**New Jersey Basic Estate Planning**

**NYC Bar Association – New Jersey Bridge The Gap**

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\*Admitted in New York and New Jersey only

1. Introduction

A. What is a Will? - a legal document that contains instructions regarding the distribution of property when the testator dies.

B. Why the Need for Estate Planning?

i) Ensures loved ones are provided for.

ii) Avoid intestacy.

iii) Direct the distribution of assets. Can minimize arguments among family and friends.

iv) Create a trust for minor children or loved ones with special needs.

v) Appoint an executor who will be in charge of gathering and distributing assets and paying off creditors.

vi) Set up guardianship for minor children.

vii) Minimize estate and inheritance taxes.

1. Who is the client?
   1. Dual Representation – You represent husband and wife to create an overall estate plan for both. They must waive the conflict of interest. You will share everything with both spouses (i.e., nothing is held in confidence with respect to each other).
   2. Separate Representation – You represent husband and wife to create separate estate plans. They must waive the conflict of interest. You will keep each spouse’s information in confidence from the other.
2. Client Intake – Important information to obtain from the client includes:
   1. Name, citizenship, addresses, dates of birth and social security numbers of the clients, their children, their grandchildren and any other beneficiaries of the clients’ estate plans;
   2. Current marital status of clients, children and grandchildren;
   3. Prior marriages, including any rights or obligations pursuant to any divorce or property settlement agreement;
   4. Prior transfers, including whether any gift tax returns were filed;
   5. Any special situations or health concern of the clients, their children and any other beneficiary;
   6. Names and contact information of financial advisors;
   7. Whether the clients expect to receive any large sums in the foreseeable future, by inheritance or through employment;
   8. Information on employment, including all types of compensation;
   9. List of all assets with current values and details regarding the registration and the beneficiaries designated;
   10. List of all liabilities; and
   11. Current estate planning documents and any premarital agreement.
3. Intestacy – See NJSA 3B:5-1, et seq. Anything not disposed of by Will passes by intestacy statute.
   1. The entire estate to the surviving spouse if all of the decedent’s descendants are also descendants of the surviving spouse.
   2. Formulas if there are descendants that are not also descendants of the surviving spouse or if there are surviving parents of the decedent.
   3. Descendants take by representation and not per stirpes.
4. Elective Share – See NJSA 3B:8-1, et seq. One cannot completely disinherit a spouse. A surviving spouse, civil union partner or domestic partner of a New Jersey domiciled decedent has a right to a share of the decedent’s estate, provided, however, that the decedent and the surviving spouse, civil union partner or domestic partner had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as a result of judgment of divorce from bed and board or under circumstances which would have given rise to the cause of action for divorce or nullity of marriage to a decedent prior to his or her death under New Jersey laws. The elective share is equal to one-third of decedent’s “augmented estate.”
   1. A spouse may waive his or her rights to an elective share in a document, such as a valid prenuptial or postnuptial agreement.
5. The Different Roles
   1. Testator – The person creating the Will.
   2. Executor – The person named in the Will to administer the Estate. Typically the surviving spouse, but not mandatory.

i) Duties include: marshalling the assets, paying estate’s debts and expenses, paying federal and NJ estate and inheritance taxes and distributing the assets

ii) In NJ, this job can typically range from 1 ½ – 2 years.

iii) Unless the Will states otherwise, the executor is entitled to a commission based on the size of the estate and income earned. The executor will pay income tax on the commission and the estate will deduct it as an expense.

* 1. Trustee – The person named in the Will to administer a Trust.

i) This job can last much longer than the executor’s job. (e.g., a testamentary trust set up for minor children can last for decades.)

ii) Unless the trust document says otherwise, trustees are entitled to commissions

* 1. Guardian – The person named in the Will to have legal responsibility for any minor children under the age of 18. This person must be over 18 years old. Without a guardian named in the Will, a court would determine who will be the guardian. The court may appoint a separate person to control the property for the minor children.

