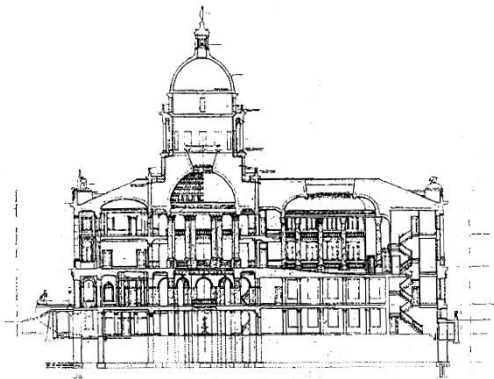


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## PROBATE

Probate is often assumed to be a terrible process that must be avoided. It is not. It is a common misconception that the process of probating a Will is complicated and expensive. In fact, in New Jersey, and particularly in Bergen County, probate is relatively simple and inexpensive. In Bergen County an individual can probate a Will in the Surrogate's Court, with or without the assistance of a lawyer, in approximately half an hour. You need not make an appointment, just appear between 8:30 a.m. to 3:30 p.m. on any business day with certain information and documents, as described below, and the Surrogate's Court will work with you in completing the probate process. The cost is generally \$100 to \$200.



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Probate is the process which permits the transfer of assets as directed in a Will by the decedent (the "testator") to the beneficiaries (recipients) under the Will. A Will can be probated by the Bergen County Surrogate if the testator resided in Bergen County at the time of his or her death.

### Assets Under a Will - What are Probate Assets and What are Not:

Not all assets must go through probate to be transferred. Some assets pass automatically (by operation of law) to other persons (beneficiaries) without the need for probate. Whether or not a particular asset must go through probate to be transferred 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 and bonds, in the testator's name alone, and monies owed to the testator, are "probate property" which are transferred in accordance with the testator's Will. These assets cannot generally be transferred without going through the probate process. However, some brokerage firms provide beneficiary designation forms which may pass these accounts without probate.

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

These assets pass by operation of law at the moment of the testator's death to the surviving joint tenant. Bank accounts, securities and real estate are often held in joint tenancy. Probate is not needed. 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 Rights of Survivorship".

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, 401k plans, IRA's, and employee death benefits (e.g., pension and profit-sharing death benefits) 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 testator (person signing a Will) indicating the beneficiaries. Language in the policy or plan may also be important.

When to Probate the Will:

A Will 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 Will to probate until after the ten (10) days.

If you are appointed under the Will to manage the estate (to be the Executor) you must first probate the Will 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 Will (which should not be unstapled or tampered with); (2) a certified copy of the death certificate (which you obtain from the municipality in which the testator died); (3) the full names and latest addresses of the closest surviving family (next of kin); (4) a check (drawn upon a New Jersey bank or a certified check) for probate fees; and (5) some form of identification. You should not fill in the check until your meeting at Surrogate's Court.

In addition, if a Will is not "self-proving," then a person who signed the Will as a witness or a "bystander witness" (one who witnessed the testator and two witnesses signing the Will but did not sign the Will as a witness) must also come to the Surrogate's Court to

authenticate the Will. A "self-proving" Will is one where the testator and two witnesses sign the Will in front of a Notary Public or New Jersey attorney and the Will contains special language provided in New Jersey law (self-proving affidavits). If a Will is "self-proving", there is no need for a witness to the signing (execution) of the Will to come to the Surrogate's Court to authenticate his or her signature because the Notary Public or New Jersey attorney, before whom the witness signed the Will, effectively attests to the authenticity of the witnesses' signatures. Most Wills signed (executed) on forms made after 1979 are "self-proving." If in doubt, ask the Probate Clerk at the Surrogate's Court or an attorney.

### How Does the Process Work?

When you arrive at the Surrogate's Court, you will be assigned a Probate Clerk by the receptionist. The Probate Clerk will review the original Will to insure that it has been properly drawn, signed and witnessed. If there are no problems with the Will or with the items you have brought, you will sign qualification papers to become the executor, pay the fee, and be deemed "qualified." In legal parlance, a "Judgment of Probate" will then be issued.

The Probate Clerk will ask you how many Letters Testamentary (also known as Surrogate's Certificates, or "Letters") you will need. A Letter Testamentary is the formal document appointing the Executor. You will generally need one original copy (with a raised seal) for each asset to be transferred from the testator to a beneficiary. Therefore, depending on the estate, you will need several Letters Testamentary, especially if the assets are being held by several banks, brokerage firms, pension plans and insurance companies. Letters Testamentary 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 Letters to avoid the need to purchase more at a later date. You will receive the Letters Testamentary, together with a general information brochure regarding the New Jersey Transfer Inheritance Tax, and a copy of the court rule regarding the Notice of Probate of Will, from the Surrogate's Court in the mail in about 7 business days.

Once the Judgment for probate is signed and Letters Testamentary have been issued, the Will is deemed "probated". As described in the copy of the Court ruling governing "Notice of Probate of Will" sent to the Executor with the Letters Testamentary, the law requires that the Executor notify all beneficiaries and next of kin that the Will has been probated, and this must be done within sixty (60) days from the date the Will was probated. This should generally be done by certified mail, return receipt requested. 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" with the Surrogate's Court together with a fee of \$5.00 for each page of the Notice of Probate of Will.

### What Comes Next?

Following probate, the Executor may then begin the process of managing the decedent's

financial affairs (administering the estate). It is the Executor's duty to collect the assets, (e.g. apply to insurance companies for proceeds) manage them during administration (e.g. temporarily invest cash), keep records (copies of all bills, check register, statements, etc.), pay debts and expenses, compute and pay income, inheritance and other taxes, and distribute the estate assets to the person or persons entitled. 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, etc. Also, the Executor generally coordinates and assists with the collection of non-probate assets (e.g., IRA, life insurance, etc.), for the beneficiaries and other successors in interest of those assets, especially when the non-probate assets affect the death taxes which the Executor is responsible for computing and reporting. 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:

- 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.

#### Refunding Bond:

Once all assets of the estate have been disbursed, the Executor must have each beneficiary sign a "Refunding Bond". The Executor should also have each beneficiary sign a "Release" at the same time. 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 part or all of the assets needed to pay estate debts. This provides the Executor with security in the unlikely event claims are subsequently made against the estate. The Release absolves the Executor from any liability pertaining to his or her administration of the estate. The Surrogate's Office provides a free sample form combining a 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. When all Releases and Refunding Bonds have been filed, the estate is then closed.