

PROBATE PROCESS FROM A TO Z

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They all laid their heads together like as many lawyers when they are gettin' ready to prove that a man's heirs ain't got any right to his property.

Mark Twain 1856

I. CLOSING THE ESTATE

AND OTHER ISSUES

A. THE IMPACT OF MEDICAID AND OTHER GOVERNMENT PROGRAMS ON PROBATE

ESTATE RECOVERY

Correctly Paid Benefits:

Federal law has established an obligation on the part of the states to obtain reimbursement out of a recipient's estate for Medicaid benefits correctly paid. 42 U.S.C. Section 1396(p)(b)(1)(B); HCFA Transmittal 63; N.J.S. 30:4D-7.2, et seq.; N.J.A.C. 10:49-1 et seq.

Under N.J.A.C. 10:49-14.1, the state may recover correctly paid benefits from the estate of a Medicaid recipient who is 55 years of age or older.

New Jersey casts a broad net to recover all assets that the decedent may have had an interest in, including non-probate assets.

There is a lien that may be filed and recovery sought from the estate of the deceased Medicaid recipient. These claims are considered in the same class as other preferred claims. See N.J.S. 3B:22-2; for example, debts and taxes with preference under state or federal law. The personal representative of the estate may obtain, from the Division, a payoff statement of amount due under this claim. The Division does not file a lien while the recipient is still alive if the exemptions set forth in the Statute and Administrative Code are applicable (children under age 25, blind, disabled, etc.). In the event that there is an arm's length transaction and a good faith purchaser for value, the state will not assert a lien but rather it will attempt to trace the proceeds of the sale, N.J.A.C. 10:49-14.1(k).

EXEMPTIONS

Under N.J.A.C. 10:49-14.1(a) and (g), there are exemptions for surviving child under age 21; surviving blind or permanently or totally disabled children; and the surviving spouse. There is also a postponement of the lien for family members of a deceased Medicaid beneficiary who had continuously resided in the home owned by the beneficiary at the time of the recipient's death and that home was the beneficiary's primary residence and continues as the family member's primary residence (caretaker daughter who has no other place to live). The Division may record a lien on the property but will not enforce it until the property is voluntarily sold or the resident family member dies or vacates the property. The debt is not forgiven, essentially the collection is postponed until the caretaker child decides not to continue to live at the residence.

LIFE ESTATES/TRUST

The Division may attempt to attack any trust, jointly held property, or life estates that do not terminate upon decedent's death.

Life estates that expire upon Medicaid beneficiary's death will be exempt from recovery. *Inter vivos* trusts established on behalf of the Medicaid beneficiary will be

exempt provided that it does not run afoul of the five-year look-back rule, N.J.A.C. 10:49-14.1(n)(2). Likewise for Testamentary Trusts.

Community spouse resource allowance is not considered available for attachment since they are not assets of the Medicaid recipient.

TRACING

Medicaid is aggressive when it comes to tracing assets set up in trust if the assets had previously belonged to the beneficiary within the five-year look-back rule, DeMartino v. Division of Medical Assistance and Health Services, 373 N.J.Super. 210 (App. Div. 2004).

HARDSHIP

There is an exemption if the imposition of this recovery right by the state will result in a hardship; however, there is a very short time frame for you to assert your rights. Upon receipt of written notice of a recovery by the Division, the estate representative has 20 days from receipt of the notice to file a request for a waiver or compromise based on undue hardship together with evidence in support of the request, N.J.A.C. 10:49-14.1(h)(3). This short time period is extremely unfair to estates in order to assert the hardship lien since, in many instances, you are dealing with persons of moderate means who do not have ready access to legal counsel, and are not able to file the notice within the 20-day window. The Division then has a 45 day period in order to reach its decision. The estate may, if it is denied, contest the decision by giving a written demand for a hearing to the Division within 20 days of the receipt of the Division's decision in accordance with N.J.A.C. 10:49-10. This then will be submitted to the Division of Administrative Law.

There are disqualifications for a disclaimer request if there was a deliberate attempt to remove assets from the estate of a decedent in order to avoid state recovery.

Undue hardship can be demonstrated only if the estate subject to recovery would become the sole income-producing asset of the survivors or by pursuing the confiscation of the asset, the survivors would, in turn, be on public assistance. The short window, I believe, is unconscionable.

PRACTICE POINTER

In the event that you are advising clients who wish to establish trusts, be it testamentary or *inter vivos*, for someone who is or will be on Medicaid, then it is very important that you have no discretionary provisions in the trust that could be interpreted as giving the recipient the right to compel distributions. These trusts should be completely discretionary so you do not run afoul of N.J.A.C. 14:49-14.1(n). This tactic will not work for a surviving spouse due to the right to elect against the Will.

In Estate of DeMartino v. Division of Medical Assistance and Health Services, 373 N.J. Super. 210 (App. Div. 2004); cert. den. 182 N.J. 425, the Appellate Division found that testamentary trust for the benefit of the surviving husband of predeceased wife, was pierced and funds could be recovered from it for the Medicaid lien. This is based on the right of an elective share, N.J.S. 3B:8-1.

For further discussion, see West Law, New Jersey Practice Series, Elder Law-Guide to Medicaid Law and Regulations, 45A N.J. Practice, Section 2:11.

THIRD PARTY ACTIONS

Under N.J.S. 30:4D-7.1, the Attorney General has the right to bring third party actions for recovery of medical assistance payments.

B. PREPARING THE FINAL ESTATE ACCOUNTING

FORMAL ACCOUNTING

Accountings are governed under R. 4:87, Actions for the Settlement of Accounts.

The Court Rules spell out the procedure to follow in a formal accounting.

There must be a filed Complaint along with an Order to Show Cause together with an accounting in the format as set forth under R. 4:87-3. A formal accounting is attached in the Appendix (12).

The Rules provide for appropriate service and availability of backup documentation should it be requested by either the local Surrogate's Court or any of the persons who have an interest in the estate, R. 4:87-5. The Surrogate's Court is charged with doing an audit and report to the Court on the formal accounting, under R. 4:87-6. In rare instances, when the administrator has not been cooperative or dilatory in administering the estate, an interested party may compel an accounting under R. 4:87-1(b) by filing the Order to Show Cause, Verified Complaint proceeding. This then would compel the filing of an accounting and could, if appropriate, result in the removal of the administrator and forfeiture of fees or back-charging of fees.

The attorney's fees require an affidavit of services under R. 4:42-9(a)(2), or R. 4:42-9(a)(3). The affidavit of services to be supplied must be in compliance with R.P.C. 1.5(a). There are also commissions which are set forth by N.J.S. 3B:18-4 for principal and income under N.J.S. 3B:18-24.

BOND OF FIDUCIARIES

In the event the fiduciary was required to post a bond under N.J.S. 3B:15-1, then notice must be given to the bonding company of the application for the approval of

accounting. This will then result in the bond being discharged, which then stops the annual premium payments required by the bonding company.

CALCULATING COMMISSIONS

A. Commissions Allowed to Executor

Income commissions: 6% on all income received, N.J.S. 3B:18-13;

Corpus commissions N.J.S. 3B:18-14. Commissions on all corpus received by the fiduciary may be taken as follows:

5% on the first \$200,000 of all corpus received by the fiduciary;

3.5% on excess over \$200,000 up to \$1M;

2% on excess over \$1M; and

1% of all corpus for each additional fiduciary provided that no one fiduciary shall be entitled to any greater commission than which would be allowed if there were but one fiduciary involved.

There may be an application for an enhancement of a fee under N.J.S. 3B:18-6 for unusual or extraordinary services.

B. Commissions Allowed to Trustee under a Will and Guardians

Income Commissions – 6% on all income received, N.J.S. 3B:18-24;

Corpus Commissions – Fiduciaries may take annually allowance commissions on corpus in the amount of \$5.00 per \$1,000 of corpus value on the first \$400,000 of value of corpus; and \$3.00 per \$1,000 on corpus in excess of \$400,000, N.J.S. 3B:18-25.

Corporate fiduciaries shall be entitled to a commission as may be reasonable and agreed to by the parties, N.J.S. 3B:18-25(b).

SURROGATE'S FEES

The Surrogate's Court charges a commission to audit and report on the accounting, N.J.S. 3B:17-11. They may charge \$175 for filing of the Complaint and for auditing, stating, reporting and recording. In estates from \$65,000 to \$200,000, the commission is 3/10 of 1% but not less than \$300. Estates exceeding \$200,000 4/10 of 1% but not less than \$400.

In computing the amount of a fee, if there had been interim accountings and previous commission calculations by the Surrogate, then the commission is computed only on the new amounts accounted for.

ABATEMENT – TAX COMPUTATIONS

In the event that there are not sufficient assets to fund all of the bequests under a Will, there then will be an abatement. This occurs frequently when the testator prepares a Will making large specific bequests and then there is a reversal in the investments of the testator or spend-down which usually results in some very unhappy beneficiaries.

Another trap for the testator is misconception of ownership in the property and the mistaken belief that his Will will govern when, in fact, either the banking laws or real estate ownership laws will control. Common examples of this are joint tenants, POD accounts, and designation of annuity or insurance beneficiary.

Unless a Will provides for the Order of Abatement, or the Court can discern the intent of the testator, the Statute provides, under N.J.S. 3B:23-12, that, except with regard to a surviving spouse who elects against an estate, the abatement shall be as follows: (a) property passing by intestacy; (b) residuary devisees; (c) general devisees; and (d) specific devisees. There then is a proportionate calculation of the amount had distributions been made in accordance with the Will.

The accounting goes to the heart of the issue and that is who gets what? The executor may have an obligation to file an appropriate application before the Surrogate's Court to compel recipients of non-probate assets to turn them over to the estate asserting that, in fact, they should have been considered part of the probate estate, thus subject to distributions under the Will or laws of intestacy. Proceedings can raise issues of undue influence, resulting in the stripping of the estate of the bulk of its assets by influencing the testator in setting up joint accounts which essentially strip the estate of most of its assets, contrary to the testator's intent, In the Matter of the Estate of Balgar, unpublished opinion (2000 W.L. 1147081), N.J. Super. A.D.

EXCEPTIONS TO ACCOUNTING

The provisions for contesting the account are in R. 4:87-8, setting forth, in detail, the reasons for the objection, backup, etc. This then will set up a determination by the Court as to contentions of the various parties with findings to be set forth then in a final Judgment of accounting. The Judgment approving the accounting puts matters to rest and is *res judicata* to all exceptions that were raised or could have been raised and operates as a discharge of fiduciary from all interested parties, N.J.S. 3B:17-8.

TAX PAYMENTS

Most Wills contain a boilerplate tax payment clause out of the residuary estate. This is fraught with danger when the estate has been depleted over the course of time or

due to claims against the estate, or estate taxes that have been increased as a result of non-probate distributions, i.e., annuity payments, joint tenancy, POD accounts.

Wills typically provide that the tax payment provision is to be paid out of the residuary portion of the estate for all taxes assessed, whether or not the property passes either by probate or non-probate. In the event that there is no residuary estate, or the estate has insufficient assets to pay the taxes, then there must be an abatement.

The testator's benefactions "must abate" where the estate he leaves is "insufficient to pay his ... taxes." 5A N.J. PRAC., WILLS AND ADMINISTRATION § 262 (Rev. 3d ed.). Beneficiaries abate in the following order: 1) property passing by intestacy 2) residuary devises 3) general devises 3) specific devises. N.J.S.A. § 3B:23-12. The New Jersey Apportionment Statute, N.J.S.A. § 3B:24 et. seq., will not apply to change the tax apportionment among beneficiaries who take pursuant to a will. See Gesner v. Roberts, 91 N.J.Super. 255 (App. Div. 1966), rev'd on other grounds, 48 N.J. 379 (stating former § 3A:25-31 did not apply to determine respective beneficiaries' estate tax liabilities with respect to property passing under the will); National State Bank of Newark v. Nadeau, 57 N.J.Super. 53 (App. Div. 1959) (N.J.S. 3A:25-30 et seq. is "specifically limited by its terms to property passing outside the will); In re Burnett's Estate, 50 N.J.Super. 482 (Bergen County Court, Probate Division 1958, stating that the New Jersey Apportionment Statute ... does not guide the apportionment of the estate tax among beneficiaries).

You must be aware of the fact that a bequest of a specific sum of money is a general bequest even if the testator designates the bequest as "specific." Parker's Ex'rs v. Moore, 25 N.J.Eq. 228 (Ch. 1874); (I gave you \$25,000.00).

Where a testator directs that all taxes be paid out of the general estate or the estate's residue and the estate is insufficiently funded to pay for the taxes, then the part of the estate's tax liabilities that arise from transfers not distributed under the Will, should be taxed in accord with New Jersey's Apportionment Statute. See Kapnek v. Kapnek, 38

N.J. Super, 368 (Ch. Div. 1955); In re Ericson's Estate, 152 N.J. Super 169 (App. Div. 1976), rev'd on other grounds, 74 N.J. 300 (1977). These cases hold that recipients of *inter vivos* transfers, be it a trust (Ericson) or a life insurance policy (Kapnek), must pay their *pro rata* share of the estate's taxes where a will's provision directing the estate to pay taxes is insufficiently funded.

In Kapnek, the testator directed that "all estate . . . taxes, on property passing under this will or otherwise . . . shall be paid out of the principal [of the estate]." Kapnek, 38 N.J. Super at 270. Kapnek's estate appraised at \$59,822.81, which was not enough to pay taxes, leaving a deficit of \$27,910.23. Id. The executors and trustees under the will sued the beneficiaries of the life insurance policy and *inter vivos* transfers to recover state and federal taxes. Id. Kapnek held in favor of the executor stating that the beneficiaries of the life insurance policy and *inter vivos* trusts "each must bear such part of the federal and New Jersey estate tax and interest as is represented by the proportion of the total tax that the value of the assets in each category bears to the total assets entering into the total tax." Id. at 273, citing, Morristown Trust Co. v. Childs, 14 N.J. Super, 300.