1. Titling of Assets – A Will controls how a decedent’s probate assets will be distributed. Non-probate assets pass by contract or by operation of law.
   1. Probate Assets – Assets that are titled in the decedent’s name individually and a decedent’s share of assets titled as tenants in common are probate assets and will pass under the decedent’s Will.
   2. Non-Probate Assets – Assets that are titled as joint tenants with rights of survivorship will pass outside of the decedent’s will by operation of law (i.e., to the joint account holder). Assets that have beneficiary designations (e.g., IRAs, 401k, life insurance) will pass outside of the decedent’s will by the contractual beneficiary designation.
   3. Beneficiary Designations – Very important to review beneficiary designations on all retirement accounts, life insurance policies and anything else with a beneficiary designation. Otherwise, the estate plan may fail to achieve the client’s goals. Part of the estate planning services should include helping the client review and change beneficiary designations.
2. The Will
   1. Where do Estate/Inheritance Taxes get paid from? Typically, from the residuary estate. May allocate taxes to get paid from certain pots of money (e.g., if a large specific bequest of cash goes to a specific person and there is little left over in the residuary, it may be better to have taxes paid by the person receiving the specific bequest rather than from the residuary beneficiaries.)
   2. Specific Bequests of Cash – Paid off the top before dividing up the residuary estate.
   3. Personal Property – Can be specified in the Will; OR NJ allows a separate personal property memo that is specifically referred to in the Will. The personal property memo lists the items of personal property (e.g., jewelry, household items, clothing, etc.) and the people to whom it will go. The personal property memo accomplishes two things: (i) it is less formal and can be changed much more easily than a Will; and (ii) it does not become a part of public record when the Will is probated.
   4. Residuary Estate – Everything that is left over after personal property and specific bequests of cash is the residuary estate. It is typically the vehicle through which the majority (if not all) of one’s estate passes. Property can pass to individuals, corporations, charities, anyone and in any proportion.
   5. Children’s Trust – You can set up a trust such that if property is to pass to someone under a specified age (e.g., 18, 21, 25, 30), that property will go into a trust for that person’s benefit.
      1. Income – Typically, trustees will be given the power to make discretionary income distributions. You can specify whether there will be mandatory income distributions and at what age such distributions will begin.
      2. Principal – Typically, trustees will be given the power to make discretionary principal distributions (usually for Health, Education, Maintenance and Support). You can specify whether there will be mandatory principal distributions and at what ages such distributions will happen.
      3. Spendthrift Provision – protects trust assets from creditors of the children.
   6. Special Needs Trust – Allows the client to provide for a disabled child or other beneficiary without risking disqualification from any governmental benefits the child or other beneficiary is currently receiving or may receive in the future. The assets in the special needs trust cannot be used to support the disabled child or other beneficiary. The special needs trust can only be used to supplement the disabled child’s or other beneficiary’s lifestyle.
   7. Disclaimer – Any beneficiary can disclaim assets within 9 months of the decedent’s date of death. Typically, this is done to fund a credit shelter trust (see below). Because nobody knows when they are going to die, what their assets will be when they die and what the law will be when they die, the disclaimer credit shelter trust allows for the flexibility of post-mortem estate tax planning. The disclaimer must be made in writing. The disclaimant may not accept the interest or any benefits of the disclaimed property, must identify the property, or interest in property that is being disclaimed, and as a result of the disclaimer, the interest must pass without any direction on the part of the person making the disclaimer. See NJSA 3B:9-1 et seq.
   8. Credit Shelter Trust (Disclaimer Trust) – A separate entity that is funded either through a formula in the Will or by assets disclaimed by a surviving spouse. An unlimited amount of assets can pass to a spouse free from Federal and NJ Estate Tax. By funding a credit shelter trust upon the first spouse’s death, you can minimize the client’s Federal and NJ Estate Taxes upon the second spouse’s death because upon the second spouse’s death, the assets in the credit shelter trust (plus any appreciation on those assets from the time of the first spouse’s death until the second spouse’s death) will pass according to the terms of the trust, free from Federal and NJ Estate Taxes.
      1. Typical Drafting – Within nine months of the first spouse’s death, the surviving spouse will disclaim assets in an amount not greater than the NJ Estate Tax Exemption (i.e., $675,000). (If the surviving spouse disclaims assets in an amount greater than $675,000, the estate will pay NJ Estate Tax on the amount over $675,000.) During the life of the surviving spouse, the spouse will receive the net income from the trust. Upon the surviving spouse’s death, the remaining principal of the trust will pass to the children of the first spouse, free from NJ Estate Tax. The surviving spouse may not have any power to appoint the assets of the trust.
