WHO IS THE EXECUTOR?

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I. WHO SHOULD YOU SELECT AS EXECUTOR?

1. Who should be your executor of your estate is an important, and of course, one of the most difficult issues which must be addressed in an estate plan. The success of the entire estate plan may depend on how wisely this decision is made. The question of who should be your executor and your successor executor, should require as much attention and discussion as any part of the estate plan.

2. An executor is the person, or institution who will handle the many steps involved in settling your estate. The executor is charged with the responsibility of carrying out the provisions of your Will. There are a number of general factors to consider when selecting an executor. The factors are as follows:

(a). An executor should be selected based on skill, not based on any perceived debt or your concern about insulting someone left out. The job is simply far too important for decisions to be based on such considerations. If you feel someone will be hurt by not being selected, consider writing some explanation or apology in a letter.

(b). You should consider the executor's ability to get along reasonably well with all of the beneficiaries. The executor does not need to be the best "buddy" of the beneficiary's named in your Will. In fact it may be preferable that he or she not be. Too close of a relationship may make it difficult for a particular person, when serving as executor, to be independent. On the other hand, if the executor and beneficiary cannot communicate or have an antagonistic relationship, the estate operations will never be as smooth and helpful as you might have wished.

(c). Your executor does not have to be the most financially astute person. The most financially astute person may not exhibit the sensitivity you want towards your beneficiaries. One solution to this dilemma is to name a co- executor. One executor can be an individual, or a company, with substantial management expertise. The other co- executor can be someone who exhibits the personal sensitivity and skills you desire. Together they can hopefully do a better job than either would alone. This approach is frequently used with institutional executors. You may select an institution, such as a bank, trust department or attorney to serve as co- executor with a family

member.

(d) Consider the term of the estate when selecting an executor. When an estate may take along time to settle, you should consider the time factor in selecting an executor. One approach is to name a co-executor. Obviously you should also consider the age and mental status of the executor. If you are naming an elderly person and you are concerned that later on in life they may become incapacitated then you should name plenty of back-ups or successor executors.

(e) Typically I suggest to clients that they look to family members first when selecting an executor. However, you have to consider the complexity involved in the estate and the relationship that the beneficiary's have to him or her. If it is a second marriage or if there are his and her children then it is more likely that I would encourage co-executors and would have an individual from each respective family be involved in the process. Obviously the circumstances involved in each estate must be reviewed and discussed with your clients. There is no automatic right or wrong choice in selecting an executor.

II WHAT ARE AN EXECUTOR'S DUTIES?

You have just learned that you have been designated as an Executor of a person's estate. What should you do next? In my opinion, the first thing an executor should do is determine whether or not a decedent had a Last Will and Testament. If the decedent had a Will then the executor should read the Will thoroughly so that he or she completely understands all of its provisions. In order for a document to be considered a will, the statutory requirements of the state in which the testator resides must be met. These requirements will vary from state to state. In general, they will set forth a minimum age requirement for a testator (typically eighteen years of age) as well as the number of witnesses required to ensure the validity of a typewritten will or to make the Will self-proving. The statutory requirements for the execution of a Will in New Jersey are contained in N.J.S.A. 3B:-1 and 3B:-2.

In significant part, this statute states, "Any person eighteen (18) or more years of age who is of sound mind may make a Will and appoint a Testamentary Guardian." The Will shall be signed by the Testator, and shall also be signed by at least two (2) persons, each of whom witnessed the signing of the Testator's signature of the Will. To avoid the necessity of the executor producing the witnesses at probate, N.J.S.A. 3B:3-4 provides that a Will, executed in compliance with N.J.S.A. 3B:3-2 "may be simultaneously executed, attested, and made self-proved by the acknowledgment thereof by the Testator and Affidavits of the witnesses, each made before an officer authorized" (i.e. an attorney or notary public) to take acknowledgments and proofs of instruments in the State of New Jersey.