Ericson reaches the same result as Kapnek. In Erickson the testator divided his residuary estate into two parts, "Part A" (the marital deduction share) and "Trust A" (the portion of the residuary estate not included in the marital deduction share). Ericson, 152 N.J. Super at 171-72. The testator directed that all inheritance, estate, and succession taxes . . . payable by reason of my death shall be paid out of and be charged generally against the contents of residuary estate other than Part A, namely Trust A, was insufficient to pay the estate taxes and the widow, holding "Part A" of the residuary estate, argued that the taxes should be paid out of an *inter vivos* trust that was not distributed under the will but was included in the gross estate. Id. at 176. the holders of the *inter vivos* trust argued in turn that the residuary estate should bear all the tax. Id. Ericson held that since the will "makes no provision for the present contingency of an insufficiency in Trust A [to pay for estates taxes] then New Jersey's Apportionment Statute applies (i.e. the testator had expressed "no clear contrary intent" for the resolution of this contingency). Id. at 177. As such, the beneficiaries of the *inter vivos* trust had to

pay a “share of the tax in the proportion that the assets so received have contributed to tax liability.” Id. at 177-78.

PROBABLE INTENT

In the event that there is a failure of the tax payment clause, you should also take a close look at what the testator’s probable intent was when preparing the Will. See Fidelity Union Trust Co. v. Robert, 36 N.J. 561 (1962); Estate of Payne, 186 N.J. 324 (2006). Thus, though general legatees are generally abated before specific legatees, that will not be the case if it is contrary to the “probable intent” of the testator. In RE: Estate of Tateo, 338 N.J. Super., 1212 (App. Div. 2001) (Modifying estate distribution so that general legatees had claims against a specific legatee). Testator, by stating that all bequests in Article 2 are “specific bequests”, he intended that, in the event abatement became necessary, then all bequests in Article 2 shall be abated on a *pro rata* basis. This would be the outcome if all the bequests are specific bequests.

IRC 6901

IRC Section 6901 applies to individuals receiving an annuity from the Estate. The annuities are included in the gross Estate. A person, personally liable under Section 6324(a)(2) is considered a transferee under section 6901 (h)¹ thereby permitting the liability created by section 6324(a)(2) to be assessed and collected according to the rules specified in section 6901. See Magill v. Commissioner, 43 T.C.M. (CCH) 859, 865 (1982). IRC Section 6324(a)(2) states that where property is included in the gross estate pursuant to sections 2034 through 2042, the transferee of the property (such as a surviving joint tenant or remainderman beneficiary) automatically becomes personally liable for the estate tax to the extent of the date of death value of the property received.

¹ Stating “[T]he term ‘transferee’ . . . includes any person who under section 6324(a)(2), is personally liable for any part of such tax.

Section 2039 provides that an annuity is to be included in a gross estate² and section 2042 provides for the inclusion of life insurance proceeds. Thus, per 6324(a)(2), a transferee is personally liable for taxes on annuities and life insurance policies received and is thereby also subject to Section 6901. For instance, Magill held that beneficiaries receiving the proceeds of an annuity were, per Section 6324(a)(2) personally liable for any unpaid taxes to the extent of the amount of the annuity proceeds they received.³ Id. at 870.

INFORMAL ACCOUNTINGS

The vast majority of estates are handled through informal accountings. This is the optimum result that you should seek in representation of the administrator of an estate. It avoids the necessity of filing a formal Complaint and Order to Show Cause together with the expense incurred for the Surrogate's Court examination and report of the accounting. In order to be relieved of your obligation to file a formal accounting, you need to obtain the consent, approval and release of the beneficiaries of the estate. The parties need only be competent and of full age in order to sign a complete release and waiver of accounting, and then also execute release and refunding bonds. See R. 4:87-9 (A copy of a form release and refunding bond together with approval of accounting and release are attached to the Appendix).

INSTRUCTIONS FOR INFORMAL ACCOUNTING

SCHEDULE A:

Corpus (this would be the same summary of assets for the entire estate which you took control of as the guardian/executor).

SCHEDULE A-1:

² "... if . . . an annuity or other payment was payable to the decedent, or the decedent possessed the right to receive such annuity or payment, either alone or in conjunction with another for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death."

³ Magill did not specifically state that the transferees obtaining annuities were subject to 6901 but it states that a liability imposed under Section 6324(a)(2) can be collected via Section 6901.

This would be a synopsis of changes to the corpus you took control of during your tenure as guardian/executor, e.g. gain in stock value, although not cashed in.

SCHEDULE B:

This would be a complete statement of all income to include pension payments, social security, rent, etc. Transfers from corpus to pay expenses are not income.

SCHEDULE C:

These are expenses. It should be clear as to the total spent.

SCHEDULE D:

This is only a summary of the first two schedules, i.e. $A + B = D$ (Balance on Hand).

SCHEDULE E:

This is a statement of the commissions you will take as the guardian/executor. You are allowed the following:

Corpus Commissions:

1/2 of 1% for the first \$400,000 annually

.3 of 1% for that over \$400,000 annually

Income Commissions:

6% of all income for any period of accounting; or

$6\% \times 7,707/\text{month} = \$462.42/\text{month}$

SCHEDULE F:

Inventory of Assets (value should equal balance on hand in Summary or D).

You cannot file an informal accounting, however, if any of the beneficiaries are developmentally disabled, as defined in N.J.S. 30:6D-25(b), this would then require a formal accounting.

STATUTE OF LIMITATIONS

In a recent decision In Re Estate of Francesco Racamato, unpublished opinion, (2010 W.L. A-2202-09T3), App. Div. 2010, the Appellate Division then considered whether or not R. 4:85-1, which governs Will contests, would be applicable to a limitation of actions after an accounting has been filed. The Appellate Division's decision was based on R. 4:87-1, which permits an interested party to file a Complaint to Compel an estate accounting and refers to 7 N.J. Practice, Wills and Administration, Section 1452 at 558(a) and Dorothy G. Black (Rev. 3 Ed. 1984; and Id. At Section 1125 at 390), there is no Statute of Limitations under this Section. Thus, if there is a fraudulent accounting or inadequate accounting, it may be challenged at a later date.

TAX AUDIT

In the event that you are the subject of an audit, be it federal or state, then you must prepare for the audit and document each and every item that you feel will be an issue based upon inquiries from the auditor.

Have available for the audit:

- A. Decedent's income tax returns for three years prior to death.
- B. All transfers within three years prior to death.
- C. Decedent's checking account statements for three years prior to death.
- D. Passbook or statements for decedent's savings accounts for three years prior to death.
- E. Decedent's brokerage account statements for three years prior to death.
- F. Estate fiduciary income tax returns.
- G. Estate fiduciary checking account statements.
- H. Homeowner's insurance policy with personal property rider.
- I. Safety deposit box inventory.
- J. Any appraisal of estate assets not previously filed with any of your forms.
- K. Substantiate all estate debts and administration expenses.

C. TRUST ADMINISTRATION AND TERMINATION IN PROBATE

The comments with regard to Point II would be applicable to accounting and termination of trusts. The fiduciary cannot combine both the trust and the estate accounting in one accounting application, but must break out each and seek approval on each since the status of the fiduciary is separate and distinct, In Re Smith's Estate, 107 N.J. Eq. 607 (1931). Likewise, for trustees, R. 4:87 provides that a testamentary trustee and non-testamentary trustee may invoke the jurisdiction of the Surrogate's Court in order to file a formal accounting.

CONFLICT OF INTEREST

There is a potential conflict of interest issue wherein a trustee has to parcel out between the life estate beneficiary and remaindermen of a trust, especially when there is a parent/child relationship. The trustee may consider appointment of independent representative for the minor remaindermen since there is a potential conflict with the parents. Matter of Will of Maxwell, 306 N.J. Super. 563 (App. Div. 1997); cert. den. 153 N.J. 214. There is a provision effective January 1, 2003 of the Uniform Principal and Income Act of 2001 contained in Chapter 19B of Title 3B. N.J.S. 3B:19B-1. The operative instrument will control unless it is silent, then the Statute needs to be looked to in order to make determinations of income and principal. Distribution of stock dividends, stock splits, etc. sets up interesting questions and accounting issues for principal and income beneficiaries. Under the New Jersey Statute, distributions of stock are allocated to principal. Cash dividends are treated as income. Stock dividends are treated as principal. You need to be careful, and I would strongly suggest that you consult with an accountant, if you do not do this on a regular basis, as to how you handle receipts as they come into a trust. See N.J.S. 3B:19B-10 and N.J.S. 3B:19B-13.

IMPARTIALITY

Trustee must administer the trust impartially and not favor one or more beneficiaries.

INSTRUCTIONS FROM THE COURT

Any particularly difficult issue or difficult beneficiary can be addressed by asking the local Surrogate's Court for instructions pursuant to Order to Show Cause, Certification, setting forth the dilemma, existing Statutory and State Law, and asking the Court for advice, N.J.S. 3B:17-10. Giving all parties notice of this application then will resolve exposure issues with regard to the fiduciary.

D. SHOPPING FOR PROBATE CASE MANAGEMENT SOFTWARE

Zane software owned by Thompson-Reuters.

Onesource Trust and Estate Administration Software, Thompson-Reuters.

The Cowles Estate Practice System.

American Bar Association, Legal Research for Estate Planners (LREP).

Probate & Property Magazine, Technology-Probate Articles

E. COMMON PROBATE MISTAKES TO AVOID AND SUGGESTIONS

1. Burial instructions; who makes the call? N.J.S. 3B:10-21.1; N.J.S. 45:27-22.
2. Failure to notice all heirs under R. 4:80-6, Notice of Probate of Will, to all beneficiaries and all descendants of decedent under R. 4:80-1(a)(3).
3. Failure to notify Attorney General's Office if any of the beneficiaries are a charity.
4. Failure to file ancillary letters and obtain waivers for all real property located outside of the State of New Jersey.
5. Make inquiry for any unclaimed funds with Unclaimed Property, NJ Gov or missingmoney.com.
6. Check decedent's records for any safety deposit box and inventory the box.
7. Examine copies of all life insurance policies and annuities with regard to beneficiary designation.
8. Contact Post Office and sign off on change of address for mail; stop newspapers.
9. Locate and cancel all credit cards of decedent.
10. See if there are any notes or accounts payable to decedent, obtain name and address of each obligor.

11. Determine whether or not any obligations are secured (any purchase money mortgages).

12. Locate all policies of liability insurance, accident, disability, fire and casualty, together with health insurance.

13. Locate title to all automobiles, boats, airplanes and other vehicles registered in the name of the decedent. If subject to lien, obtain loan number, payment book, name and address.

14. Determine if decedent has any accounts payable or promissory notes.

15. Closely held business. Need to immediately arrange for listing and sale of professional services business.

16. Contact stock broker and contact bank.

17. Secure the residence.

- A. Pets
- B. Perishable property
- C. Winterize property
- D. Change locks
- E. Safe keep valuables
- F. Lawn care
- G. Snow removal
- H. Notify local police department

18. Automobile. Is the vehicle jointly owned? Who has keys?

19. Be mindful of the three-year Statute of Limitations to claim a refund of taxes paid, which has been strictly construed, which is applied from the date that the taxes are paid.

20. Failure to file decedent's last income tax return (1040) or failure to obtain federal identification number and file fiduciary returns until estate is concluded (1041).

F. PROPERTY DISPUTES

Unless there is a specific bequest in the Will of real property, then title to the decedent's property passes pursuant to N.J.S. 3B:10-29 to the personal representative of the estate. In fact, the Statute gives the right of the personal representative to compel any heir or devisee who has property possessed by them, to deliver to the estate for purposes of administration. With this right, however, comes the obligation to pay taxes and take all steps necessary to manage, protect and preserve the property and also gives the personal representative the right to bring an action to determine the title to property. Under N.J.S. 3B:10-30, the personal representative has the same power over the title to the property as that of the absolute owner.

In Ewald Pries v. Hughes and Estate of Mallon, unpublished 209 N.J. Super. Lexus 2967 (App. Div.) the Court affirmed a finding by the trial court granting a Summary Judgment that the testamentary heirs do not have individual liability for damages caused by the defendant/estate's failure to repair a broken sewer which caused raw sewerage to flow onto plaintiff's property, resulting in a nuisance and continuing trespass.

CREDITOR'S CLAIMS AGAINST THE ESTATE

The estate can be sued for actions of the decedent including tort, breach of contract, and any other claims that may be cognizable by our courts. Once those claims are filed, then the claimant may demand a jury trial with regard to allegations of decedent's actions.

No claims are to be filed against the estate for a period of claim for six months from granting of letters with the exception of funeral expenses, N.J.S. 3B:14-40.

The fiduciary has the power to require persons who may have property that is an asset of the estate to avail itself of the power of the probate court to compel that person or

persons to appear before the Court to inquire as to assets that may be part of the estate, N.J.S. 3B:14-44.

PRESENTATION AND BAR OF CLAIMS

N.J.S. 3B:22-4 provides that decedent's creditors must present their claims to the personal representative, in writing, under oath, setting forth the particulars of the claim within nine months from the date of decedent's death for any claims not presented within this nine month period, the personal representative shall not be liable to the creditor for assets which may have then been delivered from the estate with respect to any assets which the personal representative may have distributed. In other words, the personal representative is no longer responsible; however, the creditor can pursue valid claims against the persons who received the asset from the estate, under the release and refunding bond obtained by the distribution, N.J.S. 3B:22-16. Within three months of the presentation of a claim, the personal representative shall either approve or disapprove of the claim and give written notice that the estate will dispute it. The creditor then has three months after that notice in order to commence an action, N.J.S. 3B:22-7 and 8.

