

Removing an Executor from an Estate

by Kenneth A. Vercammen, Esq.

Under New Jersey Law, the people selected as an executor of a Will have numerous legal responsibilities following the death of the person who signed the Will. Primarily, they have a duty to probate the Will, liquidate assets, pay bills and taxes, file all necessary court and tax returns, and then distribute the assets to beneficiaries. If there is no will, someone can petition the surrogate to be appointed as "administrator" of the estate.

In New Jersey, the court and surrogate do not supervise how an executor or administrator handles the estate. Unfortunately, the Executor occasionally fails to timely carry out their duties. They may fail to file tax returns, fail to keep records, misappropriate funds or ignore instructions under the Will. If you are not satisfied with the handling of the estate, you can have an attorney file a Complaint in the Superior Court.

The New Probate Statute of NJ revised various sections of the New Jersey law on Wills and estates. law makes a number of substantial changes to the provisions governing the administration of estates and trusts in New.

Duty of Executor in Probate & Estate Administration

1. Conduct a thorough search of the decedent's personal papers and effects for any evidence which might point you in the direction of a potential creditor;
2. Carefully examine the decedent's checkbook and check register for recurring payments, as these may indicate an existing debt;
3. Contact the issuer of each credit card that the decedent had in his/her possession at the time of his/ her death;
4. Contact all parties who provided medical care, treatment, or assistance to the decedent prior to his/her death;

Your attorney will not be able to file the NJ inheritance tax return until it is clear as to the amounts of the medical bills and other expenses. Medical expenses can be deducted in the inheritance tax.

Under United States Supreme Court Case, Tulsa Professional Collection Services, Inc., v. Joanne Pope, Executrix of the Estate of H. Everett Pope, Jr., Deceased, the Personal Representative in every estate is personally responsible to provide actual notice to all known or "readily ascertainable" creditors of the decedent. This means that is your responsibility to diligently search for any "readily ascertainable" creditors.

Other duties/ Executor to Do

Bring Will to Surrogate

Apply to Federal Tax ID #

Set up Estate Account at bank (pay all bills from estate account)

Pay Bills

Notice of Probate to Beneficiaries (Attorney can handle)

If charity, notice to Atty General (Attorney can handle)
File notice of Probate with Surrogate (Attorney can handle)
File first Federal and State Income Tax Return [CPA- ex Marc Kane]
Prepare Inheritance Tax Return and obtain Tax Waivers (Attorney can handle)
File waivers within 8 months upon receipt (Attorney can handle)
Prepare Informal Accounting
Prepare Release and Refunding Bond (Attorney can handle)

Obtain Child Support Judgment clearance (Attorney will handle)

Let's review the major duties involved-

In General. The executor's job is to (1) administer the estate--i.e., collect and manage assets, file tax returns and pay taxes and debts--and (2) distribute any assets or make any distributions of bequests, whether personal or charitable in nature, as the deceased directed (under the provisions of the Will). Let's take a look at some of the specific steps involved and what these responsibilities can mean. Chronological order of the various duties may vary.

Probate. The executor must "probate" the Will. Probate is a process by which a Will is admitted. This means that the Will is given legal effect by the court. The court's decision that the Will was validly executed under state law gives the executor the power to perform his or her duties under the provisions of the Will.

An employer identification number ("EIN") should be obtained for the estate; this number must be included on all returns and other tax documents having to do with the estate. The executor should also file a written notice with the IRS that he/she is serving as the fiduciary of the estate. This gives the executor the authority to deal with the IRS on the estate's behalf.

Pay the Debts. The claims of the estate's creditors must be paid. Sometimes a claim must be litigated to determine if it is valid. Any estate administration expenses, such as attorneys', accountants' and appraisers' fees, must also be paid.

Manage the Estate. The executor takes legal title to the assets in the probate estate. The probate court will sometimes require a public accounting of the estate assets. The assets of the estate must be found and may have to be collected. As part of the asset management function, the executor may have to liquidate or run a business or manage a securities portfolio. To sell marketable securities or real estate, the executor will have to obtain stock power, tax waivers, file affidavits, and so on.

