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ESTATE ADMINISTRATION IN NEW JERSEY

Dear Executors and Administrators,

First and foremost, please accept my condolences for your loss. I've written this article to help guide you through the duties and obligations of estate administration in the State of New Jersey. This article is not an exhaustive analysis on all of the issues that may arise in the administration of the estate. But it serves as a very thorough reference guide for you as it is applicable to virtually all estates in New Jersey.

1. **Executors & Administrators.** As fiduciaries for the estate, executors and administrators perform the same functions, except that there are the following distinctions in terminology:

a. **Executors.** For estates that have a Will that is probated in the Surrogate's Court, you (the fiduciary) are referred to as an executor. In that situation, the estate is referred to as a testate estate and that the decedent died testate (with a Will).

b. **Administrators.** For estates that do not have a probated Will, you are referred to as an administrator. In that situation, the estate is referred to as an intestate estate and that the decedent died intestate (without a Will).

2. **Probate Procedure.**

a. **Testate.** If there are probate assets in the estate (see below), then it is time to probate the Will very soon after the decedent's death. This requires the original Will, any codicils, the death certificate and your attendance at the office of the Surrogate's Court in the county where the decedent resided at the time of his or her demise. You should be permitted to enter the decedent's bank safe deposit box, accompanied by a bank officer, to remove the Will. If the Will is not "self-proving," it will also be necessary for a witness of the Will to either appear at the Surrogate's Court or, if the witness is from another jurisdiction, then sign a notarized affidavit that needs to be filed with the Surrogate's Court acknowledging that the signature on the Will is his or her signature as a witness.

b. **Intestate.** If the decedent left no Will, the next of kin should apply to be appointed "administrator" (rather than executor) and New Jersey intestacy statutes (rather than a Will) shall determine who receives the net assets in the estate.

c. **Surrogate's Court.** In either situation, during the visit to the Surrogate's Court, you will be asked to provide the names, addresses and (if known) the social security numbers of himself, the spouse, and the children or other next of kin. You also sign an application to admit

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the Will to probate, an authorization for the Surrogate's Court to accept service of process (claims) against the estate, and a qualification whereby you agree to collect the assets, pay the bills, pay the death taxes, and make distribution as required by the Will.

3. **Bond.** If you are an administrator or if the Will requires it, then you will be required to post bond to guarantee that you shall properly administer the estate. The bonding company agrees to pay for the completion of the task if the administrator fails to do so, or for the errors, omissions or thefts of the administrator; and if such occurs the bonding company will also seek reimbursement from the administrator. Wills typically waive the requirement that an executor post bond, thereby saving an annual premium. You will not be released from the bond until the estate is wound up and the court files any Refunding Bonds and Release (discussed below) and you attest to there being no remaining estate creditors.

4. **The Short Certificate.** There will be a ten-day wait period from date of decedent's death before the Surrogate's Court will issue the "Short Certificate" indicating your appointment as executor or administrator. This waiting period allows time for someone to challenge the validity of the Will by filing a caveat. If someone challenges the Will or otherwise raises any dispute, the Surrogate's Court may no longer proceed with the probate and no one is authorized to administer the estate until the probate court resolves the dispute if it cannot be settled. Note also that New Jersey residents have four (4) months (whereas non-residents have six (6) months) to file a lawsuit to challenge the Will. In order for you to act on behalf of the estate, the Short Certificate must be issued by the Surrogate's Court. The Short Certificate is a one-page paper, with a seal at the bottom, signed by the Surrogate's Court saying that you have been appointed executor or administrator of the decedent's estate. In effect, you stand in place of the decedent to administer the estate, pay debts and expenses and collect and distribute assets. The Short Certificate must be provided to each bank, brokerage firm and other person when collecting or transferring property of the decedent so you'll likely need multiple original certificates.

5. **Federal Tax ID Number (TIN) for Estate.** The estate Federal Tax ID Number (TIN) or Employer Identification Number (EIN) (used if there are any employees hired by the estate) can be obtained by filing form SS-4 with IRS (usually done online by you or authorized power of attorney). You will need the TIN to open an estate bank account and brokerage account.

6. **Bank & Brokerage Account.** The estate is a distinct legal entity (a different legal 'person') that is separate from the decedent. With the Short Certificate in hand, you will open a bank account and/or brokerage account in the name of the estate. All receipts and all disbursements will pass into and out from this account. From these records, you will be required to prepare income tax returns for the estate and a summary of receipts and disbursements (sometimes a full accounting) so that the residuary beneficiaries can see that they have received what is due to them. You retain ultimate control as the only person with check signing power. If there is more than one executor or administrator, then both must sign all checks.