The creditor also has a right to bring an action on the refunding bond, N.J.S. 3B:22-16.

PRIORITY OF CLAIMS

In the event that the estate is insolvent, there is a priority of claims set forth by Statute under 3B:22-2, which sets forth, as the number one priority claim, the funeral expenses followed by costs and expenses of administration. The best course to follow would be to file a Complaint pursuant to an Order to Show Cause that the estate is insolvent. All claims then should be listed and a request to the Court to approve distribution.

G. CURRENT LEGISLATIVE/CASE LAW UPDATES AND FORECASTS

The most important pending legislative issue is federal estate taxes and what the Congress will do after the next election cycle. Currently, for decedents dying in 2010, the exemption is \$5M. For decedents dying in 2011 and 2012, the applicable exclusion has two components, the basic exclusion amount of \$5M (as the amount is adjusted for inflation beginning in 2012) and a deceased spouse's unused exclusion amount (DSUEA). There will be a sunset of this on December 31, 2012, absent further action by the Congress. For estates of a decedent who died in 2010, the estate tax was repealed. In the event there is no action on the part of Congress, then the estate tax as it existed in 2001 becomes effective. In 2001, it was \$675,000.00.

II. ETHICAL CONSIDERATIONS

A. WHO IS THE CLIENT? AVOIDING CONFLICTS OF INTEREST.

In most estates, the executor or personal representative mistakenly believes that the attorney is their attorney and not the attorney for the estate. The general rule is that an attorney for the estate represents only the estate and not its beneficiaries. In re Estate of Fedor, 356 N.J. Super. 218, 221-22 (Ch. Div. 2001); Todd A. Fuller, *Attorney Liability to Estate Beneficiaries: The Privity Passes Through*, 100 DICK. L. REV. 29 (1995); Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc., 131 Cal. App. 4th 802, 826 (App. 2005). The attorney does owe a fiduciary duty to the estate's beneficiaries. Id. In fact, a Will might even be declared invalid because of "undue influence" if an estate beneficiary has too close a relationship with an estate's attorney. See Haynes . First Nat. State Bank of NJ, 87 N.J. 163, 176-84 (1981) (noting that there is a presumption of "undue influence" where the attorney represents both the decedent and the principal beneficiary). An attorney representing both the decedent and the beneficiary may also be violating conflict of interest rules. See Id.; AM. JUR. WILLS, Section 387 (relationship between the beneficiary and the attorney who is engaged in the testator's will entails a conflict of interest).⁴

This is also pointed out in the attached Advisory Committee on Professional Ethics Opinion #719 (Appendix 57), which cites the case of Estate of Albanese v. Lolio, 393 N.J. Super. 355, 374 (App. Div. 2007), where it spelled out that an attorney may also represent the executor individually, however, there cannot be any potential conflict of interest.

⁴ Nevertheless, there is always the possibility that a separate attorney-client relationship arose between the beneficiary and the attorney for the administration of the estate. This may run into conflict of interest issues.

In Estate of Balgar, 399 N.J. Super. 426 (Probate Passaic County 2007), the executrix was not allowed to charge the estate for legal services of the attorney retained by her to handle the estate in contesting *inter vivos* transfers made to her.

With respect to a trustee's accounting, there may be conflicts of interest when the trustee is also the parent of a remainderman, who is their child. This is an obvious conflict if the remainderman is an infant. In the event that there is a conflict of interest, then the wiser course would be to seek appointment of a Guardian *ad litem*, R. 4:26-2(b).

You must be aware of a recent opinion of the Advisory Committee on Professional Ethics, Opinion 719, N.J.L.J. 997 December 13, 2010, where the Advisory Committee found that an attorney cannot co-sign for an administrator on a surety bond (Appendix 57).

B. TIPS ON DEALING WITH GRIEVING FAMILY

Many times, there is frustration, disappointment or unresolved family issues that color the relationship you have with your clients when administering estates. Anger is often expressed as to why persons were disinherited, debts forgiven or not forgiven, etc. In some instances, the decedent misled, either intentionally or unintentionally, family members as to what their bequest was going to be at the time of death. This is a usual part of probate practice and the parties are more interested in blowing off steam than expecting you to do anything to remedy the situation. I point out to them that, under New Jersey law, as in most jurisdictions, as long as the person is competent and not subject to undue influence, they do not have to make a fair Will or Will that you or I would make; they simply have to understand what the nature of their assets are and what they wish to do with them.

In those unfortunate instances where the death is a truly tragic event, referral to a competent, licensed, trained professional is appropriate. I have found, in cases of the death of a child, that an organization known as *The Compassionate Friends* (website attached; Appendix 22) has been extremely helpful in the devastated parents dealing with the loss of a child.

C. KEEPING THE CLIENTS IN THE KNOW – WHY IT PAYS OFF AND HOW TO DO IT EFFICIENTLY

Communication, communication, communication. Give the clients a realistic timeline in their initial conference. Give them ample warning as to potential tax and liquidity problems. In the event that you suspect there may be a Will contest, let them know what the consequences of that will be and how that will impact the timeframe in resolving the estate matters.

Warn them in advance of the frustration in dealing with hyper-technical stock transfer clearinghouses that constantly bounce paperwork for ridiculous reasons, resulting in months of delay in getting stocks transferred.

In the event that there is the possibility of a New Jersey audit, let the client know and advise them that that will greatly delay the closing of the estate.

Clients that have e-mail can easily be copied with documents and letters.

D. GETTING PAID: BILLABLE/NON-BILLABLE HOUR AND RETAINER AGREEMENTS

I have attached an engagement letter to the Appendix (4). I suggest that clients be billed on a monthly basis so that they are aware of ongoing fees and out-of-pocket costs. In the event that there is an unanticipated development, immediately alert the client as to the potential impact on the attorney's fees. This crops up when there is an unexpected Will contest or issues of *inter vivos* transfers that the parties were not aware of when initially retained. You must have a written retainer agreement to comply with the Rules of Professional Conduct.

You also have the ability to access the Surrogate's Court when you file your accounting to have a Court Order entered by the Surrogate approving your fees. This is an excellent way for you to lay out your attorney's fees and costs and get the Court's approval of them, which then will have the force of a Court Order. Please note that your attorney's fees are governed by the Rules of Court and you must submit a detailed affidavit in accordance with the Rules, carefully spelling out the services rendered by the attorney or the paralegal. Please note that the Court will not approve ordinary out-of-pockets for photocopying, postage, telephone, etc.

E. PREVENTING UNAUTHORIZED PRACTICE OF LAW BY LEGAL STAFF

In order to prevent the unauthorized practice of law, you simply need to comply with RPC 5.3 – Responsibilities Regarding Non-Lawyer Assistants

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) every lawyer, law firm or organization authorized by Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of non-lawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for the conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or ratifies the conduct involved.

(2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the non-lawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

In R. 4:42-9(b), with regard to paraprofessionals, you are required to set forth the paraprofessional's qualifications and billing rates for them when you seek Court approval.

There are a number of Advisory Opinions by the Committee on Authorized Practice of Law dealing with legal assistants. In Opinion #24, 126 N.J.L.J. 1306 (November 15, 1990), the Committee found that paralegals cannot practice without direct supervision. In other words, they cannot open up a storefront to do real estate closings, etc., but must act under an attorney's license. In Opinion #41 (N.J.L.J. 444 (October 25, 2004), the Committee cautioned Notary Publics misrepresenting or misleading the public which may result in the unauthorized practice of law. The Committee points out that Notary Publics in other countries are considered as quasi judicial officers. This is true in South American countries and also in Italy. This, of course, has a tendency to mislead persons who are under the mistaken belief that their Notary in the United States is of the same qualifications and licensing authority.

After much hand-wringing, the Committee on Attorney Advertising, in Opinion #16, 136 N.J.L.J. 375 (1994), allows paralegals to identify themselves on letterhead and business cards as long as they are under an attorney's supervision.

The simple answer to paralegals is supervision, supervision, supervision.

James J. Curry, Jr.

Dated: Toms River, NJ
October 14, 2011

APPENDIX

1.	Letter of Instruction to Executor/Administrator	1
2.	Engagement Letter	4
3.	Treatises	
A.	NJ Practice, Wills & Administration, Clapp & Black	7
B.	NJ Estate and Probate Law pamphlet, West	8
C.	NJ Probate Procedures Manual, Walter Kean series	9
D.	How to Save Time & Taxes Handling Estates	10
E.	Tax, Estate and Financial Planning for the Elderly, Lexis/Nexis	12
F.	Representing the Elderly Client, Law & Practice, Begley & Jeffreys	13
G.	Estate and Trust Litigation, NJICLE	14
H.	NJ Estate Litigation, NJ Law Journal Books	15
4.	Outline of relevant Internal Revenue Code sections regarding taxation of estates, etc.	16
5.	Estate Control Sheet	18
6.	Compassionate Friends, Website	22
7.	Estate Tax Closing Letter from the Department of Treasury, Internal Revenue Service, together with waiver of restrictions on assessment and collection of deficiency/report of estate tax examination changes	23
8.	State of New Jersey, Department of Treasury, Division of Taxation, Resident Inheritance Tax notice of assessment	27
9.	Corrected assessment issued by Transfer Inheritance Tax Bureau, State of New Jersey	29
10.	New Jersey Estate Tax Waiver form	30
11.	New Jersey Estate Tax Waiver form for real property	31

12.	Formal accounting	33
13.	Release & Refunding Bond	52
14.	Waiver of Account & Release	54
15.	Opinion 719 Advisory Committee on Professional Ethics, 12/1/10, 202 <u>N.J.L.J.</u> 997	57

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REPLY TO: TOMS RIVER

RE: Estate of

Dear

You have been appointed personal representative of the estate of *. The Surrogate issued your Letters Testamentary, which are also called Surrogate's Certificates, a certified copy of which is enclosed with this letter for your records. This document is evidence of your appointment as personal representative of the estate, and gives you authority to act on behalf of the estate. If anyone should question your authority, please exhibit this document. If you need more for any reason, we will be happy to get them for you.

We need to obtain a separate identification for the estate with the Internal Revenue Service, which is known as an employer identification number (EIN), which is Form SS-4 which we will complete for you. It will then be necessary to open an estate checking account through which assets should be passed and from which bills should be paid. Please advise us as to your preference in banking institutions. We would suggest that the account be opened and checks authorized on your signature, and the monthly statements sent to this firm. This will allow us to maintain accurate records with regard to the administration. In addition, consideration should be given to opening an interest-bearing account if cash will be held for any period of time.

The following information is provided in order to explain the nature of the office which you now hold, and to provide you with guidance in carrying out your new responsibilities.

Under the New Jersey Probate Statutes an "executor", an "executrix", an "administrator", and an "administratrix" are all "personal representatives" and you are so designated in your letters testamentary or letters of administration issued by the Surrogate.

You are the personal representative for the purpose of winding up the decedent's affairs. This involves the assembly, collection and valuation of the decedent's assets, the payment of debts, expenses of administration and taxes, and the distribution of the remaining assets to the persons entitled thereto. This is generally described as administering or settling the estate.

The administration of this estate is an essential and important process. It clears the title to the decedent's property. It settles legitimate debts and wipes out others. It establishes a new tax basis for the property in the estate and protects you in making distribution of the property to the persons entitled thereto.

In order to assist you in performing your duties, we will need to obtain additional information, and we will have to work together very closely during the coming months.

The first step in the probate process, using that term in its broad sense, was opening the estate by probating the Will, and securing your appointment as personal representative. Now that this has been accomplished, the administration of the estate begins. We must assemble, collect and value all of the decedent's assets and prepare a cash flow projection, so we can anticipate the cash needs of the estate to pay bills, debts and anticipate all tax liabilities and needs of the beneficiaries. All of the income of the estate and accounts receivable must be collected and accounted for.

Complete records must be kept of all cash and investment transactions. We suggest that all receipts and disbursements be run through the estate checking account and savings account. We will assist you in maintaining the accounting if you require assistance.

The New Jersey Transfer Inheritance Tax is due within eight months of decedent's death and the Federal Estate Tax and New Jersey Estate Tax are due within nine months of death.

To assure payment of the New Jersey Transfer Inheritance Tax, New Jersey imposes a lien on all of a decedent's property located in New Jersey and in particular, all bank accounts in which the decedent had an interest. Once the taxes are paid, New Jersey will issue a tax waiver releasing this property for administration and distribution. In the meantime, however, you may withdraw up to one-half of any bank account and place it in the estate checking and/or estate savings account in order to pay debts and expenses. An exception to this rule is in the case of transfers to a Class A beneficiary, which is a surviving spouse, child, stepchild, legally adopted child, parent, grandparent, or grandchild, in which a Form L-8 affidavit and self-executing inheritance tax waiver may be filed with a bank, savings institution or other transfer agent.

The Federal Estate Tax is assessed on the total value of a decedent's estate, irrespective of amounts passing to the beneficiaries (although transfers to a surviving spouse are exempt). A Federal Estate Tax Return must be filed and the tax paid within nine months of the decedent's death. The Internal Revenue Service usually completes the audit of the Federal Estate Tax return within two years of filing the return.

There are various options and further items to discuss and consider with respect to the Federal Estate and New Jersey Transfer Inheritance Taxes. For example, for the Federal Estate Tax Return, we have an option to value the estate assets at the date of death, or six months after the date of death; however, should the New Jersey Transfer Inheritance or Estate Tax be applicable, we must value all assets as of the date of death. Naturally, for Federal Estate Tax purposes, the value which results in the lower tax would be a more attractive valuation date. We will discuss this and the other options available to us in greater detail in the future.

