WILL DRAFTING FUNDAMENTALS POST PANDEMIC

2024 Seminar Material

MI0581.24

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WILL DRAFTING FUNDAMENTALS POST PANDEMIC

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PROFESSIONAL RESPONSIBILITY IN ESTATE PLANNING

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Rules of Professional Conduct

- Under New Jersey Rules of Professional Conduct ("RPC") estate planning attorneys must:
  - represent clients diligently;
  - avoid conflicts of interest and personal gain;
  - properly define the scope of the representation;
  - maintain client confidentiality;
  - and more…

Conflicts of Interest Among Clients

- RPC 1.7 – a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, which exists if:
  - The representation of one client will be directly adverse to another; or
  - There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client, or a third person, or by a personal interest of the lawyer

Exceptions to RPC 1.7

- A lawyer may represent a client notwithstanding a concurrent conflict of interest if:
  - each affected client gives informed consent, confirmed in writing, after full disclosure and consultation;
  - the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each client;
  - the representation is not prohibited by law; and
  - the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation

Common Estate Planning Conflicts of Interest

- Preparing a Will for a family member of an existing client which benefits your existing client. Haynes v. First National Bank of NJ, 87 N.J. 163 (1981)
  - Isabel Dutrow is an elderly woman with two daughters, Betty Haynes and Dorcas Cotsworth;
  - Isabel lives with Betty until Betty's death then moves in with Dorcas;
  - Isabel's estate plan generally benefitted both daughters and their families equally;
  - Dorcas brings Isabel to her (Dorcas') attorney;
  - Isabel changes her estate plan to principally provide for Dorcas and her children which is contested on the basis of undue influence

Haynes, Continued

- A Will prepared by the pre-existing attorney of a beneficiary to be favored is a possible indicator of undue influence
  - undue influence occurs when the Will results from exertion by another that deprived the testator of his free will
- Burden of proof falls on the contestant to prove, by clear and convincing evidence, that a confidential relationship existed between the testator and alleged influencer and the presence of suspicious circumstances (which need be no more than "slight")
  - a "confidential" relationship is defined broadly and encompasses all relationships, whether legal, natural or conventional in their origin, in which confidence is naturally inspired and trust is reposed

Haynes, Continued

- Held: there was a confidential relationship between Dorcas and Isabel and the use of Dorcas' attorney was a suspicious circumstance
  - attorney's improper role was held to be such an egregious suspicious circumstance that the Court determined the Will proponent must overcome the shifted burden of proof by clear and convincing evidence (instead of the usual preponderance of the evidence)
- Court also noted the attorney could also be subject to ethics sanctions
- In re Will of Landsman, 319 N.J. Super. 252 (App. Div. 1999), attorney's conflict of interest arose out of a referral relationship, not an attorney-client relationship, with the referring party (who was

Punitive Damages

- When a lawyer is involved as a party to undue influence, not only may the burden of proof shift to the proponent of the Will, the standard of proof be raised and/or disciplinary action be taken against the lawyer, it may also allow for punitive damages

Punitive Damages, Continued

- Punitive damages may be awarded in particularly egregious cases involving one who is "essentially a stranger to the testator" engaging in a scheme of undue influence

- In the Matter of the Estate of Stockdale, 196 N.J. 275 (2008)
  - involved a neighbor who used his friend, an attorney, to prey upon an elderly, frail woman to leave her estate to the neighbor. Will was prepared by neighbor's attorney-

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Stockdale, Continued

- Court noted the circumstances in which punitive damages may be awarded are "limited" and undue influence is typically not a separately stated tort; rather, an analytical framework

- However, when undue influence is exerted by one who is not a natural object of the testator's bounty, or one who is in a fiduciary position, the conduct can be sufficiently egregious to allow for punitive damages, especially when combined with a depletion of assets that allows for compensatory damages

Obligations to Former Clients

- RPC 1.9 – a lawyer shall not represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed written consent
- Matters are substantially related if:
  - the lawyer received confidential information from the former client that can be used against the client in the subsequent representation of parties adverse to the former client; or
  - facts relevant to the prior representation are both relevant and material to the subsequent representation

Estate Planning For Spouses

- Spouses typically consider estate planning to be a joint undertaking in which their interests are intertwined into a coordinated estate plan
- Lovett v. Estate of Lovett, 250 N.J. Super. 79 (Ch. Div. 1991), generally, the representation of a husband and wife in their estate planning is not considered to be an inherent conflict, even if they have different objectives, so long as both know of them and each can separately carry out their own desires

Issues Arising in Estate Planning for Spouses

- Attorney must be cognizant of differing objectives and concerns, separate children, premarital agreements, or property settlement agreements
- Attorney may hear confidential information from one spouse that would be contrary to the interests of the other
  - Husband and Wife prepare mirror Wills, but Wife confides that she intends to unilaterally change her Will
- Generally an issue of confidences. Attorney should condition joint representation on written disclosure of potential conflicts, waiver of those conflicts, and waiver of the obligation of confidentiality between spouses

Client Confidentiality

- RPC 1.6 – a lawyer may not reveal information relating to the representation of a client unless the client gives informed consent
- RPC 1.6(b) and 1.6(c) – a lawyer "shall" reveal information to prevent the client or another person from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to cause death, substantial bodily harm, or substantial financial injury

Client Confidentiality, Continued

- Information "shall" be revealed to the proper authorities, and "may" be revealed to the person threatened if the lawyer believes disclosure is necessary to protect the person from death, substantial bodily harm, or substantial property loss
- RPC 1.6(d) – a lawyer "may" reveal information that the lawyer reasonably believes is necessary to rectify the consequences of a client's criminal, illegal or fraudulent act in furtherance of which the lawyer's services had been used

Client Confidentiality, Continued

- A v. B v. Hill Wallack, 158 N.J. 51 (1999), estate planning group of Hill Wallack represents a Husband and Wife in preparing their Wills
- Shortly thereafter, the family law group mistakenly took on a client to assert a claim against the Husband for paternity
- Upon learning of the conflict, the firm withdrew its representation of the woman seeking paternity

A v. B v. Hill Wallack, Continued

- On the basis that it owed a duty of disclosure to the Wife, firm advised the Husband if he did not inform his wife of the non-marital child, the firm would. Husband sued.
- Court found that potential financial injury to the wife was relatively remote and, therefore, not "substantial" and Hill Wallack was not required to disclose the information to the Wife under RPC 1.6(b) and 1.6(c)
- Court also concluded that Hill Wallack was permitted (not required) to disclose the information to the Wife under RPC 1.6(d) on the basis that Husband's failure to disclose the non-marital child was essentially a fraud that led to the Will which was drafted for the Wife by the firm

A v. B v. Hill Wallack, Continued

- NJ Advisory Committee on Professional Ethics Opinion 591 (1985) states that the lawyer should first try to obtain the client's consent to the disclosure before making the disclosure

- Court indicated that it would be permissible for the lawyer to not disclose a confidence to one spouse of the other's infidelity and financial provisions for an undisclosed non-marital child if such financial provisions do not materially adversely affect the spouse

A v. B v. Hill Wallack, Continued

- What if lawyer chooses not to disclose, but also to withdraw?
- "Lawyer may exercise discretion whether to inform Wife either that circumstances, which Lawyer has been asked not to reveal, indicate that she should revoke her recent Will or to inform Wife of some or all of the details that Husband has recently provided so that she may protect her interests. Alternatively, Lawyer may inform Wife only that Lawyer is withdrawing because Husband will not permit disclosure of information that Lawyer has learned from Husband"

Who Is The Client?

- In estate planning for a parent's estate, the parent is the client and the parent's objectives, confidences and interests must control
- RPC 1.8 – it is permissible for a child to pay the legal fees so long as the parent consents, and there is no interference with the lawyer's performance, or with the lawyer-client relationship

Personal Gain

- RPC 1.8(c) – a lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client
- "Related" persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship

Personal Gain, Continued

- Attorney drafter designated as attorney for the estate, Executor, or beneficiary – New Jersey Advisory Opinion 487 (1981)
- Drafter, absent a request from the testator, may not draft a direction that he or his firm be retained as counsel for the estate
  - unethical because the professional employment was not initiated by the client (Executor)
- Drafter is instructed by the testator to include a direction that he or his firm be retained as counsel for the estate
  - permissible if: (1) the relationship is long standing, (2) the suggestion is originated by the testator, and (3) the attorney advises the testator that the direction is not binding on the Executor

Personal Gain, Continued

- Attorney drafter designated as Executor
- Drafter, absent a request from the testator, drafts a direction that he be appointed Executor of the testator's estate
  - unethical because the appointment was not initiated by the testator
- Attorney drafter is permitted to serve as Executor if the lawyer-client relationship with the testator is long standing and the suggestion is originated by the client

Personal Gain, Continued

- Is the attorney obligated to enter into a writing with the testator disclosing the compensation the lawyer will receive as Executor, the testator's alternatives, and obtaining the testator's consent?
  - New Jersey Advisory Opinion 683 (1996) states this is not necessary; although, may still be prudent to rebut any later claim the attorney pressured the testator
- Compare New York SCPA 2307-a which requires such written disclosure or the attorney-Executor is entitled to only one-half the statutory Executor commissions

Scope of the Representation

- Subject to the scope of the representation, an attorney engaged by a client to prepare a Will owes no separate duty to the beneficiaries of the Will
- Pivnick v. Beck, 326 N.J. Super. 474 (App. Div. 1999), aff. 165 N.J. 670 (2000), "[N]o New Jersey decision has held that a disappointed heir has a malpractice claim against an attorney for allegedly disregarding the testator's drafting instructions, and leaving the heir less than the testator originally intended"
  - attorneys are not insurers of the beneficiaries' testamentary expectations

Scope of the Representation, Continued

- Pivnick crafted a narrow cause of action for an estate beneficiary to sustain a legal malpractice action if the beneficiary can prove, by clear and convincing evidence, that the attorney who drafted the Will (or other instrument) had negligently failed to correctly draft the Will in accordance with the Testator's intent

Scope of the Representation, Continued

- An attorney engaged by an Executor to administer an estate owes no separate legal duty to the beneficiaries of the estate
- The attorney need not act in furtherance of the interests of the beneficiaries, especially when those interests are inconsistent with the testator's intent as expressed in the Will
  - Barner v. Sheldon, 292 N.J. Super. 157 (App. Div. 1996), the estate attorney had no duty to advise the beneficiaries about potentially favorable tax planning if they disclaimed because that would conflict with the testator's intent

Scope of the Representation, Continued

- Albanese v. Lolio, 393 N.J. Super. 355 (App. Div. 2007), held that the estate attorney owed no duty to two beneficiaries regarding the income tax consequences of liquidating inherited IRAs to pay their share of estate taxes
  - Imposing such a duty would create an unreasonable open-ended responsibility on the part of the attorney that could interfere with the representation undertaken (the administration of the estate)
- Third beneficiary, who was also Executor, was owed a duty as the retainer agreement listed her "individually and as Executrix" and stated the attorney would provide "[p]ost-mortem planning"

Incapacitated Clients

- N.J.S.A. 3B:3-1 – any individual who is of "sound mind" and over the age of 18 is capable of making a Will

- Testamentary capacity is a low standard. Testator must be able to comprehend:
  - the nature and scope of his property;
  - the natural objects of his bounty; and
  - the nature and consequences of signing a Will

Incapacitated Clients, Continued

- The question of whether the testator possessed capacity is answered as of the date and time of the Will execution
  - even a testator who suffers from conditions which affect memory or cause delusions can be competent to make a Will if of "sound mind" at the moment of execution
- A lawyer has an obligation to prohibit the execution of legal documents where he believes his client does not possess the requisite capacity

Establishing Good Practices

- Create a list of questions to ask each client to evaluate capacity
  - where does the client live? For how long?
  - what are the client's assets?
  - what is the family dynamic like?
- Inquire about the client's reasons for creating and/or changing his estate plan
  - asset protection or tax planning?
  - change in family or financial circumstances?
- Take instructions directly from the client, not a third party

Establishing Good Practices, Continued

- Document conversations with client through memoranda and notes to the file
- Possibly have the client's physician perform an examination and attest to his or her mental capacity
- Where a Will contest is suspected to arise, attorney may wish to memorialize the execution ceremony
  - to videotape or not to videotape?
  - participants may not present well on video
  - attorneys and clients are not actors

Establishing Good Practices, Continued

- Develop a procedure for Will executions and use the same procedure every single time
- Future testimony may be required and the attorney will want the ability to testify as to his or her routine practices

Questions?


PORZIO
Bromberg & Newman
Sample Simple Will
Deirdre R. Wheatley-Liss, Esq., LL.M (Taxation), CELA
PorzioPlanning.com

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Speaker

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Revoke Prior Will

I, HAROLD SMITH, a resident of Flanders, County of Morris and State of New Jersey, being of sound mind and disposing memory and understanding, do hereby make, publish and declare this instrument to be my Last Will and Testament, and I do hereby revoke all former Wills and Codicils executed by me at any time heretofore.

Payment of Debts

FIRST: I direct that all my just debts (other than debts, if any, secured by mortgages of real estate or the assignment or pledge of life insurance policies), my funeral expenses, expenses of my last illness and the costs of administering my estate be paid as soon as practicable after my death.

Personal Property

SECOND: (A) I bequeath to my wife, WANDA SMITH, all clothing, jewelry, household goods, personal effects, automobiles, and all other tangible personal property (except cash on hand or on deposit, choses in action, and evidence thereof) owned by me at the time of my death. If my said wife shall not survive me, I bequeath all of the aforesaid property in as nearly as equal shares as practicable to my children who shall be living at the time of my death, to be divided among them as they shall agree, or failing such agreement, as my Executor, in its sole and absolute discretion, shall determine.

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Specific Bequest

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THIRD: I hereby give the sum of Five Thousand ($5,000.00) Dollars to my godson, GEORGE JONES, if he survives me. If he does not, this devise shall lapse.

Residue

FOURTH: All the rest, residue and remainder of my estate, both real and personal, of whatever kind or character, and wherever situated, or over which I now or hereafter may have any power of appointment (hereinafter referred to as my "residuary estate"), I give to my wife, WANDA SMITH. If my wife fails to survive me, I direct that my residuary estate shall be divided into as many equal shares as will allow my Executor to set apart (i) one share for each of my then living children, and (ii) one share for the issue then living of each of my children who shall have died, to be divided per stirpes.

Age Restrictions Trust

8

FIFTH: If the distribution of any person's interest in any trust established hereunder is subject to the restrictions set forth herein, that interest shall be held by my Trustee as a separate trust for the benefit of the person in accordance with the following terms and conditions:

Alternate Distribution/Wipe Out Article

SIXTH: When any property is to be disposed of as provided in this Article, my fiduciary shall divide such portion into two equal parts which shall be disposed of as follows:

Executor

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SEVENTH: I hereby nominate, constitute and appoint my wife, WANDA SMITH, as Executor of this my Last Will and Testament. If my wife, WANDA SMITH, is unable or unwilling to act, or fails to qualify, or having qualified ceases to act as Executor, then I hereby nominate, constitute and appoint my brother, BRANDON SMITH, to be Successor Executor of my Will. If BRANDON SMITH is unable or unwilling to act, or fails to qualify, or having qualified ceases to act as Successor Executor, then I hereby nominate, constitute and appoint my sister-in-law, SAMANTHA SMITH, to act in his place and stead.

Trustee

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EIGHTH: In the event it becomes necessary to establish Trusts under the provisions of this my Last Will and Testament, I hereby name my brother, BRANDON SMITH, to be Trustee of any trusts so created. If brother, BRANDON SMITH, is unable or unwilling to act, or fails to qualify, or having qualified ceases to act as Trustee, then I hereby nominate, constitute and appoint my sister my sister-in-law, SAMANTHA SMITH, to act in his place and stead.

Guardian

12

NINTH: In the event my wife, WANDA SMITH, shall not survive me or dies without appointing a guardian of my minor children, I appoint my brother, BRANDON SMITH, to be guardian of the person and property of such children. If BRANDON SMITH is unable or unwilling to act, or fails to qualify, or having qualified ceases to act as guardian, then I hereby nominate, constitute and appoint my sister-in-law, SUSAN SMITH, to act as guardian of the person and property of such children.

Construction – Fiduciaries

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TENTH: The word "fiduciaries" as used in this Will means executor, executrix, executors, executrices, trustee, trustees, guardian and guardians and the survivor or survivors of them, and their successor or successors in office, as the context requires.

Fiduciary Powers

14

ELEVENTH: In the administration of my estate and of any fund held hereunder my Executor and Trustee shall have the following powers, exercisable without court approval and in the absolute discretion of my Executor and Trustee, upon such terms and conditions as my Executor and Trustee shall deem advisable, in addition to, and without limitation upon any other powers granted by this Will or by law:

Waiver

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TWELFTH: I direct that no bond or other security shall be required of my Executors or Trustees, or any successor or substitute Executors or Trustees, in any jurisdiction in which any of them may be called upon to act.

Spendthrift Provision

16

THIRTEENTH: I direct that no beneficiary shall sell, transfer, pledge or in any other manner anticipate or encumber his or her interest in my estate or any trust hereunder, and that such interest shall not be subject to attachment or other legal process of any creditor or spouse of any beneficiary.

Construction - Gender

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FOURTEENTH: Any word in this Will in the singular or plural, or in the masculine, feminine or neuter, shall be either singular or plural, and masculine, feminine or neuter, as the context may require.

