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 estate[2] 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:

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[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% x 7,707/month = $462.42/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