The decedent's final income tax returns (I.R.S. and N.J. Forms 1040) covering the period beginning on January 1 of this year and ending on the date of death, must be prepared and filed, if Decedent had sufficient gross income, and any tax due must be paid. As the administration of this estate progresses, we will be in a better position to evaluate the need to file such returns. If required the returns must be filed and the taxes paid on or before April 15 of the year following Decedent's death.

A Federal fiduciary income tax return for Decedent's estate (IRS form 1041) may be required in all years in which the estate's income exceeds \$600.00. The beginning of the first year is the date of death, and will

normally end on December 31 or at the end of any other month which we may select, provided that it does not exceed one year from the date of decedent's death. Within a short time, we will determine together the tax year of the estate, as well as the need for the preparation and filing of these returns. A New Jersey return (N.J. Form 1041) for income received by the estate will generally be required in all years in which a Federal return is filed.

Normally we will wait until the closing of the estate to pay the expenses of administration, including fees, and to make final distributions. However, we may consider earlier partial distributions and payments, depending on such factors as the size of the taxable estate, the needs of the beneficiaries, good utilization of tax deductions, and avoidance of paying interest on specific bequest after one year from date of death.

After all known debts, administration expenses and taxes have been paid or provided for, we will then prepare a formal accounting which will be either informal (beneficiaries consent to accounting) or formal (court approves accounting). In the meantime, depending on the size of the estate and length of time of the administration, we may prepare one or more intermediate reports or accountings which will be distributed to interested parties.

Once we have received all the tax waivers and releases from liability for taxes and after the estate accounting has been approved either formally or informally, you will be in a position to make final distribution of the remaining assets to the appropriate beneficiaries. Prior to any distribution, whether it be partial or final, we will request that the beneficiaries sign a Release and Refunding Bond. This Bond signifies that the appropriate distributees have received their share of the inheritance, and release you, the personal representative, from further liability. It also stipulates that in the event additional taxes must be paid or other liabilities are found, each of the appropriate beneficiaries will refund the proportionate amount of funds distributed to them which are required to satisfy the deficiency.

My legal secretaries are experienced in probate matters and will be working closely with me in connection with the administration of the estate. In particular, she will be keeping our office file in order and working on the day-to-day bookkeeping for the estate. You should not hesitate to contact her regarding the status of routine estate matters. We will, of course, always be happy to answer your questions.

We hope this letter gives you a general outline of the manner in which the estate will be administered. We look forward to working closely with you in the coming months and shall keep you fully informed as to all pertinent developments.

Please do not hesitate to contact us if you have any questions regarding this letter or the estate at any time, your duties, or the procedures which we follow.

Sincerely,

James J. Curry, Jr.

JJC/tv
Enclosures

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REPLY TO: TOMS RIVER

Our File

October 1, 2011

RE:

Dear

Because of this letter agreement ("Agreement") describes our professional relationship and our agreement for fees and costs in this matter, I trust you will forgive its formal nature. Our agreement to this representation is under the following terms and conditions:

1. It is understood that we will represent you in the captioned matter. The words "you" and "your" throughout this Agreement refers to _____. Please note that, as the attorney for the estate, we represent you in your capacity as administrator of the estate, not personally, but rather in your fiduciary capacity. In the event that you wish for us to represent you individually, or any of the beneficiaries individually, we, of course, will be happy to discuss that with you. The words "we," "us" and "our" refers to the law firm of James J. Curry, Jr., LL.M. In representing you, we will perform all legal services reasonably necessary and advise you of what legal action, if any, would be in your best interest.

2. Our general fee for legal services is \$325.00 per hour for my services; \$250.00 per hour for James R. Icklan, Esquire; and \$200.00 per hour for Timothy J. Petrin, Esquire, together with, if required, paralegal at the rate of \$150.00 per hour, plus any out-of-pocket as described in paragraph 5 below.

3. We shall represent you regarding the probate and administration of the estate of _____, assist you in collecting the assets of the estate, and prepare an accounting of your services as executor. In preparing the accounting, we may, in order to reduce the costs, retain the services of William Campbell, CPA,

an accounting firm with whom we have an ongoing relationship with regard to estate matters. You may, of course, designate a different accounting firm if you so choose.

4. All of our services in this matter will end unless otherwise agreed upon in a writing signed by us, when there is a final agreement, settlement, decision or judgment by the court. Not included in the scope of our representation are appeals from any judgments or orders of the court. Appeals are subject to separate discussion and negotiation between our firm and you. Also not included in the scope of this agreement are services you may request of us in connection with any other matter, action or proceeding.

5. You agree to be responsible for all costs incurred by us in representing you (which are separate from attorney's fees). You will be billed for these costs, which may include, but are not limited to, photocopies, long distance telephone charges, court fees, postage, messengers, fax charges, courier services, travel expenses, local and interstate delivery charges, fees to outside companies (such as, but not limited to, title companies, corporate service companies, process servers) and investigator's fees. You hereby authorize us to incur these costs on your behalf. At our discretion, invoices for any such costs may be sent directly to you for payment. In any event, you will promptly pay all such costs, regardless of the outcome or status of any legal action on your claims.

6. At the time you have signed this agreement, you have agreed to give us a check in the amount of \$2,000.00. This amount shall be applied to the disbursements and fees described above.

7. We will bill you for disbursements and fees monthly, as they are incurred. We may allow small bills to accumulate for two months before billing you, but we will bill you at least once every two months. In the event that the estate is not liquid, we are willing to await payment until funds are liquidated.

8. You agree that we have the right to withdraw from representing you in this matter if you do not make the payments required by this Agreement, if you misrepresent or fail to disclose material facts to us, or in the event we determine the continuing services to you would be unethical or improper or for any other reason. In any of these events, you will pay all amounts owing under this Agreement within 30 days after receipt of our final notice for services rendered and costs incurred prior to the date of withdrawal. In the event that there is an unused portion of the retainer which may not have been applied to our invoices, we shall refund any such unused part of the retainer within 30 days after sending our final invoice.

9. In the event of a dispute regarding any invoices sent to you by our firm, we, of course, will comply with the New Jersey Rules of Court and Canons of Professional Ethics, if this dispute is submitted to any fee arbitration panel established by the New Jersey Supreme Court, or is the subject of an application for fee approval by the appropriate Surrogate Court, whichever has jurisdiction in any fee dispute.

10. You and we each have the right to terminate our legal representation in this matter at any time upon written notice, provided that any such termination shall in no way affect your responsibility to pay the fees and disbursements due to us through the date of such termination. In the event that any arbitration proceeding or legal action relating to the subject matter of this Agreement is instituted by either you or us, the prevailing party shall be entitled to an award of reasonable attorney's fees and other costs incurred as a result of the action or proceeding.

11. This Agreement is the entire agreement between you and us, and no portion of it may be changed

or waived unless the change is in writing and signed by both you and us.

12. Please read this Agreement carefully. You may seek the advice of an independent lawyer of your choice about its terms before deciding whether to sign it. If you would like us to represent you in this matter according to the terms of this Agreement, please sign and date one copy of this letter and return it to us.

13. The person(s) executing this letter on your behalf personally represents that he (they) is (are) duly authorized to do so.

14. Attached to this retainer agreement are the Statement of Client's Rights and the Statement of Client's Responsibilities, which you acknowledge receiving and reading.

We appreciate the opportunity to represent you in this matter, and we look forward to a mutually satisfying relationship.

Very truly yours,

James J. Curry, Jr.

JJC/tv

I HAVE READ THE UNDERSTAND THE TERMS AND CONDITIONS OF THIS LETTER AGREEMENT AND ACCEPT THE AGREEMENT.

Date: _____

Signature

NEW JERSEY PRACTICE

Volume 7

Wills and Administration

A Text on the Law of Wills, Testamentary Trusts
Future Interests, Descent and Distribution, Dower
and Curtesy and Equitable Conversion and
the Procedural Law of Probate,
Administration, Guardianship,
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with Forms

REVISED THIRD EDITION

By

ALFRED C. CLAPP

and

DOROTHY G. BLACK

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NEW JERSEY PROBATE PROCEDURES MANUAL

Navigating a New Jersey Estate Administration

VOLUME II

Gerard G. Brew, Esq.

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PUBLICATION UPDATE

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How To Save Time & Taxes Handling Estates

Publication 00203

Release 65

April 2011

HIGHLIGHTS

- Release 65 of *How to Save Time & Taxes Handling Estates* is completely up-to-date for the latest rulings, regulations, and cases, and reflects the legislative changes made by the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010.
- For the complete collection of estates practice information and resources available online, sign onto Lexis.com® and follow this path: Legal > Area of Law by Topic > Estates, Gifts & Trusts

Highlights of this release include:

Federal Wealth Transfer Taxation in 2010. Chapter 23 has been completely rewritten to cover the following:

- legislative enactments impacting 2010 estate planning (see § 23.01);
- factors in deciding to make the election into the carryover basis rules (see § 23.02);
- making the carryover basis election (see § 23.03);

- income tax basis rules applicable to property acquired from a decedent estate making carryover basis election (see § 23.04);
- continued enforcement of the federal gift tax in 2010 (see § 23.05); and
- filing requirements (see § 23.06).

Basic Principles of the Federal Estate Tax. Chapter 1 includes new coverage of the application of the federal estate tax in the following areas:

- temporary amendments to the federal estate tax (see § 1.01[1]);
- estates of decedents dying in 2010 (see § 1.01[2]); and
- estates of decedents dying in 2011 and 2012 (see § 1.01[3]).

Marital Deduction. Chapter 12 now explores planning dependent on the deceased spousal unused exclusion amount (see § 12.15[1]), post-mortem planning to obtain optimal marital deduction without use of the deceased spousal unused exclusion amount (see § 12.15[2]), and transferring

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Law & Business

2011-2 SUPPLEMENT

ESTATE & TRUST LITIGATION

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APPENDIX E

OUTLINE OF RELEVANT INTERNAL REVENUE CODE SECTIONS

SUBCHAPTER J

ESTATES, TRUSTS, BENEFICIARIES AND DECEDENTS

PART I - ESTATES, TRUSTS AND BENEFICIARIES

Subpart A – General Rules for Taxation of Estates and Trusts

- Sec. 641. Imposition of tax.
- Sec. 642. Special rules for credits and deductions.
- Sec. 643. Definitions applicable to Subparts A, B, C, and D.
- Sec. 644. Taxable year of trusts.
- Sec. 645. Certain revocable trusts treated as part of estate.
- Sec. 646. Tax Treatment of electing Alaska Native Settlement Trusts.

Subpart B – Trusts Which Distribute Current Income Only

- Sec. 651. Deduction for trusts distributing current income only.
- Sec. 652. Inclusion of amounts in gross income of beneficiaries of trusts distributing current income only.

Subpart C – Estates and Trusts Which May Accumulate Income or Which Distribute Corpus

- Sec. 661. Deduction for estates and trusts accumulating income or distributing corpus.
- Sec. 662. Inclusion of amounts in gross income of beneficiaries of estates and trusts accumulating income or distributing corpus.
- Sec. 663. Special rules applicable to sections 661 and 662.
- Sec. 664. Charitable remainder trusts.

APPENDIX E (continued)

Subpart D – Treatment of Excess Distributions by Trusts

- Sec. 665. Definitions applicable to Subpart D. ⁽¹⁾
- Sec. 666. Accumulation distribution allocated to preceding years. ⁽¹⁾
- Sec. 667. Treatment of amounts deemed distributed by trust in preceding years. ⁽¹⁾
- Sec. 668. Interest charge on accumulation distributions from foreign trusts.

⁽¹⁾ Repealed (except for certain multiple trusts created before March 1, 1984 and for all foreign trusts) for distributions made in taxable years beginning after August 5, 1997.

Subpart E – Grantors and Others Treated as Substantial Owners

- Sec. 671. Trust income, deductions, and credits attributable to grantors and others as substantial owners.
- Sec. 672. Definitions and rules.
- Sec. 673. Reversionary interests.
- Sec. 674. Power to control beneficial enjoyment.
- Sec. 675. Administrative powers.
- Sec. 676. Power to revoke.
- Sec. 677. Income for benefit of grantor.
- Sec. 678. Person other than grantor treated as substantial owner.
- Sec. 679. Foreign trusts having one or more United States beneficiaries.

Subpart F – Miscellaneous

- Sec. 681. Limitation on charitable deduction.
- Sec. 682. Income of an estate or trust in case of divorce, etc.
- Sec. 683. Use of trust as an exchange fund.
- Sec. 684. Recognition of gain on certain transfers to certain foreign trusts and estates.
- Sec. 685. Treatment of funeral trusts.

PART II – INCOME IN RESPECT OF DECEDENTS

- Sec. 691. Recipients of income in respect of decedents.
- Sec. 692. Income taxes of members of Armed Forces and victims of certain terrorist attacks on death.

