

BEING AN EXECUTOR: WHAT YOU NEED TO KNOW

What is an executor?

An executor is a fiduciary named in a Will who is in charge of carrying out the instructions in the Will regarding distribution of the property owned or controlled by a decedent, as well as “marshalling” (i.e., identifying, gathering and taking charge of) the decedent’s assets, paying the decedent’s debts and metaphorically “stepping into the decedent’s shoes” to wrap up his or her financial affairs. If there is no Will, state law will control the disposition of the decedent’s estate in an “intestacy” (instead of probate) proceeding, and the fiduciary appointed is referred to as the “administrator”. Where appropriate, we will refer to both as the “personal representative” of the estate.

What does it mean to “probate” a Will?

“Probate” refers to the judicial acceptance of a decedent’s Will and is a first step in the administration process. In New Jersey, probate is usually easy, fast and inexpensive – though controversy or irregularities in the Will may complicate the process. In New Jersey, application for probate (or intestacy) is made to the Surrogate in the county where the decedent resided at death. Assuming there are no irregularities, the Surrogate will issue letters testamentary to an executor or letters of administration to an administrator, and the personal representative will be able to begin formally administering the estate.

What should happen first?

Even before probate of the Will (which may not be completed until several weeks after the decedent’s death), certain steps can and must be taken:

- Funeral arrangements must be made (and decedent’s instructions about those arrangements should be followed).
- Any safe deposit box should be accessed, especially if it is thought to contain the decedent’s funeral instructions or the original Last Will.
- All information on the death certificate should be verified as accurate, and multiple original certificates should be ordered (we typically suggest ordering at least 20).
- Anyone financially (or otherwise) dependent on the decedent will need to be provided for until the probate process is complete and the executor has control of the estate assets.
- Any obligations that are immediately due (e.g., a tax return filing or required year-end IRA withdrawal), including the funeral bills, need to be addressed: either held in abeyance if possible or, if necessary, paid with funds advanced by others, who will be fully and promptly reimbursed once the executor has access to estate funds.
- Decedent’s assets may need to be secured (e.g., household contents, which can be a “flashpoint” for conflict if damaged or missing) and perhaps cared for pending appointment of the personal representative. (As a general rule, actions taken by the personal representative prior to appointment are ratified retroactively once appointed.)

- The Social Security Administration may need to be notified of the decedent's death, as well as the provider of any pension or annuity to the decedent and any home or auto insurance carrier; however, it may be best to delay collecting life insurance or other assets passing outside the Will until the personal representative's legal counsel can be consulted, which may not occur until several weeks after appointment (and after loved ones have had some opportunity to grieve before the "business" of the estate must get under way).

What else is involved in the administration of an estate?

Even the simplest of estate will require that the personal representative take the following steps:

- Officially inform beneficiaries of the estate that the Will have been admitted to probate (or that an intestate estate is being administered). Bear in mind that some beneficiaries may be inquisitive and sometimes unjustifiably impatient. A prudent personal representative will provide appropriate information to beneficiaries about the progress of the administration so that they have some idea of a timetable for the process, remain apprised of the actions being taken by the personal representative and keep their expectations within reason.
- Create an inventory of everything the decedent owned, in whole or in part, as well as identifying anything else in which the decedent may have had an economic interest or control, even if not as owner (e.g., as trustee or beneficiary, leaseholder, etc.).
- Gather information about gifts made by the decedent, since those gifts may affect estate or inheritance tax calculations.
- Value all of the property on the inventory as of the decedent's date of death, based upon the requirements of the various jurisdictions that might seek to impose estate or inheritance tax on such property. For example, if the decedent owned property in a state not his or her official state of residence (e.g., a vacation home in upstate New York), that other state may have its own probate requirements and impose its own estate tax obligation.
- Deal with the decedent's "unfinished business" (mostly economic but sometimes personal). For example, the personal representative may need to have the estate satisfy contractual obligations left by the decedent and put mechanisms in place to deal with ongoing estate business in order to wind down the decedent's economic affairs in an orderly and efficient manner.
- Pay the creditors of the decedent – but only for debts ascertained to be valid and payable by the decedent.
- Prudently manage and keep safe all of the decedent's assets until they can be properly distributed from the estate to the beneficiaries. For example, high-risk assets may need to be liquidated sooner rather than later. Although the decedent may have been comfortable with the risk level of those assets, they may be unsuitable to be held by a fiduciary.

