

CHAPTER I
**INTRODUCTION TO ESTATES AND TRUSTS AND ROLES OF FIDUCIARIES
AND OTHER PARTICIPANTS IN THE ESTATE OR TRUST ADMINISTRATION**

A. Basic Concepts

When a person dies, his assets are collected, administered, and distributed by someone who is appointed to act in place of the deceased person (the “decedent”). In most instances, the person appointed may be generically referred to as the “personal representative” of the decedent (that term would include those who have titles such as “executor” or “administrator,” which have specific meaning under our law).

The personal representative is appointed to gather the decedent’s assets (all of his right, title, and interest in real property or tangible or intangible personal property) that comprise his “estate.” That representative conducts what is known as an estate “administration” – a term used to describe the process of gathering (or “marshaling”) the decedent’s assets, paying the decedent’s debts, paying all taxes resulting from the decedent’s death, and then making distribution to those who ultimately receive the decedent’s estate (pursuant to the decedent’s directions in his will or other governing instrument or, absent such valid directions, the law).

Administration of the decedent’s assets at his death might involve administering trusts that he created during his lifetime (these are called “inter vivos trusts” or “lifetime trusts,” created by a separate document executed by the decedent during his lifetime). Those instruments might take the form of a “trust agreement,” an agreement of trust made between a trustee and the person who created the trust (who is now defined by our law as the “settlor,” but who might also be called the “grantor” or the “trustor”). Historically, that was the fundamental concept of a trust: the settlor would deliver his property to a person to whom it would be entrusted; their relationship and the disposition of the entrusted property by the trustee would be determined by their agreement. A trust can also be created by a “declaration of trust,” an instrument by which the settlor declares the terms of his trust for administration by the designated trustee. In either case, it is possible that the trust could be created without knowledge of the persons who might benefit from its existence (known as the “beneficiaries”).

Many types of trusts exist, as will be discussed further below and elsewhere in this Book. At this point, it is important to bear in mind a fundamental distinction between inter vivos trusts (described above) and trusts created by the decedent under the terms of his will called (“testamentary trusts”). While inter vivos trusts exist from the time of their execution, testamentary trusts do not come into existence until the decedent’s will has been admitted to probate.

Thus, as has become increasingly common, the disposition of assets upon the decedent’s death might involve trusts created by the decedent; it might even involve trusts created by others (such as a predeceased spouse or an ancestor). In such cases, assets might be administered by the decedent’s *personal representative*, or, in addition to or even in place of that representative, through another fiduciary, the *trustee*.

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B. Governing Law: Statutes and Common Law

Title 3B of the New Jersey Statutes (captioned “Administration of Estates”) and a body of common law govern the disposition and administration of estates in New Jersey. *See N.J.S.A. 3B:1-1 et seq.* Title 3B will be referred to in this Book as the “Probate Code.” New Jersey’s Probate Code is adapted from, but is not identical to, the “Uniform Probate Code” promulgated by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”).

The Uniform Probate Code was first promulgated by NCCUSL (www.uniformlaws.org) in 1969. The Probate Code was first enacted in New Jersey to be effective May 28, 1980. After several proposed revisions by the National Conference Commissioners, the New Jersey Bar Association began considering the 1991 version of the Uniform Probate Code for use in updating the New Jersey statutes. One principal purpose of the revisions to the Uniform Probate Code reflected the reality that society had changed such that the vast majority of an estate would pass by operation of law or contract and thus, the code was designed to incorporate references to “governing instruments,” *see N.J.S.A. 3B:1-1*, and not merely reflect testamentary transfers through a will. Nonetheless, the process of revising the New Jersey statutes resulted in a 14-year project, culminating in their ultimate passage in 2004. Those Amendments were effective for decedents dying after February 28, 2005 (the “2005 Amendments”). While the goals of this revision included an update and modernization of the rules concerning testamentary dispositions, some inconsistencies have been noted, but are yet to be corrected.

