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New York Probate and Trust Administration

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Robert F. Baldwin Jr. is a partner in Baldwin & Sutphen, LLP, of Syracuse, New York. He concentrates his practice on estate planning and administration, charitable tax planning, and related matters. Mr. Baldwin was formerly an adjunct professor of law at Syracuse University College of Law, where he lectured on estate planning and related issues. He is an active member of the New York State Bar Association and the American Bar Association, and is a fellow of the American College of Trust and Estate Counsel, where he is a past state chair and chair of the Committee on Employee Benefits in Estate Planing. Mr. Baldwin is a past president of the National Association of Estate Planners & Councils. He has been a frequent lecturer on and has authored various programs relating to estate planning, administration, and employee benefit matters. Mr. Baldwin earned his undergraduate degree and his law degree from Syracuse University.

Antar P. Jones is the founder of the Law Office of Antar P. Jones, PLLC, located in Brooklyn, New York. His practice concerns advising fiduciaries and successful individuals concerning income and estate taxation matters, among other things. Mr. Jones' practice involves many complex post mortem taxation issues. In addition to having advised clients regarding insurance trusts, he has advised fiduciaries on taxation matters concerning how living trusts are taxed once the grantor has passed. Mr. Jones has done extensive work concerning the annuity reporting requirements of qualified domestic trusts, in addition to how specifically marital deductions operate with respect to such trusts where there is a foreign spouse from a country that has a tax treaty with the United States. He is a member of the New York State Bar Association, where he is active in the Estate and Trust Administration Committee of the Trusts and Estates Section. Mr. Jones earned his J.D. degree from the New York Law School and his LL.M degree in taxation from the graduate program in taxation at New York Law School.

Leslie E. Levin is special counsel to the firm Cuddy & Feder LLP, in White Plains, New York, where she practices in estate planning, probate, estate and trust administration, gift and generation-skipping tax transfer planning, asset protection, IRA distribution planning, not-for-profit organizations, charitable planning, special needs and disability planning, Medicaid

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Submitted by Leslie E. Levin

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NBI New York Probate and Trust Administration Probate Process and Overview

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A. Review of the Probate Timeline C. Deadlines to be Aware of

- Following the death of a client, the attorney should meet with family to discuss the administration of the decedent's estate and arrange to probate the Will.
- Identify the Executor from the clause in the Will which names the fiduciaries. The attorney should review the procedure for probating the Will and the timeline for the estate administration with the Executor.

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Topics A and C

- A. Probate the Will.
- B. After appointment as Executor - Obtain Employer Identification Number ("EIN") (also called a Taxpayer Identification Number "TIN"), open Estate account, marshal assets, obtain date of death valuations and close Decedent's accounts.
  - The EIN is similar to a social security number, except that the tax id is for entities.
  - With the Letters Testamentary and the Tax Identification Number, the Executor can open an estate account at one or more financial institutions.

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Topics A and C

- Once the Estate account is open, then the Executor will close each account in the Decedent's name and transfer them to the Estate account(s).
- Income earned on this account, if any, is reportable to the IRS with the EIN and an income tax return would be filed.

- C. Identify and if possible, pay all debts and expenses within seven months of appointment.
- D. Obtain alternate valuations valued as of six months from date of death.

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Topics A and C

- E. File disclaimers within nine months of date of death.
- F. File Estate Tax Return for Federal and State purposes nine months after date of death (can obtain six month extension).
- G. File inventory with Court nine months after appointment as Executor.
- H. Distribute assets to beneficiaries after obtaining Receipt, Release, Refunding and Indemnification Agreements from beneficiaries.
- I. Close estate by filing Affidavit of Completion with Court and filing final income tax returns with Federal and State.

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B. Forms of Administration

- If the estate is valued at $50,000 or less (exclusive of property set off under EPTL §5-3.1(a)(1) through (5)), then the decedent's estate may be settled without court administration.
- A voluntary administrator is appointed to settle the estate "without the formality of court administration" (SCPA §1301(2)).
- Informal administration is not available for administering real property (SCPA §1302).