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7. **Marshalling Assets.** As one of the first parts of your analysis, you must expeditiously determine which assets are probate assets and non-probate assets. Probate assets are subject to your authority and control. Cooperation by some beneficiaries of such assets will be needed in order to properly determine the nature of the assets in relation to the estate. Some 'non-probate' assets are subject to estate or inheritance tax return reporting even though they are not 'probate' assets under your control and forming part of the 'probate' estate. Such 'non-probate' assets include joint property, life insurance, pensions, IRAs and trusts. Non-probate assets must be valued and appraised and are subject to estate or inheritance tax reporting but, as executor or administrator, you have no control over it; nor do you have any responsibility to transfer it to the new owner. However, if life insurance or annuities are payable to the estate at death, then they are part of the estate. If there are any probate assets in the estate, then you should submit the Will to the Surrogate's Court for probate because the Will shall govern the disposition of such probate assets. The non-probate assets are unaffected by the Will because their disposition is governed by either the contract itself, e.g., the annuity or life insurance policy, which pass to the designated beneficiary after completion and delivery of the required forms to the annuity and insurance company, or by statutory or common law operation of law, e.g., joint bank accounts or jointly held real estate, which automatically pass to survivor. A death certificate and form of identification of the beneficiary will usually be requested in order to collect any non-probate property. Collecting life insurance also entails the proper filing of a proof of claim form with the life insurance company.

8. **Inventory.** You must promptly begin to make an inventory of the assets in the estate. In New Jersey, the inventory need not be filed with the Surrogate's Court, but it will be important for preparing the estate tax return, inheritance tax return and preparing the final accounting to beneficiaries. It will also reveal particular assets requiring transfer, sale or appraisal. The decedent's last federal income tax return provides a good start and, for this reason, New Jersey requires a copy of it to accompany the inheritance tax return and/or estate tax returns. An inventory is incomplete without an appraisal of the assets for which the value is uncertain. Therefore, you must schedule and obtain an appraisal from an expert of real estate, jewelry and other assets in order to complete the inventory. A real estate broker can serve as the appraiser of real estate. No furniture, jewelry and other tangible personal property should not be distributed until it has been appraised. The appraisal will be needed for any required death tax returns, and for determining the shares of beneficiaries. Moreover, for tax purposes, the appraisal is critical to establish the stepped up tax basis of all estate property to date of death fair market value (or the 6-month later alternative valuation date, when and where applicable).

9. **Insurance.** All real estate and automobiles should be kept insured. The automobiles, if they are in the decedent's name alone, should not be driven if insurance coverage cannot be obtained. Sell or transfer the cars and trucks as soon as possible. Insurance companies do not like to, and often will not, insure empty houses, so if the house is to be sold, then it is best to proceed promptly.

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10. **Disclaimers.** If any beneficiary, including a surviving spouse, is entitled to receive any assets from the estate, such beneficiary may disclaim (avoid receiving) the asset. This can be beneficial when an estate plan intends and arranges for the disclaimed asset to be transferred into a trust to take advantage of certain tax planning and other asset protection considerations. A written disclaimer must be filed with the court within nine months of the decedent's death and, if real estate is disclaimed, then also with the county clerk's office where the real estate is located. Also the asset must not be transferred to the beneficiary whatsoever in order for the disclaimer to be effective because the disclaimer does not undo a prior transfer to the beneficiary.

11. **Filing Tax Returns.** All required tax returns should be timely filed to avoid unnecessary interest and penalties caused by late filings or tax payments.

a. **Final Income Tax Return of Decedent.** You must file the decedent's final federal and state income tax returns. Income received or accrued prior to the death is reportable on the decedent's final form 1040, which you file on behalf of the decedent. If there is a surviving spouse, a joint return can be filed, showing decedent's income to date of death, plus the surviving spouse's income for the entire calendar year. The final federal income tax return will be a required attachment to any required estate tax returns.

b. **Federal Estate Tax Return.** Federal estate tax returns are only required if the taxable estate is valued at more than \$5.43 million per person as applicable to any decedent's demise in 2015 (double for married couple if portability of exemptions is properly elected upon filing).

c. **New Jersey Death Tax Returns.** New Jersey has two death taxes: an estate tax and an inheritance tax.

i. **NJ Estate Tax.** For the NJ estate tax, which taxes primarily based on amount rather than beneficiary, a NJ Estate Tax Return is required to be filed if the value of the gross taxable estate (probate and non-probate assets) exceeds \$675,000, even if no taxes are due. Bequests to the surviving spouse and charity are deductible and this tax is paid by the estate. The tax rate is as high as 16%.

ii. **NJ Inheritance Tax.** The inheritance tax is based upon the identity of the beneficiary but exempts bequests to the surviving spouse and lineal ancestors and descendants. In most cases the beneficiaries are spouse and/or children, so the tax does not apply. In other cases the tax rate is also as high as 16% and is paid by the beneficiary.