Survival

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FIFTEENTH: In the event any beneficiary fails to survive me for a period of ninety (90) days commencing upon the date of my death, it shall be conclusively presumed for all purposes under this Will that I survived such beneficiary, and my estate shall be administered and distributed, in all respects in accordance with such presumption.

State Law

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SIXTEENTH: This, my Last Will and Testament, shall be construed, and its validity and effect, and the rights hereunder of the beneficiaries, and fiduciaries shall, at all times, be determined in accordance with the laws of the State of New Jersey, insofar as they can be applied.

Blue Line

SEVENTEENTH: If any part or provision in this Will shall be held to be inoperative, invalid or void for any reason, it is my intent that the remaining provisions have operative effect and be carried out insofar as it is reasonable to do so.

Children

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EIGHTEENTH: At the time of the execution of this Will, I have two (2) children, namely CHRISTOPHER SMITH and CARRIE SMITH. If subsequent to the execution of this Will, there shall be an additional child or children born to me or adopted by me, and if such child or children shall survive me, they shall share in the benefits of my estate equally and to the same extent as my children hereinabove named, and the provisions of this Will shall be deemed modified to the extent necessary to effectuate such intention.

Beneficiary as Trustee

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NINETEENTH: If at any time any person serves as a fiduciary (that is to say, as an executor or trustee) of my estate or of a trust created hereunder, and if such person is also a beneficiary of my estate or such trust, such person shall not participate in any decision to make a discretionary distribution, either interim or terminating, of income or principal to himself or which is for his pecuniary benefit. Such decision shall be made exclusively by fiduciary. In addition, no fiduciary shall have the power to make a discretionary distribution of income or principal which is in discharge of a legal obligation of himself, including but not limited to a legal obligation to support any person. Any and all such power or powers shall be vested in a fiduciary other than the person whose legal obligation would be discharged by, or who would enjoy a pecuniary benefit from, the exercise of such power. Notwithstanding the above, a fiduciary shall be permitted to make a distribution for his or her benefit when such distribution is subject to an ascertainable standard, as set forth in Section 2041 of the Internal Revenue Code of 1986, as amended.

Successor Fiduciaries

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TWENTIETH: My named Executors, Trustees and Guardians shall have the power at any time to designate substitute or successor Executors, Trustees and Guardians, who shall have the same duties and powers as are conferred in this Will upon my Executors, Trustees and Guardians named herein, including the power to designate additional substitutes or successors. Any person named pursuant to this authority shall serve only in the event that none of the herein named person or persons shall be available or willing to serve. Any appointment shall be made in writing, shall be acknowledged, shall state the time or the event when such appointment shall take effect and shall be forwarded by certified mail to all named Executors, Trustees, Guardians and Beneficiaries.

Rule Against Perpetuities

TWENTY-FIRST: Any trust created hereunder or created pursuant to a power of appointment created hereunder shall not be subject to and shall not be void by any reason of any rule against perpetuities, whether common law rule or otherwise, pursuant to N.J.S.A. 46:2F-9.

Waiver of Spousal Rights

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TWENTY-SECOND: The provisions of this Will in favor of my spouse are intended to be in lieu of my spouse's right of election and of all other provisions for the surviving spouse under the laws of the State of New Jersey or any other jurisdiction where any of my estate, real or personal, may be situated.

Definition Income & Principal

TWENTY-THIRD: In the administration of my estate and of the trusts established hereunder, all cash dividends, ordinary and extraordinary, and all distributions treated as ordinary income for Federal Income Tax purposes (other than in liquidation or reorganization of the distributor) shall be income; and all other income distributions with respect to stock, including stock dividends, stock splits, liquidating dividends, capital gains dividends from mutual funds and proceeds from the sale of rights shall be principal.

Consideration of Other Assets

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TWENTY-FOURTH: My Trustee, in exercising the discretions conferred upon my Trustee under this Will to pay or apply the income or principal of a trust for the benefit of certain persons, all as more particularly provided hereinabove, may, but shall not be required to, take into consideration any other resources any such persons may have, including income or capital. My Trustee's determination as to the advisability of making any such payment or application shall be conclusive and binding upon all persons interested in the trusts hereby created.

Waiver of Accounting

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TWENTY-FIFTH: It is my desire that there be no public or judicial accounting of the administration of my estate or the trusts established under this Will, but nothing herein shall preclude my Executor, Trustee, or any beneficiaries hereof from seeking a judicial accounting of any such administration. In lieu of a formal accounting it is suggested that the fiduciaries settle their accounts by agreement with the beneficiaries (or their parents or legal guardians.) Such agreement or agreements shall effectively release and discharge my fiduciaries from the acts and proceedings so accounted for. The written approval by all of the then living adult and competent beneficiaries of this Will of any matter relating to or arising in the course of the administration of my estate or the trusts established under this Will, whether the same relates to an accounting or any action taken or omitted or proposed to be taken or omitted by my Executor or Trustee, shall be binding upon all beneficiaries hereof, including those who are minors or as yet unborn at the time of such accounting.

Small Trust Termination

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TWENTY-SIXTH: Whenever my Trustee (other than a beneficiary of such trust), in its sole and absolute discretion, shall determine that the size of any particular share being held in trust does not warrant the cost of continuing the trust with respect to such share, my Trustee, without the permission or order of any court, may terminate the trust. Upon such termination, the entire balance remaining shall be paid over to the beneficiaries entitled to the income thereof at that time, in the proportions in which they are beneficiaries of such income. If any such beneficiary is a minor, payment of any such minor's share may be made to such minor, or to a guardian of the property of such minor wherever appointed without requiring ancillary guardianship, or any qualified custodian under the Uniform Gifts to Minors Act of any jurisdiction with power to select any person or trust company (including any Trustee hereunder) to be such custodian. My Trustee shall have no obligation to see to the use or application thereof and the receipt of such minor, guardian, parent, person or custodian shall be a complete discharge as to such transfer or payment. In deciding whether to terminate such trust, my Trustee need not consider the interest of remaindermen or succeeding income beneficiaries, and their respective interests in the trust share in question shall cease upon termination by my Trustee.

Will Execution

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- **3B:3-2 Execution; witnessed wills; writings intended as wills.**

  a. Except as provided in subsection b. and in N.J.S.3B:3-3, a will shall be:

  (1) in writing;

  (2) signed by the testator or in the testator's name by some other individual in the testator's conscious presence and at the testator's direction; and

  (3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.

Will Execution

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- **3B:3-2 Execution; witnessed wills; writings intended as wills.**

  b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

  c. Intent that the document constitutes the testator's will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator's handwriting.

Ancillary Document Execution

- Revocable Trust – Signed by Grantor and Trustee – NJSA 3B:31-18
- Power of Attorney – Notarized - NJSA 46:2B-8.9
- Advanced Directive – Witnessed, not by health care representative - NJSA 26:2H-56

Thank You!

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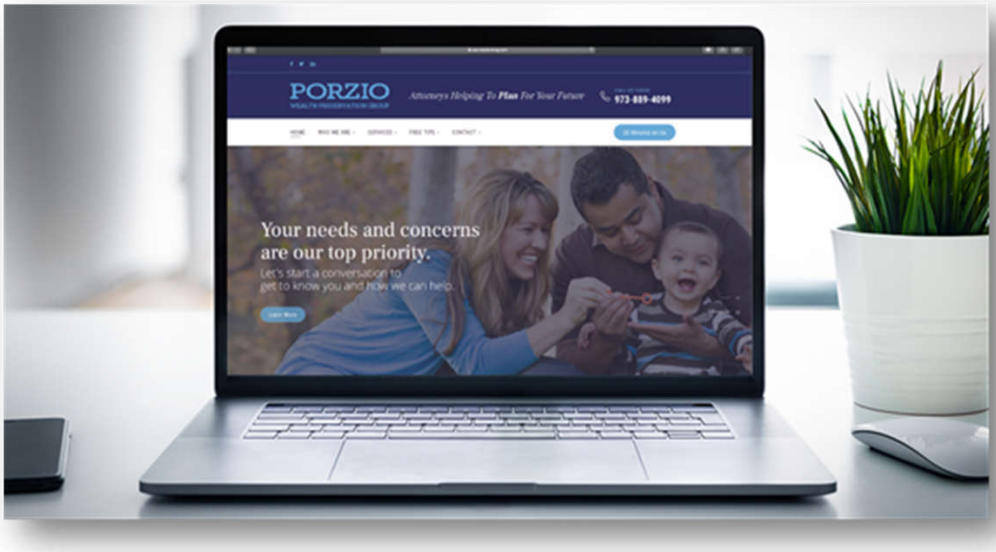
More Resources at *www.porzioplanning.com*



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Annotated Form of Will
All Assets to Spouse Outright
On Second Spouse's Death, Pass to Children

LAST WILL AND TESTAMENT

OF

HAROLD SMITH

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LAST WILL AND TESTAMENT
OF
HAROLD SMITH

I, HAROLD SMITH, a resident of Flanders, County of Morris and State of New Jersey, being of sound mind and disposing memory and understanding, do hereby make, publish and declare this instrument to be my Last Will and Testament, and I do hereby revoke all former Wills and Codicils executed by me at any time heretofore.

This clause provides the legal name and the residence of the Testator. It also makes a statement regarding revoking all former Wills and Codicils. Accordingly, if there are any prior Will terms that the Testator wishes to include in his new Will, those terms need to be added to this document.

If the Testator is known by more than one name the a.k.a. should be in this section.

FIRST: I direct that all my just debts (other than debts, if any, secured by mortgages of real estate or the assignment or pledge of life insurance policies), my funeral expenses, expenses of my last illness and the costs of administering my estate be paid as soon as practicable after my death.

This clause provides for the payment of any debts, funeral expenses and estate administration expenses. Note that by this language any mortgages are excluded from the payment of the debts. If there is a specific devise of real property, and that real property has a mortgage, this provision should be modified to provide that the devisee will take the real property subject to the mortgage.

Unless there is an alternate allocation clause, these expenses will reduce the residuary estate (Article Forth), but not any specific gift (Article Third).

SECOND: (A) I bequeath to my wife, WANDA SMITH, all clothing, jewelry, household goods, personal effects, automobiles, and all other tangible personal property (except cash on hand or on deposit, choses in action, and evidence thereof) owned by me at the time of my death. If my said wife shall not survive me, I bequeath all of the aforesaid property in as

Initials:_____

nearly as equal shares as practicable to my children who shall be living at the time of my death, to be divided among them as they shall agree, or failing such agreement, as my Executor, in its sole and absolute discretion, shall determine.

This provision is a general devise of all personal property not otherwise distributed to the Testator's spouse, and then to the Testator's children if the child is not living. To the extent that there are other specific recipients of the personal property, this provision should be modified.

Note that "Cash on Hand" is actual cash and "Choses in Action" refer to lawsuits.

If any such beneficiary shall be a minor, my Executor shall select items appropriate for distribution to or retention for such minor, and sell the remaining balance of such minor's share. Such items and such proceeds of sale may be retained for such minor until he or she becomes an adult or may, at any time prior thereto, be distributed to such minor or to any other person with whom such minor resides. The receipt of any such distributee shall fully discharge my Executor.

Where there are minor children, the above clause should be added to Subarticle (A) to provide for personal property to be held for the benefit of the minor beneficiary, or distributed to an adult on behalf of the minor beneficiary, as appropriate. If there are no minor beneficiaries, this clause can be excluded.

(B) I herein reserve the right to dispose of certain items of my tangible personal property by a written statement prepared pursuant to N.J.S. 3B: 3-11. I instruct my Executor to honor the disposition set forth in any such statement.

This clause allows the Testator to prepare legally binding memoranda, which is a separate document from the Will, to outline his or her specific distributions of personal property. This is normally utilized to distributed jewelry, paintings, furnishings, etc., to specific individuals. Those individuals do not need to be the same people named in Subarticle (A), or otherwise beneficiaries under the Will. The benefit of this provision is that it allows the Testator to make important personal property devises without needing to contact the attorney for every modification. The personal property memorandum should be in the Testator's own handwritten so that if the Testator dies in a State that does not allow a separate memorandum by statute it may be binding as a holographic Will.

(C) I direct that the expenses in connection with packing, insuring and shipping such property to any beneficiary shall be paid by my Executor and treated as a general administration expense of my estate.

This provides that any cost of packing, insuring, or distributing personal property will be general administration expense, payable out of the residuary of the estate, and not charged to the recipient.

THIRD: I hereby give the sum of Five Thousand ($5,000.00) Dollars to my godson, GEORGE JONES, if he survives me. If he does not, this devise shall lapse.

Any specific devise of either a fixed sum of money or a specific asset are made separate from the general personal property disposition, and the distribution of the residuary estate. A "devise" is any testamentary distribution of real or personal property, so that there is no longer a distinction between a "bequest" of personal property and a "devise" of real property. See N.J.S.A. 3B:1-1.

Some key points in drafting such a provision:

- *If a devise is of a specific item, and that item is not in existence at the Testator's death, the language should provide whether the devise will lapse, or if there will be an offsetting distribution to the beneficiary.*
- *If no provision is made, the principal of ademption presumes that the bequest lapses, but for in certain situations regarding real estate as more completely described in N.J.S.A. 3B:3-46.*
- *There should instruction regarding the distribution of the devise should the beneficiary predecease the Testator. In the absence of such an instruction the devise will pass to the devisee's issue (if the devisee is related to the decedent through the grandparents of the decedent), pursuant to the anti-lapse statue N.J.S.A. 3B:3-35.*
- *For making large cash devises, it may be appropriate to add a limitation so that the total cash devise should not exceed some fixed percentage of the estate, in order to account for estate shrinkage over time.*
- *Devises to charity may also be placed in this section.*
- *A devise of property should specifically indicate whether or not it would be subject to any mortgage on the property.*

FOURTH: All the rest, residue and remainder of my estate, both real and personal, of

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whatever kind or character, and wherever situated, or over which I now or hereafter may have any power of appointment (hereinafter referred to as my "residuary estate"), I give to my wife, WANDA SMITH. If my wife fails to survive me, I direct that my residuary estate shall be divided into as many equal shares as will allow my Executor to set apart (i) one share for each of my then living children, and (ii) one share for the issue then living of each of my children who shall have died, to be divided *per stirpes*.

This represents a general devise to the spouse of all the remaining assets after all the preceding articles have been addressed. If the spouse is not surviving, it directs that the residuary estate will be divided among the issue, per stirpes. Note that in the absence of a per stirpes direction, the statutory default in New Jersey is a distribution by Right of Representation. See N.J.S.A.3B:3-41.

Each such share shall be distributed as provided in Article FIFTH. (ALTERNATE 1)

Where all beneficiaries are likely to be under the age of distribution, it is appropriate to direct that any share created for a beneficiary will be distributed subject to the terms of the Age Restrictions Trust. This is generally the case where there is a young family.

Any share to be distributed to a child of mine shall be distributed outright and free from trust. Any share to be distributed to any issue other than a child shall be distributed subject to the terms, conditions and restrictions of Article FIFTH. (ALTERNATE 2)

With an older couple with adult children and minor grandchildren, it may be appropriate to make distributions to the children outright, and indicate that any further issue will have distributions made subject to the Age Restrictions Trust.

If my wife fails to survive me and I am not survived by any issue, my residuary estate shall be distributed as provided Article SIXTH.

The Residuary Article needs to be concluded with a direction of distribution in the event that none of the identified beneficiaries survive.

FIFTH: If the distribution of any person's interest in any trust established hereunder is

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subject to the restrictions set forth herein, that interest shall be held by my Trustee as a separate trust for the benefit of the person in accordance with the following terms and conditions:

This Article is commonly termed an "Age Restrictions Trust Article". A separate trust is created for each beneficiary (unlike a "sprinkle trust" for the benefit of a group of beneficiaries). The Age Restriction Trust will hold assets for the benefit of the beneficiary until such time as the beneficiary reaches what the Testator deems to be an appropriate age. This Trust can provide for a single distribution at a certain age, or for multiple distributions of portions of the Trust over different ages, or upon different events (such as a graduation). The Trust can also provide for differences in the timing of distributions from income or principal. In drafting the Trust, the Testator can also give the Trustee very wide or very limited discretion. When drafting, it is necessary to consider that this Trust may likely govern the Testator's wishes for many years to come after his or her death. Given the inability to totally foresee future occurrences, there is much to be said for giving the Trustee the greatest discretion possible. If the Testator is concerned about giving a person so much discretion, then that may be an indication that that person should not serve as a Trustee, or should not serve as a sole Trustee.

(A) If the person is at least thirty (30), but not yet thirty-five (35) years old at the time for distribution, one half (1/2) of the interest shall be distributed to him or her, outright and free of trust; if the person is at least thirty-five (35) years old at the time for distribution, all of the interest shall be distributed to him or her, outright and free of trust. The balance of the person's interest shall be held for the benefit of the person in accordance with the following terms and conditions:

This provides for two mandatory distributions, ½ at age 30 and ½ at age 35. If any beneficiary has already attained the age of 30, then she will receive ½ of her trust share upon the Testator's death.

(B) Until the person reaches the age of twenty-five (25) years, the Trustee shall distribute to the person such amounts of the trust's net income as my Trustee in my Trustee's sole and non-reviewable discretion deems wise. My Trustee shall accumulate the balance of the net income and shall add that accumulated income to the trust's principal at the end of each year.

This provides that prior to the person reaching the age of 25 any income generated by the Trust (interest, dividends, and rents) may be used by the Trustee for the beneficiary's benefit in the Trustee's sole discretion. This provision goes with Subarticle (C) below, which provides for

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mandatory quarterly distribution of income starting at the age of 25.

(C) After the person reaches the age of twenty-five (25) years, my Trustee shall distribute to the person the entire net income of the trust at convenient intervals, but not less frequently than quarter-annually.