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Topic B

- A voluntary administrator can only be the named executor and the Will must be filed in Surrogate's Court.
- If there is no Will, then SCPA §1303 provides an order of priority for serving as voluntary executor beginning with the surviving spouse followed by the children.
- No bond is needed (SCPA §1304(2)).
- The Court will issue a short certificate showing that the voluntary administrator has authority to act SCPA §1304(5).
- Duties of a voluntary administrator are listed in SCPA §1307.
- If the value of an asset is uncertain and may in fact be greater than $50,000, then the better course of action is to proceed with a formal probate proceeding.
- If greater than $50,000 and there is a Will, then bring probate proceeding.
- A probate proceeding's purpose is to authenticate the Will so that the decedent's property may be disposed, to appoint and empower the executor to administer the decedent's estate and to appoint trustees if any are nominated under the Will.

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D. Documents Used in the Probate Process
G. Initial Petition and Notices

- Attorney should retain the original of the Will for safekeeping because a Will which cannot be found is presumed to be destroyed or revoked by the testator.
- Lost Will can be admitted in probate only if it can be established that it has not been revoked, execution of the Will is proved that it was in compliance with EPTL §3-2.1, and all of the provisions of the Will are proved by two witnesses or by a true and complete copy of the Will SCPA §1407.

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Topics D and G

- Will must be in writing, signed by the testator in the presence of at least two witnesses who are at least 18 years of age and competent. Establishing these factors can be very difficult.
- Probate is usually not an option with lost Will and the client's family must choose intestate administration.
- If the Will is in the safe deposit box of the decedent, Court may issue an ex parte order upon submission of a Petition (also known as a will-search order) to open safe deposit box (SCPA §2003, 20 NYCRR §360.2).
- If a Will is withheld, a proceeding may be brought to compel production of the Will under SCPA §1401.

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Topics D and G

- A Will may be revoked by the testator signing a new Will, stating in writing the intent to revoke the Will, the testator burning, tearing, cutting, cancelling, obliterating, mutilating, destroying the Will (or someone else doing so under the direction of the testator) (EPTL §3-4.1).
- Confusion about whether the decedent had or did not have a Will can lead to unexpected delays and costs upon the death of the decedent.
- Verify that the Will does not have any staples removed, different paper, text added between the lines, or erasures before filing the Will.

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Topics D and G

- The complete probate petition is filed together with:
- 1) Original Death Certificate
- 2) Original of Last Will and Testament and Codicil, if any
- 3) Copy of Last Will and Testament together with Affidavit of Comparison (22 NYCRR §207.19)
- 4) Attorney Certification (22 NYCRR §207.4)
- 5) Notice of Probate (SCPA §1409) together with Affidavit of Mailing
- 6) Proposed Decree (not required in all counties)

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Topics D and G

- 7) Self-addressed stamped envelope in which to forward the copy of the Decree and Letters Testamentary to the attorney's office
- 8) Check representing the filing fee (see SCPA §2402 for filing fee schedule)
- 9) Check representing the fee for Letters Testamentary and Letters of Trusteeship, if necessary (current fee is $6 per letter)
- 10) Any other document required due to specific nature of the case

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Topics D and G

- To be sure that all proper forms have been filed, good practice is to review the documents using the Probate Proceeding Checklist provided by the Court (see https://www.nycourts.gov/LegacyPDFS/FORMS/surrogates/pdfs/p-chklst-frm.pdf).
- The Surrogate's Court has official forms which can be found in the "Green Book" or by using HotDocs. Additionally, a link to many of these forms can be found at http://www.nycourts.gov/forms/surrogates/index.shtml
- Check whether the Surrogate's Court is requiring that the matter be E-Filed.

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Topics D and G

- Pursuant to SCPA §708 the designated fiduciary must file an oath. Typically this Oath and Designation is attached to the back of the Probate Petition.
- A self-proving affidavit for subscribing witnesses usually found as a separate sheet at the end of the Will avoids having to search for witnesses at time of testator's death (SCPA §1406).
- If there is not a self-proving Will, at least two witnesses must file affidavits or they must be examined before the Court (SCPA §1404).

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Topics D and G

- Under SCPA §2307-a, when a client nominates the attorney as executor, the client must sign an acknowledgment of disclosure which is filed at the time of probate.
- Absent execution of the disclosure, an attorney who serves as executor will be entitled to only one-half of the statutory commissions.
- Executor must file a statement that the executor is an attorney, whether such person (or such person's law firm) will act as counsel and whether such executor was the draftsman of the Will (22 NYCRR §207.17).

