



**FALL 2022**

Can a Last Will &  
Testament Require  
Arbitration of Disputes?

Inheriting &  
Bequeathing Firearms  
in New Jersey

# planning matters

PRACTICAL INSIGHTS INTO  
ESTATE PLANNING & WEALTH PRESERVATION

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# Can a last will & testament require that beneficiaries arbitrate their disputes?: In a case of First Impression, New Jersey court says no.

by Elizabeth Engert Manzo, Esq.



Whether a Testator can compel beneficiaries of an Estate to arbitrate potential disputes regarding the enforcement, interpretation, and administration of a Last Will and Testament by including a mandatory arbitration provision is a novel legal issue which, until recently, had not been considered by the courts in New Jersey. For those hoping that an arbitration provision could be used when drafting a Last Will and Testament to bar litigation in court and thereby reduce the possible time and expense of estate disputes, a recent New Jersey decision dashed such hopes and held that arbitration provisions in a will are unenforceable.

In the case of *In Re Estate of Hekemian*, the plaintiff, Richard E. Hekemian, one of the Decedent's four sons and a beneficiary of his Estate, filed a lawsuit seeking compensation from two of his brothers, Peter S. Hekemian and Edward G. Imperatore, in their capacities as Co-Executors of their late father's Estate. Upon notice of the litigation, the defendants filed a motion to compel arbitration based on an arbitration provision in the Decedent's Will. In turn, the plaintiff opposed the motion claiming that the arbitration provision in the Will is invalid under New Jersey.

While noting that the State of New Jersey, as a matter of public policy, generally favors arbitration as a dispute resolution mechanism, the New Jersey Superior Court determined that an arbitration provision in a Decedent's Last Will and Testament was unenforceable. The court began its analysis by noting the hallmark principle that a testator's intent should be honored and upheld. To wit, the court cited to the statute at N.J.S.A. 3B:3-33.1 which states that "the intention of a testator as expressed in his will controls the legal effects of his dispositions."

Nevertheless, the court compared a mandatory arbitration clause, which would compel arbitration and prevent litigation within the courts, with an "in terrorem" clause, also known as a "no-contest" clause. An "in terrorem" clause generally provides that beneficiaries will lose their beneficial interest

in an estate, or will lose their interests in an estate, if they challenge a will. The court noted that an "in terrorem" clause is generally unenforceable where the litigant has "probable cause" to challenge the Last Will and Testament. In the case of *In re Estate of Hekemian*, the court determined the plaintiff had a reasonable, good faith basis and the legal grounds to challenge the administration due to his role as beneficiary of the Estate and his right to receive an accounting following failure of the defendants "to keep the Plaintiff apprised of the affairs."

Next, the Court also applied state contract law to analyze the arbitration provision. It found that the parties challenging a will did not mutually assent to the arbitration clause because they were not involved in the preparation of the will. Finding the arbitration provision to be unenforceable, the court noted that a Last Will and Testament is an expression of the Testator's testamentary intent. Continuing, the court explained that the beneficiary of an estate cannot be compelled to arbitrate because "a will is not a contract or an agreement of consensual understanding between two parties." Highlighting the recognized importance of a litigant's right to sue in court, the court further noted that the arbitration provision under consideration did not a) inform the litigant of his right to sue in court and b) did not give the litigant a "clear and unambiguous" opportunity to waive the right to sue in court both of which are generally required to enforce arbitration provisions under the traditional principles of contract law.

In short, despite the many cases in New Jersey favoring arbitration in general, and the "strong preference" towards enforcing arbitration agreements under both state and federal law in the context of a will contest, at least one New Jersey court has now held that a mandatory arbitration provision under a Last Will and Testament is unenforceable regardless of the Testator's expressed "testamentary intent" mandating arbitration.

## how to lawfully & responsibly transfer possession

by Donald Pierce, Esq.

