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A LAST WILL & TESTAMENT is a legal document which allows you to determine how your assets (i.e., estate) will be distributed; who, when, and/or in what manner beneficiaries may receive those assets. A Last Will & Testament also permits you to choose fiduciaries such as executors (who manage the estate), trustees (who manage trusts under your Last Will & Testament) and, in the event there are minor children, who shall serve as their guardian. Without a Last Will & Testament, the laws of the State of New Jersey determine who receives your assets. These laws are known as “laws of intestacy.” In addition, without a Last Will & Testament, the Surrogate’s Court, based on the law, will appoint the guardian of your minor children and an administrator of your estate.

Requirements

Any person, at least 18 years old and of sound mind may make a Last Will & Testament. In order to be valid in New Jersey, a Last Will & Testament must be in writing; signed by the person (testator) making the Last Will & Testament and the signing must be witnessed by at least two people over the age of 18. The act of the testator signing the Last Will & Testament is identified as executing the Last Will & Testament.

A handwritten Last Will & Testament, known as a holographic Last Will & Testament, may be valid if it can be proved that the signature and the important provisions are in the same handwriting, and that the handwriting is the testator’s. This handwritten document must be probated in Superior Court rather than Surrogate’s Court. Consequently, this is a very expensive document to probate which is why a typewritten, formally signed Last Will & Testament, is always preferable.

General Considerations; Self Help

Computer software programs and websites now offer “do-it-yourself” Last Will & Testament kits. Many of these programs are not specific to individual states or to any person’s personal or family circumstances. Instead, these programs offer general Last Will & Testament language which may or may not create a valid Last Will & Testament in New Jersey. Even those programs which claim to customize the document to individual states may create an invalid Last Will & Testament if there is a mistake

in its preparation or in the circumstances surrounding the signing of the document. While self-help programs and websites can educate you, and thereby help you save professional fees, they are rarely a substitute for professional guidance.

Updating Your Last Will & Testament

It is important to review your Last Will & Testament about every three (3) years, as well as any time there is a significant change in your circumstances, in order to ensure that it continues to reflect your wishes and complies with current law. Even though the laws can automatically make some changes for you, it is best to keep your documents current. For example, if you should divorce and not change a Last Will & Testament that leaves the assets to your ex-spouse, those assets will be distributed as if your ex-spouse predeceased you. The result could alter your expectation as to how distribution would otherwise occur. This may or may not be what you want.

Remember, 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.

Care of Your Last Will & Testament

It is also important never to mark up or change a signed Last Will & Testament because this may compromise its validity. If you wish to change any provisions of your Last Will & Testament, it can be done through a properly executed amendment.

An amendment to a Last Will & Testament is called a “codicil.” Codicils can be used for simple changes and are hence a part of the Last Will & Testament. Significant changes are best made by making a new Last Will & Testament. With the common use of word processing computer programs, signing a new Last Will & Testament can often be as inexpensive as signing a codicil. A new Last Will & Testament avoids any risks of inconsistencies that could occur among, and from having several codicils.

An original Last Will & Testament should be kept in a safe, fireproof place. A photocopy of the Last Will & Testament should also be kept with your other important papers including instructions as to where the original has been stored. A safe deposit box is an appropriate place to keep a Last Will & Testament. A bank employee should be present as the box is opened. If the Last Will & Testament is contained in the box, it may be released to the named executor. An alternative is to have the named executor and the successors sign the signature card for the safe deposit box. Because a Last Will & Testament may not be located immediately after, nor can it be probated until ten (10) days subsequent to a death, it is best not to rely on a Last Will & Testament for burial instructions. Those instructions ought to be specified in a private letter, or a living will, or a funeral directive.

The Need for a Last Will & Testament

Many people have the mistaken notion that if they die without a Last Will & Testament their spouse will always inherit their entire estate. In New Jersey pursuant to N.J.S.A. 3B:5-3, the surviving spouse will inherit the entire estate only if no descendant or parent of the decedent survives the decedent; or all of the decedent's surviving descendants are also descendants of the surviving spouse and there is no other descendant of the surviving spouse who survives the decedent.

Another example for needing a Last Will & Testament is if there are special considerations for you or your family, such as a special needs child, minor or adult, who receives government benefits which may be compromised or eliminated if he or she receives an inheritance outright, provisions can be made in your Last Will & Testament to protect that family member's government benefits (such as SSI and Medicaid) while still allowing them to benefit under your Last Will & Testament.

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.

IMPORTANT NOTE: 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.

Assets Passing Under a Last Will & Testament

Any property passing under a Last Will & Testament is called a “probate asset.” Not all assets are controlled by a Last Will & Testament. Property held (owned) in joint names with a right of survivorship, as well as bank accounts held in joint names, will automatically pass to the surviving joint owner(s). In addition, property held by married couples as “tenants by the entirety” will automatically pass to the surviving spouse. Life insurance policies, IRA’s, annuities and 401(k)’s are examples of assets that designate beneficiaries through a beneficiary designation form and are, therefore, not controlled by a Last Will & Testament. Many brokerage firms have created forms to designate a beneficiary for a regular brokerage account. Only assets held in your sole name or with another as “tenants in common” and that do not pass under a contract will pass under the terms of your probated Last Will & Testament. This fact must be addressed in planning to assure that your wishes are carried out even though your Last Will & Testament may only control the distribution of some of your property. Be sure to keep a copy of every completed beneficiary designation form with important records. Banks and brokerage firms have occasionally lost them.

Settling The Estate

The process of settling an estate in New Jersey is similar whether a person dies with or without a Last Will & Testament. A personal representative must go to the Surrogate’s Court of the county where the decedent resided to take charge of the estate. If there is a Last Will & Testament, the executor named in the Last Will & Testament is the personal representative. If there is no Last Will & Testament, the personal representative, who is usually a family member, is called an administrator. Under New Jersey law, if there is a surviving spouse then he or she is the first person in line to serve as administrator, followed by children, grandchildren, parents and siblings. This may lead to family quarrels, as more than one person including estranged family members may have equal right to serve as administrator. For example, all children of a decedent have an equal right to serve in that capacity, so renunciations must be obtained from all those who will not be serving. This is yet another reason why it is always advisable to take the time to have a Last Will & Testament properly and professionally prepared.

The Surrogate must qualify the administrator. While a Last Will & Testament may provide that no “surety bond,” or simply bond, be required for the executor, an administrator may be required to purchase a surety bond. A surety bond is a financial arrangement in which the executor or administrator pays an annual fee (i.e., premium) to a company specializing in these arrangements. That company then insures the heirs against certain wrongful acts of the executor or administrator. It is yet another way the Surrogate and state law endeavor to protect heirs. The price of the bond’s annual premium, which can be hundreds of dollars, is determined by the size of the estate. The bond premium often costs more than the fee for having a Last Will & Testament prepared. The surety bond must remain in effect and renewed yearly until the estate is settled. Providing that no bond is necessary, known as “waiving the bond requirement,” for an executor is a major advantage to having a Last Will & Testament.

There are many good reasons to have a Last Will & Testament; they include tax planning, avoiding the cost of a bond’s annual premium, and planning for family members entitled to government benefits. The best reason for having a Last Will & Testament is peace of mind; knowing that you have provided for your loved ones and that by your planning, the distribution of your estate becomes a smoother, easier process for them.