Together with Subarticle (B), this provides for an income stream (interest and dividends) starting at age 25.

(D) At any time or times, the Trustee may distribute to the person such amounts of the trust's principal as the Trustee deems advisable to provide for the person's comfort, welfare, health, maintenance and education (including but not limited to elementary, secondary, undergraduate,
graduate and postgraduate education). Before exercising this discretionary power, my Trustee may, but need not, consider any other resources of any beneficiary.

This Article provides for a distribution of principal in the total discretion of the Trustee. Distributions that are limited to standards only (health, maintenance, education and support) can give the beneficiary rise to a claim for payment from the Trust, or allow third-parties supporting the beneficiaries (such as if the beneficiary is disabled) to make a claim against the trust.

*If income is not distributed separately from principal, then Article (D) should be modified to address "*such amounts of the trust's net income or principal or both", *and a sentence should be added to the end that* "The Trustee shall accumulate the balance of the net income and shall add that accumulated income to the trust's principal at the end of each year.".

(E) I do not desire that the Guardian of any minor beneficiary should incur personal expense in the support and maintenance of such beneficiary. The Trustee is authorized to disburse funds from the income and/or principal of the trust for purposes of reimbursing such Guardian for reasonable expenses incurred for the health, education, maintenance and support of such beneficiary.

This provision allows for payments to a Guardian of a minor beneficiary to offset the cost of

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care. Beware of any conflicts where the Trustee and the Guardian are the same parties.

(F) On or as soon as practicable after the person's thirtieth (30th) birthday, my Trustee shall distribute to the person, outright and free of trust, one half (1/2) of the balance of his or her separate trust as of that birthday. On, or as soon as practicable after the person's thirty-fifth (35th) birthday, my Trustee shall distribute to the person, outright and free of trust, the entire remaining balance of his or her trust. The trust shall then terminate.

To the extent that the beneficiary was less than 30 at the time of the creation of the Trust, this provides for the mandatory distribution of ½ of the principal at age 30, and the remainder at age 35, and then requires the Trust to be terminated.

(G) Upon the person's death, my Trustee shall distribute the trust as then constituted to such of the person's then living issue, in such proportion and manner, in trust, or otherwise, as the person may effectively appoint by specific reference to this power of appointment in his or her Last Will and Testament or Codicil thereto.

This grants a limited power of appointment to the beneficiary to reallocate the Trust among his or her issue upon death. It must be cautioned that to the extent that the client has significant assets that may generate a generation skipping tax (in 2023, individual assets in excess of $12,920,000), the ability to pass assets from one generation to the next, i.e. to a child's issue, may create a generation skipping trust. This type of Will is not appropriate to that situation, where it may be necessary to grant a General Power of Appointment to the child to avoid the application of the generation skipping tax. This provision is appropriate for smaller estates where the Testator's desire is to ensure that the assets stay within the family line in the event of a premature death.

(H) If the person dies before reaching the age of thirty-five (35) my Trustee shall distribute the then remaining balance of his or her separate trust, which person has not appointed as above provided, to such person's then living issue, *per stirpes*. If, on such person's death, he or she is not survived by issue but is survived by my issue, my Trustee shall distribute the then remaining balance of his or her separate trust to the then living issue, *per stirpes*, of the person's closest lineal ascendant among myself and my issue who has issue then living. Any such distribution shall be made subject to the terms, conditions and restrictions of this Article FIFTH. If none of my issue has survived, then the remaining balance of the trust shall be distributed as provided in Article SIXTH.

This provision disposes of the balance of the Trust in the event that the beneficiary dies prior to the final distribution at age 35. It is distributed in order of (1) as indicated in the Power of Appointment, (2) to the person's issue, per stirpes, and then (3) the issue of one generation up on the family tree. All the distributions are made pursuant to the same trust terms. Again, if nobody is surviving, there is a direction to an ultimate distribution clause.

(I) Any amounts to be paid to a person for whom a separate trust is already being maintained by my Trustee pursuant to this my Last Will and Testament shall in all respects be added to the principal of such trust and be held and distributed as provided herein.

This provides that in the event that a beneficiary already has his or her own trust share under this Article, then the trust shares will be combined.

SIXTH: When any property is to be disposed of as provided in this Article, my fiduciary shall divide such portion into two equal parts which shall be disposed of as follows:

(A) The first part shall be distributed to the then living issue of my parents, *per stirpes*, subject to the terms and conditions of Article FIFTH. If no such individuals are living at the time a distribution is called for, then the first part shall be distributed as provided in Subarticle (B) of this Article.

(B) The second part shall be distributed to the then living issue of my wife's, WANDA SMITH, parents, *per stirpes*, subject to the terms and conditions of Article FIFTH. If no such individuals are living at the time a distribution is called for, then the second part shall be distributed as provided in Subarticle (A) of this Article.

(C) If none of the individuals designated as distributees in Subarticles (A) and (B) of this Article is then living, then any property to be disposed of as provided in this Article shall be distributed to any one or more organizations or entities described in Section 2055(a) of the Internal Revenue Code that my fiduciary shall designate.

The above is the Ultimate Distribution Article. It provides for what happens if none of the people named in the Will survive. In the absence of an Ultimate Distribution Article, the assets will pass via the intestacy laws in degree kinship, or to the State of New Jersey, in accordance with N.J.S.A. 3B:5-1 et seq. This Article provides for 50% to pass to each spouse's family, subject to the age restriction terms of Article Fifth (the Age Restrictions Trust Article). It also provides for an ultimate charitable beneficiary so that in the event that no individual is living,

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all of the assets will pass to a designated charity instead of to the State of New Jersey.

In the event that the client wishes the assets to pass otherwise if no spouse or descendents are living, this section should be customized accordingly.

SEVENTH: I hereby nominate, constitute and appoint my wife, WANDA SMITH, as Executor of this my Last Will and Testament. If my wife, WANDA SMITH, is unable or unwilling to act, or fails to qualify, or having qualified ceases to act as Executor, then I hereby nominate, constitute and appoint my brother, BRANDON SMITH, to be Successor Executor of my Will. If BRANDON SMITH is unable or unwilling to act, or fails to qualify, or having qualified ceases to act as Successor Executor, then I hereby nominate, constitute and appoint my sister-in-law, SAMANTHA SMITH, to act in his place and stead.

In naming the Executor, one person can be named followed by successors, or a combination of persons can be named followed by successors. It is important that successor Executors are named. It is also important to give weight to the practicalities of having multiple Executors. Any group of Executors greater than 2 is highly unwieldy. In the event that there are no successors named, persons are able to act as Administrators CTA in order of statutory preference.

EIGHTH: In the event it becomes necessary to establish Trusts under the provisions of this my Last Will and Testament, I hereby name my brother, BRANDON SMITH, to be Trustee of any trusts so created. If brother, BRANDON SMITH, is unable or unwilling to act, or fails to qualify, or having qualified ceases to act as Trustee, then I hereby nominate, constitute and appoint my sister my sister-in-law, SAMANTHA SMITH, to act in his place and stead.

In this Article, Trustees of any Trust created are named. Again, there can be one or multiple Trustees at the same time. Thought needs to be given to what happens if one Trustee can no longer act; will the co-Trustee act alone or will the Trustee who cannot act be replaced? If no Trustee is named, a Trustee may be appointed by statutory preference.

NINTH: In the event my wife, WANDA SMITH, shall not survive me or dies without appointing a guardian of my minor children, I appoint my brother, BRANDON SMITH, to be guardian of the person and property of such children. If BRANDON SMITH is unable or unwilling to act, or fails to qualify, or having qualified ceases to act as guardian, then I hereby nominate,

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constitute and appoint my sister-in-law, SUSAN SMITH, to act as guardian of the person and property of such children.

This Article names the guardian of any minor children as provided in N.J.S.A. 3B:12-1 et seq. In naming the guardians, it is important that the client consider who in the family they wish to be the guardian. Clients often say, "I wish to name my sister and her husband." However, in the event of a divorce, do they want just the sister to be named or the husband to actually succeed the sister? It is important that at least two successors are named to avoid the possibility of a Court having to decide on the guardian of minor children.

TENTH: The word "fiduciaries" as used in this Will means executor, executrix, executors, executrices, trustee, trustees, guardian and guardians and the survivor or survivors of them, and their successor or successors in office, as the context requires.

Fiduciaries are known by different names for the roles they take on, as well as from State to State. This clarifies that the Testator does not intend to limit roles or power merely by the title given to the fiduciary.

ELEVENTH: In the administration of my estate and of any fund held hereunder my Executor and Trustee shall have the following powers, exercisable without court approval and in the absolute discretion of my Executor and Trustee, upon such terms and conditions as my Executor and Trustee shall deem advisable, in addition to, and without limitation upon any other powers granted by this Will or by law:

The extensive powers of fiduciaries are set forth by statute in N.J.S.A. 3B:14-23. The below incorporates that list of powers to reiterate it within the governing document itself. However, unless the Testator specifically states otherwise, to the extent that the statutory powers change over time, those powers will be incorporated by reference into the Will.

Oftentimes recent case law will identify additional powers that should be specified in the general grant of powers section in order for the estate or trust to have authority to act. It is critical to stay informed of this case law and update the powers section of the Will template accordingly as legislation incorporating case law into the statue lags behind the case law itself.

(A) To retain any property owned by me or at any time held hereunder, including any business or interest therein;

(B) To invest and reinvest in any property whatsoever, without regard to any legal limitations upon investments, and without regard to the principle of diversification;

(C) To invest and reinvest in shares of common trust funds, whether or not maintained by any corporate fiduciary serving hereunder;

(D) To hold cash uninvested for a reasonable period of time without liability for interest thereon;

(E) To sell or exchange any property at public or private sale, for cash or on credit, with or without security, and to comply with the terms of any stock buy-sell agreement or any similar agreement to which I may be a party and which continues after my death;

(F) To mortgage, pledge or lease, or grant options with respect to any property, for any period of time, whether or not extending beyond the administration of my estate or any fund held hereunder;

(G) To demolish, abandon, or otherwise dispose of any property;

(H) To manage, insure, repair, improve, develop, subdivide, partition, and alter any property;

(I) To borrow money for any purpose in connection with the administration of my estate or any fund held hereunder from any person or corporation, including a fiduciary hereunder, on such terms as deemed advisable by my Executor or Trustee;

(J) To register and hold securities in the name of a nominee, and to hold securities in bearer form;

(K) To incorporate any business or property, and thereafter to hold a majority or minority interest in such corporation;

(L) To transfer any business or property to a general or limited partnership, and thereafter to be a general or limited partner in such partnership;

(M) To transfer any business or property to a limited liability company and thereafter to be a member thereof;

(N) To vote stock or securities, in person or by proxy, discretionary or otherwise, or pursuant to a voting trust agreement;

(O) To exercise subscription and conversion rights, and to participate or refuse to participate in any type of reorganization, recapitalization, merger, consolidation, liquidation,

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dissolution or other action with respect to any corporation;

(P) To settle, compromise, or refer to arbitration, any claim or obligation in favor of or against my estate or any fund held hereunder;

(Q) To continue, renew, extend or modify any note, bond, other indebtedness or mortgage, and to enforce payment of such indebtedness or mortgage by foreclosure or otherwise;

(R) To employ and terminate the employment of legal counsel, accountants, brokers, investment advisors, custodians, managers, and other agents and employees, and to pay them reasonable compensation out of my estate or any fund held hereunder to which such compensation is attributable, and to appoint and pay reasonable compensation to an ancillary administrator;

(S) To allocate receipts and disbursements and gains and losses between income and principal, in such manner as my Executor and Trustee shall deem equitable;

(T) To distribute any legacy or share of my estate or any fund held hereunder in cash or in kind or partially in each, pro rata or non pro rata, in such manner as my Executors and Trustees shall deem equitable;

(U) To move the situs of any fund established hereunder to or from New Jersey or any other state in the United States;

(V) To exercise any and all of the powers, authorities and discretions conferred hereunder in respect of any securities of any corporate fiduciary acting hereunder, or in respect of any securities of a holding company or corporation owning securities of any corporate fiduciary acting hereunder; and

(W) In general, to exercise any additional powers which I might exercise if I were living, competent, and the absolute owner of any property at any time held hereunder.

TWELFTH: I direct that no bond or other security shall be required of my Executors or Trustees, or any successor or substitute Executors or Trustees, in any jurisdiction in which any of them may be called upon to act.

N.J.S.A. 33:15-1 contemplates circumstances in which a fiduciary need to supply a bond to ensure faithful performance of their duties.

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THIRTEENTH: I direct that no beneficiary shall sell, transfer, pledge or in any other manner anticipate or encumber his or her interest in my estate or any trust hereunder, and that such interest shall not be subject to attachment or other legal process of any creditor or spouse of any beneficiary.

This Article is commonly referred to as the "Spendthrift Provision". The existance of this article puts the assets of the trust beyond the reach of a beneficiary's creditors. All Wills that create trusts must contain this term for the asset protection aspects of trusts to be available to the beneficiaries. Note that the spendthrift provisions are only applicable to the principal; income is available to satisfy judgments pursuant to N.J.S.A. 2A:17-50 et seq.

FOURTEENTH: Any word in this Will in the singular or plural, or in the masculine, feminine or neuter, shall be either singular or plural, and masculine, feminine or neuter, as the context may require.

This is a construction article, similar to any contract, making terms gender and multiple neutral.

FIFTEENTH: In the event any beneficiary fails to survive me for a period of ninety (90) days commencing upon the date of my death, it shall be conclusively presumed for all purposes under this Will that I survived such beneficiary, and my estate shall be administered and distributed, in all respects in accordance with such presumption.

N.J.S.A. 3B:3-32 provides that a person must survive merely 120 hours (or 5 days) to be deemed to have survived the Testator. Thus, the deceased beneficiary's estate will control the disposition of the assets instead of the Testator's Will. As this can lead to unintended beneficiaries (i.e.: passing to a spouse instead of to issue) a longer survival period may better express the Testator's intentions.

SIXTEENTH: This, my Last Will and Testament, shall be construed, and its validity and effect, and the rights hereunder of the beneficiaries, and fiduciaries shall, at all times, be determined in accordance with the laws of the State of New Jersey, insofar as they can be applied.

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Regardless of the residence at the time of death, this provision states that the Will will be interpreted under the laws of the State of New Jersey, as those were the laws under which the Will was drafted.

SEVENTEENTH: If any part or provision in this Will shall be held to be inoperative, invalid or void for any reason, it is my intent that the remaining provisions have operative effect and be carried out insofar as it is reasonable to do so.

This is a "blue-line" provision that allows un-enforceable terms to be struck from the Will without negating the Will as a whole.

EIGHTEENTH: At the time of the execution of this Will, I have two (2) children, namely CHRISTOPHER SMITH and CARRIE SMITH. If subsequent to the execution of this Will, there shall be an additional child or children born to me or adopted by me, and if such child or children shall survive me, they shall share in the benefits of my estate equally and to the same extent as my children hereinabove named, and the provisions of this Will shall be deemed modified to the extent necessary to effectuate such intention.

Here the children are identified and provision is made for afterborn children. In the event there are stepchildren, they should be identified here with a statement of if they or their issue are to be included in class distributions (i.e.: to my issue, per stirpes or excluded to avoid confusion following death). Any excluded child should also be identified here. New Jersey has a broad testamentary intent statue for Will construction issues. As many Will claims arise from unequal distributions to children, it is advisable to use this section to explain the Testator's intent, and to reinforce that intent within the earlier sections where the actual unequal distributions are made. See N.J.S.A. 3B:3-33 and N.J.S.A. 3B:33.1

NINETEENTH: If at any time any person serves as a fiduciary (that is to say, as an executor or trustee) of my estate or of a trust created hereunder, and if such person is also a beneficiary of my estate or such trust, such person shall not participate in any decision to make a discretionary distribution, either interim or terminating, of income or principal to himself or which is for his pecuniary benefit. Such decision shall be made exclusively by fiduciary. In addition, no fiduciary shall have the power to make a discretionary distribution of income or principal which is in discharge of a legal obligation of himself, including but not limited to a legal obligation to

support any person. Any and all such power or powers shall be vested in a fiduciary other than the person whose legal obligation would be discharged by, or who would enjoy a pecuniary benefit from, the exercise of such power. Notwithstanding the above, a fiduciary shall be permitted to make a distribution for his or her benefit when such distribution is subject to an ascertainable standard, as set forth in Section 2041 of the Internal Revenue Code of 1986, as amended.

Under federal tax laws, where a Trustee has discretion over the trust that rises to a general power of appointment (as described in IRC Section 2041) for the Trustee's own benefit, the trust corpus is deemed to belong to the Trustee for estate tax purposes upon the Trustee's death. In a more complex estate, a trust may be established with the express goal of not having the trust included in a Trustee's taxable estate upon death. This provision back-stops N.J.S.A. 3B:11-4., which provides that where a beneficiary is also a Trustee, such Trustee can only make distributions to his or her benefit for his or her health, education, maintenance and support.

TWENTIETH: My named Executors, Trustees and Guardians shall have the power at any time to designate substitute or successor Executors, Trustees and Guardians, who shall have the same duties and powers as are conferred in this Will upon my Executors, Trustees and Guardians named herein, including the power to designate additional substitutes or successors. Any person named pursuant to this authority shall serve only in the event that none of the herein named person or persons shall be available or willing to serve. Any appointment shall be made in writing, shall be acknowledged, shall state the time or the event when such appointment shall take effect and shall be forwarded by certified mail to all named Executors, Trustees, Guardians and Beneficiaries.