APPENDIX A*
Estate's Control Sheet

Estate of _____

Date Prepared: _____ By: _____

Responsible Partner/Lawyer: _____

BASIC DATA

Office file number: _____ Court Docket No.: _____

Date of death: _____

Place of death: _____ Date of Birth: _____

Domicile: _____

Date of Birth: _____ Social Security Number: _____

Marital Status: _____ Spouse's Name: _____

If widow or widower, provide SSN and DOD: _____

Estate's BIN: Trust #1 EIN: _____

Trust #2 EIN: _____

Surrogate's Court: _____

PROBATE/ADMINISTRATION PROCEEDING

Date of Will: _____

Date(s) of Codicil(s): _____

Date of Revocable Trust Agreement: _____

Date(s) of Revocable Trust Amendment(s): _____

Date Preliminary/temporary letters issued: _____

Executor(s)/Administrator(s): _____

Date letters of trusteeship issued: _____

Trustee(s): _____

Estimated value of estate for Federal estate tax purposes: _____

Estimated amount of Federal estate taxes due: _____

Estimated amount of State estate taxes due: _____

CRITICAL DATES:

Date Order to Show Cause returnable: _____

Date of safe deposit box opening: _____

End of estate's fiscal year: _____

Date estate's Federal and New Jersey fiduciary income tax returns due: _____

Date other state(s) fiduciary income tax return(s) due: _____

Alternate valuation date: _____

Date to file disclaimer: _____
 Final date to pay estimated New Jersey estate tax: _____
 Final date to pay other state(s) estimated death tax: _____
 Final date for surviving spouse to file notice of election: _____
 Final date to pay legacies without interest: _____
 Final date to file qualified disclaimers: _____
 Final date to make QTIP election: _____
 Date decedent's final Federal and New Jersey income tax returns due: _____
 Date decedent's other state(s) final income tax return(s) due: _____
 Date decedent's final Federal gift tax return due: _____
 Date Federal estate tax return due without extension: _____
 Date Federal estate tax return due with extension: _____
 Date statute of limitations runs on Federal estate tax return: _____
 Date letter sent to IRS requesting gift tax returns: _____
 Date New Jersey estate tax return due without extension: _____
 Date New Jersey estate tax due with extension: _____
 Date for request for refund: _____
 Date other state(s) death tax return(s) due without extension: _____
 Date other state(s) death tax return(s) due with extension: _____

CONTACT INFORMATION

PROFESSIONALS

Other Attorney

Name: _____ Phone: _____
 Firm: _____
 Address: _____
 Email: _____

Accountant

Name: _____ Phone: _____
 Firm: _____
 Address: _____
 Email: _____

Stock Broker/Investment Advisor

Name: _____ Phone: _____
 Firm: _____
 Address: _____
 Email: _____

Casualty Insurance Broker

Name: _____ Phone: _____
 Firm: _____
 Address: _____
 Email: _____

Appraiser
me: _____ Phone: _____
Firm: _____
Address: _____
Email: _____

FAMILY MEMBERS

Name: _____ Relationship: _____
Phone: _____ Email: _____
Address: _____
Interest in Estate: _____

Name: _____ Relationship: _____
Phone: _____ Email: _____
Address: _____
Interest in Estate: _____

Name: _____ Relationship: _____
Phone: _____ Email: _____
Address: _____
Interest in Estate: _____

Name: _____ Relationship: _____
Phone: _____ Email: _____
Address: _____
Interest in Estate: _____

Name: _____ Relationship: _____
Phone: _____ Email: _____
Address: _____
Interest in Estate: _____

* This Appendix was adapted from the Probate Data Packet, New York Probate, published by Thomson Reuters/West, 2011.

APPENDIX B

Schedule to Determine Estimated Cash Requirements

Estate of _____

Date of death: _____

Estimated Gross Estate:		
Real Estate		
Stocks & Bonds		
Mortgages, Notes and Cash		
Life Insurance		
Jointly-Owned Property		
Other Miscellaneous Property		
Annuities		
TOTAL Estimated Gross Estate		
Less: Funeral Expenses, Administration Expenses, Debts		
Funeral expenses		
Executor(s) commissions (est.)		
Legal fees (est.)		
Accounting expenses (est.)		
Appraisals, shipping, etc.		
Miscellaneous Expenses, including: Apartment maintenance Continuing business expenses Insurance Final income taxes		
Debts of the decedent (est.)		
Total Expenses		
Less: Estate Taxes		
Federal estate taxes (est.)		
New York State estate tax (est.)		
Other state estate or inheritance taxes (est.)		
Total Estate Taxes		
Less: Cash Legacies		
Bequest		
Bequest		
Total Cash Legacies		
TOTAL Estimated Cash Needs		



The Compassionate Friends

The Compassionate Friends Credo

We need not walk alone. We are The Compassionate Friends.
 We reach out to each other with love, with understanding, and with hope.
 The children we mourn have died at all ages and from many different causes,
 but our love for them unites us. Your pain becomes my pain, just as your hope
 becomes my hope. We come together from all walks of life, from many different
 circumstances. We are a unique family because we represent many races,
 creeds, and relationships. We are young, and we are old. Some of us are far
 along in our grief, but others still feel a grief so fresh and so intensely painful
 that they feel helpless and see no hope. Some of us have found our faith
 to be a source of strength, while some of us are struggling to find answers.
 Some of us are angry, filled with guilt or in deep depression,
 while others radiate an inner peace. But whatever pain we bring to this gathering
 of The Compassionate Friends, it is pain we will share, just as we share with
 each other our love for the children who have died. We are all seeking and
 struggling to build a future for ourselves, but we are committed to building a future
 together. We reach out to each other in love to share the pain as well as the joy,
 share the anger as well as the peace, share the faith as well as the doubts,
 and help each other to grieve as well as to grow.
We Need Not Walk Alone. We Are The Compassionate Friends.

[Home](#)

[Credo](#)

[National Organization](#)

[Location](#)

[Coming Events](#)

[Newsletter](#)

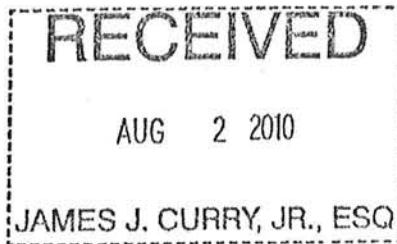
Siblings Walking Together (Formerly The Sibling Credo)

We are the surviving siblings of The Compassionate Friends.
 We are brought together by the deaths of our brothers and sisters.
 Open your hearts to us, but have patience with us.
 Sometimes we will need the support of our friends.
 At other times we need our families to be there.
 Sometimes we must walk alone, taking our memories with us,
 continuing to become the individuals we want to be.
 We cannot be our dead brother or sister;
 however, a special part of them lives on with us.
 When our brothers and sisters died, our lives changed.
 We are living a life very different from what we envisioned,
 and we feel the responsibility to be strong even when we feel weak.
 Yet we can go on because we understand better than many others
 the value of family and the precious gift of life.
 Our goal is not to be the forgotten mourners that we sometimes are,
 but to walk together to face our tomorrows as surviving siblings of
The Compassionate Friends.



[Site design and maintenance by](#)
[DFW Personal Assistant.](#)

Internal Revenue Service



Department of the Treasury

Date: July 28, 2010

JAMES J CURRY JR ESQ
505 MAIN ST
TOMS RIVER, NJ 087537443054

Taxpayer Name:

Taxpayer Identification Number:

Form Number:
706

Year(s):

Person to Contact/ID Number:

Contact Telephone Number:

Contact Fax Number:

Dear James J Curry Jr ESQ:

We are sending the enclosed material under the provisions of your power of attorney or other authorization we have on file. For your convenience, we have listed the name of the taxpayer to whom this material relates in the heading above.

If you have any questions, please call the contact person at the telephone number shown in the heading of this letter.

Thank you for your cooperation.

Sincerely,

Chief, Estate and Gift Tax Program

Enclosures:

- ☒ Letter(s)
- ☒ Report(s)
- ☐ Copy of Determination Letter
- ☐ Other:

Date: July 28, 2010

Person to Contact:

Employee Identification Number:

Contact Telephone Number (Toll Free):

Estate Name:

Social Security Number:

Date of Death:
01/07/2008

Estate Tax Closing Document
(Not a bill for tax due)

We have made the following determination on the estate tax return referenced above.

Net Estate Tax	*\$	1,027,710.00
State Death Tax Credit/Deduction**	*\$	652,569.00
Generation-Skipping Tax	*\$	0.00

*These figures do not include any interest and penalties that may be charged.

** For dates of death after 12/31/04, this amount represents the State Death Tax Deduction.

This letter is evidence that the Federal Estate Tax Return has either been accepted as filed or has been accepted after an adjustment to which you have agreed. You should keep this letter as a permanent record. You may need it to close probate proceedings, transfer title to property and/or settle state taxes.

If the estate elects and qualifies to pay the estate tax in installments under Internal Revenue Code section 6166 and the IRS has not contacted you, the IRS will contact you to determine whether the estate is required to provide a bond, or alternatively a special extended lien under section 6324A, and may request additional financial information to make this determination. The IRS will continue to monitor whether the government's interest is at risk throughout the section 6166 installment payment period.

This letter is not proof that any amount of tax due has been paid. If you have requested a discharge from personal liability under section 2204, proof of full payment of the amounts shown above (plus applicable interest and penalties) releases you of personal liability. If payment is not timely made or the time for payment is extended under sections 6161, 6163, or 6166, there is a lien on all estate property for the federal estate tax due for 10 years from the date of death or until the entire balance is paid, whichever date is earlier.

We will not reopen or examine this return unless you notify us of changes to the return or there is: (1) evidence of fraud, malfeasance, collusion, concealment, or misrepresentation of a material fact; (2) a clearly defined substantial error based upon established Internal Revenue Service position; or (3) a serious administrative error. (See Revenue Procedure 2005-32, 2005-1 Cumulative Bulletin 1206.)

Sincerely,

Chief, Estate and Gift Tax Program

Form 890
(Rev. Oct. 1988)

Department of the Treasury - Internal Revenue Service
*Waiver of Restrictions on Assessment and Collection
of Deficiency and Acceptance of Overassessment --
Estate, Gift, and Generation-Skipping Transfer Tax*
(Please see the instruction on the second page of this form)

RECEIVED
INTERNAL REVENUE SERVICE
SB/SE COMPLIANCE
Date Received by
Internal Revenue
Service
JUN 15 2010

Part 1, Consent to Assessment and Acceptance of Overassessment

Examination Area (Central)

Philadelphia Territory

Group 1153

I consent to the immediate assessment and collection of any deficiencies (increase in tax and penalties) shown below, plus any interest provided by law. I understand that by my signature on this waiver, a petition to the United States Tax Court may not be made, unless additional deficiencies are determined.

Date of Death or
Period Ending

1 7 2008

Item	Increase	Decrease
Tax	0	53,385
Penalty	0	0
Total	0	53,385

If the estate is required to file with the Area Director of Internal Revenue evidence of payment of estate, inheritance, legacy, succession or generation-skipping transfer taxes to any State or the District of Columbia, I understand that such evidence must be filed by _____, or the credits for these taxes will not be allowed. I also agree to the assessment and collection of the increase in estate tax and penalties of _____ based on the disallowed credits, plus interest figured to the 30th day after _____ or until this increase is assessed, whichever is earlier.

RECEIVED
INTERNAL REVENUE SERVICE
SB/SE COMPLIANCE

JUN 15 2010

Examination Area (Central)
Philadelphia Territory
Group 1153

Estate of

Executor or
Administrator

Sign \
Here /
Address

Date

6/10/10

Executor or
Administrator

Sign \
Here /
Address

Date

Donor

Name
Address

Donor's
Signature

Sign \
Here /

Date

Form 890 (Rev. 10-66)

Estate of		Social Security Number	Date of Death 1 7 2008
Name of Person With Whom Findings Were Discussed: James Curry, Esq		Agreement Secured [x] Yes [] No	
1	Tentative taxable estate on return	5,077,599	
2	Increase <decrease> in tentative taxable estate	<141,229>	
3a	Tentative taxable estate as corrected	4,936,370	
		Shown on Return	As Corrected
3b	State Death Tax Deduction	675,165	652,569
3c	Taxable estate as corrected	4,402,434	4,283,801
4	Adjusted Taxable Gifts	0	0
5	Total	4,402,434	4,283,801
6	Tentative Tax	1,861,895	1,808,510
7	Aggregate Gift Tax Payable	0	0
8	Tax before Unified Credit	1,861,895	1,808,510
9	Unified Credit from Table	780,800	780,800
10	Adjustment to Unified Credit	0	0
11	Net Unified Credit	780,800	780,800
12	Tax before SDTC	1,081,095	1,027,710
13	State Death Tax Credit	0	0
	Tentatively allowed		
	Submit evidence by		
14	Net Tax after State Death Tax Credit	1,081,095	1,027,710
15	Gift Tax Credit	0	0
16	Foreign Death Tax Credit (Statutory)	0	0
17	Prior Transfer Credit	0	0
18	Foreign Death Tax Credit (Treaty)	0	0
19	Total Credits	0	0
20	Estate Tax	1,081,095	1,027,710
21	Generation Skipping Transfer Tax	0	0
22	Increased Estate Tax	0	0
23	Total Federal Tax	1,081,095	1,027,710
24	Total transfer tax previously assessed		1,081,095
25	Total transfer tax - Increase <decrease>		<53,385>
26	Penalties previously assessed		0
27	Penalties as corrected		0
28	Net penalties - Increase <decrease>		0
29	Net tax and penalties payable - Increase <decrease>		<53,385>

Examiner's Signature

Area
EasternDate
5 17 2010

Form 1273 (Rev. 12/05)

Page 2



State of New Jersey
DEPARTMENT OF THE TREASURY
DIVISION OF TAXATION
RESIDENT INHERITANCE TAX

TAXPAYER ID NO :
DECEDENT'S NAME:
DLN :
RESIDENCE : OCEAN
DATE OF DEATH : 01/07/08

NOTICE OF ASSESSMENT

This is a current statement of your account, as of 11/05/08. It is based upon the return filed and any processing corrections made by the Division. If the return has been selected for audit, and the audit has been completed, it also reflects any audit adjustments made by the Division.

DATE RECEIVED: 09/08/08

CURRENT BALANCE

1. TOTAL TAX DUE	\$ 675,165.00
2. AMNESTY PENALTY	0.00
3. INTEREST TO 12/20/08	0.00
4. TOTAL AMOUNT DUE	\$ 675,165.00
5. LESS AMOUNT PAID	675,165.00
6. REFUNDS PREVIOUSLY ISSUED	0.00
7. BALANCE DUE	\$ 0.00

SEE REVERSE FOR INTEREST EXPLANATION AND APPEAL RIGHTS

QUESTIONS?

