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WHEN TO BYPASS A SPOUSE

Absent a written agreement or court order, NJ estate planning law does not permit one spouse to bypass or dis-inherit the other.

At the very least, one spouse must leave an "augmented 1/3 share" of his/her estate to the other. The determination of this "1/3 augmented share" can be rather complicated. In calculating this figure, it is advisable to engage a post-mortem accountant who is familiar with this equation.

In NJ Medicaid planning circles, there are times that attorneys advise the healthy spouse to dis-inherit their not-so-healthy counterpart. This occurs in instances where one spouse is diagnosed (or perceived) to have an illness or condition which could result in a prolonged stay in a long-term care facility.

An often-used Medicaid planning strategy results in the re-titling of most marital assets into the name of the healthy spouse. In said spouse's Will or Living Trust, the more fragile spouse is bypassed to the extent permitted by NJ law.

END RESULT:

If the healthy spouse unexpectedly dies first:

- The not-so-healthy spouse receives the 1/3 augmented share.
- The remaining 2/3 can be used to enhance that individual's emotional, physical or spiritual needs over and above what the public subsidy programs (NJ Medicaid and Medicare) will provide.

James E. De Martino is licensed to practice in the State of New Jersey.

Our practice is limited to estate planning, long-term care planning, and NJ Medicaid asset protection.

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