This provision allows that last acting fiduciary to name successors, avoiding the need for court appointed successors when the listed fiduciaries are exhausted.

TWENTY-FIRST: Any trust created hereunder or created pursuant to a power of appointment created hereunder shall not be subject to and shall not be void by any reason of any rule against perpetuities, whether common law rule or otherwise, pursuant to N.J.S.A. 46:2F-9.

New Jersey allows Testator's to opt-out of the Rule Against Perpetuities, stating that a trust may only last so long as lives in being at the Testator's death plus 21 years, so long as the opt-out is elected in the governing document.

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TWENTY-SECOND: The provisions of this Will in favor of my spouse are intended to be in lieu of my spouse's right of election and of all other provisions for the surviving spouse under the laws of the State of New Jersey or any other jurisdiction where any of my estate, real or personal, may be situated.

This states the Testator's intent that the Will should satisfy any right of election or similar right the spouse may have. The spouse is entitled to 1/3 of the "augmented estate" upon the Testator's death per N.J.S.A. 3B:8-1, et seq. This cannot be waived except in a validly executed pre- or post-nuptial agreement.

TWENTY-THIRD: In the administration of my estate and of the trusts established hereunder, all cash dividends, ordinary and extraordinary, and all distributions treated as ordinary income for Federal Income Tax purposes (other than in liquidation or reorganization of the distributor) shall be income; and all other income distributions with respect to stock, including stock dividends, stock splits, liquidating dividends, capital gains dividends from mutual funds and proceeds from the sale of rights shall be principal.

This article sets the standards for what types of trust receipts are "Income" for trust purposes, and which are additions to "Principal". Where the distribution of different classes of receipts are separate, as in the Age Restrictions Trust Article in Article FIFTH, there needs to be clarity as to what is "Income" for the purposes of the distribution provisions, and what is "Principal".

TWENTY-FOURTH: My Trustee, in exercising the discretions conferred upon my Trustee under this Will to pay or apply the income or principal of a trust for the benefit of certain persons, all as more particularly provided hereinabove, may, but shall not be required to, take into consideration any other resources any such persons may have, including income or capital. My Trustee's determination as to the advisability of making any such payment or application shall be conclusive and binding upon all persons interested in the trusts hereby created.

This provision is intended to provide protection to the Trustee in exercising discretion to make distributions by protecting the Trustee from challenges to the exercise, or non-exercise, of

discretion. Note that this will not act to protect the Trustee from his own gross negligence.

TWENTY-FIFTH: It is my desire that there be no public or judicial accounting of the administration of my estate or the trusts established under this Will, but nothing herein shall preclude my Executor, Trustee, or any beneficiaries hereof from seeking a judicial accounting of any such administration. In lieu of a formal accounting it is suggested that the fiduciaries settle their accounts by agreement with the beneficiaries (or their parents or legal guardians.) Such agreement or agreements shall effectively release and discharge my fiduciaries from the acts and proceedings so accounted for. The written approval by all of the then living adult and competent beneficiaries of this Will of any matter relating to or arising in the course of the administration of my estate or the trusts established under this Will, whether the same relates to an accounting or any action taken or omitted or proposed to be taken or omitted by my Executor or Trustee, shall be binding upon all beneficiaries hereof, including those who are minors or as yet unborn at the time of such accounting.

This waives the requirement for the Executor to submit a formal accounting to the Surrogate Court, as described in N.J.S.A. 3B:17-1 et seq. This must be stated in the Will, or an accounting may be required, thus causing significant additional expenses to the estate.

TWENTY-SIXTH: Whenever my Trustee (other then a beneficiary of such trust), in its sole and absolute discretion, shall determine that the size of any particular share being held in trust does not warrant the cost of continuing the trust with respect to such share, my Trustee, without the permission or order of any court, may terminate the trust. Upon such termination, the entire balance remaining shall be paid over to the beneficiaries entitled to the income thereof at that time, in the proportions in which they are beneficiaries of such income. If any such beneficiary is a minor, payment of any such minor's share may be made to such minor, or to a guardian of the property of such minor wherever appointed without requiring ancillary guardianship, or any qualified custodian under the Uniform Gifts to Minors Act of any jurisdiction with power to select any person or trust company (including any Trustee hereunder) to be such custodian. My Trustee shall have no obligation to see to the use or application thereof and the receipt of such minor, guardian, parent, person or custodian shall be a complete discharge as to such transfer or payment. In deciding

Initials:_____

whether to terminate such trust, my Trustee need not consider the interest of remaindermen or succeeding income beneficiaries, and their respective interests in the trust share in question shall cease upon termination by my Trustee.

This is a small trust termination provision. Where assets are limited, or significant distributions have been made, it may no longer be economically viable to maintain the trust. Trusts are subject to higher income taxes than individuals, and the Trustee fees may outweigh the benefits of the trust. In this instance, this allows the trust to be distributed to the beneficiary in advance of the term limits set in the governing language.

(Signatures on the Next Page)

If the Will ends mid-page, direct the documents to flow to the next page so the Testator's and Witnesses signatures are on the same page.

IN WITNESS WHEREOF, I, HAROLD SMITH, Testator, made signed, sealed, published and declared this instrument to be my Last Will and Testament, in the presence of each and all of the subscribing witnesses, each of whom I have requested, in the presence of each other, to subscribe his name and address as an attesting witness, in my presence, and in the presence of the others, and to the same as such, I have hereunto set my hand and affixed my seal this _____ day of _____, 2023.

This provision states that the Testator signs the Will understanding its importance and contents, and well as the date of execution. N.J.S.A. 3B:3-2 governs Will execution, and states that (2) witnesses are required. For future identificaiton purposes, have them print their name under the signature and insert their address.

_____(L.S)
HAROLD SMITH, Testator

The foregoing instrument was subscribed, sealed, published and declared by HAROLD SMITH, the Testator above named, as his Last Will and Testament, in our presence, and in the presence of each of us, and we, at the same time, at his request, in his presence and in the presence of each other, hereunto subscribed our names and addresses as attesting witnesses this _____day of _____, 2023.

_____ ADDRESS _____

Print Name: _____

_____ADDRESS _____

Print Name: _____

Initials:_____

STATE OF :

COUNTY OF :

We, HAROLD SMITH, _____ and _____, the Testator and the witnesses respectively, whose names are signed to the attached or foregoing instrument, being duly sworn, do hereby declare to the undersigned authority that the Testator signed and executed the instrument as his Last Will, and that he had signed willingly (or willingly directed another to sign for him), and that he executed it as his free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the Testator, signed the Will as witness and to the best of his knowledge the Testator was at that time eighteen (18) years of age or older, of sound mind and under no constraint or undue influence.

_____
HAROLD SMITH, Testator

_____
Witness

_____
Witness

Subscribed, sworn to and acknowledge before me by HAROLD SMITH, the Testator, subscribed and sworn to before me by _____ and _____, the witnesses, this _____ day of _____, 2023.

_____

An Affidavit of Execution must be completed to make the Will self-proving, thus avoiding the need to "Prove" the Will through witness testimony at the time of death. To be self-proving, the Will must be executed in accordance with N.J.S.A. 3B:3-2 and acknowledged before a Notary Public or Attorney (see N.J.S.A. 3B:3-4).

New Jersey now permits virtual notarization (but not virtual witnessing). Gov. Phil Murphy signed Assembly Bill No. 4250 into law on July 22, 2021. The new law – New Jersey Law on Notarial Acts (Act) – permanently authorizes New Jersey Notaries to conduct in-person notarizations of electronic documents and remote online notarizations of electronic and tangible documents. It effectively replaces the temporary law passed in April 2020 that authorized these types of notarizations to help deal with the COVID-19 public health emergency. Refer to the New Jersey Notary Public Manual at

Initials:_____

https://www.nj.gov/treasury/revenue/pdf/NotaryPublicManual.pdf for compliance instructions.

Initials:_____

SUMMARY OF FEDERAL AND NEW JERSEY TRANSFER TAXES[1]

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The reference to "transfer taxes" includes both Federal and state transfer taxes. The Federal transfer taxes are the Estate Tax (which is, generally, a tax that is imposed at the time of one's death on one's "taxable estate" plus "adjusted taxable gifts"), the Gift Tax (which is, generally, a tax that is imposed when one makes a "taxable gift") and the Generation Skipping Transfer Tax (which is, generally, a tax imposed on the transfer of wealth to, or for the benefit of, members of a generation more than one generation younger than the transferor). Many states also impose transfer taxes; the forms of which vary from state to state. New Jersey imposes a State Transfer Inheritance Tax, as well as a State Estate Tax for those who died prior to 2018.[2]

I. Federal Gift Tax: The federal gift tax is imposed on the transfer of a decedent's property during life by gift. IRC is at 26 US Code, Subtitle B, Ch. 12, Secs. 2501 through 2524.

A. IRC Sec. 2501(a) imposes a gift tax on "the transfer of property by gift"

1. The tax is imposed on the donor of the gift. Treas. Reg. Section 25.2511-2(a).

2. The term "gift" not defined in the Internal Revenue Code. The definition developed in case law and Treasury Regulations

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[1] These materials are intended as a brief and basic discussion that omits much that may be relevant to the subject area. As such, these materials should be used with caution and only after diligent consideration is given to other resources and of all potential legal, tax, and other consequences.

[2] New Jersey does not impose a State Gift Tax; although, gifts made to nonexempt transferees within three years prior to death in contemplation of the donor's death are subject to New Jersey's Inheritance Tax.

a. Treas. Reg. Section 25.2511 provides that a gift is a direct or indirect lifetime transfer of property, in trust or otherwise, for less than full and adequate consideration. If there is consideration, the value of the gift (if it is a gift) is the excess of the value of the property transferred over the consideration received.

b. Although donative intent is not required, generally a gift involves a transfer of property out of generosity and donative motivations

B. To be subject to gift tax, the transfer must be "complete"

1. That is, the donor must have given up sufficient (not necessarily all) dominion and control over the property. For example, a revocable transfer is not a complete gift; nor is a transfer where the donor has reserved the right to change beneficiaries unless in a fiduciary capacity limited by an ascertainable standard. Treas. Reg. Section 25.2511-2(c).

C. In determining taxable gifts (which are subject to gift tax):

1. IRC Sec. 2503 (b) provides for a $10,000 per donee per year annual exclusion. This $10,000 amount increases by cost of living increase in $1,000 increments rounded to lowest multiple of $1,000. For gifts made in 2024, the exclusion amount is $18,000.

a. Annual exclusion is available only with regard to gifts of present, not future, interests. A present interest is a right to immediate use, possession and enjoyment

2. IRC Sec. 2503(c), regarding minor trusts, deals with the problem of giving present interests to minors.

a. Gifts in trust, or otherwise,[3] are considered present interests, even if really a future interest, if the property and income therefrom:

i. may be expended only for the donee before attaining age 21 and

ii. to extent not so expended, passes to donee upon attaining age 21 or, if donee dies before age 21, passes to donee's estate or as donee appoints

[3] E.g. UTMA accounts.

by general power of appointment.

3. So called "Crummey Trusts" are intended to convert gifts made to trusts from future interest gifts to present interest gifts by providing trust beneficiaries with an immediate (often limited) rights to withdraw the gift made to the trust.[4]

4. IRC Sec. 2503(e) excludes from taxable gifts, medical and tuition payments made directly to service provider or school.

D. Generally, IRC Sec. 2522 provides for an unlimited deduction for the value of property passing to a tax exempt charity; subject to special rules involving "split interest" gifts. Note, a gift to a tax exempt charity may also be deductible for income tax purposes. See IRC Sec. 170.

1. A split interest gift is one where the term or life interest holder and remainder interest is split between charitable and non charitable beneficiaries.

2. In 1969, the Internal Revenue Code was changed in response to historical abuses regarding charitable income trusts. The changes disallowed deductions for split interest gifts unless the gift was a Charitable Remainder Annuity Trust ("CRAT"), Charitable Remainder Unitrust ("CRUT"), a Charitable Lead Annuity Trust ("CLAT"), a Charitable Lead Unitrust ("CLUT"), a Pooled Income Fund, a remainder interest in a residence or farm, an undivided interest in property, or a qualified conservation contribution.

3. In a Charitable Remainder Trust, the grantor or decedent transfers property to trust and either retains or gives to a non-charitable beneficiary (such as a family member), either an annuity interest (a Charitable Remainder Annuity Trust, "CRAT") or unitrust interest (a Charitable Remainder Unitrust, "CRUT") for specified term (years or lives) at the end of which the trust property passes to charity (either as designated in the instrument or as selected under a special power of appointment by the grantor or another).

a. For a CRAT, a fixed money amount (determined by a stated amount or a stated percentage of the value of the initial funding) is paid periodically to a non-charitable term life beneficiary.

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[4] Crummey v. Comm., 397 F.2d 82, 68-2 USTC Para 12541 (9th Cir. 1968); Rev. Rul 73-405.

b. For a CRUT, a fixed percentage amount of the changing value of the trust is periodically paid to the non-charitable term / life beneficiary.

4. In a Charitable Lead Trust, the grantor or decedent transfers property to trust and grants either an annuity interest (Charitable Lead Annuity Trust, "CLAT") or unitrust interest (Charitable Lead Unitrust, "CLUT") to a charity for a term of years or a measuring life, at the end of which the trust property passes to the remainderman.

5. A pooled income fund is a trust sponsored by a charitable organization to which one or more donors make gifts and are entitled to receive a proportionate share of the fund's income for life, with the remainder to pass to the charity.

6. A gift to a charity of a remainder interest in one's personal residence or farm allows an immediate income tax deduction, although the gift is deferred until the donor's death. Such a gift also qualifies for a gift and estate tax charitable deduction.

a. Deductions for gifts of remainder interests are not available for gifts of other types of property, such as art or other tangible personal property.

7. Gifts to a charity of undivided fractional interests in property are deductible (e.g. a one-fourth interest as opposed to a term and remainder interest).

E. IRC Sec. 2523(a) provides for an unlimited marital deduction for transfers between spouses, so long as pass in qualifying manner.

1. The transferred interest must not be a nondeductible terminable interest.

a. A terminable interest is one where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest transferred to the spouse will terminate or fail. E.g., a life estate.

i. A terminable interest is not nondeductible if, on the happening of such event, the property passes to the spouse (or to the spouse's estate) or if the transfer is of qualified terminable interest property ("QTIP").

2. For a transfer to be QTIP, the following requirements must be satisfied:

a. All income from the property must be paid to the spouse,

b. The income must be paid to the spouse at least annually,

c. No portion of the property may be paid to anyone other than the spouse during the spouse's life, and

d. An election must be made on a timely filed gift tax return (Form 709) to treat the property as QTIP property. Code Section 2523(f).

3. Note, to the extent of the value of QTIP property at the death of the beneficiary spouse, the QTIP property is included in the beneficiary spouse's gross estate for estate tax purposes as the time of the beneficiary spouse's death. Code Section 2044 (discussed below).

4. If the spouse is not a US citizen, the marital deduction is not allowed. Instead, there is an enhanced annual exclusion under Code Section 2503(b) for gifts (of a present interest) made to, or for the benefit of, a non-US citizen spouse. The enhanced annual exclusion is $100,000, adjusted by cost of living. Code Section 2523(i). The exclusion amount is $185,000 for gifts made in 2024.

F. IRC Sec. 2513 provides for split gifts. Thereunder, spouses can elect to treat gift by one to a third party as having been made ½ by each.

G. IRC Sec. 2502: Computation of gift tax:

1. Use IRC Sec. 2001 (c) rate tables (same as used for estate taxes; gift taxes and estate taxes unified after 1976; 40% rate)

2. Gift tax is excess of

a. gift tax on aggregate of all taxable gifts in current plus preceding years over

b. gift tax on all taxable gifts in preceding years back to June 6, 1932 (including pre 1977 gifts in excess of pre 1977 exemptions)

3. The gift tax is then reduced by IRC Sec. 2010 unified credit to extent available.

a. The gift tax exemption amount had been $5,000,000, subject to cost of living increases since 2011 in $10,000 increments.

b. However, the Tax Cuts and Jobs Act, which was signed into law on December 22, 2017, temporarily doubles the gift tax exemption to $10,000,000, subject to cost of living increases since 2011, for gifts made before 2026. Thereafter, the

pre-existing exemption amount come back into effect. For 2024, the exemption amount is $13,610,000.

c. The amount of the unified credit is the amount of tax that would be imposed on the exemption amount absent the credit. For example, the unified credit on an exemption amount of $5,000,000 is $1,945,000; the unified credit on an exemption amount of $10,000,000 is $3,945,000; the unified credit on an exemption amount of $13,610,000 is $5,389,800.

d. The credit is "unified" because it applies not only for gift tax purposes, but also for estate tax and generation skipping tax purposes.

H. A gift tax return on Form 709 is filed each calendar year for taxable gifts made in prior calendar year or, even if no taxable gifts, if gift splitting is elected or to comply with "adequate disclosure" regulations (which pertain to gifts where the value of the gift is discounted).

1. The statute of limitations on a taxable gifts only begins to run with the filing of a gift tax return,

II. Federal Estate Tax: The federal estate tax is imposed on the net value of a decedent's property at death plus the value of property gifted during life (with a reduction for gift taxes paid so there is no double tax). IRC is at 26 US Code, Subtitle B, Ch. 11, Secs. 2001 through 2210.

A. The estate tax is imposed on the sum of the decedent's "taxable estate" and the decedent's "adjusted taxable gifts". IRC Sec. 2001.