If you have any questions regarding this notice, call the Division of Taxation's Individual Tax Audit Branch - Inheritance and Estate Tax Section at 1-609-292-5033.

PROTEST and APPEAL

The determination as reflected in this notice shall be final within 90 days of the date of this notice unless a written letter of protest is submitted requesting a Conference or an Administrative Review with the Division of Taxation or a complaint is filed with the Tax Court of New Jersey.

1. To apply for a Conference or an Administrative Review, send a written request to the Individual Tax Audit Branch - Inheritance Tax within 90 days of the date of this notice. Your request containing the legal and/or factual basis for the protest, should be addressed to: Chief, Individual Tax Audit Branch, NJ Division of Taxation, 50 Barrack Street, PO Box 249, Trenton, NJ 08695-0249

OR:

2. You may file an appeal/complaint with the Tax Court of New Jersey within 90 days of the date of this notice. To obtain a form and copy of the rules for the filing of a complaint, or to file a complaint, write to:
Tax Court of New Jersey, Richard J. Hughs Justice Complex, PO Box 972, Trenton, NJ 08625-0972

NOTE: An appeal will not stay the collection of any tax or the enforcement of payment by entry of a judgement, unless by order of the Tax Court. In lieu of payment, security approved by the Director, Division of Taxation may be submitted to halt further enforcement and collection action.

If you do not pay your tax liability or request a review within the 90 day period, collection proceedings will begin.

In order to be valid, a protest must be made in writing, signed by the estate representative, certified to be true, and contain the following:

a) Whether a phone conference, an in-person conference or administrative review without a conference is requested; b) The decedent's name, date of death, social security number and county of residence; c) The name, address and telephone number of the estate representative whom the Branch should contact in connection with the protest; d) a copy of the assessment or determination subject to the protest; the specific amount of tax, penalty and/or interest under protest; e) A full explanation of the grounds on which the protest is based; f) The specific facts supporting the protest and a summary of the evidence, or documentation to be presented in support of the estate's contention. All evidence and documentation should be submitted prior to the conference or review.

*If this is a corrected Notice of Assessment that reflects a change in the total tax due, the protest and appeal rights listed above apply only to the findings and changes which are covered by this corrected notice. The findings and changes are set forth on the Analysis of Tax which is attached. You were previously advised of your protest and appeal rights regarding issues raised in prior assessments and not changed by this notice. Your time for filing an appeal or protest on those issues is **NOT** extended by this corrected notice.*

If this Notice of Assessment only reflects additional interest or the receipt of payment(s), your protest and appeal rights were set forth on the back of the Notice(s) of Assessment previously forwarded to you. This notice does not constitute a corrected assessment.

As an alternative to protesting or appealing an audit assessment made with respect to a decedent dying on or after January 1, 1999, an estate that does not timely protest or appeal the audit assessment may pay the audit assessment and then file for a refund of the payment. However, the estate must (1) pay the entire audit assessment, including all penalties and interests, within one year after the time for filing the protest or appeal expires and (2) file the refund claim on Form A-1730 with all supporting documentation within 450 days after the time for filing the protest or appeal expires.

Note: Per R.S. 54:49-6(b), the Branch may make additional or corrected assessments up to four (4) years after the original assessment should material errors, omissions or information be discovered.

INTEREST CHARGES*

INHERITANCE TAX

Interest accrues at the rate of 10% per annum on any direct tax or portion thereof not paid within eight months of the decedent's death.

Interest accrues at the rate of 10% per annum on any contingent tax or portion thereof not paid within two months from the date the contingency occurs. However, if the contingency occurs prior to the expiration of the eight month period stated above, interest will not be due until after the expiration of said eight month period.

ESTATE TAX

Interest accrues at the rate of 10% per annum on any New Jersey Estate Tax or portion thereof not paid within nine months of the date of the decedent's death, in an estate of a decedent whose date of death was on or after March 1, 1992.
Interest accrues at the rate of 6% per annum on any New Jersey Estate Tax or portion thereof not paid within eighteen months of the date of the decedent's death, in an estate of a decedent whose date of death was before March 1, 1992.

*Note: All payments are applied to interest first. Interest subsequent to payments is computed on the remaining balance.

inhpa4(rev.08/29/2007)

CORRECTED ASSESSMENT**STATE OF NEW JERSEY
DEPARTMENT OF TREASURY
DIVISION OF TAXATION
TRANSFER INHERITANCE TAX SECTION**

PAGE 1

(FORM 0-3)

04/02/02

ASSESSMENT IN RE: _____

ESTATE OF _____

OF _____

OCEAN COUNTY

LATE RESIDENT OF _____

DATE OF DEATH _____

January 7, 2008

ASSESSMENT DATED _____

AUDITOR _____

AMOUNT OF ESTATE:

REAL	\$	150,000.00
PERSONAL	\$	4,683,743.00
TRANSFERS	\$	0.00

TOTAL \$ 4,833,743.00

DEBTS, EXPENSES ETC. 147,373.00

NET ESTATE 4,686,370.00

EXEMPT & CONTINGENT INTERESTS 475,000.00

TAXABLE INTERESTS 4,211,370.00

***COMPROMISE TAX = 0.00

WILL		ANALYSIS OF TAX				DIRECT TAX		652,569.21
PROPERTY PASSING TO FOLLOWING		VALUE OF PROPERTY	RELATION TO DECEDENT	CLASS	EXEMPT AND CONTINGENT	TAXABLE	RATE	TAX
David W. Longley								
Cash Beq.	t	325,000.00	step son	A	325,000.00	0.00		0.00
Warren Longley								
Cash Beq	t	150,000.00	step son	A	150,000.00	0.00		0.00
Robert Neary								
Cash Beq.	t	25,000.00	stepson in law	D	0.00	25,000.00	15%	3,750.00
Michael Kraykowski								
1/3 of Residue	t	1,395,456.66	nephew	D	0.00	1,395,456.66	15-16%	216,273.07
Leo Kraykowski								
1/3 of Residue	t	1,395,456.67	nephew	D	0.00	1,395,456.67	15-16%	216,273.07
Stephen Kraykowski								
1/3 of Residue	t	1,395,456.67	Nephew	D	0.00	1,395,456.67	15-16%	216,273.07
TOTALS		4,686,370.00			475,000.00	4,211,370.00		652,569.21
REPORTED AMT.		DETERMINED AMT.	REASON FOR CHANGE					
\$4,829,918.00		\$4,683,743.00	Sch. B1-total of schedule-change pursuant to Amended IT-R					
\$152,319.00		\$147,373.00	Sch. D-total of schedule-change pursuant to Amended IT-R					
			Change is pursuant to IRS closing letter dated 7-28-10					

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF TAXATION
TRANSFER INHERITANCE TAX
NEW JERSEY ESTATE TAX

ISSUED: November 5, 2010

File No:

IN THE MATTER OF THE ESTATE OF:

THIS WAIVER SHOULD BE
IMMEDIATELY FORWARDED TO:

Late of: OCEAN COUNTY

WACHOVIA

Date of Death: Jan 24, 2007

The Director, Division of Taxation, hereby waives the requirements of Revised Statutes 54:35-19 and 21 and 54:38-6, and the amendments thereof and supplements thereto, with respect to the property herein described: consents to the transfer of said property and releases said property from the lien of the State of New Jersey. TO AVOID PENALTY PROVISIONS OF N.J.S.A. 54:35-20, THE FULL AMOUNT OF DEPOSITS ON DATE OF DEATH MUST BE SHOWN.

This document may NOT be reproduced, and MUST be printed on State of New Jersey watermarked paper.

- | | | |
|----|-------------|---------------------|
| 1) | \$101.00 | IN NAME OF DECEDENT |
| 2) | \$131.00 | IN NAME OF DECEDENT |
| 3) | \$10,960.00 | IN NAME OF DECEDENT |
| 4) | \$267.00 | IN NAME OF DECEDENT |
| 5) | \$5,552.00 | IN NAME OF DECEDENT |

NJ Division of Taxation

If corrected waiver is needed, write to: NJ Inheritance Tax, PO Box 249, Trenton, NJ 08695-0249 and enclose original or copy thereof.

SB

FORM 0-1
(09-02)

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF TAXATION
TRANSFER INHERITANCE TAX
NEW JERSEY ESTATE TAX

INSTR # 2010106581
DR BK 14744 PG 0030
RECORDED 11/16/2010 08:52:03 AM
SCOTT M. COLABELLA
ACTING COUNTY CLERK
OCEAN COUNTY, NEW JERSEY

ISSUED: Nov 05, 2010

IN THE MATTER OF THE ESTATE OF:

File No:

Date of Death: Jan 24, 2007

Date of: OCEAN COUNTY

This Waiver should be immediately filed with:

THE COUNTY CLERK OF OCEAN COUNTY, TOMS RIVER, NJ

With appropriate filing fee as determined by county.

The Director, Division of Taxation, hereby waives the requirements of Revised Statutes 54:35-19 and 21 and 54:38-6, and the amendments thereof and supplements thereto, with respect to the property herein described: consents to the transfer of said property and releases said property from the lien of the State of New Jersey.

This document may NOT be reproduced, and MUST be printed on State of New Jersey watermarked paper.

1) PROPERTY SITUATE AND KNOWN AS
OCEAN COUNTY, NJ

, LOT , BLOCK , WARETOWN,

NO ENTRIES BELOW THIS LINE

NJ Division of Taxation

If corrected waiver is needed, write to: NJ Inheritance Tax, PO Box 249, Trenton, NJ 08695-0249 and enclose original or copy thereof.

R R

JAMES J CURRY JR ESQ
505 MAIN STREET
TOMS RIVER, NJ 08753

DELIVERY ADDRESS:

CURRY A - 31

\$15 chg 4/18 Curry

SB

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF TAXATION
TRANSFER INHERITANCE TAX
NEW JERSEY ESTATE TAX

ISSUED: November 5, 2010

File No:

IN THE MATTER OF THE ESTATE OF:

THIS WAIVER SHOULD BE
IMMEDIATELY FORWARDED TO:

Late of: OCEAN COUNTY

TEMPLETON GROWTH FUND

Date of Death: Jan 24, 2007

The Director, Division of Taxation, hereby waives the requirements of Revised Statutes 54:35-19 and 21 and 54:38-6, and the amendments thereof and supplements thereto, with respect to the property herein described: consents to the transfer of said property and releases said property from the lien of the State of New Jersey. **TO AVOID PENALTY PROVISIONS OF N.J.S.A. 54:35-20, THE FULL AMOUNT OF DEPOSITS ON DATE OF DEATH MUST BE SHOWN.**

This document may NOT be reproduced, and MUST be printed on State of New Jersey watermarked paper.

1) \$82,867.00 IN NAME OF DECEDENT

NJ Division of Taxation

If corrected waiver is needed, write to: NJ Inheritance Tax, PO Box 249, Trenton, NJ 08695-0249 and enclose original or copy thereof.

SB

James J. Curry, Jr., Substitute Administrator CTA
Attorney at Law
505 Main Street
Toms River, New Jersey 08753

In the Matter of the Estate
of

ADMINISTRATOR'S FIRST
AND FINAL ACCOUNTING

The account of James J. Curry, Jr., Administrator of the Estate of deceased, covering the period of administration from date of appointment, February 23, 2005, to February 28, 2006, shows as follows:

AS TO CORPUS

CORPUS CHARGES ARE AS FOLLOWS:

Assets Received, per Schedule A	\$2,478,088
Unrealized Gains on Assets on Hand, per Schedule B	<u>352,500</u>
Total Corpus Charges	<u>2,830,588</u>

AS TO CORPUS

CORPUS ALLOWANCES ARE AS FOLLOWS:

Corpus Distributions, per Schedule D	\$ 16,500
Corpus Disbursements, per Schedule E	<u>119,348</u>
Total Corpus Allowances	<u>135,848</u>

OTHER RECEIPTS ARE AS FOLLOWS:

Other Receipts, per Schedule F	<u>48,558</u>
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INCOME CHARGES ARE AS FOLLOWS:

Income Receipts, per Schedule G	<u>50,601</u>
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Total Corpus and Income on Hand As of February 28, 2006, per Schedule H	<u>\$2,793,899</u>
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James J. Curry, Jr.
Substitute Administrator CTA

Dated: March 10, 2006

AS TO CORPUS

SCHEDULE A

PAGE 1 of 1

ASSETS RECEIVED

Value at _____
February 3, 2005

Real Estate

Real estate values are presented at date of death (May 7, 2004) values based on appraisals and comparative market analyses. No adjustments have been made to reflect appreciation or depreciation of the values of the properties between date of death and date of appointment.