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Topics D and G

- A Putnam Affidavit is needed whenever there is a bequest to a person in a confidential relationship to the decedent such as an attorney, doctor, accountant or clergy to explain the circumstances surrounding the gift.
- Also, if the attorney is designated as the fiduciary, a Weinstock Affidavit may be needed to explain why the decedent appointed the attorney in such capacity.
- Any person who is adversely affected by the probating of the Will may file objections to probate (SCPA §1410, 22 NYCRR §207.26).
- Drafting Codicils should be discouraged because anyone whose interest was adversely affected by the Codicil now has standing to object to probate.

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Topics D and G

- Adversely affected parties and distributees may contest a Will on the following grounds:
  - Capacity - standard is that the testator:
    - Understood the nature and extent of his or her assets
    - Knew who he or she would normally be expected to provide for, such as a spouse
    - Knew what his or her Will provides.
  - Fraud, duress or undue influence
  - Forgery
  - Will executed without valid Will formalities
  - Existence of a later Will

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Topics D and G

- An interested party as defined in SCPA §103(39) may object to the nominated fiduciary by filing objections (SCPA §709).
- The executor cannot dispose of any assets before letters testamentary are issued except for the purpose of paying funeral expenses.
- Executor may also file a request for issuance of preliminary letters testamentary which give the preliminary executor all of the fiduciary capacities of an executor with full letters testamentary other than the power to pay or distribute assets to beneficiaries (SCPA §1412).

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Topics D and G

- The reason for the need for Preliminary letters should be explained in an Affidavit of Urgency that is filed with the Petition.
- The decree granting probate will include a provision revoking the preliminary letters.
- Pursuant to EPTL §1-2.5, a "distributee is a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution."
- All distributees must be served and the process must include the name of the petitioner and if the Will is nuncupative (SCPA §1403).
- Preferably, the distributees will sign a Waiver of Process and Consent to Probate which avoids the need to serve them and having a citation issued.

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Topic D and G

- If the decedent is not survived by any distributees, is survived by only one distributee, or if the distributees are more remote than the issue of the decedent's siblings, then an Heirship Affidavit or Affidavit of Kinship must be filed by a disinterested person.
- A family tree may also be required (22 NYCRR §207.16).
- An Affidavit of Due Diligence may also be required when complete information cannot be found in order to prove to the Court that all avenues were exhausted to discover the missing relatives (22 NYCRR §207.16(d)).

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Topic D and G

- Once identified, the attorney should also discuss whether or not the beneficiaries wish to disclaim any part of or all of the inheritance.
- Disclaimers are a form of post mortem planning which allow for altering the beneficial interests of the beneficiaries by the beneficiary refusing to accept the bequest.
- As previously discussed, a Notice of Probate (SCPA §1409) is sent to each beneficiary who is not a distributee.
- If there are charitable bequests to an unnamed charity or of an unspecified amount, then the Attorney General must also get Notice.

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Topics D and G

- Good practice is to include a copy of the Will with this Notice to send a message of transparency and to avoid the beneficiaries calling the attorney and requesting one.
- Will is a public record once filed with the Surrogate's Court so the attorney is not sharing confidential information when giving the Will to the beneficiaries.
- If the estate has a charitable interest, other than a specific legacy, it must register with the New York State Attorney General's Charities Bureau within six months of Letters Testamentary being issued (EPTL §8-1.4 and 13 NYCRR §92.2).
- After Letters Testamentary are issued, the Executor is not required to make distributions to the beneficiaries until 7 months have passed (EPTL §11-1.5(a)).
- During the 7 months, the Executor must ensure that there are sufficient assets to pay the administration expenses, funeral expenses, debts of the decedent and taxes.
- The executor can commence an action for wrongful death but it must be brought within two years of the decedent's death (EPTL §5-4.1).

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E. Information Gathering

- When the Will is reviewed, the attorney will be able to identify the beneficiaries from the clauses in the Will.
- Good practice is to obtain contact information when preparing the Will for each person named.
- Family members may have more current information and a search of the internet can also yield contact information.