B. The taxable estate is the decedent's gross estate minus allowable deductions. IRC Sec. 2051.

1. The gross estate is valued at fair market value as of the date of death, except

a. IRC Sec. 2032 allows for an alternate valuation date 6 months after the date of death, if elected. The election can be made only if the result is the reduction in actual estate taxes owed.

i. This limitation is intended to disallow the use of the

alternate valuation date solely for the purpose of increasing the date of death basis adjustment under IRC Sec. 1014.

ii. Other than of items representing income in respect of a decedent ("IRD"; such as IRA accounts), IRC Section 1014 generally provides for a basis adjustment of property acquired from a decedent to the date of death value.

b. IRC Sec. 2032A allow for a special use valuation for certain family owned real property used in a family farm or in a family business

i. This allows for a reduced valuation based on actual use of the property as opposed to the highest and best use.

2. The gross estate includes the decedent's probate estate (IRC Sec. 2033) plus a number of non-probate property interests, including

a. Transfers with retained interests in the transferred property that were held at any time within 3 years prior to death. IRC Secs. 2036, 2035. The retained interests involve the retention of the income from, or enjoyment of, the transferred property; or, the right to control the income or enjoyment by others.

b. Transfers of property in which the decedent held a significant reversionary interest within 3 years prior to death and in which the property can be obtained only by surviving the decedent. IRC Secs. 2037, 2035. This involves transfers where the receipt of the transferred property depends on the transferee surviving the decedent and the decedent retained a significant reversionary interest in the transferred property (valued at least 5% of the value of the property immediately before the decedent's death).

c. Transfers in which the decedent held the right to amend or revoke the transfer within 3 years prior to death. IRC Secs. 2038, 2035.

d. Value of annuities or other payments (e.g. IRA's, 401Ks and other retirement plans) in which the decedent had an interest and is payable to a beneficiary by reason of surviving the decedent. IRC Sec. 2039.

e. Interests in jointly owned property that passes by rights of survivorship. IRC Sec. 2040.

i. Compare tenancy in common interests, which are probate property interests.

ii. Amount included is based on the proportionate share of the value of the property attributable to the decedent's contributions.

iii. Note, IRC Sec. 2040(b) pertains to "qualified joint interests"; which are joint interests in which the only co-owners are the decedent and the decedent's surviving spouse. In this case, ½ of the value is included in the decedent's gross estate.

iv. The purpose of qualified joint interests is to limit the IRC Sec. basis adjustment under IRC Sec. 1014.

f. Property over which the decedent held a general power of appointment within 3 years prior to death. IRC Sec. 2041.

i. A general power of appointment is, generally, a right to appoint the property to one's self, one's creditors, one's estate or the creditors of one's estate; unless the right is subject to an ascertainable standard relating to health, education, maintenance or support; or, unless the right can only be exercised with the consent of one who would be substantially adversely affected by the exercise.

g. Proceeds of life insurance on the decedent if payable to or for the benefit of the estate or if the decedent owned or had any ownership rights (incidents of ownership) in the policy within 3 years prior to death. IRC Sec. 2042, 2035.

h. The decedent's interest in QTIP property. IRC Sec. 2044.

C. The allowable deductions include

1. Funeral expenses, administration expenses, claims against the estate and indebtedness of the estate. IRC Sec. 2053.

2. Losses from uninsured casualties (assets lost, stolen or destroyed) during the administration of the estate. IRC Sec. 2054.

3. Charitable transfers. IRC Sec. 2055. Generally, there is an unlimited deduction for the value of property passing to a tax exempt charity; subject to special rules involving "split interest" gifts. Split interest gifts are discussed above in the context of the federal gift tax.

4. Amounts passing to the surviving spouse either outright or in a manner that is not a non-deductible terminable interest – the marital deduction. IRC Sec.

2056.

a. Purpose is to make sure that property is subject to tax (to extent not consumed) in surviving spouse's estate.

b. "Terminable interest" is an interest in property passing to the surviving spouse that terminates due to lapse of time, occurrence or non-occurrence of an event or contingency and then passes to one other than the surviving spouse or his/her estate. E.g. life estate. E.g. an interest in property that terminates upon remarriage.

c. Outright transfers are clearly not terminable interests.

d. Conditioning a spouse's inheritance on surviving for 6 months is not a nondeductible terminable interest if, in fact, the spouse survives for the 6 month period. IRC Sec. 2056(b)(3).

e. Life estate coupled with general power of appointment in the surviving spouse: IRC Sec. 2056(b)(5) allows a marital deduction if the terms of the transfer are that all income is payable to the spouse for life, at least annually, and the spouse, alone, has a general power of appointment over the property. Note, inclusion in the surviving spouse's estate will be assured under IRC Sec. 2041.

i. Also, the marital deduction will be allowed for transfers to a so-called "Estate Trust" (which typically allow for the accumulation of income) for the benefit of the surviving spouse. An Estate Trust provides that, when the spouse dies, the property passes to the spouse's estate. Therefore, it is not a terminable interest (because it doesn't pass to one other than the spouse or his/her estate).

f. Qualified terminable Interest Property ("QTIP"). IRC Sec. 2056(b)(7), which was enacted in 1981, allows for a marital deduction if the requirements thereunder are met. The requirements are:

i. All the income from the transferred property must be paid solely to the surviving spouse,

ii. The income must be paid to the surviving spouse at least annually,

iii. Principal cannot be expended during spouse's life for anyone other than the spouse, and

iv. An election must be made on a timely filed Federal Estate Tax Return (Form 706).

v. Note that, as per IRC Sec. 2044, when the surviving spouse dies the then value of the QTIP property is included in the surviving spouse's gross estate.

- Might not make a QTIP election in order to avoid estate tax inclusion in surviving spouse's estate (especially at an appreciated value if the value of the QTIPable property increases from the date of the death of the first spouse to die).

- If no QTIP election is made, there is no IRC Sec. 1014 basis adjustment at the second spouse's death. If, however, a QTIP election is made, the inclusion of the QTIP property in the beneficiary spouse's estate under IRC Sec. 2044 will allow for a basis adjustment at the surviving spouse's death. The beneficiary spouse's larger taxable estate (by reason of the IRC Sec. 2044 inclusion) might be offset by an increased exemption amount due to possible portability to the surviving spouse of the deceased spouse unused exemption (DSUE).

- IRC Sec, 2010(c)(4), (5) allows for an increase in the surviving spouse's exemption amount to the extent that the deceased spouse's estate does not fully use the deceased spouse's exemption amount (DSUE; enacted in 2010 on a temporary basis and made permanent in 2012); provided that, an election to this effect is made in a timely filed federal estate tax return (Form 706). The DSUE applies for Federal Estate and Gift Tax purposes, but not for Generation Skipping Transfer Tax purposes. Additionally, inflation adjustments do not apply to the DSUE and the DSUE only applies with regard to the most recently predeceased spouse.

- Rev. Proc. 2016-49 allows a QTIP election to be effective even if there is no estate tax savings at the death of the first spouse to die if the purpose of the election is to facilitate a DSUE at the death of the surviving spouse.

g. If the surviving spouse is not a US citizen by the time federal estate tax return is due and filed (and was a US resident at all times after the date of the

decedent's death and until becoming a citizen) the marital deduction is not allowed unless paid to a Qualified Domestic Trust. IRC Secs. 2056(d), 2056A.

5. Death taxes paid to a state or to the District of Columbia. IRC Sec. 2058.

a. Note, this replaces the state death tax credit under IRC Sec. 2011 that has been phased out.

D. "Adjusted taxable gifts" are then added to the taxable estate to get the "tentative estate tax base". Adjusted taxable gifts are the aggregate total of the decedent's post-1976 taxable gifts that are not otherwise included in the gross estate. IRC Sec. 2001(b).

1. The effect of this is to reduce the estate tax exemption amount by the amount of the adjusted taxable gifts (and to push the estate into a higher marginal tax bracket, if there is a higher marginal tax bracket).

2. Adjusted taxable gifts are included at the value reported for gift tax purposes.

E. The tax tables at IRC Sec. 2001(c) are applied to the tentative estate tax base to get the "tentative estate tax".

1. The tax tables have marginal rates. However, the highest marginal rate of 40% applies at a tentative estate tax base ($1,000,000) that is less than the applicable federal estate tax exemption. As such, the federal estate tax is effectively imposed on the amount subject to tax in excess of the exemption amount at a flat rate of 40%.

F. The tentative estate tax is then reduced by gift taxes paid on adjusted taxable gifts (IRC Sec. 2001(b)) and by various estate tax credits, including:

1. The unified credit under IRC Sec. 2010 (discussed above) that provides an exemption equivalent of $13,610,000 for decedents dying in 2024.

The Tax Cuts and Jobs Act, which was signed into law on December 22, 2017, temporarily doubles the estate tax exemption to $10,000,000, subject to cost of living increases since 2011, for gifts made before 2026. Thereafter, the pre-existing exemption amount come back into effect. Note: Tax base is TE + ATG; if use larger exemption by lifetime taxable gifts than exemption available at death, get to use higher

exemption amount; See anti-clawback Treas Reg adopted in 2019 20.2010-1(c).

2. Note, that the state death tax credit under IRC Sec. 2011 has been repealed (the credit fully phased out for those dying after 2004). The state death tax credit is replaced by a deduction under IRC Sec. 2058.

3. Credit for gift taxes paid on pre 1977 gifts that are included in the gross estate. IRC Sec. 2012.

4. Credit for estate taxes imposed on property included in the estate of another decedent dying within 10 years before or 2 years after the decedent. IRC Sec. 2013.

a. The credit is the lesser of (x) adjusted pro rata share of transferor's estate tax allocable to the transferred property (the estate tax multiplied by a fraction, the numerator of which is the value of the transferred property and the denominator of which is the taxable estate) or (2) the additional estate tax to the transferee's estate allocable to the transferred property if included, and at value in transferor's estate; subject to percentage reductions based on time between the deaths.

5. Credit for foreign death taxes paid by the estate on property situated in a foreign country. IRC Sec. 2014.

G. The tentative estate tax, minus the gift taxes paid on adjusted taxable gifts and by the various estate tax credits, equals the federal estate tax.

H. The personal representative must prepare and file the decedent's Federal estate tax return, Form 706. The Form 706, is due 9 months after the date of death, with a single automatic 6 month extension allowed. IRC Sec. 6075; Treas. Reg. Sec. 20.6081-1. An extension is obtained by filing a Form 4768. Payment of the estate tax is due 9 months after the date of death.

1. A Form 706 is required if the decedent's gross estate plus adjusted taxable gifts exceed the estate tax exemption amount. IRC Sec. 6018(a).

a. A Form 706 may also be prepared and filed for the purposes of making a DSUE election, even if filing is not otherwise required. Generally, in order to make an effective DSUE election, the Form 706 must be timely filed. However, Rev. Proc 2022-32 provides relief if a Form 706 is not otherwise required to be filed. Thereunder,

the DSUE election can be made in a late filed Form 706 so long as it is filed on or before the fifth anniversary of the decedent's death and the return includes a note at the top stating that it is "filed pursuant to Rev. Proc. 2022-32 to elect portability under Sec. 2010(c)(5)(a)." This avoids a letter ruling process and no user fee is required.

2. The personal representative is responsible to pay the federal estate tax and is personally responsible for the amount of tax due. IRC Sec. 2002; Treas. Reg. Sec. 20.2002-1.

a. The personal representative may be discharged from personal liability by making written application to the IRS with Form 5495 and by paying any tax due, and bonding any extended payments, as the IRS may so notify the personal representative by a Form 7990. Such notice is to be given within 9 months after the making of the application or, if later, within 9 months after the return is filed. IRC Secs. 2204(a), 6905.

b. If the amount of the estate tax is attributable to the inclusion of non-probate property in the gross estate (see below), the personal representative may recover the taxes paid from the recipient of such property, unless the Will provides otherwise. IRC Secs. 2206, 2207, 2207A, 2207B; NJSA 3B:24-1 et. seq.

i. Tax apportionment clauses or, in the absence thereof, state default statutes, determine how beneficiaries share the burden of estate taxes (discussed below).

3. The tax is due at the time that the return is due; although filing extensions do not extend the time to pay tax. Extensions of time to pay (with interest) for a limited time (up to 10 years) can be obtained for reasonable cause by filing a Form 4768). IRC Sec. 6161(a)(1). Extensions can also be granted with respect to future interests. IRC Sec. 6163.

a. Where the estate consists largely of closely held business interests, the payment of the portion of the estate tax attributable to such interests can be deferred (with interest) for up to 15 years. IRC Sec. 6166.

4. The personal representative will need to consider a number of decisions and elections in preparing the Form 706, including

a. QTIP election. IRC Sec. 2056(b)(7).

b. Reverse QTIP election for generation-skipping transfer tax purposes. IRC Sec. 2652(a)(3).

c. DSUE election

i. Under pre-2010 law, the exemption of the first spouse to die would be lost if not used. This could happen where the spouse with resources below the exemption amount dies before the richer spouse or where the first spouse to die left everything outright to the surviving spouse (thereby utilizing the marital deduction, not the estate tax exemption). One way to address that was to set up a trust for the surviving spouse or for the poorer spouse. Such a trust is often referred to as a credit shelter trust. The portability rule may make setting up a credit shelter trust unnecessary in some cases. But there still may be other reasons to employ credit shelter trusts.

ii. The increase only applies with regard to the unused exemption amount by the most recently predeceased spouse. As such, the increase can be lost if there is a remarriage and another predecease.

iii. The increase is based on the exemption amount at the predeceased spouse's death and is not adjusted for subsequent inflation.

iv. The increase does not apply for Generation Skipping Transfer Tax purposes.

v. Note that outright inheritance by the surviving spouse, and relying on an increased exemption amount the DSUE, may lessen future income taxation because of the basis adjustment that may be available under IRC Sec. 1014 when the surviving spouse dies.

d. Whether to deduct administration expenses on the estate or income tax return. IRC Sec. 642(g).

e. Whether a beneficiary should make a qualified disclaimer under IRC Sec. 2518.

f. Whether and how the GST exemption should be allocated.

g. Whether an IRC Sec. 754 election should be made with respect to partnerships in which the decedent had an interest.

h. Whether the alternate valuation date should be elected. IRC Sec. 2032.

i. Whether taxes should be paid by extension. IRC Secs. 6161, 6163 and 6166.

j. Whether farm or business property should be valued by the special valuation rules of IRC Sec. 2032A.

5. For returns filed after July, 2015, the Surface Transportation and Veterans Healthcare Choice Improvement act of 2015 requires the personal representative to file Form 8971 with the IRS and provide a copy of Form 8971, and Schedule A, to all estate beneficiaries advising them of the estate tax value of property which they may receive as a distribution from the estate in order for the beneficiary to comply with basis consistency rules enacted under IRC Sec. 1014(f).

a. The gross estate, plus adjusted taxable gifts, must exceed the basic exclusion amount then in effect thus requiring the personal representative to file a Form 706 with the IRS.

i. Filing a Form 706 solely to elect portability or allocate Generation Skipping Transfer Tax will not require the filing of Form 8971 or Schedule A with the IRS. Consequently, no copies must be furnished to the beneficiaries.

b. Form 8971 and all Schedules A must be filed with the IRS and copies provided to the beneficiaries no later than the earlier of:

i. The date that is 30 days after the date on which Form 706 is required (including extensions) to be filed with the IRS; or

ii. The date that is 30 days after the date on which Form 706 is filed with the IRS.

III. Federal Generation Skipping Transfer ("GST") Tax: The GST tax is imposed on the transfer of property by gift or at death to, or for the benefit of, a person more than one generation younger than the transferor. IRC 26 US Code, Subtitle B, Ch.13, Secs. 2601 through 2664. For example, a gift to a grandchild; a gift of successive life estates in a trust.

A. The GST tax defends the policy that estate tax should be imposed at each generation.

B. The GST tax was first enacted in 1976. The Tax Reform Act of 1986 retroactively repealed the GST tax that had been enacted in 1976 and replaced the GST that had been enacted in 1976. It is applicable to lifetime transfers made after September 25, 1985 and to testamentary transfers by decedents dying after October 22, 1986.

C. The GST tax is imposed on generation skipping transfers. A generation skipping transfer is a transfer to or for the benefit of a "skip person." A skip person is a person more than one generation below transferor.

1. Generally, generations are determined based on lineal descent – children, grandchildren, great grandchildren, etc.

2. Spouses of the transferor (current or former) are always treated as members of the same generation as the transferor; as are spouses of relatives.

3. Legally adopted children are treated the same as blood relatives of the adopting parent.

4. Others are assigned to a generation based on their age. Generations a presumed to be 25 years in length, with the transferor being in the middle of his or her generation. Therefore, a person (other than a lineal descendant) who is more than 37½ years younger than the transferor is a skip person.

5. Generation “move-up rule”: If a lineal descendant of the transferor who is the parent of a skip person is deceased at the time a transfer is first subject to gift or estate taxation, the deceased person’s child is assigned to the lower of the transferor’s generation or the generation assigned to the youngest living ancestor of the person, who is also a descendant of the parent of the transferor (or the transferor's spouse or former spouse).

a. This rule only applies to lineal descendants of the transferor unless, at the time the transfer is made, the transferor has no living lineal descendants.

