

## What is Probate?

Probate is the process where after death the instructions of the Will are carried out. Will is admitted to "Probate" in the County Surrogate. Some people refer to the Surrogate as the Will Clerk. Upon the death of the testator or testatrix (maker of the Will), the probate procedure can begin. This is the legal process which establishes the genuineness of the Will. It is done by the Surrogate in the county where the testator or testatrix resided at the time of death.

The probate application must contain the following information:

1. the applicant's residence;□
2. the name, domicile and date of death of the decedent;□
3. the names and addresses of the decedent's spouse, heirs (those entitled to take under the laws of interstate succession), and any person named to serve as Executor;□
4. the ages of any minor heirs; and□
5. the names of the testator's children when the Will was made and the names of children born and adopted after the Will was made, or their children, if any.

To minimize time spent in the Surrogate, it is recommended, and in some counties required, that before an Executor submits the Will for probate the executor's attorney or executor send the Court:

- 1) a "data sheet" (referred to in some counties as an "information sheet" or a "fact sheet") containing the information needed by the Surrogate to complete the application;
- 2) a copy of the Will; and
- 3) a copy of the death certificate.

**FILING A PROBATE APPLICATION** Upon the death of a person, a probate proceeding may be commenced by offering the decedent's (the dead person's ) last Will for probate in the Surrogate's Court of

the county in which the decedent was domiciled at death. R. 4:80-1(a). Generally, the Executor nominated in the Will brings the proceeding by filing a verified application with the Court.

When the applicant files the original Will for probate, the applicant must also file a death certificate (and original with a raised seal). A filing fee of approximately \$150 must be paid. Once the Will, application and death certificate are filed, the Surrogate will review the papers, and if there are no irregularities or objections, admit the Will to probate. Although New Jersey law prohibits admission of a Will to probate within 10 days of the testator's death, an applicant may submit the application prior to expiration of the 10-day period. If the Will is filed after the 10-day waiting period, many Courts will issue a judgment for probate contemporaneously with the filing of the probate papers.

### Qualifying the Executor

Once the Will is admitted to probate, the Court will issue letters testamentary to an Executor who has properly qualified to serve. An Executor named in a Will qualifies to serve by filing a form affidavit in which the Executor agrees to perform his or her duties. The nominated Executor must also provide a power of attorney to the Surrogate empowering the Surrogate to accept service of process of claims against the estate. Once the Executor qualifies, the Court then issues letters testamentary.

### Mailing Probate Notices

After a Will is admitted to probate, the Executor's Attorney or Executor must mail within 60 days a notice of probate to the decedent's spouse, heirs and all beneficiaries under the Will. The notice of probate should contain the executor's name and address, place and date that the Will was probated, and an offer to furnish a copy of the Will upon request. Within 10 days of mailing the notice the Executor's Attorney or Executor should file proof of service of the notice with the Surrogate's Court. Once notice of probate has been sent and proof of mailing has been filed the probate process is essentially completed.

Completing the probate process should cause only minimal delay, perhaps a few weeks, in administering a decedent's affairs. The cost of admitting a Will to probate should be limited. Unlike in some other states, the Surrogate's filing fee in New Jersey is the same regardless of the size of the estate. See Zimiles "Probate is not a Dirty word in New Jersey" N.J. Lawyer pg. 14 ( July/August 1992)

How do I begin the probate procedure?

The Executor or personal representative can be appointed and the Will admitted to probate in most cases by going to the Surrogate's 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 the signature on the Will.

How is an administrator appointed when there is no Will?

When there is no Will, an administrator, administratrix or personal representative is appointed by the Surrogate's Court. The surviving spouse has the first right to apply for the position of administrator; however, any heir of the decedent may be appointed. When one of several heirs seeks to be appointed administrator, all other heirs must renounce their right to be appointed administrator. In most cases, a surety bond must be furnished to cover the value of the real and personal property in the estate.

What kind of information should I collect?

The decedent's personal representative should make a list of all of the next of kin of the person who died, along with their degree of relationship, addresses and ages.

What if the Will is not properly executed?

The Surrogate will advise the personal representative as to the proper procedure in order to allow the Will to be admitted to probate. This procedure normally involves a formal hearing before a Judge of the Superior Court.

How soon must state inheritance taxes be paid?

State inheritance tax returns must be filed and the tax paid within eight (8) months after decedent's death to avoid interest.

Are unpaid inheritance taxes a lien on property?

Yes, to sell real estate, you Will need to obtain "tax waivers" from the New Jersey State Transfer Inheritance Tax Bureau, and the waivers must be 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. Other property may be subject to a lien for unpaid inheritance taxes such as bank accounts and certificates of deposit.

How about federal estate taxes?

In 2008 there is no federal tax due unless the estate exceeds \$2,000,000. However, there is a New Jersey Estate tax for estates over \$675,000.

There is also an unlimited federal marital deduction, which means unlimited amounts of property can be transferred between spouses without estate or gift taxes.

How many Surrogate's Certificates ("Shorts") Will I need?

A list of all of the assets of the estate should also be prepared to help determine the number of Surrogate's Certificates that must be issued by the probate clerk in the Surrogate's Office.