d. **Income Taxes.** The estate, a separate tax-reporting entity, files its own income tax return on IRS Form 1041, beginning with the date of death. The estate will report much the same way that an individual does, with one large difference: the estate may deduct income which is distributed to beneficiaries during the tax year or report taxable income to the estate. Any

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such distribution, except a specific bequest or satisfaction of a cash bequest, will carry out the “distributable net income” to the beneficiaries and then the beneficiaries must report this income on their own tax returns, form 1040. You will provide each beneficiary with an IRS Schedule K-1 form which indicates what income must be reported. Because distribution may be part income and part non-taxable principal (the inheritance itself is normally not income), the K-1 figures are usually very different (and less than) the dollars actually received by the beneficiary. If you are beneficiary of an estate, be sure to wait for or ask for the K-1 before preparing your income tax return. For estimated tax purposes, income received from an estate is deemed received on the last day of the estate’s tax year, regardless of when it was actually received. Administration expenses can be deducted on either the federal death tax return or the federal income tax return, but not both. The choice will depend upon whether the estate is subject to federal estate tax or not, and the time at which expenses are incurred. After final distribution, you still have work to do because you must file a final estate income tax return. There will usually be no tax due because the distribution will have carried the income out to the beneficiaries for their individual reporting on their own tax returns. Nevertheless, the IRS will want to know this and the beneficiaries need to know what to report. For the next three years, you will hope that IRS does not audit an earlier year and claim additional taxes, for you are now without assets and would have to rely on the Refunding Bonds of the beneficiaries. This illustrates the desirability of trying to distribute income and assets currently, to shift the risk to the beneficiaries (who have the funds). It also illustrates one reason why you are paid a percentage (arguably reflecting a risk premium) rather than being paid by the hour.

12. **Tax Waivers or Clearance.** New Jersey imposes an automatic lien on New Jersey real estate, stocks of New Jersey corporations and New Jersey bank accounts as security for the payment of taxes. The stocks and half of each bank account are frozen in place until the state reviews the inheritance tax return and issues “tax waivers.” A spouse or lineal ancestor or lineal descendant can avoid the lien (because no tax is due) by presenting a New Jersey Form L-8 and a copy of the Will, to show that no tax is due. In such cases the property can be sold or transferred without a tax waiver. In cases where there are beneficiaries other than spouse, lineal descendants and lineal ancestors, an inheritance tax return must be filed in order to obtain the tax waiver. Real estate passing to an exempt beneficiary requires a New Jersey Form L-9 to obtain the tax waiver. Real estate can be sold before the waiver is obtained by leaving the sales proceeds on deposit in an interest bearing escrow account with the title company. “Frozen” bank accounts and proceeds from real estate may be used to pay inheritance taxes.

13. **Creditors.** You must pay creditors of the estate in order to avoid personal liability. New Jersey formerly required executors to publish notice to creditors giving them a time period to file claims or otherwise be barred. Now you must merely pay known claims to creditors. If claims are later filed against the estate for known or unknown claims, then you may be personally liable for such debts. Thus, it is important that you file Refunding Bond and Release forms with the Surrogate’s Court in order to entitle you to demand refunds from beneficiaries of previously distributed assets in order to pay late claims. Note however that late claims may be subject to applicable statutes of limitations that may permanently bar claims if not filed timely. Real estate

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owned by the estate may also be subject to a lien, for one year after death, for payment of decedent's debts. The title company for the buyer of the estate's real estate may require that some of the purchase price be held in an escrow account pending payment of certain debts and will certainly require an indemnity from you. Real estate outside of New Jersey will be subject to death taxes and title requirements of the state where it is located.

14. **Distributions.** After the debts and taxes are paid, the remaining assets can be distributed. Usually this is done only after the New Jersey state tax auditors have reviewed the return and indicated approval. Any earlier distribution requires confidence that the estate tax returns can't be challenged. A reserve fund should be maintained by the estate for at least six years from the date of death to protect the estate against unexpected claims. Transfer of assets will require the signing and delivery of certain documents. No distributions should be made without the receipt by you of a Refunding Bond and Release forms (see below) signed by a beneficiary in front of a notary public. All New Jersey securities, bank accounts and real estate (whether probate property or joint property) will also require either a tax clearance notice from the NJ Division of Taxation or an inheritance tax waiver, New Jersey Forms L-8 and/or L-9, prior to making distributions. Securities are usually transferred through a broker, which requires opening an account (contract, W-9). Each security will require a stock power and affidavit of domicile.

15. **Commissions.** At or prior to final distribution, you are entitled to be paid your statutory commission. Individuals do the same tasks that bank executors perform so they are usually paid the same rate of commission. But the Will may limit an executor's compensation. New Jersey provides a statutory rate of compensation as follows: 5% of the first \$200,000 of gross assets, plus 3½% of the next \$800,000, plus 1% of any excess over \$1,000,000, plus 6% of all income received by the estate. Add 1% of assets for each additional executor. You are also entitled to reimbursement of all reasonable out of pocket expenses. If you are also the sole beneficiary of the estate, then you will likely decline payment if the income tax rate exceeds the estate tax rate because you will have to report the commission as income on your income tax returns but the estate gets an estate tax deduction.