      2. Maximum Flexibility – Because one cannot know when he/she will die, what the law will be when he/she dies, and how much he/she will be worth when he/she dies, this allows the surviving spouse maximum flexibility to determine how much to shield from Federal and New Jersey estate tax upon the first spouse’s death.
   9. Fiduciary Powers – Typically, the decedent will grant broad powers to the Executor and Trustee to ensure maximum flexibility to deal with the Estate and any Trusts.
   10. Appointment of Executor – This is the person that is tasked with administering the Estate in accordance with the Will. Estate administration includes: (i) marshalling the decedent’s assets; (ii) paying off the Estate’s debts; (iii) filing the Estate’s tax returns; and (iv) distributing the assets to the beneficiaries. The Executor’s job typically lasts 1-2 years, but can last longer or shorter depending on the complexity of the Estate.
   11. Appointment of Trustee – This is the person that is tasked with administering any Trusts under the Will. This includes following the terms of the Trust and making discretionary and/or required distributions of income and principal. The Trustee’s job lasts for as long as the Trust is in operation. For example, if the Will states that property passing to a beneficiary who is under 30 at the time of the decedent’s death will go into trust, and one of the beneficiaries is 12, then the Trustee’s job will be for 18 years. If a Trustee is also a beneficiary, a co-trustee should be appointed to make discretionary distributions to that beneficiary to avoid the trust being included in the beneficiary’s estate and to protect the beneficiary from creditors.
   12. Guardianship – The Guardian is the person that is tasked with caring for minor children and their property should something happen to both biological parents. A surviving biological parent, with few exceptions, will always be the guardian to minor children.
   13. Funeral/Burial Arrangements – These are better stated in a separate letter to family and/or friends than being stated in the Will. In NJ, a Will cannot be probated until at least 10 days after date of death, and the funeral/burial will most likely take place before then.
3. Will Execution
   1. Testator must be over 18 and have testamentary capacity to execute a Will. The threshold for testamentary capacity is relatively low: the testator must have a general idea of his or her assets and the “natural objects of his or her bounty.”
   2. Need two witnesses and a notary to be present. A NJ attorney can sign instead of a notary. A beneficiary may be a witness, but it is better practice to have disinterested witnesses.
   3. Take care that the testator is not being subject to undue influence during the drafting of and execution of a will. When doing your client intake, the best practice is to talk to the testator by him or herself before allowing others into the room.
   4. If the drafting attorney is named as the executor or a trustee, the testator should sign an acknowledgment that he or she is aware that the attorney is entitled to a commission.
   5. Self-Proving Affidavit – A statement by the witnesses at the end of the Will that states that: (i) they witnessed the execution of the Will at the request of the testator; (ii) the testator declared it to be his or her Will; (iii) the testator was at least 18 years old and was not under any undue influence or duress. Both witnesses sign in front of a notary (or NJ attorney). This affidavit avoids having to find the witnesses years later when the testator dies.
   6. Execute only one original. Many attorneys offer to keep the original in the firm’s safe deposit box. The original should NOT be kept in the client’s safe deposit box because once the client dies, you will need the Will in order to access the safe deposit box. Once stapled, do not remove the staples.
4. Estate and Inheritance Tax
   1. Husbands and wives should have roughly equal estates in order to take full advantage of the credit shelter trust. To get equal estates, they may have to re-title assets from joint tenants with rights of survivorship to tenants in common.
   2. Estate Tax looks at the value of all of the assets being transferred to a non-spouse. New Jersey Inheritance Tax looks at to whom assets are being transferred.
   3. Deadlines – Federal, New Jersey and New York Estate Tax Returns must be filed and paid within nine months of the decedent’s death. New Jersey Inheritance Tax Returns must be filed and paid within eight months of the decedent’s death. New York does not have an inheritance tax.
   4. Marital Deduction – Qualifying transfers between spouses are effectively exempt from Federal Estate and Gift Tax and New Jersey and New York Estate Tax.
   5. Federal Estate Tax – A decedent can pass up to $5,250,000 total (adjusting for inflation in the future) to a non-spouse(s) free from Federal Estate Tax. The maximum tax rate is 40%.
   6. Portability – To the extent one spouse does not use up his or her $5,250,000, the surviving spouse may use the remainder of the first to die’s exemption in addition to the surviving spouse’s $5,250,000. The first to die’s estate must file a federal estate tax return to take advantage of portability.
   7. New Jersey Estate Tax – A decedent can pass up to $675,000 total to a non- spouse(s) free from New Jersey Estate Tax. For most NJ estates, this will be the amount you aim to put into a credit shelter trust for the benefit of the surviving spouse. The maximum tax rate is 16%.
   8. New York Estate Tax – A decedent can pass up to $1 million total to a non-spouse(s) other than a spouse free from New York Estate Tax. For most NY estates, this will be the amount you aim to put into a credit shelter trust for the benefit of the surviving spouse. The maximum tax rate is 16%.