Take Care of Tax Matters. The executor is legally responsible for filing necessary income and estate-tax returns (federal and state) and for paying all death taxes (i.e., estate and inheritance). The executor can, in some cases be held personally liable for unpaid taxes of the estate. Tax returns that will need to be filed can include the estate's income tax return (both federal and state), the federal estate-tax return, the state death tax return (estate and/or inheritance), and the deceased's final income tax return (federal and state). Taxes usually must be paid before other debts. In many instances, federal estate-tax returns are not needed as the size of the estate will be under the amount for which a federal estate-tax return is required.

Often it is necessary to hire an appraiser to value certain assets of the estate, such as a business, pension, or real estate, since estate taxes are based on the "fair market" value of the assets. After the filing of the returns and payment of taxes, the Internal Revenue Service will generally send some type of estate closing letter accepting the return. Occasionally, the return will be audited.

Distribute the Assets. After all debts and expenses have been paid, the executor will distribute the assets. Frequently, beneficiaries can receive partial distributions of their inheritance without having to wait for the closing of the estate.

Under increasingly complex laws and rulings, particularly with respect to taxes, in larger estates an executor can be in charge for two or three years before the estate administration is completed. If the job is to be done without unnecessary cost and without causing undue hardship and delay for the beneficiaries of the estate, the executor should have an understanding of the many problems involved and an organization created for settling estates. In short, an executor should have experience

At some point in time, you may be asked to serve as the executor of the estate of a relative or friend, or you may ask someone to serve as your executor. An executor's job comes with many legal obligations. Under certain circumstances, an executor can even be held personally liable for unpaid estate taxes. Let's review the major duties involved, which we've set out below.

In General. The executor's job is to (1) administer the estate--i.e., collect and manage assets, file tax returns and pay taxes and debts--and (2) distribute any assets or make any distributions of bequests, whether personal or charitable in nature, as the deceased directed (under the provisions of the Will). Let's take a look at some of the specific steps involved and what these responsibilities can mean. Chronological order of the various duties may vary.

Probate. The executor must "probate" the Will. Probate is a process by which a Will is admitted. This means that the Will is given legal effect by the court. The court's decision that the Will was validly executed under state law gives the executor the power to perform his or her duties under the provisions of the Will.

An employer identification number ("EIN") should be obtained for the estate; this number must be included on all returns and other tax documents having to do with the estate. The executor should also file a written notice with the IRS that he/she is serving as the fiduciary of the estate. This gives the executor the authority to deal with the IRS on the estate's behalf.

Pay the Debts. The claims of the estate's creditors must be paid. Sometimes a claim must be litigated to determine if it is valid. Any estate administration expenses, such as attorneys', accountants' and appraisers' fees, must also be paid.

Manage the Estate. The executor takes legal title to the assets in the probate estate. The probate court will sometimes require a public accounting of the estate's assets. The assets of the estate must be found and may have to be collected. As part of the asset management function, the executor may have to liquidate or run a business or manage a securities portfolio. To sell marketable securities or real estate, the executor will have to obtain stock power, tax waivers, file affidavits, and so on.

Take Care of Tax Matters. The executor is legally responsible for filing necessary income and estate-tax returns (federal and state) and for paying all death taxes (i.e., estate and inheritance). The executor can, in some cases be held personally liable for unpaid taxes of the estate. Tax returns that will need to be filed can include the estate's income tax return (both federal and state), the federal estate-tax return, the state death tax return (estate and/or inheritance), and the deceased's final income tax return (federal and state). Taxes usually must be paid before other debts. In many instances, federal estate-tax returns are not needed as the size of the estate will be under the amount for which a federal estate-tax return is required.

Often it is necessary to hire an appraiser to value certain assets of the estate, such as a business, pension, or real estate, since estate taxes are based on the "fair market" value of the assets. After the filing of the returns and payment of taxes, the Internal Revenue Service will generally send some type of estate closing letter accepting the return. Occasionally, the return will be audited.

Distribute the Assets. After all debts and expenses have been paid, the distribute the assets with extra attention and meticulous bookkeeping by the executor. Frequently, beneficiaries can receive partial distributions of their inheritance without having to wait for the closing of the estate.