When is the Will admitted to probate?

After all the proper forms are filed with the probate clerk, the clerk will prepare a judgment which admits the Will to probate. The Surrogate then signs the judgment and issues "Letters Testamentary."

What are Surrogate's Certificates used for?

Surrogate's Certificates act as evidence of the authority of the personal representative ( Executor, Administrator, Trustee ) to act. These certificates are necessary to accomplish certain tasks such as transferring stocks, closing bank accounts, etc.

Is it necessary to send copies of the Will to the beneficiaries?

From the time the Will is probated, the Executor has 60 days to mail all beneficiaries a notice that they can be provided with a copy of the Will, along with a notice giving the specific date and place the Will was entered into probate. See Zimiles "Probate is not a Dirty word in New Jersey" N.J. Lawyer

Basically, what is the Executor/Administrator required to do?

The Executor or Administrator is, in general, required to collect and safeguard all of the assets of the estate and eventually to pay the debts of the decedent, as well as any taxes due, and be able to provide an accounting of his actions to the beneficiaries or heirs. An Executor or Administrator must obtain the necessary legal documents, called either LETTERS TESTAMENTARY (for an Executor) or LETTERS OF ADMINISTRATION (for an Administrator), are obtained through the Surrogate in the county in which the DECEDENT (the deceased person) resided at the time of death.

The duties of the personal representative include:

\* - finding the Will and having it PROBATED. Probate is the legal procedure used to establish the validity of a Will. □ \* - locating and protecting the assets of the estate. □ \* - finding and notifying the heirs. □ \* - paying the debts, expenses, and taxes of the estate from the assets of the estate. □ \* - complying with the requirements of state and federal law. □ \* - distributing property to the heirs after all proper procedures have been followed.

Is an attorney necessary in estate administration?

As a practical matter, it is very difficulty for a nonlawyer to correctly follow the required procedures in administering an estate without the assistance of an attorney. The personal representative selects the attorney for the estate. You may wish to call your attorney to give you further advice as to specific duties and obligations.

Where does the Executor/Administrator obtain the funds to pay debts?

The Executor may, in most cases, withdraw up to one-half of the funds in the decedent's New Jersey bank accounts. Generally, the Executor should open an estate checking account which can be used to receive and disburse funds.

Am I entitled to compensation for acting as Executor or Administrator?

An Executor or Administrator is entitled to corpus commissions of 5% of the first \$200,000.00 of estate assets subject to administration, 3-1/2% on the excess over \$200,000.00 up to \$1,000,000.00 and 2% or such other percentage as the Court may determine on the excess over \$1,000,000.00.

If there is more than one Executor or Administrator, an additional 1% corpus commission may be allowed by the Court for each additional Executor or Administrator.

In addition to corpus commissions, an Executor or Administrator is entitled to income commissions of 6% of income earned on estate corpus during the administration of the estate.

What do I do about a safe deposit box in the name of the decedent ?

Individuals generally keep their Will in their safe deposit box. The personal representative is permitted to remove the original Will, as well as a deed to a cemetery plot and certain life insurance policies from the decedent's safe deposit box before probate without a representative of the Inheritance Tax Bureau present. Thereafter, the box is sealed until the District Supervisor of the New Jersey Transfer Inheritance Tax Bureau opens and makes an inventory of the contents of the box. It is the responsibility of the personal representative to contact the District Supervisor of the county in which the box is located to arrange for an appointment for this inventory.

How do I handle joint bank accounts or certificates of deposit?

Certain bank accounts and certificates may be owned with rights of survivorship, which means that upon the death of one party to the account, the surviving party (or parties) become the sole owner (or

owners). If the decedent maintained such an account, the survivor Will be able to withdraw on-half of the funds in the account by giving the bank a Death Certificate and without the need to provide anything from the Surrogate. The other half will not be released until a tax waiver is issued by the New Jersey Transfer Inheritance Tax Bureau, normally after the tax is paid and the return is filed.

Is all this paperwork necessary even on small estates?

There is a procedure whereby the assets of small estates can be transferred to the surviving spouse without the necessity of administration. The spouse files an affidavit stating, among other things, that the decedent had no Will and that all of the real and personal assets of the decedent do not exceed \$10,000.

How do I prove that legacies were paid?

The Executor has a duty to pay the legacies or distribute shares as provided for under the Will; however, when he /she does so, he/she must take a Release and Refunding Bond from the person taking the share. The Refunding Bond is then forwarded to the Surrogate for filing and recording.

What if there is no Will?

If the decedent dies without a Will (intestate), there is a statute which determines to whom the decedent's property is to be distributed according to the degree of family relationship.

Kenneth Vercammen is the 2008 Municipal Court Attorney of the Year by the Middlesex County Bar Association. He was selected one of only three attorneys as a Super Lawyer 2008 in NJ Monthly in the Criminal – DWI category. Kenneth Vercammen was the NJ State Bar Municipal Court Attorney of the Year and past president of the Middlesex County Municipal Prosecutor's Association. □ □ He is the past chair of the NJ State Bar Association Municipal Court Section. He is the Deputy chair of the ABA Criminal Law committee, GP Division.

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