In New Jersey, a holographic will is recognized. A holographic will is one which is written entirely in the hand of the testator. The Surrogate's Court may not act to admit a holographic (handwritten) Will to probate; this must be accomplished through the

Superior Court.

1. <u>If a Will Exists</u>

If a decedent had executed a Last Will and Testament, then said Will should be probated at the Surrogate's Court in the county where the decedent was domiciled at the time of death. Although there is a statutory ten-day waiting period after death before a Will can be admitted to probate, the process may nevertheless begin before such waiting period has expired and the Surrogate's Court will hold the papers until that time.

a. Probate Will

Each Surrogate's Court has procedures which must be followed to probate a Will. Rule 4:80 and Rule 4:81 deal with the routine matters typically handled by the Surrogate's Court. These matters are now initiated in the Surrogate's Court by an application. It is only in the Superior Court that actions are instituted by a Complaint. Rule 4:80-1(a) sets forth the following items which must be included in a probate action which is filed with the Surrogates Court:

(i). Applicant's residence.

(ii). Name and date of death of decedent, domicile at the time of death, and date of Will if any.

(iii). Names and addresses of the decedent's spouse, if any, decedent's heirs, next-of-kin and other persons entitled to letters and their relationships to the decedents.

(iv). Ages of any minor heirs or minor next-of-kin and in an application for probate of a Will, whether the Testator had issue living when the Will was made, whether he left any child born thereafter, or any issue of such after-born child, whether he left any child adopted thereafter, or any issue of such adopted child, and the names of after-born children and children adopted since the date of the Will or their issue, if any.

(v). Certain estates do not require probate. For example, the decedent and another person may own real estate as joint tenants. In addition, the decedent may have a insurance policy payable to a spouse and no assets in his name alone. In that type of situation, there are no assets requiring administration. The estate may be subject to inheritance and estate taxes and still be a non-probate estate. Generally, though, there will be some assets that require appointment of the appropriate fiduciary. There may be, for example, a car in the name of the decedent or an uncashed social security check or a checking account in the sole name of the decedent. In such event, probate proceedings will be required. The procedures for handling the estate depend on how the property was titled and whether beneficiary designations are listed.

2. <u>If No Will Exists</u>

If the decedent died without leaving a Will, then an application must be made to the Surrogate's Court to have an administrator (not an executor) appointed. If there is a surviving spouse, he or she has priority to be appointed as administrator. If there is no surviving spouse or the spouse renounces the right to serve as administrator, then the next-of-kin (those persons who inherit under the New Jersey intestacy law, as discussed below) may apply to become the administrator, in the order in which they would so inherit. A person applying to become administrator must obtain renunciations from all persons whose priority is equal to or greater than that of the applicant. In lieu of such renunciations, the applicant may send notices to the other heirs who have equal or greater priority.

Unlike the probate procedures where the decedent left a Will, in an intestate estate the administrator must post a bond with the Surrogate's Court, unless the administrator is the surviving spouse and the sole beneficiary of the estate. The bond premium is an expense to be paid out of the estate funds and is charged on an annual basis. The administration bond can be obtained from a surety company which is approved by the Surrogate's Court.

3. <u>Additional Duties of an Executor are as follows</u>:

The initial duty of an executor is to determine whether the decedent had a Will. If so, then the executor should review the Will so that he or she completely understands all of its provisions. In order for a document to be considered a will, the statutory requirements of the state in which the testator resides must be met. The Will must be probated at the Surrogate's Office in the County where the decedent resided at the time of death. The executor should also do the following:

a. <u>Notices of Probate</u> - Within 60 days after the Will has been admitted to probate by the Surrogate's Court, <u>R</u>. 4:80-6 of the New Jersey Court Rules require that a notice of probate be sent to all of the beneficiaries under the decedent's Will as well as to his or her spouse, heirs and next-of-kin, i.e., to those persons who would be entitled to inherit had the decedent died intestate. The notice must inform the recipient of the date the Will was admitted to probate, the name and address of the executor, and must state that a copy of the Will is available upon request. Proof of mailing of the notices of probate must be filed in the Surrogate's Court by a certification within 10 days thereafter. If the Will contains a charitable bequest, whether specific or residuary, a notice of probate must also be sent to the New Jersey Attorney General's office.

b. <u>File IRS Forms SS-4, 2848 and 56 -</u> The executor will need to obtain a Federal identification number for the estate. This number must appear on all income tax returns filed for the estate (Forms 1041) and is needed when opening any bank or

brokerage accounts in the name of the estate. A Federal identification number is obtained by filing I.R.S. Form SS-4 with the Internal Revenue Service.