   9. New Jersey Inheritance Tax
      1. Any portion of the decedent’s estate passing to any beneficiary which is less than $500 will be exempt from New Jersey Inheritance Tax.
      2. Class “A” Beneficiaries – Any portion of a decedent’s estate passing to the decedent’s parents, grandparent, spouse, civil union partner after 2/19/07, domestic partner after 7/10/04, child or further descendant (e.g., grandchild), or stepchild is exempt from New Jersey Inheritance Tax.
      3. Class “C” Beneficiaries – Any portion of a decedent’s estate passing to the decedent’s sibling, the spouse, widow or civil union partner after 2/19/07 of a child of the decedent is subject to New Jersey Inheritance Tax at the following rates
         1. The first $25,000 is exempt;
         2. The next $1,075,000 is taxed at a rate of 11%;
         3. The next $300,000 is taxed at a rate of 13%;
         4. The next $300,000 is taxed at a rate of 14%; and
         5. Any amount over $1,700,000 is taxed at a rate of 16%.
      4. Class “D” Beneficiaries – Everyone who’s not Class A or Class C is subject to New Jersey Inheritance Tax at the following rates:
         1. The first $700,000 is taxed at a rate of 15%; and
         2. Any amount over $700,000 is taxed at 16%.
      5. Class “E” Beneficiaries – Any portion of a decedent’s estate passing to the State of New Jersey or any of its political subdivisions for public or charitable purposes, an educational institution, church, hospital, public library, orphan asylum, or certain other nonprofit agencies is exempt from New Jersey Inheritance Tax.
   10. Gifting – There is a Federal gift tax. In 2013, one can gift up to $14,000 per person per year ($28,000 per person per year with spousal consent) without filing a gift tax return or paying any gift tax. In addition, in 2013, one can gift up to $5.25 million total for his or her lifetime without paying any gift tax. The client will have to file a gift tax return for all gifts over $14,000 per person, but will not have to pay gift tax unless the total gifts over $14,000 per person exceed $5.25 million. When the client dies, the amounts gifted over $14,000 per person get subtracted from the $5.25 million estate tax exemption. For example, if the client gifts $2 million of the $5.25 million exemption in 2013 and dies in 2013, he or she may only pass $3.25 million to a non-spouse free from Federal Estate Tax. The tax rate is 40%.
       1. Assets gifted within three years prior to the decedent’s death will be included in the decedent’s taxable estate.
       2. Basis – The recipient of the gift keeps the gift giver’s basis in the asset. Assets transferred upon death get an automatic step up in basis. Therefore, the client is better off gifting assets that have very little to no appreciation (or even a loss).
       3. The donee is not required to pay income taxes on the amount of the gift.
       4. School Tuition and Medical Expenses – Excluded from gift tax are gifts made on behalf of an individual for educational or medical expenses, provided that such payments are made directly to the educational institution or the medical provider.
   11. Civil Unions and Same-Sex Couples – New Jersey has civil unions, which extend all the rights and benefits of married couples to same-sex couples. This includes the unlimited marital deduction for passing unlimited assets to the surviving civil union partner free from New Jersey estate and inheritance taxes. With the recent Supreme Court decision overturning the Federal Defense of Marriage Act (DOMA), if a same sex couple was married in a state that recognizes same sex marriages, the federal government must recognize it. New Jersey does not yet allow same sex marriage, so if you have a same-sex couple worth more than $10,500,000, you will need to worry about Federal Estate Tax upon the first to die.
5. Inter Vivos Revocable Trust – Created during lifetime that can be amended, revoked or restated at any time during an individual’s lifetime. Usually created to provide for the grantor’s needs during the grantor’s life, then provides for the disposition of its assets after the grantor’s death. Does not reduce estate taxes at the grantor’s death.
   1. Not a public document (unlike a Will)
   2. Can help avoid probate and ancillary probate.
6. Inter Vivos Irrevocable Trust – Created during lifetime that cannot be amended. Usually for the benefit of any one or more persons, other than the Grantor. May reduce estate taxes at the grantor’s death.
   1. Irrevocable Life Insurance Trust (ILIT) – Trust owns the life insurance policy and is the beneficiary of the life insurance proceeds upon the death of the grantor. Proceeds pass free from federal and New Jersey Estate Tax according to the terms of the ILIT. The terms of the ILIT are typically similar to the credit shelter trust. If the grantor of the ILIT transfers ownership of life insurance policies into the ILIT (as opposed to the ILIT purchasing new policies), then the grantor must live for three years or else the proceeds will be included in the grantor’s estate.
   2. May also be a way for parents to gift assets to their children during their lifetime.
7. Qualified Terminable Interest Property “QTIP” Trusts – Usually drafted when the testator has children from a previous marriage. Upon the testator’s death, property passes to the QTIP trust and when the surviving spouse dies, to the testator’s children.
   1. To qualify as a QTIP Trust:
      1. Property must “pass” from the deceased spouse to the surviving spouse;
      2. The surviving spouse must be entitled to all of the income from the entire property interest payable at least annually for life. The surviving spouse can require that the Trustee invest the property held in the QTIP Trust in income producing assets. There is no requirement that principal be distributed;