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Topic E

- Attorneys should be provided with a list of all assets and liabilities.
- List should be prepared of all of the decedent's:
  - 1) real estate,
  - 2) stocks and bonds,
  - 3) mortgages, notes and cash,
  - 4) insurance on the decedent's life,
  - 5) jointly owned property,
  - 6) trust assets,
  - 7) annuities and retirement accounts and
  - 8) any other assets.

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Topic E

- By having this information before a client dies, the attorney is better able to ascertain which assets held by the decedent will be subject to probate and which are considered non-probate.
- Each asset will need to be valued as of the decedent's date of death and on the sixth month anniversary of the decedent's date of death for alternate valuation purposes.
- The assets and their values will be accounted for on the decedent's Federal estate tax return and on the decedent's New York estate tax return.
- The value of the probate property is used when filing the probate petition for determining the appropriate fee on the fee schedule (SCPA §2402, 22 NYCRR §207.16).

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Topic E

- Inventory of all probate assets and their values is required for the Inventory which must be submitted to Court within nine months of the date letters issued to the fiduciary (22 NYCRR §207.20). This Inventory contains information about both probate and non-probate assets.
- Property in the decedent's individual name without a named beneficiary is considered probate property and governed by the decedent's Will or if the decedent had no Will, then by intestacy.
- The remaining assets held in joint name or which have a named beneficiary are considered to be non-probate assets, are not governed by the decedent's Will and are not subject to the jurisdiction of the New York Surrogate's Court. These assets pass by operation of law. Regardless, they will still need to be valued and collected.

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Topic E

- Attorneys should ensure that joint asset holders collect the jointly held assets and will need to know the date of death value of each of these assets.
- A form used to name a beneficiary of a particular asset such as an IRA, 401(k) Plan or Life Insurance is beneficiary designation form. These assets pass outside of client's Will and are not subject to probate. Regardless, they will still need to be valued and collected.
- If the Executor is aware of property belonging to the decedent but which is not being turned over to the estate, the executor may bring a petition to discover such withheld property and/or information about such property (SCPA §2103).

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F. Laws of Intestacy

- An administration proceeding's purpose is to dispose of the decedent's property when he or she dies without a Will and to appoint and empower the administrator to administer the decedent's estate.
- When a person dies without a Will, such person is considered to have died intestate (SCPA §103(28)).
- Article 4 of the EPTL governs this situation.

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Topics F

- The Surrogate's Court has official forms which can be found in the "Green Book" or by using HotDocs. Additionally, a link to many of these forms can be found at http://www.nycourts.gov/forms/surrogates/index.shtml
- Check whether Court requires that the matter be E-Filed.
- The filing fee schedule can be found at SCPA §2402(7).
- Under intestacy, the decedent's assets pass to such person's distributees.
- Pursuant to EPTL §4-1.1(a)(1), if a decedent is survived by a spouse and issue, the spouse inherits the first $50,000 plus 50% of the balance of the decedent's estate and the issue inherit the remaining 50% of the balance of the decedent's estate.
- If a proceeding is needed to determine who are the distributees, a petition can be brought under SCPA §2225 to show that all efforts have been made to locate distributees.

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Topics F

- Any person who is interested in the estate, any person agreed upon by all distributees, public administrator, chief fiscal officer of the county, a creditor or a person interested in an action in which the decedent is a party may bring a petition to serve as administrator (SCPA §1002(1)).
- This large class of potential appointees can lead to the appointment of someone not familiar with the estate, can lead to litigation if multiple parties wish to serve, can lead to delay as the decision is made as to who will serve and can cause unnecessary expenses due to the delays and litigation.
- SCPA §1001 provides an order of priority to those who are eligible to receive Letters of Administration. The surviving spouse, followed by the children, is given preference. However, it is possible that had the decedent drawn a Will, he or she would not have named the surviving spouse as the decedent's personal representative.
- Pursuant to SCPA §708 the designated administrator must file an oath. Typically, this Oath and Designation is attached to the end of the Administration Petition.

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Topics F

- SCPA §1001 provides an order of priority to those who are eligible to receive Letters of Administration. The surviving spouse, followed by the children, is given preference. However, it is possible that had the decedent drawn a Will, he or she would not have named the surviving spouse as the decedent's personal representative.
- Pursuant to SCPA §708 the designated administrator must file an oath. Typically, this Oath and Designation is attached to the end of the Administration Petition.
- All distributees must be served and the process must include the name of the petitioner (SCPA §1005).
- Preferably, the distributees will sign a Waiver of Process and Consent to Administration which avoids the need to serve them and having a citation issued.