If a trust is created under the Will, it is also necessary to file Form SS-4 with the I.R.S. to obtain a Federal identification number for the testamentary trust. Again, the trust's identification number must appear on all income tax returns (Forms 1041) filed for the trust, and it must be provided to institutions where a trust account will be opened. I.R.S. Form 2848 is a power of attorney form to be filed with the I.R.S. if the attorney anticipates filing a Federal estate tax return (Form 706). This power of attorney will allow the I.R.S. to communicate with the attorney regarding the estate, and will authorize the I.R.S. to provide the attorney with a copy of the closing letter or an audit notice. Lastly, I.R.S. Form 56 notifies the estate that a fiduciary relationship has been created so that any tax notices will be sent to the executor or administrator. It is necessary to attach to Form 56 an executor's or administrator's certificate issued by the Surrogate's Court.

c. Notify Social Security Administration - It is necessary to notify the Social Security Administration of the decedent's death. This will often be taken care of by the funeral home, but if not, it can be done by the executor or administrator or by the attorney for the estate. A photocopy of the decedent's death certificate should be submitted to Social Security. If the decedent was receiving Social Security benefits at the time of his or her death, it should be noted that benefits for the month of death must be returned if in the form of a check. If the benefits were directly deposited at the decedent's bank, the Social Security Administration will remove the last month's benefits from the bank account automatically. A very small Social Security death benefit may be payable.

d. Open an Estate Account - It is usually necessary for the executor or administrator to open a checking account at a bank or brokerage firm. The reason for opening an estate account is to provide an account where checks for interest, dividends, refunds, etc. that are received either in the decedent's name or in the name of her estate can be deposited, and an account on which the executor or administrator can write checks to pay estate expenses. If the spouse is the sole beneficiary of the estate, it is possible to deposit checks and pay expenses through an account in the spouse's name, although it is preferable that a separate estate account be used for record-keeping purposes.

e. Notify Post Office - Especially in the case where the decedent is not survived by a spouse or children who live locally, it may be beneficial to have the decedent's mail forwarded to the home of the executor or administrator, or to the fiduciary in care of the attorney's office. This can be accomplished by providing the decedent's local post office with a certified copy of the death certificate and a Surrogate's Court certificate evidencing the appointment of the executor or administrator. It may also be necessary to have a letter of authorization signed by the executor or administrator if the attorney's office address will be used. In this way, the attorney can be sure that any checks, bills or notices received in the decedent's mail will be processed. The decedent's mail may also provide the attorney with clues as to assets and expenses that need to be reported on the estate and inheritance tax returns.

f. Settle Debts and Distribute Assets - The duties of an executor or administrator are to settle debts and distribute the assets. However, a fiduciary should refrain from making distributions during the first six (6) months of administration because of potential claims by creditors. The timing of distributions thereafter depends upon the nature of the assets, whether there are any claims by creditors, and whether tax waivers are necessary. If it appears that an estate cannot be closed within a reasonable period of time, the personal representative should consider making a partial distribution on account. Sufficient reserve should be made for all liabilities, anticipated and unanticipated.

g. Locate any Missing Heirs - The personal representative should use best efforts to locate an absent person. When all efforts have failed, a notice to the beneficiary must be published in a news paper having general circulation in the county in which the decedent died. Court Rule 4:86. If a response is not received, the personal representative should seek the appointment of a trustee for an absent person pursuant to N.J.S.A. 3B:26-1 et. seq. The trustee has a responsibility to hold the property for the absent person, and to make distribution in a manner as the court may deem proper.

