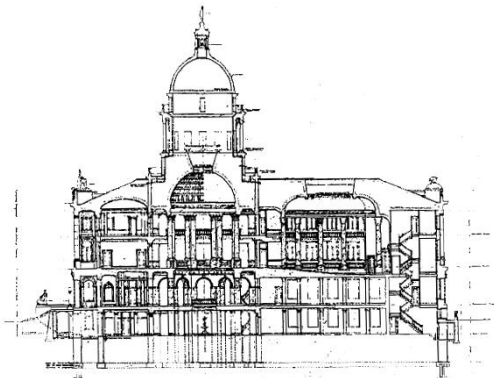


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## PROBATE

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 3:30 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.



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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.

### **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 Does the Process Work**

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 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 Certificates, especially if the assets are being held by several banks, brokerage firms, pension plans and insurance companies. Surrogate 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.**