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Topics F

- If the decedent is not survived by any distributees, is survived by only one distributee, or if the distributees are more remote than the issue of the decedent's siblings, then an Heirship Affidavit or Affidavit of Kinship must be filed by a disinterested person.
- A family tree may also be required (22 NYCRR §207.16).
- An Affidavit of Due Diligence may also be required when complete information cannot be found in order to prove to the Court that all avenues were exhausted to discover the missing relatives (22 NYCRR §207.16(d)).
- The Attorney General and the Public Administrator must be cited if there are no known distributees.
- Once an administrator is appointed by the Court, he or she will have to be bonded (SCPA §805).

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Topics F

- If a minor child inherits from a deceased parent, the Court will appoint a guardian of the property of the infant, who can be the surviving parent, and upon the person of the infant if there is no surviving parent (SCPA §1702) upon petition by a person on behalf of the infant (SCPA §§1703, 1704).
- If there are multiple children under the age of eighteen years, then a separate petition must be brought on behalf of each such infant (22 NYCRR §207.11).
- A bond is required for the property of the infant (SCPA §1708).
- Once a guardian is appointed, inherited funds will be held for such child in a guardianship account.
- Whenever funds are needed for such child, a petition must be made to the Court by the guardian requesting such funds for the support and education of the child (SCPA §1713).
- Guardian must file an annual account with the Court (SCPA §1719).

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Topics F

- The administrator cannot dispose of any assets before letters of administration are issued.
- Court can grant temporary letters of administration when there is a delay, an interested party cannot be found or when an interested party is a prisoner of war (SCPA §901).
- Affidavit of Urgency should be filed to explain the reasons for the request.
- Under SCPA §1007, when an administrator fails to complete his or her duties and then ceases to serve, the court can appoint letters of administration de bonis non ("d.b.n.") to an eligible person.
- Another option is distribution of the estate under SCPA §2207 which governs the situation where a fiduciary dies while in office, even to the point of allowing the fiduciary of a deceased fiduciary the rights and powers of such deceased fiduciary.

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H. Sample Forms, Letters and Documents

- 1. Court Forms
- 2. Apply for EIN
- 3. Receipt, Release, Refunding, and Indemnification Agreement
- 4. Receipt and Release Agreement
- 5. Attorney Disclosure Form under SCPA §2307-a
- 6. Affirmation of Attorney under 22 NYCRR §207.16
- 7. Weinstock Affidavit of Attorney-Draftsman
- 8. Putnam Affidavit

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- This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.
- Under IRS regulations we are required to add the following IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) addressed herein. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent.

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A. Review of the Probate Timeline
C. Deadlines to be Aware of

Following the death of a client, the attorney should be notified by the family and a meeting can be put on the calendar for when the family wishes to meet to discuss the administration of the decedent's estate and arrange to probate the Will. When the client dies and the Will is reviewed, the attorney will be able to identify the Executor from the clause in the Will which names the fiduciaries. If the person named in the Will is eligible to serve, the attorney should contact the individual and arrange for a meeting. At the meeting, the attorney should review the procedure for probating the Will and the timeline for the estate administration. The attorney should convey that the person designated must be capable of handling the responsibilities to which such person will be assigned and must have the time and ability to carry out the estate administration.

<u>The Estate Timeline – What Must be Done When</u>

A. Probate the Will.

B. After appointment as Executor - Obtain Employer Identification Number ("EIN ") (also called a Taxpayer Identification Number "TIN"),

open Estate Account, marshal assets, obtain date of death valuations and close Decedent's accounts. The EIN is similar to a social security number, except that the tax id is for entities. An estate is an entity. With the Letters Testamentary and the Tax Identification Number, the Executor can open an estate account at one or more financial institutions. Once the Estate account is open, then the Executor will close each account in the Decedent's name and transfer them to the Estate account(s). Income earned on this account, if any, is reportable to the IRS with the EIN and an income tax return would be filed.