50% interest in the decedents residence at NJ (appraised value \$473,000)	\$ 236,500
Residence, (comparative market analysis value) , FL Asset subject to ancillary jurisdiction by	355,000
Residential rental property, , NJ (appraised value)	555,000
Residential rental property, , NJ (appraised value)	436,000
Three parking spaces, NJ (appraised value)	30,000
Investment property, , FL (appraised value)	5,000
Investment property, NJ (appraised value)	46,000
Investment property, Township of , NJ Block , Lots and	10,000

Investments

100% interest,	Inc.	9,384
1,664 Shares,	Inc.	33,280

AS TO CORPUS

SCHEDULE A

PAGE 1 of 1

ASSETS RECEIVED

Value at
February 3, 2005

Investments

Incorporated	
100% interest in a 40' Hatteras Yacht	\$ 145,000
Cash	1,105
(Yacht is valued at appraised value)	
Asset subject to ancillary jurisdiction by	
50% interest in	
(value reported on Federal Estate Tax Return. This	
amount is an estimated value; the actual value, yet	
to be determined, may vary significantly from this	
estimate.)	500,000

Cash and Retirement Accounts

50% of the cash on hand and in the decedents home	
after disbursements made by	
per separate Accounting of Funds for Esq.	
(not dated)	40,886
Accounts at Savings Bank:	
Checking account	18,950
Certificate of deposit #	3,589
Certificate of deposit #	5,798
Certificate of deposit #	2,208
Age 50 Plus Checking account #	9,475
Savings Bank Individual Retirement Account	11,619
Bank checking account #	
owned jointly with (50% of the	
balance in the account as of date of death	21,294

Other Assets

Two small boats	2,000
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Total Assets Received	<u>\$2,478,088</u>
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AS TO CORPUS

SCHEDULE B

PAGE 1 of 1

UNREALIZED GAINS ON ASSETS ON HAND

<u>Description</u>	<u>Value at February 23, 2005</u>	<u>Value at February 28, 2006</u>	<u>Unrealized Gain</u>
50% interest in the decedents residence at Toms River, NJ	\$ 236,500	\$ 300,000	\$ 63,500
Residential rental property Unit Hoboken, NJ	555,000	730,000	175,000
Residential rental property Unit Hoboken, NJ	436,000	550,000	<u>114,000</u>
Total Unrealized Gains On Assets on Hand			<u>\$ 352,500</u>

AS TO CORPUS

SCHEDULE D

PAGE 1 OF 1

CORPUS DISTRIBUTIONS

<u>Date</u> <u>2005</u>	<u>Payee</u>	<u>Amount</u>
<u>Cash Disbursements - Estate Checking Account</u>		
August 11		\$ 2,500
September 30		2,000
November 3		2,000
December 19		1,500
<u>Cash Disbursements - James J. Curry, Jr.</u> <u>Trust Account</u>		
June 6		6,000
June 30		<u>2,500</u>
Total Corpus Distributions		<u>\$ 16,500</u>

AS TO CORPUS

SCHEDULE E

PAGE 1 of 6

CORPUS DISBURSEMENTS

<u>Date</u> <u>2005</u>	<u>Payee</u>	<u>Amount</u>
<u>Cash Disbursements - Estate Checking Account</u>		
July 7	Bank charges	\$ 67
	Bank charges	
July 25		5,920
	Dues	
August 1	City of	18,243
	Taxes	
August 3	City of	27
	Taxes	
August 8	Mortgage Co.	1,395
	Mortgage	
August 10		1,466
	Dues	
September 6	Insurance	1,495
	Insurance	
September 6	Insurance	2,860
	Bond	
September 13	Mortgage Co.	2,412
	Mortgage	
September 13	Tax Collector	14
	Taxes	
September 19		2,020
	Dues	
September 16		1,346
	Dues	
September 26	City of	3,527
	Taxes	

AS TO CORPUS

SCHEDULE E

PAGE 2 of 6

CORPUS DISBURSEMENTS

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
2005		
October 4		
	Construction	\$ 15,000
October 5	Return Deposit - Rent	3,150
October 5	Bank Service Charge Bank Charges	10
October 5	Professional Fees, CPA	2,000
October 11	Mortgage Co. Mortgage	1,395
October 11	Insurance Fire Insurance Co.	311
October 20	James J. Curry, Jr. Attorney Fees	5,000
October 25	Dues	26
October 25	Attorney Fees	5,000
October 25	Appraisal Fee	600
November 3	Mortgage Co. Mortgage	3,021
November 3	Dues	259
November 16	Dues Condo	680
November 16	Mortgage Co. Mortgage	3,020

AS TO CORPUS

SCHEDULE E

PAGE 3 of 6

CORPUS DISBURSEMENTS

<u>Date</u> 2005	<u>Payee</u>	<u>Amount</u>
November 22	Appliance Repair	\$ 159
November 22	Dues	1,446
December 1	Professional Fees, CPA	1,263
December 5	Appraisal Fee	250
December 5	City of Taxes	235
December 5	City of Taxes	3,154
December 5	City of Taxes	118
December 19	Medical Report	1,750
December 19	Utilities	141
December 19	Utilities	100
December 27	Insurance Fire Insurance Co.	633
December 27	Dues	26
December 27	County Utilities	81
December 27	Mortgage Co. Mortgage	3,189

AS TO CORPUS

SCHEDULE E

PAGE 4 of 6

CORPUS DISBURSEMENTS

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
<u>2005</u> December 27	Utilities	\$ 167
<u>2006</u> January 16	Investigation	1,240
January 16	County Tax Collector Taxes	633
January 16	Mortgage Co. Mortgage	3,189
January 17	Reimbursement For Grave	1,725
January 23	Appraisal Fee	600
January 23	Dues	534
January 23	Utilities	176
January 23	Utilities	81
January 23	Title Search	110
January 25	Dues	35
January 25	New Jersey Natural Gas Utilities -	269
January 31	County Utilities Utilities	101
January 31	Tax Assessor Taxes	3,477

AS TO CORPUS

SCHEDULE E

PAGE 5 of 6

CORPUS DISBURSEMENTS

<u>Date</u>	<u>Payee</u>	<u>Amount</u>
2006		
February 9	JCP&L	
	Utilities	\$ 28
February 9	County Utilities	178
	Utilities	
February 9	Dues	505
February 9	Appraisal Fee	275
February 16	Mortgage Co.	3,189
	Mortgage	
February 16	Shorthand Reporter Fee	373
February 16	Fire Insurance Co.	517
	Insurance	
February 21	Utilities	282
February 23	Insurance	1,582
	Insurance	

Cash Disbursements - James J. Curry, Jr.
Trust Account

2005		
April 22	Shorthand Reporting	139
April 25	Fire Insurance Co.	305
April 25	Fire Insurance Co.	517
May 2	Mortgage Co.	1,827
May 3	Township Tax Collector	36
May 3	Township Tax Collector	15

AS TO CORPUS

SCHEDULE E

PAGE 6 of 6

CORPUS DISBURSEMENTS

<u>Date</u> <u>2005</u>	<u>Payee</u>	<u>Amount</u>
May 3	Township Tax Collector	\$ 244
May 17	Mortgage Co.	844
May 25	Mortgage Co.	1,827
June 7	Appraisal	550
July 5	Mortgage Co.	<u>969</u>
Total Corpus Disbursements		<u>\$ 119,348</u>

AS TO CORPUS

SCHEDULE F

PAGE 1 of 1

OTHER RECEIPTS

<u>Date</u> 2005	<u>Source</u>	<u>Amount</u>
<u>Deposits to Estate Checking Account</u>		
September 19	Technologies	\$ 3,338
September 20	Insurance proceeds received in connection with hurricane damage claim	<u>45,220</u>
Total Other Receipts		<u>\$ 48,558</u>

AS TO INCOME

SCHEDULE G

PAGE 1 OF 2

INCOME RECEIPTS

<u>Date</u>	<u>Source</u>	<u>Amount</u>
<u>2005</u>		
<u>Deposits to Estate Checking Account</u>		
June 24	- rent	\$ 9,360
July 7	- rent	1,900
July 25	- rent	1,900
August 10	rent	3,000
September 1	- rent	1,735
October 5	- rent	1,900
November 8	- rent	1,900
November 16	rent	3,200
November 30	Deposit Adjustment	1
December 1	- rent	1,900
December 20	- rent	3,150
<u>2006</u>		
January 10	- rent	1,900
January 27	- rent	5,000
January 31	- rent	1,900
<u>Deposits to James J. Curry, Jr., Trust Account</u>		
<u>2005</u>		
March 17	- rent	3,000
March 30	- rent	1,900
April 6	- rent	3,150

AS TO INCOME

SCHEDULE G

PAGE 2 OF 2

INCOME RECEIPTS

<u>Date</u> <u>2005</u>	<u>Source</u>	<u>Amount</u>
May 3	- rent	\$ 1,900
June 1	Bank	5
June 2	- rent	<u>1,900</u>
Total Income Receipts		<u>\$ 50,601</u>

AS TO CORPUS AND INCOME

SCHEDULE H

PAGE 1 OF 2

ASSETS ON HAND

Assets on Hand at February 28, 2006 consist of:

<u>Cash in Estate Checking Account</u>	\$	893
<u>Real Estate</u>		

Real estate values are presented at date of death (May 7, 2004) values based on appraisals and comparative market analyses. No adjustments have been made to reflect appreciation or depreciation of the values of the properties between date of death and date of this interim accounting with the exception of the two properties in , NJ. Those properties are reported at appraised values as of December 19, 2005.

50% interest in the decedents residence at (appraised value \$473,000) , NJ	300,000
Residence, (comparative market analysis value) , FL	355,000
Residential rental property, , NJ (appraised value) ,	730,000
Residential rental property, , NJ (appraised value)	550,000
Three parking spaces, Spaces , and (appraised value) NJ	30,000
Investment property, , FL (appraised value)	5,000
Investment property, NJ Block Lots , and (appraised value)	46,000
Investment property, Township of , NJ Block Lots and	10,000

Investments

1,664 Shares, , Inc.	33,280
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AS TO CORPUS AND INCOME

SCHEDULE H

PAGE 2 OF 2

ASSETS ON HAND

Investments

Incorporated	
100% interest in a 40' Hatteras Yacht	\$ 145,000
Cash	1,105
(Yacht is shown at appraised value. Asset is currently inoperable and has significantly decreased in value since the appraisal.)	
50% interest in	
LLC	
(value reported on Federal Estate Tax Return. This amount is an estimated value; the actual value, yet to be determined, may vary significantly from this estimate.)	500,000

Cash and Retirement Accounts

50% of the cash on hand and in the decedents home after disbursements made by Esq. per separate Accounting of Funds for (not dated)	40,886
---	--------

Accounts at Savings Bank:	
Bank accounts are shown at date of death values. Actual values at February 28, 2006 will be adjusted upon receipt of a final accounting by the predecessor administrator.	
Checking account #	18,950
Certificate of deposit #	3,589
Certificate of deposit #	5,798
Certificate of deposit #	2,208
Age 50 Plus Checking account #	9,475
Less: Transfers to estate checking account	(28,198)
Provident Savings Bank Individual Retirement Account	11,619
Wachovia Bank checking account # owned jointly with	21,294

Other Assets

Two small boats	2,000
Corpus and Income on Hand	
As of February 28, 2006	<u>\$2,793,899</u>

AS TO CORPUS AND INCOME

SCHEDULE K

PAGE 1 OF 1

PROPOSED DISTRIBUTIONS

Total Assets on Hand at February 28, 2006 \$2,793,899

Adjustments to Distributable Corpus and Income:

State of New Jersey Estate Taxes due 61,430
(Estate taxes due do not include
penalties and accrued interest
assessed in connection with late
payment.)

Principal balance due on mortgage payable
on residence at Toms River, NJ,
plus estimated closing costs in connection
with sale of property. 127,000

Principal balance due on mortgage payable
to EverHome Mortgage Company
(Mortgage on Stuart, Florida residence) 202,167

Outstanding professional fees:

	, LLC	46,548
Esq.		35,470
	, CPAs	3,000
Esq.		67,654
	(estimated)	60,000
	CTA	130,551*
Partnerships, Judgement dated		
July 19, 2005		40,703
	CPA	<u>3,500</u>

Total Adjustments to Distributable
Corpus and Income 778,023

Balance of Distributable Corpus and Income
to be Distributed at February 28, 2006 \$2,015,876

*Based on hourly basis and not percentage basis per
the Administrator's Statute.

CALCULATION OF
ADMINISTRATOR'S CORPUS AND INCOME COMMISSIONS

SCHEDULE K-1

CORPUS COMMISSIONS

Total Corpus Charges subject to Administrator's corpus commission - Total assets received	<u>\$ 2,830,588</u>
Statutory corpus commission pursuant to NJSA 3B:18-14	
\$ 200,000 x 5%	\$ 10,000
\$ 800,000 x 3.5%	28,000
\$1,830,588 x 2%	<u>36,612</u>
Total corpus commissions due	<u>\$ 74,612</u>

Release and Refunding Bond

COUNTY SURROGATE COURT

IN THE MATTER OF THE ESTATE OF

Deceased.

Attorney:

Office Address & Tel. No.:

KNOW ALL MEN BY THESE PRESENTS, That I,

residing at

herein designated as the Obligor,

am hereby held and firmly bound unto

herein designated as the Obligee,

in the sum of

lawful money of the United States of America, to be paid to Obligee or to Obligee's certain Attorney, successors in office or assigns, for which payment well and truly to be made I bind myself, my heirs, executors and administrators firmly by these presents. Sealed with my seal and dated the ____ day of _____, 2009,

The Condition of the above Obligation is such, that whereas the Obligor has received from the Obligee the sum of \$ _____ representing distribution of my share in the estate of _____, Deceased.

And in Consideration Therefore, the Obligor has remised, released, released and forever discharged and by these presents, does remise, release and forever discharge the Obligee from all claims and demands whatsoever, in law or in equity, on account of or in respect to the estate of the said deceased and of Obligor's interest therein, but only to the extent of the partial distribution now being made.

NOW, THEREFORE, if the Obligor be a devisee, then and in that case if any part or the whole of such

devise shall at any time hereafter be needed to discharge any debt or debts, devise or devises, which the said executor or administrator may not have other assets to pay, the Obligor will return said devise or such part thereof as may be necessary for the payment of the said debts or for the payment of a proportional part of the said devises; or

If the Obligor be a distributee, then and in that case if any debt or debts, truly owing by the intestate, shall be afterwards sued for and recovered or otherwise duly made to appear, and which there shall be no other asset to pay, Obligor shall refund and pay back to the administrator, the Obligor's ratable part of such debt or debts, out of the part and share so allotted to the Obligor.

Then the above obligation to be void, or else to be and remain in full force and virtue.

The words "debt and debts" wherever used herein shall be deemed to include all taxes imposed upon or chargeable to the estate or owed by the deceased, including but not limited to Federal, New Jersey or other State or Sovereignty transfer inheritance, estate, death, transfer and income taxes, together with interest, penalties, costs, expenses and counsel fees, if any.