What kinds of tax returns will need to be filed?

In New Jersey, estates with a gross value less than \$675,000 that pass exclusively to a spouse, descendant or ancestor of the decedent are not required to file a federal or New Jersey estate or inheritance tax return. Estates over that amount or that pass property to someone other than a spouse, descendant or ancestor of the decedent must file a New Jersey estate tax return and/or inheritance tax return. Estates over \$5,340,000 in 2014 will also need to file a federal estate tax return. (Gifts made by the decedent before death may also need to be taken into account.) The New Jersey inheritance tax return is due eight months from date of death, and the New Jersey and federal estate tax returns are due nine months from date of death. Extensions can be obtained, as long as the tax is paid by the due date. It is usually not prudent to file any of these returns much before the due date, since valuable tax planning opportunities can be lost in the event a beneficiary dies after the filing but before the due date.

In addition, any estate – including the smallest and simplest – with more than \$600 of gross income in the estate’s tax year must file its own separate federal income tax return (and possibly a state income tax return). Note that the estate’s first tax year commences on the decedent’s date of death and runs – at its longest – until the last day of the month previous to the anniversary date of the decedent’s death. For example, if a decedent dies on June 15, 2015, the estate’s first tax year begins on that date and can run until May 31, 2016, with a new tax year beginning on June 1, 2016, and running until May 31, 2017. If beneficial for income tax purposes, the personal representative can choose a shorter first tax year, ending on the last day of any month between the month in which death occurred and the latest permissible date. In the example above, the short tax year could end on June 30, 2015, or the last day of any month before May 31, 2016. Bear in mind that estate income tax returns may need to be filed for multiple years, since it is rare to conclude any but the simplest estate administration in less than a year.

Finally, the decedent’s own final income tax returns will likely need to be filed for the year of death.

Who is responsible for paying the taxes?

As with the tax return filing, the obligation to pay any taxes due rests with the personal representative, though the taxes will be paid with estate funds. (Note that one of the responsibilities of the personal representative will be to ensure that there are liquid assets available at the due dates for paying the taxes or, if not, to take any available steps to arrange deferred or installment payments in order to avoid costly penalties.) However, the personal representative will be personally liable to the extent that estate assets have been distributed to beneficiaries without retaining sufficient assets to pay all finally determined taxes. And estate taxes are unlikely to be “finally determined” for months after the filing of the returns.

In some cases, if the taxing authorities take issue with valuations of assets or other items reported on the return (e.g., excessive or questionable deductions), final resolution of the estate administration may take years. Non-tax issues, such as inability to sell illiquid estate assets, potential estate liabilities (e.g., a residential oil tank) and beneficiary disputes can also stretch an estate administration for years. However, once all of the tax issues have been settled, the Internal Revenue Service will issue a “closing letter”, indicating that (barring fraud) the federal estate taxes have been finally determined, and the New Jersey Division of Taxation will issue “tax waivers” that permit transfer of New Jersey assets (e.g., real property, stock issued by New Jersey corporations, bank and brokerage accounts located in New Jersey institutions). Before the issuance of tax waivers, only one-half of New Jersey assets are available to the personal representative, with the balance “frozen” until the waivers are provided to the custodian.

Once all of the estate’s debts, expenses and taxes have been paid, is the administration over?