D. GST transfers are taxed at flat rate (not graduated) equal to highest estate tax rate (40%).

E. There are 3 types of generation skipping transfers.

1. Direct skip

a. This involves an outright transfer to a skip person.

i. Includes a transfer to a trust in which there is no beneficial interest held be a non-skip person.

b. The GST tax is imposed at time of transfer and payable by transferor.

c. e.g. $1,000,000 lifetime GST transfer to skip person (presuming no GST exemption is available – see below):

i. $400,000 generation skipping tax

ii. The gift tax imposed on the value of the gift plus the GST tax imposed. IRC Sec. 2515. Therefore; gift tax is imposed on $1,400,000 gift. At a 40% gift tax rate, the gift tax is $560,000.

iii. Therefore, the total transfer taxes (GST tax plus gift tax) on the $1,000,000 gift is $960,000 (or, it costs $1,960,000 to net $1,000,000 gift to a skip person)

d. e.g. $1,000,000 testamentary transfer to skip person (presuming no GST exemption is available – see below):

i. 1st determine estate tax on the amount to be transferred and then impose GST tax on the amount left.

ii. At a 40% estate tax rate, the estate tax on $1,000,000 estate tax is $400,000, leaving $600,000.

iii. The GST tax on $600,000 is $240,000, leaving $360,000 after both estate and GST taxes are imposed (or, need to leave $2,777,778, rounded, to net $1,000,000 to a skip person).

2. Taxable termination

a. This involves the termination of a beneficial interest in a trust if thereafter no non-skip person has an interest in the trust.

b. GST tax is imposed at time of termination on the value of the property with respect to which the termination occurred and is payable out of trust by trustee.

3. Taxable distribution

a. This involves a distribution from a trust to a skip person.

b. GST tax imposed on value of property distributed and is payable by transferee.

F. Exemptions and exclusions

1. lifetime gifts within gift tax exclusions; e.g. $18,000 per donee for 2024.

a. Gifts to a trust, even if it qualifies for the annual exclusion for gift taxes (e.g., due to "Crummey" rights of withdrawal), do not qualify for GST exclusion for nontaxable gifts unless the trust is for the benefit of only one person and the trust property is included in that person's estate if he or she dies during the term. IRC Sec. 2642(c)(2).

2. Exemption arising from the unified credit applies to GST transfers. E.g., $13,610,000 for 2024.

3. Spouses can elect to split GST gifts.

4. "Inclusion ratio": this is primarily applicable to transfers in trust in order to allocate exemption if the GST exemption was allocated to transfer to the trust e.g. if $1,500,000 is transferred to trust and $1,000,000 of the GST exemption is applied, the inclusion ration is 1/3rd (excess of 1 over the fraction of which $1,000,000 is the numerator and $1,500,000 is the denominator).

i. The significance then is that taxable terminations and taxable distributions pertaining to the trust will be proportionately GST nonexempt and GST exempt based on the inclusion ratio.

ii. Or, the trust can be divided into GST exempt and GST non-exempt portions in a "qualified severance" under IRC Sec. 2642(a)(3) if such division is permitted by the governing instrument or by local law.

IV. New Jersey Transfer Inheritance Tax: The New Jersey transfer inheritance tax imposes a graduated inheritance tax at rates ranging from 11% to 16% on the death transfer of real and personal property to certain non-exempt transferees, as well as on lifetime gifts

intended to take effect after death and lifetime gifts made within three years prior to death in contemplation of the donor's death.

A. Exempt transferees are Class A transferees and Class E transferees.

1. Class A transferees are the decedent's grandparents, parents, spouse (including same sex spouse) and lineal descendants (including adopted and step children; but, not step grandchildren or step great grandchildren; and includes mutually acknowledged children). Also, Class A transferees include civil union partners and domestic partners. Domestic partners are those persons who are qualified and have registered as domestic partners. Domestic partners can be two unmarried and unrelated adult persons of the same sex, or of the opposite sex if both are age 62 or older, who have a common residence and who are jointly responsible for each other's welfare.

2. Class E transferees are charities, New Jersey and its political subdivisions.

B. Non-exempt transferees are Class C and Class D transferees (there is no Class B).

1. Class C transferees are the decedent's siblings, sons-in-law and daughters-in-law (even if the spouse is deceased), as well as, civil union partners and domestic partners of a child. Transfers to them are taxed at the following rates

First $25,000	0%
next $1,075,000	11%
next $300,000	13%
next $300,000	14%
over $1,700,000	16%

2. Class D transferees are all who are not in the other Classes. Transfers to them are taxed at the following rates

First $700,000	15%
over $700,000	16%

C. Certain transfers are exempt. Exempt transfers include

1. Transfers to a transferee of less than $500 in the aggregate

2. Life insurance proceeds paid to a named beneficiary.

D. The New Jersey transfer inheritance tax return, Form IT-R, is due 8 months from the date of death and only if there are any non-exempt transferees.

V. New Jersey Estate Tax: For decedents who die prior to January 1, 2017, the New Jersey estate tax is a tax in the amount equal to the credit that would have been allowable for federal estate tax purposes under IRC Sec. 2011 under the federal estate tax laws as in effect on December 31, 2001. For decedents who die during 2017, the New Jersey estate tax is an estate tax imposed on the "taxable estate" in excess of the "exclusion amount" of $2,000,000.00 determined in accordance with the federal estate tax laws. For decedents who die after 2017, there is no New Jersey estate tax. Note, according to the New Jersey Division of Taxation, the New Jersey estate tax was not repealed. Rather, the rate was reduced to zero…

A. The New Jersey estate tax had been a "pick-up tax".

B. The phase out of the IRC Sec. 2011 credit and the increasing federal estate tax exclusions adversely impacted the state's tax collections under pick-up taxes. As such, in 2002 (retroactive to apply to all those dying after 2001) New Jersey "decoupled" its estate tax from the federal estate tax by requiring the New Jersey estate tax to be imposed as if the federal estate tax laws in effect on December 31, 2001are still in effect. Recent changes to the New Jersey estate tax laws render these provisions applicable only to those decedents who die prior to 2017.

1. As a consequence, for those who die prior to 2017 the estate tax exemption for New Jersey estate tax purposes is $675,000 as this was the federal estate tax exemption in effect in 2001.

2. However, for those who died during 2017 the "exclusion amount" is $2,000,000.00, and the tax is applied against the "taxable estate" as determined under the federal estate tax laws, IRC Sec. 2051.

3. The New Jersey estate tax is repealed (or the tax rate is reduced to zero) for those who die after 2017.

C. The tax rate for those who died prior to 2017 is based on the graduated schedule at IRC Sec. 2011(b); starting at 4.8% up to a top bracket of 16%. E.g., the New

Jersey estate tax on a $1,000,000 adjusted taxable estate is $33,200; on a $2,000,000 adjusted taxable estate is $99,600; on a $5,000,000 adjusted taxable estate is $391,600; on a $10,000,000 adjusted taxable estate is $1,067,600.

1. "Adjusted taxable estate" is the federal taxable estate reduced by $60,000.

D. For those who died in 2017, the tax rate is based on a similar rate schedule that is incorporated into NJSA 54:38-1. The rate schedule is based on the "taxable estate" at rate brackets that eliminate the $60,000 reduction that is applied in the IRC Section 2011(b) rate schedule for the adjusted taxable estate and that take the $2,000,000 exemption into account.

1. This results in tax brackets that effectively graduate from 7.2% to 16%. E.g., the tax on $5,000,000 is $262,589.92.

E. The tax is reduced proportionately by death taxes actually paid to any other state, territory of the US or the District of Columbia. The proportionate reduction is based on the proportion that the property taxed by such other jurisdictions bears to the entire estate subject to tax.

F. There is no deduction for New Jersey estate tax purposes with regard to property passing to a domestic partner; although, a deduction is allowed for property passing to a civil union partner for New Jersey estate tax purposes (as well as a same sex spouse).

G. For those who died prior to 2017, a New Jersey estate tax return, Form IT-Estate, is due if the gross estate as determined under the federal estate tax as in effect on December 31, 2001 exceeds $675,000.

1. For those who died prior to 2017, there are 2 filing methods for the IT-Estate – the Form 706 method and the Simplified Form method. The return is due 9 months after the decedent's death, plus 30 additional days if the Form 706 method is used.

a. The Form 706 method requires a completed 2001 Form 706 to be filed with the Form IT-Estate.

i. If a Form 706 is filed with the IRS, the elections made for federal estate tax purposes must be made consistently for New Jersey estate tax

purposes.

ii. Note that the Division of Taxation has informally indicated that consistent treatment is not required if a Form 706 is not to be filed. As such, presumably a trust that meets the QTIP requirements for which an election is not made can be treated as a QTIP trust for which an election is made for New Jersey estate tax purposes if no Form 706 is to be filed (e.g. because the estate plus adjusted taxable gifts is less than the exemption amount). However, even when a Form 706 is filed only to elect portability (see below), apparently the duty of consistency still applies.

b. The Simplified Form method can only be selected if no Form 706 is filed with the IRS and it is required to be filed along with a Form IT-R completed in accordance with the laws in effect on December 31, 2001.

c. The Simplified Form Method (which may not be so simple) involves adjusting the net estate as shown on the Form IT-R to reflect the following:

i. Real and tangible personal property located outside New Jersey, plus

ii. The proceeds of life insurance on the decedent's life owned by the decedent at death, or within 3 years prior to death, paid to a beneficiary other than the estate or the personal representative of the estate, plus

iii. Transfer made by the decedent within 3 years of the date of death and not included in the Form IT-R, less

iv. Property passing outright to the surviving spouse (not QTIP or similar property) who is a US citizen at the date of the decedent's death; less

v. Property passing for charitable purposes.

H. For those who died in 2017, the New Jersey estate tax return is Form IT-Estate 2017.

1. A Form 706 must be completed (whether or not it will be filed) and submitted with the Form IT-Estate 2017.

2. The information on the Form 706 provides the starting information on the Form IT-Estate 2017.

3. The tentative tax is calculated based on a New Jersey estate tax

website calculator; after which there is a reduction for New Jersey inheritance taxes due and the portion of the tax attributable to non-New Jersey property (on a pro rata basis of the gross estate values).

I. The personal representative is responsible to pay the New Jersey estate tax, as well as the New Jersey transfer inheritance tax, to the extent of the assets coming into the personal representative's possession. NJS 54:35-2, NJS 54:38-11.

1. Interest at the rate of 10% per annum is charged on New Jersey estate taxes not paid within 9 months of the decedent's death, unless an extension to pay the federal estate was granted, in which case the interest rate is 6% per annum during the period of any such extension.

2. Interest at the rate of 10% per annum is charged on New Jersey transfer inheritance taxes not paid within 8 months of the decedent's death.

3. Payments on account of the estate and inheritance taxes can be made with Form IT-EP.

J. It is important for the personal representative to determine how death taxes (Federal, as well as state) are to be apportioned among the beneficiaries' interests in the estate.

1. At common law, unless the Will provides otherwise, death taxes are paid from the residuary estate. If there are significant pre-residuary gifts, this can materially impact the residuary estate.

2. NJSA 3B:24-4 provides that, unless the Will provides otherwise, death taxes are proportionately apportioned among the beneficiaries, excluding transfers for which the marital or charitable deductions are allowed.

3. The New Jersey transfer inheritance tax is a tax on the transfer to each beneficiary that is calculated based on the amount of the transfer and the relationship of the transferee to the decedent (see below). Unless the Will provides otherwise, this tax is allocated to each such beneficiary's transfer.

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BASIC TESTAMENTARY ESTATE PLANNING

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BASIC TESTAMENTARY ESTATE PLANNING

I. Last Will and Testament: Disposition instrument that instructs the executor of your estate to dispose of your probate estate in a particular fashion. If no valid Will, the Laws of Intestacy apply.

A. Probate versus Non-Probate Property

1. **Probate Property -** passes under will (investment or bank account owned individually, real estate owned individually or as Tenant-in-Common, tangible personal property)

2. **Non-Probate Property -** passes pursuant to Beneficiary Designation Form or to Joint Owner. Examples include retirement plans, IRAs, life insurance and jointly held property.

II. Updating your Will: Generally, estate planning documents should be reviewed and/or updated every 3-5 years. That said, an immediate review/update should be performed under any of the following circumstances:

A. A change in family structure or dynamics (i.e. marriage, divorce, death, birth of children or grandchildren)

B. A significant change in the federal and/or State transfer tax laws

C. A significant change in your net worth (whether positive or negative)

D. A change in your state of residence

E. A change in your testamentary intent (i.e. who you want your executor, trustees, guardians and beneficiaries to be)

III. WILL PROVISIONS: This outline will address three primary portions of any well-drafted Will:

A. Preresiduary/Specific Bequests
B. Residuary Bequests
C. Tax Clauses

PRERESIDUARY/SPECIFIC BEQUESTS

I. Tangible Personal Property.

A. It is advisable to include a separate pre-residuary disposition of tangible personal property, even if the disposition of that property is to be made in the same manner as the residuary dispositions.

B. Code Sections 661 and 662 generally provide that income earned by the estate in a tax year is taxable to the estate beneficiaries if and to the extent that the beneficiaries receive distributions, whether in money or in kind. This creates the possibility that the distribution of personal effects to residuary beneficiaries may unexpectedly result in the estate's taxable income being taxed to the beneficiaries to the extent of the value of the distributed personal effects.

C. Code Section 663 provides that the provisions of Code Section 661 and 662 do not apply to specific bequests. As such, the inclusion of a separate, pre-residuary, provision to dispose of tangible personal property will avoid the possible imposition of unexpected income taxation on the recipients.

D. Sample pre-residuary bequest of tangible personal property:

A: TANGIBLE PERSONAL PROPERTY. *I give and bequeath, absolutely and forever, any automobiles which I may own, all my personal wearing apparel and jewelry, any household furniture and furnishings which I may own, and all other tangible personal property owned by me, in accordance with a written statement or list, in my handwriting or signed by me, which I have prepared or may prepare and/or supplement from time to time on or after the date hereof. If no such statement or list is found within sixty (60) days after my death, it shall be conclusively presumed that there is no such statement or list and distribution may be made on that basis. All such property not passing pursuant to such statement or list, I give to my spouse, JOE SMITH, if my spouse shall survive me. Should my spouse not survive me, then I give such property to my issue who survive me, per stirpes. If no issue of mine survive me, such property shall pass together with the balance of my property pursuant to Article 3 below. I direct that the expenses of distributing, safeguarding and storing all of my tangible personal property before the distribution of such property according to the directives provided hereunder, shall be paid from my estate as administration expenses.*

II. Charitable Bequests.

A. In New Jersey, whenever a charity is a beneficiary of an estate, the Attorney General's office becomes involved and acts as a watchdog for the charity.

B. When the charity is to receive a certain percent of the residuary estate, the Executor is required to prepare a full accounting even if the other beneficiaries are willing to waive it.

C. Accordingly, it is often preferable to leave a charity a specific (as opposed to a residuary) bequest. In that case, the Attorney General, on behalf of the charity, will have no need to (and in our experience will not) request an accounting.

CAUTION: A significant specific bequest to a charity could greatly deplete an estate if the value of the decedent's assets decreases after the Will is executed.

III. TAX CONSEQUENCES: As will be illustrated later, depending upon the type of tax clause contained in the Will, a person receiving a specific bequest may not be required to pay their share of any estate or inheritance tax that is due.

THE PLANNED ESTATE

I. In General. Historically, basic testamentary estate planning for married couples combined the use of a person's applicable exemption amount for State or federal estate tax purposes and the unlimited marital deduction. Current estate tax laws make such planning less viable in many cases.

II. Use of Applicable Exemption Amount

A. Shelter amount equal to decedent's available exemption amount

1. Federal ($13,610,000) in 2024 ($12,920,000) in 2023

2. New Jersey

a. Unlimited

b. NJ Estate Tax No Longer Applies

B. Can pass outright to or in trust for benefit of a non-spouse beneficiary or in trust for the benefit of the decedent's spouse

C. Trust can allow beneficiary certain rights

1. Right to income

2. Limited right to corpus of trust according to ascertainable standard or discretion of trustees other than surviving spouse (if the trust is for the spouse)

D. NOTE: The by-pass or credit shelter trust will generally *not* be included in the estate of the surviving spouse and the assets in the trust will therefore not receive a step-up in basis.

III. Marital Deduction

A. All amounts bequeathed to surviving United States citizen spouse pass tax-free

B. Interest must be non-terminable, i.e., cannot lapse after a term of years

C. QTIP Trust

a. Included in surviving spouse's estate

b. Keeps ultimate control with decedent

c. Second marriages

IV. Portability

A. Background: Under prior law, if an individual died and failed to utilize all of his/her gift and estate tax exemption, this exemption was forever lost. Under portability, a surviving spouse is able to utilize the unused exemption of his/her "deceased spouse" if the deceased spouse died after 2010.

B. EXAMPLE: If, in 2023, the first spouse to die has a $5,000,000 estate and utilizes only $1,500,000 of exemption at death, by electing portability, the surviving spouse will have a $24,340,000 ($12,920,000 + $11,420,000) exemption available for lifetime gifts or transfers at death.

C. In order to elect portability, a complete Form 706 (Unites States Estate Tax Return) must be filed.

D. NOTE: Portability does not apply to the GST Tax.

E. Is the Rule of Thumb to Make a Portability Election?

1. Is there a downside to making a Portability Election? Every surviving spouse in a situation where there is Deceased Spouse Unused Exemption (DSUE) should consider making a Portability Election.

2. Even if there is little probability that the DSUE will be utilized by the surviving spouse, there is still a chance that the surviving spouse will have a windfall (lottery) or marry a wealthy second spouse whose family would welcome the opportunity of being able to reduce their federal estate tax.

F. Why Not Make a Portability Election?

1. In New Jersey, until January 1, 2018, almost every estate that is required to file a Form IT-Estate (New Jersey Estate Tax) can make the Portability Election at very little extra cost (professional fees) because Form 706 (U.S. Estate Tax Return) is already being prepared as part of the Form IT-Estate (New Jersey Estate Tax Return) filing (except when using the Simplified Method).