      3. No power may be held by any person (including the surviving spouse) to appoint any part of the property to any person other than the surviving spouse during the surviving spouse’s life;
      4. The Executor must elect that the interest be treated as Qualified Terminable Interest Property. The election is made on the Federal Estate Tax Return (Form 706)
   2. Assets remaining in the QTIP Trust at the death of the surviving spouse are included in the surviving spouse’s gross estate.
8. Life Insurance
   1. Income Replacement Tool – used to replace the income of the decedent and pay for expenses of surviving spouse and children in the case of a decedent’s untimely death
   2. Wealth Replacement Tool – used to pay any estate taxes and/or inheritance taxes
   3. Life insurance proceeds not subject to New Jersey Inheritance Tax. Life insurance proceeds are part of the decedent’s estate for New Jersey Estate Tax purposes.
9. Financial Power of Attorney – The Financial Power of Attorney allows a principal to appoint an attorney-in-fact to manage the principal’s assets and make investment decisions on the principal’s behalf while the principal is alive.  Having such a document avoids the necessity of having to go to court to get someone appointed as the principal’s guardian if the principal cannot manage his or her own affairs.
   1. General Powers – The principal generally gives the attorney-in-fact powers to conduct the principal’s activities for the principal, such as: selling property in which the principal maintains an interest, collecting funds owed to the principal, defending suits against the principal, making gifts on the principal’s behalf, and generally acting in a manner which allows them to manage the principal’s affairs.  Given the significant power granted to the attorney-in-fact, a decision on who to appoint in this role requires considerable thought.  If desired, the principal can also provide certain limitations on the powers granted to the attorney-in-fact.
   2. The principal may choose anyone to act as attorney-in-fact (the typical first choice is a person’s spouse).  Successor attorneys-in-fact can be appointed, and multiple parties may serve simultaneously as co-attorneys-in-fact.
   3. Durable vs. Springing – The Power of Attorney can either be effective immediately upon executing the document (and remain in effect if the principal becomes disabled, termed a “durable” power of attorney) or can be effective only in the event of the principal’s disability or incapacity (termed a “springing” power of attorney).  A “hybrid” format can also be used, where the power of attorney becomes effective immediately for the initial attorney-in-fact, but only becomes effective upon the principal’s incapacity or disability as to any successor.
   4. The advantage of the durable power of attorney is that it is more convenient and more readily accepted by financial institutions. However, the principal has to have a level of comfort with his or her attorney-in-fact since they will be able to, in effect, stand in the principal’s shoes and act on the principal’s behalf right away. Note, though, that the attorney-in-fact has fiduciary duties to the principal and must act in the principal’s interest.
   5. While the springing power of attorney can give greater comfort in that the attorney-in-fact cannot act until the principal is disabled, the springing power of attorney is less convenient. Who determines whether the principal is disabled? Does the attorney-in-fact make the determination? Does the principal’s doctor? What kind of proof is necessary? Financial institutions are less comfortable accepting springing powers of attorney (and may make the attorney-in-fact jump through some hoops to protect themselves.)
10. Health Care Directive (Living Will) – Health care directives (also sometimes termed “living wills” or “health care proxies”) serve two primary purposes:  (i) Allows the client to assert his/her desires to be free from the use of life-sustaining or prolonging procedures and medications, if he/she becomes irreversibly or terminally ill (if this is in line with his/her wishes); and (ii) directs a surrogate appointed by the client to make a wide range of medical and health care decisions for him/her, if he/she is unable to articulate his/her own preferences.
    1. Although health care directives are typically drafted to maximize a health care agent’s powers under state law, they can be modified to narrow the agent’s scope in accordance with the client’s wishes.
    2. The party the client appoints as his/her health care representative typically acts in situations where the client has become unable to express his/her desires regarding health care treatments.  In the health care directive, the client may specify types of treatments which he/she wishes to have withheld under certain circumstances.  For example, the client can direct his/her agent to only authorize medications which relieve pain and increase comfort if he/she is facing a terminable condition.  A standard health care directive also contains a release, allowing the disclosure of individually identifiable health information to the health care agent.
    3. The client can choose anyone as his/her health care agent – many parties will choose their spouse as their initial agent.  The client can also appoint successor health care agents, if the initial agent is unable or unwilling to serve.
    4. It is highly advisable to have the client discuss his/her specific wishes regarding health care treatment with his/her designated health care agent (and any successor health care agents).