One of the last steps in the administration will be the final distribution of estate assets to the beneficiaries. Interim distributions of cash bequests or partial funding of trusts or residuary bequests may have occurred during the administration, but ultimate distribution will be one of the personal representative’s final acts. However, before that final distribution occurs, the personal representative must have resolved any disputes with creditors, received approval from the state Attorney General’s office if there were charitable beneficiaries of the estate and obtained a receipt from each beneficiary for assets distributed and a release from liability for actions taken as fiduciary.

Assuming that the estate has been run prudently and in business-like fashion, with documentation of every receipt, disbursement or disposition of estate assets, the final release of liability may come in the form of an informal agreement from all of the beneficiaries. In the event of a controversy, the personal representative may have to prepare a formal accounting of all acts and transactions as fiduciary – again dependent on accurate and complete record-keeping – and then apply to court for approval of the accounting and for discharge as fiduciary.

Must the personal representative serve alone?

Often, a testator will provide for co-personal representatives to serve – sometimes with one of them being a bank or trust company, which can provide needed expertise in administering large or complex estates. Even if not named in the Will, an individual personal representative may be given the ability to appoint a co-fiduciary to serve with him or her and so may add a bank or trust company if needed.

How is a personal representative compensated?

In New Jersey, a personal representative is entitled to a fee for services based on rates set by statute. However, if the personal representative is also a beneficiary of the estate, a decision must be made to take the commissions (which will be taxable income to the personal representative) or not, since distributions from the estate will not be taxable income (except to the extent of income earned by estate assets during administration).

Who is available to help an individual personal representative?

As noted above, a personal representative is able to hire professional advisors to assist in the administration of the estate. The administration “team” for all but the simplest estates may be made up of: (i) legal counsel, who represents the personal representative as fiduciary and may have the most experience preparing estate tax returns; (ii) an accountant, who can provide income tax advice and prepare required returns (often the decedent’s own accountant is a good choice, because of familiarity with the decedent’s affairs and the preparation of previous Forms 1040); and (iii) a financial advisor, who can help the personal representative prudently invest estate funds, provide advice on the liquidation of assets to pay expenses and taxes and provide financial information about the estate assets on a timely basis. As noted above, the personal representative may even formally delegate investment authority to a financial advisor. All of the above advisors would be paid from estate funds because their advice and counsel was necessary for the prudent and efficient administration of the estate. But the key question before employing any estate advisor is: does the attorney or accountant or investment professional have particular expertise in the administration of estates, the preparation of estate tax returns and the kinds of investments appropriate for a fiduciary? Prudent estate administration includes prudently choosing advisors.

Once all estate assets have been distributed and the personal representative released, is the estate “wound up”?

Generally speaking, yes. However, the personal representative may have also been appointed as a trustee of one or more trusts created under the Will. In that case, the personal representative will have ongoing fiduciary duties. (See our “Being a Trustee: What You Need to Know” for additional information.) In addition, sometimes assets of the decedent (e.g., a forgotten refund or rebate) may turn up months after the estate has been considered “closed”. In that case, the personal representative may have to take possession of the asset and distribute it to the beneficiaries.

Should I qualify as personal representative?

Whether or not to qualify as personal representative is an important and private decision. Certainly, the testator trusted you and thought that you were the right person to carry out his or her last wishes. And it is understandable that being a fiduciary can, at least initially, seem overwhelming. As noted above, the duties can be vast, long-term and with some risk to you, both emotionally and economically. Qualifying as a personal representative is not to be undertaken lightly or without the appropriate assistance of professional advisors, who can help ensure a thoughtful, deliberate and proper administration and provide advice that may help minimize the risk of personal liability for you.

This White Paper provides only general information about executors and administrators and their duties. In case of doubt about any particular action (or inaction) by the personal representative of an estate, please consult your tax or legal advisor and document any advice you receive in the estate records.

This White Paper was prepared by the Tax and Trusts & Estates Practice Group at Sherman Wells Sylvester & Stamelman LLP. If you have questions, please contact any of the attorneys in our Group. Nothing in this White Paper should be relied upon as legal advice in any particular matter. © Sherman Wells Sylvester & Stamelman LLP.

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