C. Identify and if possible, pay all debts and expenses within seven months of appointment.

D. Obtain alternate valuations valued as of six months from date of death.

E. File disclaimers within nine months of date of death.

F. File Estate Tax Return for Federal and State purposes nine months after date of death (can obtain six month extension).

G. File inventory with Court nine months after appointment as Executor.

H. Distribute assets to beneficiaries after obtaining Receipt, Release, Refunding and Indemnification Agreements from beneficiaries.

I. Close estate by filing Affidavit of Completion with Court and filing final income tax returns with Federal and State.

B. Forms of Administration

If the estate is valued at $50,000 or less (exclusive of property set off under EPTL §5-3.1(a)(1) through (5)), then the decedent's estate may be settled without court administration. A voluntary administrator is appointed to settle the estate "without the formality of court administration" (SCPA §1301(2)). Informal administration is not available for administering real property (SCPA §1302). A voluntary administrator can only be the named executor and the Will must be filed in Surrogate's Court. If there is no Will, then SCPA §1303 provides an order of priority for serving as voluntary executor beginning with the surviving spouse followed by the children. No bond is needed (SCPA §1304(2)). The person desiring to be the voluntary administrator must file an affidavit and a certified copy of the death certificate with the Surrogate's Court clerk (SCPA §1304(3)). The Court will issue a short certificate showing that the voluntary administrator has authority to act SCPA §1304(5). The duties of a voluntary administrator are listed in SCPA §1307. If additional certificates are needed, the request must be made in the form of an affidavit (22 NYCRR §207.46).

If the value of an asset is uncertain and may in fact be greater than $50,000, then the better course of action is to proceed with a formal

probate proceeding. Choosing a formal probate proceeding in this case will save time in the long run and potentially keep costs down because the client will not have to pay the attorney for preparing documentation for an informal proceeding and a formal proceeding. The risk is that the asset does turn out to be $50,000 or less and the client will have paid larger fees for a formal proceeding as opposed to an informal proceeding. Such a scenario can happen with an interest in a cooperative apartment where the appraisal shows a value less than $50,000 but the eventual sale price is greater than $50,000 shortly after the decedent's death.

For estate's greater than $50,000 and where the decedent had a Will, then a probate proceeding should be brought. A probate proceeding's purpose is to authenticate the Will so that the decedent's property may be disposed, to appoint and empower the executor to administer the decedent's estate and to appoint trustees if any are nominated under the Will. SCPA §1402 (1)(a) provides that any person in a Will designated as "legatee, devisee, fiduciary or guardian or by the guardian of an infant legatee or devisee or the committee of an incompetent legatee or devisee, or the conservator of a legatee or devisee who has been designated a conservatee pursuant to article seventy-seven of the mental hygiene law" may bring a probate petition.

D. Documents Used in the Probate Process
G. Initial Petition and Notices

The original Will must be filed with the Court. Best practice is for the attorney to retain the original of the Will for safekeeping. Then upon the death of the client, the attorney knows the location of the Will. If the client retains possession of the original, there is a great possibility that the client will lose the Will or forget the location of the original Will. If the Will cannot be found, the family should consult with the attorney who drafted the Will, look in the decedent's personal papers, check the safe deposit box, ask a bank which has been named as fiduciary, look in the decedent's residence (and if there is more than one residence, a search should be conducted of all such residences) and the Court which may be holding the Will (New York Surrogate's Court and Procedure Act ("SCPA") §2507). A Will which cannot be found is presumed to be destroyed or revoked by the testator. Pursuant to SCPA §1407, a lost Will can be admitted in probate only if it can be established that it has not been revoked, execution of the Will is proved that it was in compliance with the New York Estates, Powers and Trusts Law ("EPTL") §3-2.1, and all of the provisions of the Will are proved by two witnesses or by a true and complete copy of the Will. The EPTL provides that a Will must be in writing, signed by the testator in the presence of at least two witnesses who are at least 18 years of age and competent. Establishing these factors can

be very difficult. Often, probate is not an option and the client's family must choose intestate administration.

If the Will is in the safe deposit box of the decedent, then a petition may be brought and the Court may issue an ex parte order (also known as a will-search order) directing that the safe deposit box be opened and that such person named in the order inventory the contents of the box in the presence of an authorized person at the institution wherever such safe deposit box is located (SCPA §2003, 20 NYCRR §360.2). The Will, if found, should be delivered personally, by overnight mail or by registered mail to the Surrogate's Court clerk.