16. **Record-Keeping.** Record keeping is often easier if only one bank account is used for the estate and copies of all documents are kept in one file by you. It is much easier to set up the records correctly in the first place than to try to sort it out weeks or months later. Proper record-keeping puts attorneys and accountants in a much better position to give advice when decisions are being made.

17. **Accounting.** Many times, beneficiaries will demand or require an accounting prior to accepting any distributions from the estate. An attorney or accountant may prepare the accounting. If a beneficiary demands an accounting, then you may negotiate for the submissions and acceptance of an informal accounting. However a beneficiary may demand a formal accounting that would be required to be submitted to the court as well. Formal accountings may require judicial

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proceedings that can be expensive. And judges may require that the formal accounting be paid by the beneficiary demanding it. The estate is “wound up” by you presenting his “accounting” to the beneficiaries, and the beneficiaries approving the accounting. At a minimum the accounting will show all receipts and disbursements. More elaborate accountings may contain sub-accounts of specific receipts or expenditures, schedules of investments, gains and losses, assets on hand, and a schedule of proposed distribution. If any beneficiary has a question about why an asset was not collected, whether it was sold for the right price, why certain expenses were incurred, or how you or attorney was compensated, then you should be prepared to provide explanation and substantiation. If you and the beneficiary cannot agree, then the account must be filed in the Superior Court and a judge, after review by and advice from the Surrogate’s Court, will rule on the dispute. This will involve several months of time and substantial expense. Such procedure, time, and expense may also be required if any beneficiary is a minor or incompetent, or a charity. The Deputy Attorney General represents charities, whether or not they have their own counsel, and must be notified and satisfied. Assuming no disagreement between you and the beneficiaries and that all are adult and competent, there is no need to expend the time and money for court accounting. The beneficiaries can sign documents indicating their approval and releasing you from claims.

18. **Refunding Bond and Release Forms.** In New Jersey, you are required to obtain Refunding Bond and Release forms signed by beneficiaries prior to any distributions to such beneficiary from the estate. This is a legal document whereby each beneficiary acknowledges receipt of part or all of his or her share of the estate and releases all claims against the executor and agrees to refund all or a portion of what has been received should a valid claim be made against the estate at a later date. You then file all of these papers with the Surrogate’s Court, signifying that the estate is closed. You will normally require that the beneficiary sign the Release and Refunding Bond before handing over the money, because after a beneficiary has received his money it will be difficult to obtain his attention or cooperation. It is also important to require a Release and Refunding Bond for even small intermediate and partial distribution before estate administration is ready for winding up and regardless of when any larger distributions are made.

19. **Professional Services.** Regardless of whether you are an individual executor or administrator or a representative of a bank trust department appointed as one, you should immediately hire the much needed help of professionals, especially an estate lawyer, accountant and real estate broker (if real estate is involved). Also, for investments, you should consult a financial advisor to act as an advisor rather than merely as just a broker.

20. **Closing the Bond.** Annual premiums are due to the bonding agent each year until the estate is closed (the accounting, Refunding Bond and Release forms, and tax waiver(s) from the state of New Jersey are all filed in Surrogate’s Court). If you do not notify the bonding company and provide proof that the estate is closed, you will continue to be billed each year for another premium.

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Darren M. Baldo, Esq., LL.M. is an attorney and formerly a practicing Certified Public Accountant. Mr. Baldo has served as counsel for various estates with assets ranging as high as several millions of dollars to as low as insolvent estates. Since 2002, Mr. Baldo has also handled probate proceedings, estate litigation and attorney malpractice litigation involving executor and attorney neglect and misappropriation and incomplete and erroneous accountings. In addition to providing the necessary advice and counsel to executors, administrators and beneficiaries, Mr. Baldo prepares and files federal and state estate and income tax returns and estate accountings. Over the past decade, Mr. Baldo advised hundreds of clients who have estate plans involving wills, trusts and estate tax and gift tax planning.

Mr. Baldo handles business law matters involving contracts; mergers and acquisitions; buying and selling businesses; real estate transactions and residential and commercial leases; business litigation; commercial litigation; partnership, LLC and corporate law; employment law; bankruptcy; and collections.

Mr. Baldo earned his Graduate Law Degree (LL.M.) in Taxation from Villanova University; Law Degree (J.D.) from Seton Hall University; and Bachelor of Science Degree in Accounting from Kean University. Mr. Baldo is licensed to practice law in all New Jersey and New York federal and state courts, U.S. Bankruptcy Court and U.S. Tax Court.