h. Prepare an Accounting of the Estate - Regardless of the type of accounting method chosen, some simple guidelines must be met:

i. Cover Page - Should disclose the nature and function of the account, identify the personal representative, note the importance of examining the account, and give an address where more information can be obtained.

ii. Summary of Account - Serves as a "table of contents" which indicates the order of details presented and reflects the separate totals for the aggregate of the assets on hand at the beginning of the accounting period, transactions during the period, and assets on hand at the end of the period.

iii. Schedule of Receipts - Must start with the assets originally inventoried in the estate and any additional receipts during the accounting period. For consistency an appropriate carrying value should be established and used throughout administration. This value should be the value as of the date of death or the subsequent purchase date.

iv. Net Gains (Loses) On Sales or Other Dispositions - Should be reported on the same schedule for the most meaningful measure of performance.

v. Principal Disbursements - Must be detailed in terms of the transactions grouped into categories such as administrative expenses, debts of the decedent, taxes, and fiduciary commissions.

vi. Principal Distributions To Beneficiaries - When it becomes

desirable or necessary to distribute assets on account, the transaction should be reflected on this schedule.

vii. Principal Balance on Hand - Lists all the assets in the hands of the fiduciary at the end of the accounting period.

viii. Income Receipts and Disbursements - These schedules reflect all income received and disbursed by the personal representative. Categorical listings are easier to check for discrepancies and therefore are preferable.

ix. Income Distributions to Beneficiaries - Distributions of income to beneficiaries should be recorded on this schedule.

x. Proposed Plan of Distribution to Beneficiaries - This schedule captures the name and age of each beneficiary and the assets to which they are entitled. If death taxes are attributable to each transferee, the transferee's relationship to the decedent and the amount of tax attributable to each should be specified.

i. Different Types of Accountings - After the accounting has been prepared it must be submitted to the appropriate parties for review and approval. Upon receipt of the signed approval pages, the beneficiaries should receive refunding bonds releases detailing the exact amount to be distributed to each individual or entity. The beneficiary then must sign and return the document to the personal representative. The bonds are to be recorded and the monies distributed.

There are three (3) methods of closing an estate. The options are as follows:

1. Formal Account - This seldom used method is utilized to obtain the highest degree of protection available to the personal representative. This protection is the highest available because it is issued by the Court and covers all of the transactions by the accounting period.

(a). Advantages - The formal account confirms any disbursements and distributions made "at risk" during administration of the estate, to creditors, beneficiaries, fiduciaries and counsel. Provided proper notice has been given as required by Rule 4:87-4, it also bars the claims of those who fail to present them at the audit of the account. Finally, it serves as a vehicle for resolution of disputes at the distribution level of the estate (versus the probate level). Examples of such disputes may include any of the following:

(i) Objections to an inventory of assets, disbursement, distributions and investments.

(ii) Claims by creditors.

(iii) Spousal election.

(iv) Identity of distributees and heirs.

(v) Construction and interpretation of the Will.

(b). Disadvantages - The formal account is time consuming and expensive in that it must be filed and reviewed by the Court and the Surrogate. A special sequence of steps must be followed in submitting an accounting to the Court for its review (Rule 4:87-1 et. seq). The potential for a hearing would involve additional legal expense to the estate possible publicity depending on the nature of the estate.

(c). Procedure - An action to settle an account is brought into Superior Court by a complaint and a Order to Show Cause which must state the amount of executor's or administrator's commissions and attorney's fees which are applied for. An action may be commenced by an interested party to compel a fiduciary to account. Court Rule 4:87-1.

(d). Complaint - The complaint must list the names and addresses of all interested parties, the period of time covered by the account, a summary of the account and shall have annexed thereto a copy of the account, and shall seek allowance for commissions and attorney's fees. The complaint must be filed twenty (20) days prior to the day on which the account is to be settled Court Rule 4:87-2.

