

2011 update Wills and Estate Planning

Seminar materials

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1. Federal Estate Tax increased to Estates over \$5,000,000, but New Jersey taxes estates over \$675,000.

After a one-year hiatus, the estate tax is reinstated for 2011 and 2012, with a top rate of 35%. The exemption amount will be \$5 million per individual in 2011 and will be indexed to inflation in 2012. Estates of people who died in 2010 can choose to follow either the rules in effect for 2010 or 2011.

The Act sets a \$5 million generation-skipping transfer tax exemption and zero percent rate for the 2010 year.

Portability of the unused estate tax exemption permits the executor of a deceased spouse's estate to transfer any unused exemption to the surviving spouse without such planning. This provision is effective for estates of decedents dying after December 31, 2010.

Extending for two years (through 2011) the provision that permits tax-free distributions to charity from an Individual Retirement Account (IRA) of up to \$100,000 per taxpayer, per taxable year. The Act allows individuals to make charitable transfers during January of 2011 and treat them as if made during 2010.

Many of the "traditional" tax extenders are extended for two years, retroactively to 2010 and through the end of 2011. Among many others, the extended provisions include the election to take an itemized deduction for state and local general sales taxes in lieu of the itemized deduction for state and local income taxes; the \$250 above-the-line deduction for certain expenses of elementary and secondary school teachers; and the research credit.

Source:

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New Jersey has an Estate Tax on amounts over \$675,000. So, even if no Federal Estate Tax due, the estate must still file a Federal Estate Tax Return, plus NJ Estate Tax Return.

2. Non formal writings could be Wills under the Revised Probate Law

SENATE Law No. 708 made a number of substantial changes to the provisions governing the administration of estates and trusts in New Jersey.

The adoption of portions of the Uniform Probate Code attempted to bring greater uniformity to the rules governing testamentary and non-testamentary transfers to make most state laws similar.

The law expanded situations where writings that are intended as Wills would be allowed, but requires that the burden of proof on the proponent would be by clear and convincing evidence. Possibly a Christmas card with handwritten notes could be presented as a Will or Codicil.

To present a non-formal Will or writing requires an expensive Complaint and Order to Show Cause to be filed in the Superior Court, and a hearing in front of a Superior Court Judge.

Be careful; have a Will done properly by an experienced attorney.

3. The recommendation for Self- Proving Wills

An old New Jersey Probate law required one of the two witnesses to a Will to travel and appear in the Surrogate's office and sign an affidavit to certify they were a witness. This often created problems when the witness was deceased, moved away, or simply could not be located. Some witnesses would require a \$500 fee to simply sign a surrogate paper. My Grandmother's Will was not self- proving, and the witness to Will extorted a \$500 fee.

The New Jersey Legislature later passed a law to create a type of Will called a "Self-Proving Will." In such a Will, the person for whom the Will is made must sign. Then two witnesses sign. Then the attorney or notary must sign; with certain statutory language to indicate the Will is self-proving.

When done properly, the executor does not have to locate any witnesses. This usually saves time and money. If your Will is not "self-proving" or if you are unsure, schedule an appointment with an elder law attorney. Some law offices ignore the revised law, and fail to prepare self proving Wills. Do not use the office in Carteret that follows 1978 laws.

The **elective share** provisions of the present Code has still not been changed yet. Currently, a spouse who is not given money in a Will can challenge the terms of the Will. This is called "electing against the Will by a spouse". A spouse could receive up to 1/3 of the estate, even if only married for 2 weeks. The spouse must file a caveat or lawsuit in Superior Court. We suggest a formal prenuptial agreement in 2nd marriage situations.

A Testator now means both male and female individuals, removing the term "Testatrix". Will forms used by attorneys will need to be revised.

The law provides a statute of limitations with respect to creditor claims against a decedent's estate. There is no longer a need to publish a Notice Limiting Creditors.

4. Revised statute requires Palimony agreements to be in writing.

This law is intended to overturn recent "palimony" decisions by New Jersey courts by requiring that any such contract must be in writing and signed by the person making the promise. More specifically, the law provides that a promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination, is not binding unless it is in writing and signed. The law provides that no such written promise is binding unless it was made with the independent advice of counsel for both parties.

In two recent cases, Devaney v. L'Esperance, 195 N.J. 247 (2008) and In re Estate of Roccamonte, 174 N.J. 381 (2002), the New Jersey Supreme Court upheld palimony agreements between two unmarried cohabitants. In the Devaney case the court held that "cohabitation is not an essential requirement for a cause of action for palimony, but a marital-type relationship is required." In the Roccamonte case, the court held that an implied promise of support for life is enforceable against the promisor's (cohabitant's) estate. Those decisions are consistent with the court's prior decision in Kozlowski v. Kozlowski, 80 N.J. 378 (1979), which had held that a promise of lifetime support by one cohabitant to another in a marital-like relationship would be enforced, if one of the partners was induced to cohabit by the promise. The court held that the right to such support is found in contract principles and that the contract may be either express or implied.

5. Supreme Court held Will could be void if signed under suspicious circumstances

When there is a confidential relationship coupled with suspicious circumstances, undue influence is presumed and the burden of proof shifts to the Will proponent to overcome the presumption.

If there is undue influence in making of Will and transfer by Deed of a house by persons in Confidential relationship, this could subject those persons to punitive damages in some instances, plus voiding of the Will. In the Matter of the Estate of Madeleine Stockdale, Deceased 196 NJ 275 (2008) (2008)

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7. NJ Inheritance tax

The NJ Inheritance Tax Return instructions were revised in October, 2009. Throw out your old forms. Even if no inheritance tax due, a Tax Waiver on a house must be obtained and filed if the house was not co-owned by the spouse.

8. Power of Attorney

Do not use a form purchased online, unless it contains reference to the NJ statute requiring banks to honor the Power of Attorney. Section 2 of P.L. 1991, c. 95 (c. 46:2B-11).

9. Federal Health Privacy Law (HIPAA)

A federal regulation known as the Health Insurance Portability and Accountability Act (HIPAA) was adopted regarding disclosure of individually identifiable health information. This necessitated the addition of a special release and consent authority to all healthcare providers before medical information will be released to agents and interested persons of the patients.

The effects of HIPAA are far reaching, and can render previously executed estate planning documents useless, without properly executed amendments, specifically addressing these issues.

Any previously executed Powers of Attorney, Living Wills, Revocable Living Trusts, and certainly all Medical Directives now require HIPAA amendments.

Powers of attorneys and Living Wills should be updated to reference this New law. More information on the HIPAA law at <http://www.njlaws.com/hipaa.htm>

After you sign the Living Will in your attorney's office, provide a copy to your doctor and family.

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