients lack the mental capacity or physical ability during the course of their medical treatment to communicate with their physicians. These patients are no longer able to make their own health care decisions directly. In New Jersey pursuant to N.J.S.A. 26:2H-53 an advance directive for health care can be drafted and executed prior to a disabling illness or accident, providing a mechanism for health care decisions when the person lacks capacity to make those decisions. This medical directive must be in writing either witnessed by two adults or acknowledged by a notary public. The directive contains the person's personal wishes regarding health care in the event of a loss of decision making ability. The directive becomes effective when transmitted to the attending physician or to the hospital and the person is medically determined to lack capacity to make health care decisions. An attending physician's determination that a patient lacks decision making ability must be confirmed by another doctor.

If you regain your ability to make medical decisions at a later time you may resume making your decisions directly. The medical directive is in effect only as long as a person is unable to make health care decisions. A medical directive may be modified in whole or in part at any time by a legally competent individual. You should review your directive periodically and update it whenever you feel it no longer accurately reflects your wishes. The directive should also be revisited if a serious health issue develops which should be addressed. A

medical directive may be revoked in writing or orally.

Proxy Directives – Appointing a Health Care Representative

Another way to control your future medical care is to designate a person, whom you trust understands your health care wishes, to act as your agent. This designee, known as a proxy, is granted the legal authority to make medical decisions for you if you are unable to make such decisions for yourself. If you become incapacitated and cannot make your own decisions, your chosen proxy (that person is known as your “Health Care Representative”) will serve as your substitute. The proxy is your representative in discussions with your physician and others responsible for your care when you are unable to communicate your wishes. In order to be effective in New Jersey, the proxy directive appointing the health care proxy must contain clear language stating that it is to be used for such an appointment.

Many medical powers of attorney found at stationery stores, discount supply houses and bookstores do not meet these requirements. Therefore, you should be cautious about signing any such documents without professional oversight.

A proxy directive, similar to a medical directive, must be witnessed by two individuals, or acknowledged before a notary public. The completed proxy directive should be treated as any

other important legal document. It is important that copies be given to physicians, family members and friends, but care should be taken that the original document be readily available and its whereabouts known to family members. A safe deposit box is not an appropriate place to keep either a medical directive or proxy directive, as it cannot be retrieved except during banking hours.

SATELLITE OFFICES

As a means of bringing government to the people, in 1999 I initiated Bergen County's first Surrogate's Court Satellite Program, which is operated without additional taxpayer cost. The goal of the program is to make our services as accessible to the people of Bergen County as possible through placement of eleven (11) strategically selected locations which serve distinct regions of the county. In order to avail oneself of the "Satellite Program," you may call the Bergen County Surrogate's Court. You will be instructed by a Surrogate's Court staff member as to the necessary documents and pertinent information needed to probate a Last Will & Testament or have an administrator appointed, at which point you will be able to make an appointment at one of the following:

**Cresskill, Borough Hall
Fair Lawn, Borough Hall
Norwood, Borough Hall
Ridgewood, Village Library
Rutherford, Kipp Center
Oakland, Senior Center**

**Emerson, Borough Hall
Fort Lee, Senior Center
Park Ridge, Borough Hall
River Vale, Borough Hall
Wallington, Borough Hall**

OUTREACH

Since taking office, I have embarked on an unprecedented speaking tour covering every town in Bergen County addressing civic groups and service organizations informing people about the importance of having a Last Will & Testament, administering estates, guardianships of minors, adoptions, living wills and estate planning.



The program has reached over 60,000 Bergen County residents to teach them about probate and to make them aware of the services that are available to them at the Surrogate's Court. The presentation typically lasts 20 minutes, after which I would be happy to answer any questions that you and your members may have about probate, related documents and the services of the Surrogate's Court. There is no charge for these speaking engagements. It is our pleasure to serve you and to help prepare you, your family and friends for your time of need.

If you would like to schedule a speaking engagement for any Bergen County group, association or organization that you belong to, please do not hesitate to call the Surrogate's Court.



ABOUT THE SURROGATE'S COURT

In New Jersey, the Surrogate's function has its beginnings in the earliest part of our colonial history. Since so much of our country's most fundamental legal offices can find their origins in the laws and practices of England, it is not surprising to know that the office of Surrogate can be traced back to when the Church of England had the duty of probating an individual's Last Will & Testament. When the Bishops were busy and needed assistance in handling the estates, they would appoint Surrogates to take their place. The word "Surrogate" is taken from the Latin word "Subrogate," which means substitute.