**According to the Giffords Law Center to Prevent Gun Violence, New Jersey has the second strictest gun laws behind California. What are the implications raised by the transfer of a firearm following the death of a loved one?**

### Is a Firearms ID Card or Handgun Purchase Permit required?

In the case of inheritance, neither a Firearms Purchaser Identification Card (“FPID”) nor a Handgun Purchase Permit (“HPP”) are required for the passing of a firearm upon the death of an owner to his/her heir or legatee, whether the transfer is by will or by the laws of intestacy. Importantly, the heir/legatee must still meet the legal requirements for possessing the firearm.

The transfer to an heir/legatee is a unique exception to the otherwise onerous requirement of applying for and receiving either an FPID or HPP. This exception does not apply to revocable trusts and for this reason firearms should be bequeathed through a last will and testament. Additionally, the recipient of a handgun should nonetheless consider applying for a FPID or HPP as they are required for the purchase of handgun ammunition.

### Who Can Inherit a Firearm?

For one to inherit a firearm, the firearm must be legal to possess in New Jersey and the person receiving the firearm shall not be prohibited from possessing the firearm under the restrictions set forth in N.J.S.A. 2C:58-3j. Accordingly, an heir or legatee cannot:

- 1) Have been convicted of any crime, or a disorderly persons offense involving an act of domestic violence;
- 2) Be dependent on a controlled dangerous substance;
- 3) Be a habitual drunkard;
- 4) Be confined for a mental disorder to a hospital, mental institution or sanitarium;
- 5) Suffer from a physical defect or disease which would make it unsafe for him/her to handle firearms;
- 6) Have ever been confined for a mental disorder, or been an alcoholic, unless they produce a certificate of a medical doctor or psychiatrist licensed in NJ, or other satisfactory proof,

that they are no longer suffering from that disability;

- 7) Be under the age of 18, or under the age of 21 if the transfer is of a handgun;
- 8) Be a person whose possession would not be in the interest of the public health, safety or welfare;
- 9) Be subject to a restraining order issued pursuant to the “Prevention of Domestic Violence Act of 1991” prohibiting them from possessing any firearm;
- 10) Have been, as a juvenile, adjudicated delinquent for an offense which, if committed by an adult, would constitute a crime and the offense involved the unlawful use or possession of a weapon, explosive, or destructive device;
- 11) Have a firearm seized, and not yet returned, pursuant to the Prevention of Domestic Violence Act of 1991;
- 12) Be named on the consolidated Terrorist Watchlist;
- 13) Be subject to a court order prohibiting the custody, control, ownership, purchase, possession, or receipt of a firearm or ammunition.

If one inherits a firearm and is prohibited from possessing the firearm under the restrictions above, they may maintain *ownership* of the firearm for a period of 180 days to facilitate its sale. Critically, they may not possess the firearm during that period as it must be in the custody of the chief law enforcement officer of the municipality or the Superintendent of State Police.

### Can I Transfer the Firearm Out of State?

A firearm may be inherited by an individual residing outside of New Jersey, provided that the heir/legatee is permitted to possess the firearm in his or her own state. While interstate transfers without a federal license are normally prohibited, 18 U.S.C. 922(a) (5) provides an exception for transfers of firearms



to nonresidents to carry out a lawful bequest or acquisition by intestate succession.

### Other Considerations for the Responsible Transfer of Possession

- 1) Have a plan for ensuring the security of the firearm in an appropriate safe.
- 2) Consider partnering with a federally licensed dealer during the probate period to assist in taking custody of the firearm(s) during the probate period.
- 3) Ensure lawful transportation of the firearm under N.J.S. 2C:39-6(g). Absent a permit to carry, an individual may only transport a firearm to certain authorized destinations and by properly stowing the unloaded firearm.
- 4) Avoid undervaluing the firearms. As with many estate assets, the value of a firearm or collection of firearms could vary greatly depending on the age, manufacturer, model, rarity, etc.
- 5) The inheritance exception only applies between a decedent and the heir. Any subsequent transfer of the firearm must comply with the statutory requirements applicable to all transfers, even among family members. An heir may always consider surrendering the firearm to local law enforcement.



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