

# New Jersey Law Journal

VOL. CLXXXVII—NO.6—INDEX 419

FEBRUARY 5, 2007

ESTABLISHED 1878

## Estate Planning

### Benefit the Right Beneficiary

Improper planning can have adverse consequences for beneficiaries

By Cynthia Sharp

**M**ost clients wish to accomplish the following goals in creating an estate plan: (a) Ensure that their assets are distributed to whom they want, when they want; (b) minimize family disputes; (c) minimize legal fees; (d) save estate and income taxes. Unfortunately, a great deal of money is distributed each year to unintended beneficiaries because of a misunderstanding of the law or a failure to consider all possible future scenarios in setting up the plan. Certainly, many fail to create any estate plan at all based upon misinformation regarding the laws of intestate succession.

Every resident of the state of New Jersey has an estate plan, with or without his knowledge. Some have taken a proactive approach and retained an attorney to prepare appropriate documents and render professional advice. The rest have placed their faith in our legislature to determine how and when their assets will be distributed.

The “new” New Jersey Probate Code, which was effective on Feb. 27, 2005, revised the laws of intestate succession that come into play when an individual passes away without properly designating

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beneficiaries through a valid will, trust, beneficiary or payable on death designation. N.J.S.A. 3B:5-3 et seq. This article is not an exhaustive analysis of these rules, but highlights some adverse consequences of neglecting to properly plan.

Some married people justify their failure to prepare a will upon the belief that the surviving spouse automatically inherits the entire estate. If the decedent has surviving descendants from another relationship, this belief is simply false. In that case, the widow, widower or domestic partner will receive the first 25 percent, but not less than \$50,000 nor more than \$200,000 plus one half of the balance. The rest is distributed to the decedent’s surviving descendants. Mrs. Smith, a current client, who had been married for 61 years at the time of her husband’s death, is facing that surprising reality. The Smiths had one child together and Mr. Smith had three children from his first marriage.

Mr. Smith had inherited the couple’s home (valued at \$150,000) 50 years ago and held it in his sole name. The only other asset was a brokerage account, again titled solely in Mr. Smith’s name, with investments worth approximately \$50,000. Imagine Mrs. Smith’s dismay when I informed her that under the laws of intestate succession, her husband’s three children and their child are entitled to a distribution of \$75,000 of his estate

(equally by representation) since he had not bothered to execute a valid will. Fortunately, dower rights may be available. (N.J.S.A. 3B:28-1 et seq.)

The following is another provision worthy of note. When at least one parent of an intestate is surviving, and the decedent has no descendants who are not descendants of the surviving spouse or domestic partner, the spouse or domestic partner will receive the first 25 percent of the estate, but not less than \$50,000 nor more than \$200,000 plus three quarters of the balance. The surviving parent is entitled to the balance. Imagine the havoc such an inheritance would wreak if the parent is in a nursing home collecting Medicaid benefits.

Wills should be periodically reviewed and updated. This is particularly important upon the occurrence of major life events, such as marriage, divorce or the birth of a child.

N.J.S.A. 3B:5-15 sets forth the rule that applies when one neglects to amend his will after exchanging marital vows or entering into a domestic partnership. The surviving spouse or domestic partner is entitled to receive an intestate share of the estate unless: (i) evidence shows that the will was made in contemplation of the marriage or domestic partnership; (ii) the testator’s intention that the document is to be effective notwithstanding any subsequent marriage or domestic partnership expressed in the will; or (iii) if provision was made for the surviving spouse or domestic partner outside of the will and evidence shows that the decedent intended that such provision be in lieu of a

bequest or devise under the will. It follows that testator's intent with respect to the provisions of a premarital or prepartnership will should be set forth in writing, preferably in the document itself. Otherwise, evidence presented in a subsequent will contest may be limited to oral testimony, which could be less than persuasive. The elective share statute should be looked to for relief if a surviving spouse or domestic partner is excluded as a beneficiary.

Those who don't bother to update their wills or change beneficiary designations after obtaining a divorce are protected by the provisions of N.J.S.A. 3B:3-14, which mandates revocation of any property disposition to the former spouse as well as any appointment of the former spouse as fiduciary. However, if the divorced couple remarries, the provisions in favor of the previously divorced spouse are revived.

A child born to or adopted by a testator after his or her will has been executed is afforded a level of protection if the will contains no provision for the child and the omission is not intentional or the testator has not otherwise provided for the omitted child. N.J.S.A. 3B:5-16 provides: (i) if the testator had no living children at the time of the will's execution, the omitted child will receive an intestacy share of the estate unless significant provision is made for the omitted child's other surviving parent; or (ii) if the testator had living children at the

time of the will's execution, then the omitted child will share equally in the devise made to those children. Since New Jersey allows intentional disinheritance of a child (*In Re Estate of Campbell*, 71 N.J. Super. 307, 176 A.2d 840 (Cty. Ct. 1961)), such a clause should be added to the will if the testator in fact intends that result.

We cannot predict with certainty whether our named beneficiaries will survive us. Consequently, awareness of the legal provisions that dictate the disposition of assets in the event that a beneficiary predeceases the testator is critical so that appropriate contingent beneficiaries can be named.

First and foremost, clear and convincing evidence must be presented that a beneficiary survived a testator by 120 hours in order to be entitled to a devise under a will. Otherwise, the beneficiary is deemed to have predeceased the testator unless the instrument in question provides for another outcome. Under the "new" probate code, the survival requirement is extended to fiduciary appointments. Furthermore, in the case of co-owners with the right of survivorship, if there is no clear and convincing evidence that one survived the other, one-half of the property passes as if one had survived by 120 hours and one-half passes as if the other had survived by 120 hours. N.J.S.A. 3B:3-32.

If the named beneficiary does not survive 120 hours (or any other length of time

set forth in the governing document), a determination of the individual entitled to inherit must be made. The task should be relatively simple if contingent beneficiaries are named. Otherwise, we must look to New Jersey law for the answer.

The "anti-lapse" statute addresses the circumstance under which a devisee fails to survive the testator or is treated as failing to survive and the will is silent as to contingent beneficiaries. Under N.J.S.A. 3B:3-35, the descendants of the devisee who survive the testator by 120 hours will take by representation in place of the deceased devisee so long as the named devisee is a lineal descendant of a grandparent of the testator or is a grandparent or stepchild.

If provision is made for the benefit of issue or descendants of the decedent under any governing instrument, said beneficiaries shall take by representation unless a contrary intention is expressed. N.J.S.A. 3B:3-41. However, the common practice is to include the clause "per stirpes" after the name of the beneficiary. Inclusion of this clause is particularly important if the beneficiaries don't fall within the above referenced class.

Caution must be exercised in advising clients as to the implications of choosing or failing to choose beneficiaries. Otherwise, the wrong individual may receive an inadvertent windfall upon the death of a client. ■