The Surrogate is a Constitutional Office created under the Constitution of the state of New Jersey to administer a court, and has its foundations in English common-law. It is one of the three offices created by the New Jersey Constitution, which includes the Sheriff and the County Clerk, for and in each of the state's 21 counties.

In 1822, New Jersey's laws were amended granting the state legislature the power, no longer the governor, to appoint the county Surrogate.



However, in 1844, the New Jersey Constitution prescribed that the Surrogate was to be an elected, independent constitutional officer in the county, no longer to be regarded as a deputy of the governor or the appointee of the legislature. The Constitution of 1844 provided that the Surrogate was to be elected for a five (5) year term by the people of that county.

Now, for more than 150 years, the people of Bergen County have elected their own county Surrogate. Today, by virtue of laws enacted since 1844, the expanded duties of the county Surrogate now include two major functions:

1. As Judge and Clerk of the county Surrogate's Court, the Surrogate is charged with appointing fiduciaries (e.g., executors, and/or testamentary trustees, and/or guardians, or administrators) on the estate of every Bergen County resident who dies owning any asset in his or her name alone, whether or not that resident dies leaving a Last Will & Testament.
2. As Deputy Clerk of the Superior Court, Chancery Division, Probate Part, the Surrogate docket, reviews and schedules all actions pertaining to Last Will & Testament contests, estate matters, accountings, proceedings for determinations of mentally incapacitated adults, guardianships of adjudicated mentally incapacitated adults and all adoptions occurring in Bergen County. In addition, all documents involved in all county Surrogate's Court matters are recorded, stored and maintained by the county Surrogate's Court.

The Surrogate also administers and invests monies on behalf of minor children who receive judgments in the courts in Bergen County.



FREQUENTLY ASKED QUESTIONS?



1. What is probate?

Probate is the process which validates the Last Will & Testament and permits an executor to transfer assets as directed by a decedent in their Last Will & Testament (the decedent who made the Last Will & Testament is called a “testator”) to the beneficiaries (recipients).

Probate is **NOT** complicated in New Jersey.

*you do not need to bring an attorney with you.

*you need not make an appointment.

*the court is open between 8:30 a.m. and 4:30 p.m.

2. Where do I go to probate a Last Will & Testament?

To probate a Last Will & Testament, you should contact the Surrogate’s Court for the county in which the testator resided. A Last Will & Testament can be probated by the Bergen County Surrogate under these circumstances:

1. The testator resided in Bergen County.
2. An out of state resident owned property exclusively in Bergen County at the time of death.

3. What do I need to bring with me to probate the Last Will & Testament?

1. Certified Copy (raised seal) of decedents Death Certificate.
2. **All** the full names and most current addresses of the immediate degrees of kindred (i.e., surviving

spouse, surviving family and next of kin) including those who are not beneficiaries in the Last Will & Testament.

3. Original Last Will & Testament of the decedent.
4. Be prepared to pay the Surrogate's Court's statutory fee(s) for the probating of the decedent's Last Will & Testament.

IMPORTANT NOTE #1: **ONLY** an original Last Will & Testament can be probated in the Surrogate's Court; only the Superior Court of New Jersey can admit to probate a copy of a person's Last Will & Testament.

IMPORTANT NOTE #2: At the Bergen County Surrogate's Court, **WE DO NOT ACCEPT OUT OF STATE CHECKS** unless it is a certified check. Personal checks will only be accepted if they are drawn upon a New Jersey Bank bearing a New Jersey Address. We also require the payer's telephone number to be written or appear on their check.

IMPORTANT NOTE #3: Neither the Last Will & Testament nor the Certified Copy of the Death Certificate that you bring to probate will be returned to you; they will remain on file with the Bergen County Surrogate's Court in Hackensack.

4. May I write or make notations on a Last Will & Testament?

DO NOT make handwritten changes to your Last Will & Testament after it has been signed by you and your witnesses. Once you write on a Last Will & Testament, you invalidate it.

5. Do I have to probate the Last Will & Testament? - OR - When is probate necessary?

Whether a particular asset to be transferred must go through probate or not depends on how ownership

(title) to the asset is held. For example, if a title to an automobile or a piece of real estate is held in the decedent's name alone, the next of kin would have to visit the Surrogate's Court in order to be appointed as executor (or administrator in the absence of a Last Will & Testament) in order to change the title of the vehicle or the piece of property. However, if **ALL ASSETS** (bank accounts, securities, cars, real estate, etc.) are held by the testator AND another person as "Joint Tenants with Right of Survivorship," or in the event of a married couple as "Joint Tenants By the Entirety" you do not have to probate.