2. In New Jersey, after January 1, 2018, and in those states (about 2/3) where there is no estate tax, there is a more significant extra cost to preparing and filing a Form 706 to make a Portability Election

3. But even before January 1, 2018 in New Jersey, there may be real or practical reasons for not making a Portability Election

a. If the survivor spouse is very old with virtually no chance of remarriage there is little reason to make the Portability Election.

b. Another reason for not making a Portability Election is if there is little probability that the DSUE will be beneficial and there are a plethora of gift tax returns that have been filed and would need to be attached to the Form 706 even though the Form 706 is filed only to make the Portability Election.

G. What Should an Advisor do if the Executor (Administrator) Decides Not to Make the Portability Election?

1. In each and every estate of a predeceased spouse where a Portability Election is not made, counsel should have a letter in the file that counsel has advised the Executor (Administrator) of the advantages of making a Portability Election and the Executor has, nevertheless, decided not to make the election. Preferably, the Executor will sign the letter.

2. Having the letter in file could someday protect counsel from future malpractice claims by unhappy heirs who inherit less because federal estate taxes are greater since the DSUE is not available to them.

V. Basic Marital Planning Examples:

A. The "Sweetheart" Will – Husband and Wife each have $1,000,000 of assets. Husband dies in 2023. His will provides that his entire estate is to pass to his Wife. No federal estate tax will be due because of the unlimited marital deduction. When Wife dies, she will control the disposition of all $2,000,000 of assets.

B. Alternatives for Creation and funding of the credit shelter trust:

1. Disclaimer – surviving spouse determines how much, if any, is transferred to the non-marital credit shelter trust

2. Federal Exemption Amount – formula

3. Specific Dollar Amount

C. In light of the recent repeal of the New Jersey Estate Tax, the use of credit shelter trusts for the merely affluent (as opposed to the super rich) must be reconsidered

D. It is now more difficult to plan for the $5-10 million couple than for the $20+ million couple

VI. CAUTION – Outdated Wills

A. Wills which were executed several years ago may result in unintended consequences.

EXAMPLE: Husband dies with assets valued at $3 million. His will, which was drafted in 2006 when the federal estate tax exemption was only $1.5 million, provides (via formula) that the maximum amount possible without creating a federal estate tax should pass to his children from a prior marriage and the balance of his estate should pass to his spouse. In light of the increased federal estate tax exemption, Husband's children will receive his entire estate and nothing will pass to his spouse.

EXAMPLE: Husband dies with assets valued at $3,500,000. His will, which was drafted in 1999 (when the federal estate tax exemption was $650,000), provides that the maximum amount possible without creating a federal estate tax should pass to a credit shelter trust for the benefit of his spouse. Accordingly, the trust is funded with $3,500,000 and nothing passes outright to the surviving spouse. Unless a QTIP election can be and is made, the credit shelter trust will not be included in the surviving spouse's estate and the assets will not receive a step-up in basis.

B. Is it possible for the traditional Non-Marital Credit Shelter Trust to be Q-tipped? It depends primarily upon the terms of the Credit Shelter Trust.

1. All income must be payable to the surviving spouse.

2. There can be no other beneficiaries of the trust while the surviving spouse is alive.

C. The use of a trust(s) for the benefit of the surviving spouse does offer other, non-tax advantages such as:

1. Protection from creditors

2. Protection from subsequent marriages

3. Surviving spouse who is a spendthrift or is not financially astute

4. The ability to direct who the remainder beneficiaries of the trust will be which can be particularly important for second marriages

VII. Planning for Second Marriages – the QTIP Trust.

A. **In General.** Second marriages often require the incorporation of a marital or QTIP trust. Specifically, the spouses often have a desire to provide maximum financial security to their spouse but also want to ensure that *their* children or other beneficiaries ultimately inherit from them. This is often accomplished with a combination of a non-marital credit shelter trust and a marital QTIP trust.

B. **EXAMPLE:** Husband and Wife are New Jersey residents who were each previously married and who each have $2,000,000. Husband has 2 children from his previous marriage (A and B). Wife has three children from her previous marriage (C, D and E). Husband and wife's primary intent is to provide for each other upon death. If Husband were to die and leave all of his assets to his Wife, she would be free to bequeath them only to C, D and E. Since Husband presumably wants assets to pass to his children, a QTIP trust should be funded. Now, upon Wife's subsequent death, Husband can control to whom the assets remaining in the QTIP trust will pass (presumably A and B).

1. The requirements of a QTIP Trust are set forth in Code Section 2056(b)(7). They are:

a. The surviving spouse must be entitled to all the income from the trust,

b. The income must be payable to the surviving spouse at least annually,

c. No person may have a power to appoint any of the trust property to any person other than the surviving spouse, and

d. An election must be made on a timely filed estate tax return (including extensions) for the marital deduction to apply.

3. When the surviving spouse dies, the assets in the QTIP Trust are included in the spouse's gross estate for estate tax purposes under Code Section 2044.

4. Unless waived, there will be a right of recovery available to the estate.

5. The primary advantages of a QTIP Trust are:

    a. The management of the wealth in the QTIP Trust can be handled by one or more designated trustees (who can be, or include, the surviving spouse);

    b. The trust's provisions can dictate those to whom the trust property will pass when the surviving spouses dies; thereby eliminating the ability of the surviving spouse to otherwise make such decisions (as would be the case if the survivor spouse inherited the wealth outright); and

    c. Creditor protection may be provided to the surviving spouse because, as a general matter, creditors of the surviving spouse cannot levy on the assets in the QTIP Trust.

VII. Trusts for "Minor" Beneficiaries

A. Trust preserves assets until children are old enough to manage money independently.

    1. Example 25/30/35

        a. Income

        b. Principal

B. Trust can provide creditor protection.

C. Trust can provide some protection of assets from child's spouse in a divorce (See *Tannen v. Tannen*, 3A.3d 1229, 1243 (N.J. Super. Ct. App. Div. 2010).

D. Special Needs Trust: Trust can provide for a disabled child and be designed so that its existence will not disqualify child for public assistance.

E. Generation Skipping Trust: Trust may preserve more assets for your family through the generations.

TAX CLAUSES

I. **In General**. The provision in a Will regarding the payment of taxes is important, somewhat technical and often overlooked. The allocation of taxes in an estate plan can have a dramatic effect on what each beneficiary receives.

II. **New Jersey Equitable Apportionment Statute.**

A. NJ statutes provide that, in the absence of directions to the contrary in a Will or non-testamentary instrument, the taxes will be apportioned among the fiduciary and transferees proportionately. NJSA 3B:24-1 – 3B:24-5.

B. In addition, New Jersey statutes give the fiduciary the right to recover any taxes incurred with respect to property that does not come into the possession of the fiduciary (i.e., retirement plans or annuities). NJSA 3B:24-6.

III. Generally speaking, the Will should make provision for the payment of taxes with either a "residuary" tax clause or an "apportionment" tax clause.

A. A residuary tax clause provides that taxes will be paid from the residue of the estate. Therefore, neither specific bequests nor non-probate property will bear their share, if any, of the taxes.

B. An apportionment tax clause provides that the taxes will be charged proportionately against each beneficiary's share of the estate.

C. It is very important that the attorney understands the client's desires as to how the taxes should be paid.

D. This is particularly true where the client's Will has significant specific bequests or the client has significant non-probate assets. Estates subject to New Jersey Inheritance Tax are often problematic.

E. **EXAMPLE:** John, an unmarried man with no children dies with a Last Will and Testament that divides his estate equally between his brother and sister. At the time of his death, his assets consist of a residence ($300,000), bank and brokerage accounts ($700,000) and an IRA ($1,000,000). John's IRA beneficiary designation form leaves his IRA to a girlfriend. John's estate will be subject to approximately $300,000 of New Jersey Inheritance Tax ($2,000,000 x 15%).

1. Residuary Tax Clause - brother and sister pay $300,000 and girlfriend pays nothing.

2. Apportionment Tax Clause – brother and sister pay $150,000 and girlfriend pay $150,000.

F. PLANNING POINT: If there are substantial specific bequests, significant non-probate assets or an unequal distribution of property in a Will, it is often preferable to use an apportionment tax clause. The attorney should be sure to discuss the different outcomes with the client including specific computations of each such outcome.

Estate Planning for Special Situations

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I. Estate Planning for Same-Sex Couples

A. United States v. Windsor, 570 U.S. 12, 133 S.Ct. 2675 (2013) - SCOTUS strikes down the Defense of Marriage Act ("DOMA"); case arose in an estate tax context.

B. Garden State Equality v. Dow, 82 A.3d 336 (Law Div. 2013) - Superior Court ruled that the State of New Jersey must allow same-sex couples to marry; State appealed but the State's request for a stay of the Law Division's Order was denied by the Appellate Division and a unanimous NJ Supreme Court; after stay was denied, State dropped the appeal.

C. Obergefell v. Hodges, 135 S.Ct. 2584 (2015) - Supreme Court holds that all states must permit same-sex couples to marry and recognize existing same-sex marriages.

D. Intestacy. Will allow inheritance by spouse or civil union partner.

E. All estate planning documents are now the same as for heterosexual **married** couples. Wills, Living Wills, Powers of Attorney, Trusts. Can utilize benefits of federal and state marital deductions in Wills, utilizing techniques such as credit shelter trusts, disclaimer trusts, QTIP trusts, and use of the marital deduction and portability. Notwithstanding federal and state recognition of same-sex marriage, properly drafting estate planning documents are still important.

F. Greatest estate planning issue relating to same-sex couples may be children.

1. A child may be biologically related to only one spouse or the other. Issues arise regarding legal relationships of non-biological parents to children of a same-sex relationship.

2. Intestacy laws may not allow child to inherit from unrecognized parent.

3. Relationship to a non-biological parent may affect Social Security survivor benefits.

4. If only one parent is legally recognized, if that parent dies or becomes incapacitated, the other parent may lose rights to contact with the child.

5. Estate planning documents should specifically reference or define children.

6. Many agencies also recommend second-parent adoptions or parentage judgments, even if both partners are named on birth certificate. If legally adopt a child in a state that allows same-sex parents to adopt, Full Faith and Credit Clause of the U.S. Constitution requires that the adoption be recognized if move to a different state that does not allow same-sex adoption.

II. **Estate Planning for the Divorcing Client**

A. If client is considering divorce, it is imperative to create or update estate planning documents as soon as possible.

B. Intestate laws will still provide for spouse until entry of a judgment of divorce.

C. A Will or Revocable Trust providing for the surviving spouse is effective until entry of a judgment of divorce. N.J.S.A. 3B:3-14 provides for revocation of any revocable disposition to a former spouse or appointment of a former spouse or relative of the former spouse as a fiduciary, but ONLY upon the entry of the divorce judgment.

D. Rule 5:4-2(f) requires the first pleading of each party in a family action to annex an affidavit listing all known insurance coverage (including named beneficiaries) and specifying if coverage was canceled or modified within the 90-days preceding the filing of the complaint. The Rule further provides that the coverage so identified shall be maintained pending order of the court. Therefore, any changes to beneficiaries must be coordinated with matrimonial counsel. Note – this does not apply to retirement accounts.

E. N.J.S.A. 45:27-22 – Appointment of an Agent to Control Funeral and Disposition of Remains. If not included in new documents, divorcing spouse (absent temporary or permanent restraining order or charge of killing decedent) will still be permitted to make funeral arrangements. Person controlling funeral disposition does not have to be executor and the appointment of a funeral agent in a Will is fully effective even if Will is not probated.

F. BEWARE – Elective share statute changed in January 2024! Ceasing to cohabit as man and wife under circumstances that would give rise to a cause of action for divorce are no longer sufficient to disqualify a surviving spouse from the elective share. The statute (N.J.S.A. 3B:8-1) now requires that a surviving spouse, civil union or domestic partner has filed a complaint for divorce, or divorce from bed and board. Must also look at definition of "surviving spouse, partner in civil union, or domestic partnership" under N.J.S.A. 3B:5-3.

G. Insurance in Divorce

1. If spouse is a beneficiary of an irrevocable life insurance trust ("ILIT"), can consider asking the court to distribute the policy out of the ILIT to be used toward equitable distribution, especially if there is cash surrender value. BEWARE: many ILITs are grantor trusts, so must take into consideration tax consequences.

2. N.J.S.A. 3B:2-14 regarding revocation of revocable dispositions upon entry of judgment of divorce does NOT apply to ILITs because they are irrevocable. So, may need to ask court to address the trust in the divorce action or modify the trust under the uniform trust code.

3. Consider building provisions into the trust to address divorce. i.e. spouse is revoked as a beneficiary and/or fiduciary in the event of a divorce. Query: if you are engaged in joint representation of both spouses, is this a conflict in the absence of explicit consent by both spouses? Also, do you want to allow flexibility to allow the insurance to be used in the matrimonial action? "If the grantor and the grantor's spouse are divorced, then upon the date of the judgment of divorce, the grantor's spouse shall cease to be a trustee under and a beneficiary of this trust agreement unless otherwise indicated in a binding property settlement or similar agreement entered into by the grantor and the grantor's spouse pursuant to their divorce decree."

4. If hired by matrimonial counsel to draft/review an ILIT pursuant to a PSA, make sure that the tax implications are being considered and (if representing supported spouse) there are mechanisms in place to allow ongoing access to policy information, such as notice of change of beneficiary designations, duplicate premium notices, and lapse notices.

II. **Estate Planning for Second Marriages**

A. In an environment where estate tax exemptions are increasing (or being eliminated), estate planning may increasingly become more about family planning, especially in the wake of increased rates of divorce and where families are often blended.

B. Establishing client relationship - must have a clear retainer that addresses conflicts that may arise between the spouses, clear delineation of who the client is, and information that will be shared between spouses.

C. In a second marriage situation, the client may want to provide for new spouse, but also want to preserve corpus of estate for children from prior (and current?) marriage.

D Qualified Terminable Interest Property ("QTIP") trusts - qualifies for marital deduction; trust is included in the surviving spouse's estate at death (IRC 2044); surviving spouse must receive all income at least annually, trust must have no other beneficiaries. Must make QTIP election on Form 706 for first deceased spouse.

E. Planning documents (including Will) must be flexible enough to plan for children born to second marriage.

F. Deal with obligations to prior spouse - make sure you review property settlement agreement. Client may be required to maintain insurance for benefit of prior spouse, children of prior marriage; pension obligations; Qualified Domestic Relations Orders ("QDROs").

G. Prenuptial agreement - address estate planning issues before marriage. Address portability?

H. Be careful about beneficiary designations - not all beneficiary designations are revoked by operation of law upon divorce [*see* Vasconi v. Guardian Life Ins. Co. of Am., 124 N.J. 338 (1991)]; also marriage does not automatically change beneficiary designations [*see* Fox v. Lincoln Financial Group, 439 N.J. Super. 380 (App. Div. 2015)].

I. Life insurance can be used as a means to support children from a prior marriage or new spouse.

III. **Disabled Beneficiaries**

A. Many different types of aid are available to disabled persons - Supplemental Security Income (SSI), Social Security Disability Income (SSDI), Medicare, Medicaid. Some are income/resource based (i.e. Medicaid); some are not (i.e. SSDI). If beneficiary's aid is income/resource based, inheritance can disqualify beneficiary from aid.

B. Estate planning practitioners should always inquire if client has an beneficiaries (children, grandchildren, siblings, etc.) with special needs that are receiving aid. Some jurisdictions have found attorneys committed malpractice by not inquiring and planning for a disabled beneficiary [s*ee* Board of Overseers

of the Bar v. Brown, 2002 Me. Lexis 190]. Issue has also arisen in personal injury cases [*see* Grillo v. Pettiette et al., Cause No. 96-145090-92, 96th Dist. Ct. Tarrant City, TX and Grillo v. Henry, 96-167943-96, 96th Dist. Ct. Tarrant City, TX; Dept. Social Svcs v. Saunders, 724 A.2d 1093 (Ct. 1999)].

C. Options available to clients with disabled beneficiaries:

1. Disinherit disabled child - not desirable.

2. Distribute estate to non-disabled child to care for a disabled sibling. Risky - creditors issues, divorce, gift consequences.

3. Supplemental Needs Trusts (SNT).

D. Supplemental Needs Trusts

1. Must be completely discretionary.

2. Beneficiary cannot be able to compel distributions.

3. Can be inter vivos or testamentary; benefit - inter vivos can be used by other family members for gifting.

4. Supplements government resources.

5. Trustee - important to pick a suitable trustee. Some practitioners advocate for a professional trustee for SNTs. Trustee must be able to navigate and keep up to date on public benefit rules, have experience with investments, avoid conflicts of interest between disabled beneficiary and remainder beneficiaries, and follow reporting requirements.

6. Authorize trustee or court with competent jurisdiction to amend trust as necessary to comply with federal and state laws and regulations regarding SNTs.

7. If necessary, can seek judicial reformation to SNTs. For instance, outright distribution to a SNT, or non-SNT trust to SNT.

E. ABLE (Achieving Better Life Experience) Act Accounts

1. Similar to 529 Plan accounts, but for individuals who become disabled before reaching age 26 and are SSI or SSD eligible based on blindness or disability.

2. ABLE accounts are not a resource for Medicaid purposes, but an ABLE account balance over $100,000 is a countable resource for SSI purposes.

3. Earnings in account are free of federal and state income tax while in account.

4. Withdrawals for qualified disability expenses (QDEs) are tax-free (i.e. education, housing, health and wellness, transportation, employment training and support, assistive technology).