The title of Chapter 3B (“Administration of Estates”) might be viewed as something of a misnomer, as the Probate Code includes numerous provisions addressing the administration of trusts. That was addressed, to an extent, in the 2005 Amendments and the incorporation of “trusts” in the definition of “governing instrument,” a phrase used in various parts of the Probate Code. For example, the existing Probate Code contained provisions directly pertaining to trusts, such as Chapter 4 (“Testamentary Additions to Trusts”), Chapter 11 (pertaining to “Trusts and Trustees”), and Chapter 20 (containing the “Prudent Investor Act,” principally applicable to trusts). Those provisions, engrafted onto existing law, created something of a patchwork that created a host of questions. For example, did Article 14 (pertaining to “Fiduciaries”) apply to all trusts? Lawyers and courts routinely cited the provisions of *N.J.S.A. 3B:14-23* (addressing fiduciary powers) to both personal representatives and trustees.

The most significant recent change to Title 3B, however, came in 2016, when our Legislature enacted a version of the “Uniform Trust Code,” which was first promulgated by NCCUSL in 2000. That enactment is now codified in Chapter 31 (*N.J.S.A. 3B:31-1 et seq.*) of Title 3B. Our enactment (like the Probate Code) varies from NCCUSL’s formulation, so for purposes of this Book, it will be referred to as the “Trust Code.” Given the Trust Code’s implications for the administration of estates, a new chapter has been added to address its enactment and the manner in which it interacts with the rest of the Probate Code, common law, and other concepts. In some specific ways, the Trust Code supplants or replaces provisions of the Probate Code, but in many ways, numerous provisions of the Probate Code remain in effect. That, of course, is confirmed by the legislative process: our Legislature

added the Trust Code as a new Chapter 31 of the Probate Code, but it did not modify or repeal existing provisions of the Probate Code.

Cases decided under the Uniform Probate Code and the Uniform Trust Code might be helpful in evaluating how the Judiciary would construe an analogous provision of New Jersey's Probate Code or Trust Code. As New Jersey has, however, adopted so many local provisions, any such comparison must be done with caution.

The law governing the disposition of estates and trusts has always been, and remains, a creature of legislation. *In re Estate of Sapery*, 28 N.J. 599, 604-07 (1959) (describing historical basis for legislative control over the devolution of property upon death). That means a person's right to dispose of his estate stems from a legislative enactment that sets forth, among other things, the requirements for the validity of a will or the disposition of an estate in the absence of a will. *United States v. Kingsley*, 41 N.J. 75, 79-80 (1963) (noting among other things that: "the privilege of transmission of property by will or by intestacy may be subject to such terms as in the judgment of the State will serve the public good").

The Introductory Chapter of the Probate Code, in addition to defining terms and addressing other fundamental principles, codifies the essential statutory command governing the disposition of property upon death as follows:

Upon the death of an individual, his real and personal property devolves to the persons to whom it is devised by his will or to those indicated as substitutes for them in cases involving lapse, renunciation or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting the devolution of intestate estates, subject to the rights of creditors and to administration. [N.J.S.A. 3B:1-3.]

The first clause of N.J.S.A. 3B:1-3 focuses on "testate" dispositions – a disposition made by the decedent in a properly-executed written instrument (a "will"). Where a person dies with a valid will, he is said to have died "testate." The provisions of his will are called "testamentary dispositions." Where the disposition of the estate is governed by a will, the personal representative selected by the decedent is called the "executor" of the will, in that he executes the decedent's instructions contained in the will. N.J.S.A. 3B:1-2. Those who take under a will are called " devisees" pursuant to N.J.S.A. 3B:1-1 (bear in mind that the statutory definition of " devisees" apparently includes all of the terms formerly used to describe those who take under a will, such as legatees, devisees, and beneficiaries, although the current Probate Code employs the term "beneficiary" to describe one who takes under a trust).

The second clause of N.J.S.A. 3B:1-3 focuses on the devolution of property where the decedent fails to execute a will or trust governing the disposition of his assets after his death (or if such will or trust is invalid for any reason). The law of New Jersey contains provisions governing the disposition of such an estate, called the law of intestacy. N.J.S.A. 3B:5-1 *et seq.* Where that law applies, the decedent is said to have died "intestate." The law provides for the appointment of a person as "administrator" of the intestate decedent's property. N.J.S.A. 3B:1-2; 3B:5-1 *et seq.* Those who take an estate pursuant to the law of intestacy are called "heirs." N.J.S.A. 3B:1-1.