6. What about 401(k)'s, IRA's, life insurance proceeds and other assets that pass outside of the Last Will & Testament?

"Beneficiary designation property" is generally non-probate property which passes in accordance with beneficiary designations assigned by the testator. Life insurance proceeds, 401(k) plans, IRA's, employee death benefits (e.g., pension, profit-sharing, etc.) and accounts titled "Payable on Death" (POD) and/or "In Trust For" (ITF) are typical beneficiary designation property.

7. Where should I keep my Last Will & Testament?

An original Last Will & Testament should be kept in a safe, fireproof place. A photocopy should also be kept with your other important papers including instructions as to where the original has been stored.

IMPORTANT NOTE #1: THE SURROGATE'S COURT CAN PROBATE AN ORIGINAL LAST WILL & TESTAMENT, BUT A COPY OF A LAST WILL & TESTAMENT, CAN ONLY BE ADMITTED TO PROBATE BY THE SUPERIOR COURT OF NEW JERSEY.

IMPORTANT NOTE #2: IF NO ONE CAN LOCATE YOUR LAST WILL & TESTAMENT UPON YOUR DEATH, THE LAW PRESUMES THAT IT HAS BEEN REVOKED.

Further, a safe deposit box is an appropriate place to keep a Last Will & Testament. A bank employee should be present as the box is opened. If the Last Will & Testament is contained in the box, it may be released to the named executor. An alternative is to have the named executor and the successors sign the signature card for the safe deposit box. Because a Last Will & Testament may not be located immediately after, nor can it be probated until ten (10) days subsequent to a death, it is best not to rely on a Last Will & Testament for burial instructions. Those instructions ought to be specified in a private letter, or living will, or funeral directive.

8. How do I make changes to my Last Will & Testament?

If you wish to change any provisions of your Last Will & Testament, it can be done through a properly executed amendment. An amendment to a will is called a “codicil.” Codicils can be used for simple changes. Significant changes are best made by making a new Last Will & Testament. A new Last Will & Testament avoids any risks of inconsistencies that could occur among, and from having several codicils.

9. Should I have a new Last Will & Testament drafted if I move into or out of New Jersey?

It would be prudent to consult with a local attorney to ensure that the Last Will & Testament conforms to local laws in the state where you reside.

10. Why do I have to be bonded and what is a bond?

A bond, known as a surety bond, protects the assets of the estate when someone dies without a Last Will & Testament on behalf of creditors and other heirs but not the administrator. If there is no Last Will & Testament, the law requires the administrator of the estate to be bonded.

11. How many Surrogate's certificates do I need? Do I get the certificates on the same day?

You will need a number of certificates sufficient to transfer the assets that a decedent held in his or her name alone. We recommend one or two extra certificates to cover something that you may have forgotten.

IMPORTANT NOTE: Surrogate's certificates will only be good for 30 to 60 days when it comes to stock transfers, depending on the transfer agent.

12. Why do I have to list the next-of-kin if they are not beneficiaries?

If there is no Last Will & Testament, some of them may need to renounce or consent to permit an administrator to be appointed.

If there is a Last Will & Testament, and it is contested in Superior Court and which is then subsequently set aside; the next-of-kin (heirs-at-law) may become beneficiaries.

13. What is a Refunding Bond & Release Form?

A Release and Refunding Bond is signed by a beneficiary when the executor or administrator is making final distribution on the estate. It proves that the bequest has been received by the beneficiary and

releases the executor or administrator from their obligation. In some instances, if an executor or administrator makes partial distribution they will ask that a Partial Release and Refunding Bond be signed for partial distribution.

The refunding part is that if a legitimate bill is presented to the executor or administrator after distribution, beneficiaries agree to refund to the executor or administrator a sufficient amount from or the entire bequest in order to satisfy the debt.

14. If it's only a small estate, do I have to probate the Last Will & Testament or can I get a small estate affidavit?

A Last Will & Testament takes precedence over all other documents. A small estate affidavit is **ONLY** for an estate when someone dies without a Last Will & Testament, and the value does not exceed certain dollar maximums, in the event the decedent is survived by either next-of kin or a spouse (\$20,000 or \$50,000, respectively).



CONTACTING THE BERGEN COUNTY SURROGATE

The Bergen County Surrogate's Court is open from 8:30 a.m. to 4:30 p.m. every business day.



Feel free to call us at (201) 336-6700. The Surrogate's Court is located on the Fifth Floor of Two Bergen County Plaza, Suite 5000 in Hackensack, NJ 07601. Visit our website: www.bergencountysurrogate.com.