5. Account can be opened by a beneficiary, agent under power of attorney, parent, or legal guardian.

6. ABLE contributions each year are limited to the then current federal gift tax exclusion ($18,000 in 2024). This limits the use of ABLE for many lawsuits and Wills.

7. ABLE accounts may be a good alternative for an individual who is Social Security disabled by age 26 who has modest savings that he/she needs to shield for SSI, Medicaid, or other disability benefits.

8. ABLE changes under the Tax Cuts and Jobs Act

a. Can now roll up to $18,000 per year from an existing 529 savings account into an ABLE account, provided that the 529 account is for the same beneficiary as the ABLE account or for a member of the same family (spouse, child, parent, sibling, niece/nephew, aunt/uncle, in-law, cousin) as the ABLE account holder.

b. ABLE account beneficiaries earning income from employment can make contributions above the $18,000 annual cap from their own income up to the Federal Poverty Level, estimated to be $15,060 for 2024, provided they do not participate in their employer's retirement plan.

8. SNT benefits over ABLE accounts - (i) no value cap for SSI purposes, (ii) no Medicaid repayment (if third party SNT), and (iii) no annual contribution limit.

IV. **Unmarried Co-habitants**

A. For unmarried co-habitants, it is imperative to have proper estate planning documents because the parties have no legal standing to each other.

B. Intestacy will not provide for partner.

C. Control issues - Wills, trusts, powers of attorney, living wills designate who is in charge. If partner is not named in documents, next of kin could potentially exclude partner from financial and medical decisions, even denied right to see partner at end of life.

D. Tax issues - no marital deduction. Estate subject to inheritance tax. Can use life insurance as an alternative to testamentary distributions because properly designated life insurance is exempt from NJ inheritance tax.

E. Titling - can title property as tenants-in-common or with rights of survivorship. If choose joint with rights of survivorship, may want to confirm in Will to avoid contest from other relatives. However, rights of survivorship may raise a tax issue because taxing authorities may question contribution. Taxing authorities always seek to tax 100% - if both parties contribute, must keep adequate records. Alternative - ownership in a trust with partner named as successor trustee.

F. Beneficiary designations for retirement benefits and life insurance.

G. Cohabitation agreements to address issues such as payment of bills, division of assets upon separation and/or death, custody, support obligations.

H. Domestic partnership - see appendix from NJ Department of Health. Parties must be 62 years of age or older, share a common residence, and have joint responsibility for each other's benefit.

V. **Family Business**

A. Proper business planning provides for a smooth and orderly transition of ownership. Shareholders' Agreement/Operating Agreement is a contract between shareholders/members; provisions may override individual Will provisions.

B. Issues to be addressed

1. How much is business worth? How to determine worth - fair market value, book value, discounts.

2. Who takes over business? Family members or non-family members.

3. How is ownership transferred? Gifts, buy-sell agreements.

4. How are present owners paid for their interests? Insurance, self-funding.

5. What type of security is available, such as guarantees, mortgages.

C. If leaving business to one member of the family, have to address if/how to compensate family members not involved in the business - i.e. insurance, gifts, specific bequests.

D. If family owns business and land on which office is located, can distinguish between business transfer and real estate transfer.

E. IRC Section 6166 - estate tax can be deferred up to 15 years; interest continues to accrue.

F. Permitted transferees - allowing stock transfers or assignments of membership interests to only certain individuals. Keeps outsiders (i.e. spouses) from coming into business.

G. To maintain control, can prevent transfers without consent of other members/stockholders.

H. To avoid disputes, business planning documents should comprehensively discuss potential issues - triggering events for transfers of ownership; valuation method; terms of payment (i.e. promissory note, term of years, interest); methods of funding; provide method for dispute resolution (i.e. arbitration, mediation).

I. Family businesses under the Tax Cuts and Jobs Act - changes were made to how closely-held businesses, especially income from pass-through entities, were taxed under the new tax bill. *See* Section 199A. These factors are important to how clients are taxed, but should also be considered when making selection of entity decisions or considering business restructuring.

J. If passing an interest in an S corporation family business to a trust, must make sure that trust is eligible shareholder - *see* qualified subchapter S trusts (QSST) or electing small business trusts (ESBT) [Internal Revenue Code 1361].

VI. **Pets**

A. N.J.S.A. 3B: 31-24 - Trust for Care of Animal

a. A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

> b. A trust authorized by this section may be enforced by the settlor or by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed.
>
> c. Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use shall be distributed to the settlor, if then living, otherwise to the settlor's estate.

B. N.J.S.A. 3B:31-24 under Uniform Trust Code replaced former N.J.S.A. 3B:11-38.

C. New statute is tied to life of the pet. Maximum term under old statute was 21 years, which may have been shorter than life of the animal in some cases (i.e. horses).

D. Some other states allow pet trusts. However, have to make client aware that provision may not work in other jurisdictions, so Will may need to be updated if move to another state.

E. If the amount provided is too excessive, court can reduce the amount. An excessive amount left to a pet may also be grounds for a claim of incompetence by other relatives/heirs seeking to overturn Will.

F. Sometimes the client names a person to receive a specific bequest of money and the pet, with the understanding that the individual will use the funds to care for the pet.

G. Alternatively, the testator can create a trust for the benefit of an individual and the animal with distributions provided for the animal’s benefit.

H. Must select a trustee for pet trust and caretaker - does not have to be the same individual. In fact, it may be good to have two separate people. Also, provide a remainder beneficiary for trust. Again, preferably to have someone different to avoid conflicts of interest.

I. Testator should leave a separate document to the caretaker regarding the care of the pet, medical issues, temperament, etc.

J. When funding trust, take into account food, shelter, veterinary care expenses, insurance, grooming, burial or cremation costs.

K. Sample language

(1) I give and bequeath any animals which I own at my death to JANE DOE ("JANE"), currently residing in Florham Park, New Jersey, if she shall survive me.

(2) If JANE shall survive me and has agreed to take care of my animals, then I give and bequeath the sum of Fifty Thousand Dollars ($50,000) to my trustees, IN TRUST, NEVERTHELESS, to hold as a trust fund for the following uses and purposes:

My trustees shall hold, manage, invest and reinvest this trust fund and collect the rents, interest, dividends, and other income therefrom. After the payment of all lawful charges thereon, my trustees shall pay for all of the expenses of any animals I own at my death (either by payment directly to a third party provider or as reimbursement to JANE); in addition, my trustees shall also pay to JANE the sum of One Thousand Dollars ($1,000) per week. Such payments shall come from the net income of this trust fund, and to the extent such income is not sufficient, from the trust principal. Any net income not expended on a current basis shall be accumulated and added to the principal of this trust.

When the last of my animals has died, this trust shall terminate and the balance of the trust fund then on hand, including any accrued and undistributed income, shall be added to my residuary estate and disposed of in accordance with the applicable provisions of Article THIRD of this will.

New Jersey Department of Health
Office of Vital Statistics and Registry
PO Box 370
Trenton, New Jersey 08625-0370

REGISTERING A DOMESTIC PARTNERSHIP IN NEW JERSEY

What are the requirements to register a Domestic Partnership?

Couples wishing to register a Domestic Partnership must be same sex couples OR opposite sex couples who are both 62 years of age or older. Couples must meet the following requirements:

1) Share a common residence in New Jersey or in any other jurisdiction provided that at least one of the applicants is a member of a New Jersey State-administered retirement system;
2) Both persons are jointly responsible for each other's common welfare as evidenced by joint financial arrangements or joint ownership of real or personal property;
3) Both persons agree to be jointly responsible for each other's basic living expenses during the domestic partnership;
4) Neither applicant is in a marriage or civil union recognized by New Jersey law or a member of another domestic partnership;
5) Neither person is related to the other by blood or affinity up to and including the fourth degree of consanguinity;
6) Both persons have chosen to share each other's lives in a committed relationship of mutual caring;
7) Neither applicant has terminated another domestic partnership within the last 180 days. (This prohibition shall not apply when the previous partnership ended due to the death of the other partner.)

Where can you obtain an Affidavit of Domestic Partnership?

The Affidavit of Domestic Partnership form must be obtained from a Local Registrar of Vital Statistics in any municipality in the State of New Jersey. The Affidavit of Domestic Partnership does not have to be obtained (or filed) in the municipality in which the domestic partners reside.

A list of Local Registrars is available on the Department of Health website at http://nj.gov/health/vital/regbycnty.shtml. The Affidavit of Domestic Partnership must be

completed and signed by both applicants at the same time, in the presence of a notary public, and notarized. Many Local Registrar Offices have notaries on staff; please call to verify this information with the Local Registrar.

What should you bring when completing the Affidavit of Domestic Partnership with a notary public?

Each applicant must supply valid identification that establishes name, age, date of birth and proof of residency. This may be supplied by one or more documents issued by a government agency, such as a certified copy of a birth certificate, driver's license, military identification or state/county identification card.

Where should the Affidavit of Domestic Partnership be filed?

The Affidavit of Domestic Partnership must be filed and registered with the Local Registrar of Vital Statistics in any municipality in the State of New Jersey. The Affidavit of Domestic Partnership does not have to be filed or registered in the municipality in which the domestic partners reside.

What should you bring when filing the Affidavit of Domestic Partnership with a Local Registrar?

1) Applicants must appear together and each must supply valid identification that establishes name, age and date of birth. This may be supplied by one or more documents issued by a government agency, such as a certified copy of a birth certificate, driver's license, military identification or state/county identification card.

2) Applicants must bring with them proof of residence. If the residence is outside the State of New Jersey, at least one of the applicants must provide proof of membership in a New Jersey State-administered Retirement System by providing one of the following documents issued by the Division of Pension and Benefits:

a. Personal Benefits Statement from the current or previous year
b. 1099R from the current or previous year, or
c. Certificate of Pension Membership

3) Applicants must provide proof of joint financial responsibility, evidenced by at least one of the following documents:

a. Joint deed, mortgage agreement or lease;
b. Joint bank account;

c. Designation of one of the persons as primary beneficiary in the other person's will;
d. Designation of one of the persons as primary beneficiary in the other person's insurance
policy or retirement plan; or:
e. Joint ownership of a motor vehicle.
4) Payment in the amount of $28.00.

What is a Certificate of Domestic Partnership?

A Certificate of Domestic Partnership is the document that is prepared by the Local Registrar
after you have filed your signed and notarized Affidavit of Domestic Partnership. Each partner is
presented with an informational copy of the Certificate at the time it is prepared. This
informational copy is only issued as your receipt that your Domestic Partnership has been
registered; it serves no legal purpose. Each partner will also receive a copy of the Affidavit of
Domestic Partnership and a copy of the Notice of Rights and Obligation for Domestic Partners.

What do you need to prove your Domestic Partnership has been registered?

To show proof of a Registered Domestic Partnership, you must obtain a certified copy of the
Certificate of Domestic Partnership. A certified copy can be obtained from the Local Registrar
of Vital Statistics where the Partnership was registered or at the State Office of Vital Statistics
and Registry. To obtain the certificate, you must identify the date and location of the filing for
the Domestic Partnership, and provide identification to establish yourself as one of the partners
listed on the document. Fees for certified copies vary by municipality.

What are the basic steps to register a Domestic Partnership?

The applicants must obtain an Affidavit of Domestic Partnership from a Local Registrar of Vital
Statistics. The Affidavit must be completed and signed by both applicants at the same time, in
the presence of a notary public, and notarized. The applicants must appear together to file with
a Local Registrar of Vital Statistics and the required $28 fee remitted. Domestic Partnerships
are not considered registered until the Affidavit has been filed with a Local Registrar's Office
and the Certificate of Domestic Partnership has been issued.

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About the Panelists…

Lauren M. Ahern is counsel to Greenbaum Rowe Smith & Davis LLP in the firm's Woodbridge, New Jersey, office. She is experienced in the development and implementation of complex estate plans including the design and creation of Wills, revocable and irrevocable living trusts, irrevocable life insurance trusts, special needs trusts, limited liability companies, limited partnerships, powers of attorney and advance directives. She regularly counsels fiduciaries regarding the administration of estates and trusts including the duties of executors and trustees, post-*mortem* tax planning, and state and federal tax obligations.

Ms. Ahern is admitted to practice in New Jersey, New York and Pennsylvania, and before the United States District Court for the District of New Jersey and the United States Tax Court. She has been a member of the New Jersey State Bar Association's Elder and Disability Law Section and the Real Property, Trust and Estate Law Section, and the Estate Planning Council of Central New Jersey. She has lectured for ICLE.

Ms. Ahern received her B.A. from Binghamton University, her J.D. from Touro College's Jacob D. Fuchsberg Law Center and her LL.M. in Taxation from Boston University School of Law.

Brian D. Reynolds is a Shareholder in Mantell, Prince & Reynolds, P.C. in Basking Ridge, New Jersey, where he focuses his practice in matters relating to tax and estate planning; business and succession planning for entrepreneurs, professionals and closely-held businesses; the administration of estates and trusts; estate and trust litigation; taxpayer representation in connection with federal and state tax controversies; charitable planning; and other personal legal matters.

Admitted to practice in New Jersey and New York, Mr. Reynolds has been a member of the Union County Bar Association. The recipient of several honors, he is a frequent lecturer on estate planning and estate and gift tax topics for several organizations including ICLE, the New Jersey Society of Certified Public Accountants, the National Business Institute, the New Jersey State Bar Association and the New Jersey State Bar Foundation.

Mr. Reynolds received his B.S., *cum laude*, from York College, his J.D., *cum laude*, from New York University School of Law and his LL.M. in Taxation from New York University School of Law.

Tara S. Sinha is a Partner in Witman Stadtmauer, P.A. in Florham Park, New Jersey, and concentrates her practice in estate planning and administration, estate and probate litigation, and federal and state taxation.

Admitted to practice in New Jersey and New York, and before the United States District Court for the District of New Jersey and the United States Tax Court, Ms. Sinha is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and serves on the Board of Consultors of the New Jersey State Bar Association Real Property, Trust and Estate Law Section. She is a member of the New Jersey State, New York State and Morris County Bar Associations.

Ms. Sinha has been a member of the Worrall F. Mountain American Inn of Court and her articles have appeared in the *New Jersey Law Journal*. She has lectured for ICLE, the New York State Bar Association, the New York City Bar Association, the Practising Law Institute and other organizations.

Ms. Sinha received her B.S. from Rutgers College and her J.D. from Rutgers School of Law-Newark, where she was Senior Articles Editor of the *Women's Rights Law Reporter* and a Teaching Assistant for the Legal Research and Writing program. She was Law Clerk to the Honorable Walter R. Barisonek, Superior Court of New Jersey, Union County.

Judson M. Stein is a Partner in McCarter & English LLP in Newark, New Jersey, where he concentrates his practice in estate planning, estate administration, business law and transactional matters, and has been practicing law since 1978.

Mr. Stein is admitted to practice in New Jersey. In addition to membership in several bar associations, he is a Fellow of the American College of Trust and Estate Counsel (ACTEC) and has been a member of the National Academy of Elder Law Attorneys (NAELA).

Mr. Stein was an Adjunct Professor of Law at Seton Hall University School of Law for nearly 20 years, where he taught courses on estate planning, the drafting of Wills and trusts, estate and gift taxation, estate and trust administration, estate planning and partnership taxation. He has also lectured for numerous professional and lay audience groups including ICLE, the New Jersey State Bar Association, the New Jersey Society of Certified Public Accountants and ACTEC. The co-author of *New Jersey Estate Administration Basics* (ICLE), he was awarded a Certificate of Recognition by Rutgers School of Law's Estates & Trusts Society for Outstanding Achievements in Estate and Trust Law and is the recipient of several other honors.

Mr. Stein is a graduate of the Wharton School, University of Pennsylvania, and received his J.D. from Rutgers University School of Law. He received his LL.M. in Taxation from New York University School of Law.

Deirdre R. Wheatley-Liss, (11/23) Certified as an Elder Law Attorney by the National Elder Law Foundation, is a Partner in Porzio, Bromberg & Newman, P.C. with offices in Morristown and Princeton, New Jersey; and New York City. She concentrates her practice in asset protection planning taxation, estate planning and administration, and elder law, as well as representing closely-held businesses and non-profit organizations. She has experience in Medicaid, retirement benefits, probate and Will contest litigation, and guardianships and advocacy for the elderly and disabled.

Admitted to practice in New Jersey and New York, Ms. Wheatley-Liss has been a member of the New Jersey State, New York State and Morris County Bar Associations, the International Academy of Collaborative Professionals and the New Jersey Collaborative Law Group. She has been a member of the Board of Directors of the Morris County Chamber of Commerce, Chair of the Morris Members Committee and Chair of the Elder Law Committee of the Morris County Bar Association. She has served as Vice Chair of the Tax Section Steering Committee of the National Academy of Elder Law Attorneys (NAELA), has served on the Estate Planning Council of Northern New Jersey and has acted as a legal advisor to a number of local non-profit organizations created to support several Morris County populations.

Ms. Wheatley-Liss is a frequent lecturer to professionals and the public, and the author of legal and consumer-oriented articles. She is the author of *Plan Your Own Estate* and blogs at New Jersey Estate Planning & Elder Law Blog, a leading commentary on developments in tax law, estate planning, estate administration, elder law and business law. She is a two-time recipient of the Tri-County Scholarship Fund's Women of Achievement Award as well as several other honors.

Ms. Wheatley-Liss received her B.A., with honors, from John Hopkins University, her J. D. from Boston College School of Law and her LL.M in Taxation from New York University.

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