If more than one person executes the within instrument, then words used in the singular shall be considered to include the plural, and wherever herein any particular gender is used, it shall be inclusive of the masculine, feminine and neuter gender, where the text so requires.

*Signed, Sealed and Delivered
in the Presence of*

L.S.

State of _____, County of _____

I Certify that on _____, 2009, _____
personally came before me and stated to my satisfaction that this person (or if more than
one, each person):

- (a) was the maker of the attached instrument; and
- (b) executed this instrument as his or her own act.

Notary Public

JAMES J. CURRY, JR., ESQ.
505 Main Street
P.O. Box 1225
Toms River, NJ 08754
(732) 240-4200
E-Mail: jjclex@comcast.net
Attorney for Estate

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: OCEAN COUNTY
PROBATE PART
DOCKET NO.

-----X

In the Matter of the Administration of the : Civil Action
Estate of : WAIVER OF ACCOUNT AND RELEASE

-----X

KNOW ALL MEN BY THESE PRESENTS, that:

WHEREAS, on April 7, 2005, *, died, a resident of Ocean County, New Jersey; and

WHEREAS, * was appointed as Administratrix of the Estate of *, deceased, on the 14th day of October, 2005, by the Ocean County Surrogate's Court; and

WHEREAS, James J. Curry, Jr., Esquire, is the attorney for the estate of *; and

WHEREAS, * wishes to memorialize the administration of the estate and its conclusion in a manner other than by way of formal accounting; and

WHEREAS, James J. Curry, Jr. has prepared an Accounting covering the period of administration from date of death of April 7, 2005 through June 30, 2006 on behalf of the estate of *; and

WHEREAS, the undersigned is a residuary legatee of the late *; and

WHEREAS, the undersigned has received an Accounting prepared by James J. Curry, Jr., Esquire; and

WHEREAS, the undersigned represents that I have examined said account and have received a copy thereof and have been advised that we may seek the benefit of independent counsel with respect thereto, as I

may deem necessary or advisable, and I desire the Administratrix to settle the account in reliance upon this instrument, without judicial allowance thereof; and

WHEREAS, I represent that I have not assigned, transferred nor encumbered in any way, voluntarily or involuntarily, my interest in the residuary estate of *; and

NOW THEREFORE in consideration of the promises and the agreement of *, the Administratrix, to waive a formal judicial accounting,

I hereby acknowledge that I have examined the statement of account annexed hereto, and find the same to be proper and correct in all respects, and do hereby ratify, confirm and approve the aforesaid accounts and all things therein set forth in connection with the administration of the guardianship and the estate, with like force and effect as if the same had been duly examined, audited and allowed by a Court of competent jurisdiction, and I waive my right to enforce a judicial settlement of the account in any court having jurisdiction, it being my intention and purpose that the instrument shall be delivered to *, Administratrix aforesaid, as binding upon all parties interested, their heirs, successors and assigns, and in all respects as conclusive, as though the account had been rendered to and duly settled by a judgment or decree of a court of competent jurisdiction.

I do further ratify and approve the payment of an attorney's fee to James J. Curry, Jr., on December 28, 2005, in the amount of \$*; on January 16, 2006 in the amount of \$* and fees to be paid to James J. Curry, Jr. in the amount of \$*.

I do further ratify and approve the payment of professional fees to *, CPA, previously paid on February 7, 2005 in the amount of \$*; and accounting fees to be paid in the amount of \$*.

I do further ratify and approve the payment of an administratrix's commission in the amount of \$*.

I do hereby acquit, release, remise and forever discharge * as Administratrix aforesaid, and her successors and assigns from any and all suits, actions, causes or causes of action, damages, judgments, claims and demands whatsoever, whether in law or in equity, which I, my heirs, successors or assigns ever had, now

have, or hereafter may or shall have against the said administratrix by reason of any act or omission, cause or thing whatsoever recited appearing or set forth in said account or reasonably inferred from anything therein contained; and

I hereby agree to deliver to the said Administratrix my Release & Refunding Bond, fully executed and in a form suitable for filing with the Surrogate of Ocean County, New Jersey, covering the distribution to me of the my share of the balance held in the estate, after deduction of the items listed as disbursements in the account.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the date set forth below.

BY: _____

Dated: _____

STATE OF _____ :

COUNTY OF _____ :

BE IT REMEMBERED that on this _____ day of _____, 2011, before me, the subscriber, a Notary Public, personally appeared _____, who is _____ of the *, who, I am satisfied, is the person mentioned in and who executed the foregoing instrument and thereupon he/she acknowledged that he/she signed the same as his/her act and deed, for the uses and purposes therein expressed.

NOTARY PUBLIC

202 N.J.L.J. 997

December 13, 2010

Issued by ACPE December 1, 2010

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS**Appointed by the Supreme Court of New Jersey****OPINION 719****ADVISORY COMMITTEE ON PROFESSIONAL ETHICS****Attorney Agreement With Surety Company As Condition for****Issuance of Bond to Estate Administrator Client**

The Advisory Committee on Professional Ethics reviewed an inquiry from an attorney who represents the administrator of an estate. The administrator was required to obtain a surety bond. This client, however, apparently had poor credit and the surety companies set conditions for issuance of the bond. The conditions included an agreement by the attorney that the attorney will remain involved in the matter; will pay the bond premiums; will protect the interests of the surety as well as the client administrator; will provide legal services "for the benefit of the surety"; will exercise joint control over estate assets; and will notify the surety if the client administrator breaches his or her fiduciary duty. The inquirer asked whether he may, consistent with the *Rules of Professional Conduct*, comply with such conditions. The Committee finds that compliance with these conditions is prohibited by the *Rules of Professional Conduct*.

A person appointed administrator of an estate when the decedent dies intestate is required to post a bond. *N.J.S.A. 3B:15-1*. The administrator must faithfully perform his or her fiduciary duties and the bond protects the heirs and creditors of the estate in the event the administrator defalcates. *See Ordinary*

CURRY A - 57

v. Hitchner, 119 N.J.L. 20 (E. & A. 1937). A surety bond is not liability or indemnity insurance; if the surety company is ordered to make payments under the bond, it may seek recovery from the administrator. *N.J.S.A.* 3B:15-24; *Fengya v. Fengya*, 156 N.J. Super. 340 (App. Div. 1978).

The inquirer attached letters from two separate surety companies setting forth conditions for issuance of a bond. The first company, in a document titled "Probate Bond Requirements for Representing Attorney," requested the attorney make representations on firm letterhead as to nine items. The items are:

1. Please list all assets and liabilities of estate.
2. Please note that you have executed a thorough search for liabilities.
3. Provide written assurance that attorney will deposit funds in trust account and disburse accordingly.
4. Attorney has conducted a search of all heirs, please indicate all heirs and their relationship to the deceased.
5. Provide written confirmation that attorney will remain involved until Estate matters are closed and will pay the annual premiums until the refunding bonds are filed and confirmed.
6. Attorney will provide updates to the Surety on Estate matters and will work to protect the interests of the administrator and surety as a condition to the surety writing the bond and provide close out documents.
7. Attorney will attach copy of professional liability policy and agrees to be liable to the surety should the attorney fail to be involved as herein stated.
8. Attorney will confirm that there are no disputes on any estate matters to the best of his or her knowledge and if there are, will provide full details and what the plan is for the attorney's client to operate as administrator.
9. Retainer agreement indicating that as a condition to obtaining the bond, client agrees to retain law firm and to what law firm proposed in their letter to surety until estate is settled and bond is released.

The second surety company submitted a "Joint Control Agreement" for the attorney and client administrator to sign. This agreement provided that the attorney agrees "to exercise 'joint control' over all personal property assets of the estate of any nature. You agree to jointly exercise judgment over the deposit, safekeeping and expenditure of estate personal property assets in accordance with the Probate Code. Counsel acknowledges that he/she is providing legal services for the benefit of Surety in connection with the joint control agreement such as to create a legal duty to perform his/her professional duties in this regard in a reasonable manner." All deposits of estate funds are to be in an account that would "require the joint signatures of [the administrator] and Counsel for all withdraws [sic] checks, and/or other debits against the deposit." The attorney agrees to not substitute the administrator of the estate, to give notice to the surety of any change in legal representation, and to provide notice to the surety of any request for the administrator's removal, objection to a request by the administrator for commissions or fees, allegation of breach of duty, or request for surcharge damages. Lastly, "Counsel agrees to act as a fiduciary to the Surety in establishing and maintaining the joint control as set forth herein."

An attorney who complies with these requirements becomes a co-fiduciary with the client administrator. The attorney may not, consistent with the *Rules of Professional Conduct*, provide legal services to a client administrator under these circumstances.

An attorney who represents an administrator of an estate represents the administrator not personally but in his or her fiduciary capacity. *Estate of Albanese v. Lolio*, 393 N.J. Super. 355, 374 n. 4 (App. Div. 2007). An attorney may also choose to represent the executor individually or the beneficiaries, but such additional representation must be made clear in the retainer agreement and the interests of the beneficiaries and the fiduciary must not be or become in conflict. *Id.* at 375. Hence, the client administrator's duty is to faithfully administer the estate in accordance with the will or intestate laws and the attorney's duty is to assist the administrator in this task. *Estate of Fitzgerald v. Linnus*, 336 N.J. Super. 458, 468-69 (App. Div. 2001); *Barner v. Sheldon*, 292 N.J. Super. 258, 265-66 (Law Div. 1995), *aff'd o.b.* 292 N.J. Super. 157 (App. Div. 1996).

The requirement that the attorney exercise joint control over estate assets inserts the attorney into the client's administration of the estate and creates a conflict of interest under *RPC 1.7(a)(2)*. *RPC 1.7(a)(2)* provides, in part, that a conflict of interest arises when the representation of the client will be materially limited by a personal interest of the lawyer. When exercising joint control over estate assets, the attorney and the client administrator are jointly administering the estate (though only the client administrator has been appointed to serve in this role). The attorney will have a personal interest in the administration of the estate and this personal interest will interfere with his or her objectivity and independence of judgment.

Similarly, the requirement that the attorney protect the surety's interests and provide legal services for the benefit of the surety creates a conflict of interest, interferes with the attorney-client relationship, and impairs the professional independence of the attorney. The surety company may seek to control the direction of the matter, or may have interests that diverge from those of the client administrator. An attorney who complies with this condition contravenes *RPC 1.7(a)(2)* (conflict arising from attorney's responsibilities to a third person) and *RPC 2.1* (duty to exercise independent professional judgment). *Cf. RPC 1.8(f)* and *RPC 5.4 (c)* (attorney may not permit third person to interfere with the attorney's independence of professional judgment or with the attorney-client relationship).

The requirement that the attorney notify the surety if the client administrator breaches his or her fiduciary duty interferes with the attorney's obligation to maintain confidentiality. *RPC 1.6(a)* provides that all information relating to representation of a client is confidential and shall not be disclosed unless the client consents "after consultation." An attorney has the obligation to ensure that the client understands the risks of disclosure, particularly when the confidential information may establish the client's liability. An attorney should not, as a condition of representation, secure prospective client consent to disclose confidential information in order to assist the surety company.

The conditions demanded by the surety companies raise additional problems for attorneys. The requirement that the attorney will pay the surety bond premium violates *RPC 1.8(e)* (an attorney shall not provide financial assistance to a client). Further, the requirement that the attorney remain involved in the estate matter until it is closed interferes with the client's right to discharge the attorney. *See Cohen v.*

Radio-Electronics Officers, 146 N.J. 140, 161-62 (1996); *RPC* 5.6; and *RPC* 1.16.

In Advisory Committee on Professional Ethics Opinion 691, 163 N.J.L.J. 220 (January 15, 2001), 10 N.J.L. 154 (January 22, 2001), the Committee considered whether an attorney may refer a client to a factor for an advance of monies against an anticipated personal injury judgment or settlement. The Committee found that “[c]ounsel must refrain from any relationship with or responsibilities to the factor which could in any way impair his or her duty of undivided fidelity to the client.” *Ibid.* The attorney may not “allow the factor’s interests or attempted input to affect the exercise of [the attorney’s professional] judgment.” *Ibid.* The Committee also emphasized that the attorney may not be involved in the client’s decision to enter into a business transaction with the factor. *Ibid.* “[C]ounsel’s relationship with the factor should not ordinarily extend materially beyond calling to the client’s attention that there exist factors who may assist the client with financial matters.” *Ibid.* The attorney must limit the confidential information to be provided to the factor to that information “the financial institution may require in order to assess the risk of the transaction,” and then “limit, to the extent possible, the amount of information provided to the institution” to “that information which would be discoverable by the attorney’s adversary.” *Ibid.* “Under no circumstances may an attorney allow a lay individual or entity to direct or regulate the lawyer’s professional judgment in rendering legal services, and this is true even if the individual or entity is compensating the attorney for the legal services performed for the client pursuant to *RPC* 1.8(f).” *Ibid.*

An attorney presented with the conditions of the surety company set forth by the inquirer is faced with similar conflicts of interest, challenges to professional independence, demands to disclose confidential information to a third person, and potential interference with the attorney-client relationship. An attorney must avoid entering into agreements with third parties that impair his or her duty of undivided loyalty to the client.

The Committee recognizes that the interests of the surety company are generally aligned with the interests of the client in faithfully administering the estate. The attorney’s duty, however, is to assist the administrator as he or she faithfully administers the estate in accordance with the will or intestate laws. The attorney must be able to maintain the requisite objectivity and independence of professional judgment and perform his or her duty free of conflicts, personal interests, and interference. Accordingly,

an attorney may not, consistent with the *Rules of Professional Conduct*, comply with such conditions of surety companies.