Under increasingly complex laws and rulings, particularly with respect to taxes, in larger estates an executor can be in charge for two or three years before the estate administration is completed. If the job is to be done without unnecessary cost and without causing undue hardship and delay for the beneficiaries of the estate, the executor should have an understanding of the many problems involved and an organization created for settling estates.

COMPLAINT FOR ACCOUNTING

A Complaint for Accounting is filed with the Probate Part to request on accounting, removal of the current executor and selection of a new person to administer and wrap up the estate.

A signed certification of one or more beneficiaries is needed. In addition, an Order to Show Cause is prepared by your attorney. The Order to Show Cause is to be signed by the Judge directing the executor, through their attorney, to file a written answer to the complaint, as well as appear before the court at a specific date and time.

As with a litigated court matter, trials can become expensive. Competent elder law/probate attorney may charge an hourly rate of \$225-\$350 per hour, with a retainer of \$3000 needed. Attorneys will require the retainer to be paid in full up front.

The plaintiff can demand the following:

- (1) That the named executor be ordered to provide an accounting of the estate to plaintiff.
- (2) Defendant, be ordered to provide an accounting for all assets of d1 dated five years prior to death.
- (3) Payment of plaintiff's attorney's fees and costs of suit for the within action.
- (4) Declaring a constructive trust of the assets of the decedent for the benefit of the plaintiff and the estate.
- (5) That the executor be removed as the executor/administrator of the estate and that p1 be

named as administrator of the estate.

(6) That the executor be barred from spending any estate funds, be barred from paying any bills, be barred from taking a commission, be barred from writing checks, be barred from acting on behalf of the estate, except as specifically authorized by Superior Court Order or written consent by the plaintiff.

EXECUTOR'S COMMISSIONS

Executors are entitled to receive a commission to compensate them for work performed. Under NJSA 3B:18-1 et seq., Executors, administrators and other fiduciaries are entitled to receive a commission on both the principal of the estate, and the income earned by assets. However, if you have evidence that the executor has breached their fiduciary duties or violated a law, your Superior Court accounting complaint can request that the commissions be reduced or eliminated.

SALE OF REAL ESTATE AND OTHER PROPERTY

Occasionally, a family member is living in a home owned by the decedent. To keep family harmony, often this family member is permitted to remain in the home temporarily. However, it may later become clear that the resident has no desire on moving, and the executor has neither an intention to make them move nor to sell the house. The remedy a beneficiary has can be to have your attorney include in the Superior Court complaint a count to

- 1) remove the executor
- 2) remove the tenant and make them pay rent to the estate for the time they used the real property since death without paying rent
- 3) compel the appraisal of the home and, thereafter, the sale of the property
- 4) make the executor reimburse the estate for the neglect or waste of assets.

CONCLUSION

As a beneficiary, you will probably eventually be requested to sign a release and refunding bond. If you have evidence of misappropriation, you may consider asking the executor for an informal accounting prior to signing the release and refunding bond. If you have concern regarding the handling of an estate, schedule an appointment to consult an elder law attorney.

Kenneth A. Vercammen is a Middlesex County, NJ trial attorney who has published 125 articles in national and New Jersey publications on Probate and litigation topics. He often lectures to trial lawyers of the American Bar Association, New Jersey State Bar Association and Middlesex County Bar Association. He is Chair of the American Bar Association Estate Planning & Probate Committee. He is also Editor of the ABA Elder Law Committee Newsletter

He is a highly regarded lecturer on litigation issues for the American Bar Association, ICLE, New Jersey State Bar Association and Middlesex County Bar Association. His articles have been published by New Jersey Law Journal, ABA Law Practice Management Magazine, and New Jersey Lawyer. He is the Editor in Chief of the New Jersey Municipal Court Law Review. Mr. Vercammen is a recipient of the NJSBA- YLD Service to the Bar Award.

In his private practice, he has devoted a substantial portion of his professional time to the preparation and trial of litigated matters. He has appeared in Courts throughout New Jersey several times each week on many personal injury matters, Municipal Court trials, and contested Probate hearings.

KENNETH VERCAMMEN

Attorney at Law

Legal Resume

2053 Woodbridge Ave.

Edison, NJ 08817

732-572-0500

www.centraljerseyelderlaw.com