(e). Form of Account - Court Rule 4:87-3 sets forth the requirements for information to be included in an account to be approved by the Court. However, this rule does not prescribe a format for formal accountings. As the exact format is not specified by Court Rule 4:87-3, much of the information appearing in the discussion of an informal account (discussed below) is applicable to the formal account.

(f). Service - Process shall be by the Order to Show Cause which, together with a copy of the complaint, must be served on all interested parties as set forth in Rule 4:87-4. If names and address of the interested parties are unknown, an Affidavit of Inquiry must be attached. Proof of mailing and publication where ordered shall be filed before the account is allowed.

(g). Vouchers - Vouchers in support of allowances claimed in the account shall be made available for inspection for interested parties, but need not be furnished to the Court, unless requested by the Court Rule 4:87-5.

(h). Audit and Report on Accounts - The Surrogate will audit all accounts of fiduciaries, Rule 4:87-6.

(i). Report of Guardian Ad Litem - A guardian ad litem for a minor or incompetent must file the written report for the Court within seven (7) days prior to the date on which the account is settled, Rule 4:87-.

(j). Exceptions - Court Rule 4:87-8. Any interested party may file exceptions to the accounting at least five (5) days before the return of the Order to Show Cause. Exceptions must be served on the accountant in writing, signed by the person making the exceptions or his attorney. Exceptions must state particularly the item or admission excepted to.

(k). Planning Suggestions - If an accounting is to be made to the Court, at the outset of the matter discuss accounting procedures with an appropriate representative of the Court (Surrogate, Deputy Surrogate). When appropriate, at the drafting stage of the estate planning documents, consider drafting language into an instrument in order to facilitate or eliminate a fiduciary accounting.

2. Informal Account - This method, by which most estates are settled, is an agreement between the parties for the approval and acceptance by the interested parties of the fiduciary's account. It is utilized to provide the beneficiaries with a basis on which to make an informed consent.

(a). Advantages - A shorter time frame and less expense are the main attributes that make this method attractive to fiduciaries and beneficiaries.

(b) Disadvantages - Although this method offers a personal representative a release from liability based on the beneficiaries' informed decisions, it is less authoritative and complete than a Court issued release.

(c) Procedure - The account is submitted to the beneficiaries for their review and approval. Upon receipt of the approvals, the fiduciary then sends each beneficiary a refunding bond and release. The release is what offers the fiduciary protection against potential claims against the estate. It is an agreement by the beneficiary to pay to creditors his or her proportionate share of the claim. Once the documents have been obtained from all the beneficiaries, they can be recorded with the County Surrogate and distribution can be made.

3. Waiver of Account - The beneficiaries receive distribution in lieu of an accounting, they waive the right to review the fiduciaries transaction in order to expedite distribution.

(a) Advantages - This method is the least time consuming and least costly of all the settlement options.

(b) Disadvantages - A waiver of account provides the fiduciary with the least amount of protection in terms of a release from liability. The beneficiaries are approving the administration based on limited knowledge.

(c) Procedure - The waiver of account and refunding bonds and releases are sent to all beneficiaries. Upon receipt of the signed documents, they are recorded with the County Surrogate and distribution is made. j.

j. Timing of Distributions.

Distributions should not be made by the executor until the appropriate:

i. State Taxes - The New Jersey inheritance tax is due eight (8) months after the decedent's date of death, and is required for all residence unless the estate is wholly distributable to class A beneficiaries. N.J.A.C. 18:26-9.1.

ii. Federal Taxes - The federal estate tax return is due nine (9) months after the decedent's death and is required to be filed for estate's with values exceeding $1,000,000. The typical time frame for a closing letter, if all documentation is submitted can run from six (6) months to one (1) year. However, returns may be sent to the IRS office in Trenton. Those closing letters are submitted much more quickly.

iii. New Jersey Estate Taxes - The New Jersey estate tax return is due nine (9) months after the decedent's death and is required to be filed for estate's with values exceeding $675,000.