If a Will is withheld, a proceeding may be brought to compel production of the Will under SCPA §1401 if there is reasonable ground to believe that a person has "knowledge of the whereabouts or destruction of a will of a decedent." Under the New York Penal Law §190.30, concealing a Will, mutilating or destroying a Will with the intent to defraud, are all considered felonies.

Family members may believe that a Will exists even though the decedent revoked the Will prior to the decedent's death. A Will may be revoked by the testator signing a new Will, stating in writing the intent to revoke the Will, the testator burning, tearing, cutting, cancelling, obliterating, mutilating, destroying the Will (or someone else doing so under the direction of the testator) (EPTL §3-4.1). Confusion about

whether the decedent had or did not have a Will can lead to unexpected delays and costs upon the death of the decedent. Therefore, the attorney should stress to the client the importance of family members knowing whether or not the client has a Will and if such client has a Will, then the location of such Will.

The attorney should verify that the Will does not have any staples removed, different paper, text added between the lines, or erasures before filing the Will. If it does, an explanation must be furnished to the Court for the condition of the Will. For this reason, the staple should never be removed from the original Will when making copies. The Court has the duty to determine the genuineness of the Will, the validity of its execution, whether or not the testator had capacity even if no objections are brought at the time of probate.

The probate petition is a written pleading which is verified in accordance with CPLR §3020 and contains the information delineated in SCPA §§304 and 1402(2). The complete probate petition is filed together with:

1) Original Death Certificate

2) Original of Last Will and Testament and Codicil, if any

3) Copy of Last Will and Testament together with Affidavit of Comparison (22 NYCRR §207.19)

4) Attorney Certification (22 NYCRR §207.4)

5) Notice of Probate (SCPA §1409) together with Affidavit of Mailing (if there are charitable bequests to an unnamed charity or of an unspecified amount, then the Attorney General must also get Notice)

6) Proposed Decree (not required in all counties)

7) Self-addressed stamped envelope in which to forward the copy of the Decree and Letters Testamentary to the attorney's office

8) Check representing the filing fee (see SCPA §2402 for filing fee schedule)

9) Check representing the fee for Letters Testamentary and Letters of Trusteeship, if necessary (current fee is $6 per letter)

10) Any other document required due to specific nature of the case

To be sure that all proper forms have been filed, good practice is to review the documents using the Probate Proceeding Checklist provided by the Court (see https://www.nycourts.gov/LegacyPDFS/FORMS/surrogates/pdfs/p-chklst-frm.pdf). The Surrogate's Court has official forms which can be found in the "Green Book" or by using HotDocs. Additionally, a link to many of these forms can be found at

http://www.nycourts.gov/forms/surrogates/index.shtml. Before filing the above documents with the Court, best practice is to verify whether the Surrogate's Court is requiring that the matter be E-Filed.

Pursuant to SCPA §708 the designated fiduciary must file an oath stating that "the fiduciary will well, faithfully and honestly discharge the duties of the office and the trust reposed in him or her and duly account for all moneys or other property which may come into his or her hands. The oath shall also describe the office, and state that the fiduciary is not ineligible to receive letters." Typically this Oath and Designation is attached to the back of the Probate Petition.

A self-proving affidavit for subscribing witnesses usually found as a separate sheet at the end of the Will avoids having to search for witnesses at time of testator's death (SCPA §1406). If there is not a self-proving Will, at least two witnesses must file affidavits providing "such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint." Alternatively, if the witnesses will not provide affidavits, then they must be examined before the Court (SCPA §1404).

Under SCPA §2307-a, when a client nominates the attorney as executor, the client must sign an acknowledgment of disclosure stating that the client was informed that:

- Any person can serve as an executor;
- Any person serving as an executor is entitled to statutory commissions;
- Any attorney, including the attorney-executor, is entitled to legal fees for legal work performed on behalf of the estate; and
- Absent execution of the acknowledgment of disclosure, an attorney who serves as executor will be entitled to only one-half of the statutory commissions he would otherwise be entitled to receive.

This disclosure must also be filed at the time of probate. Additionally, the executor must file a statement that the executor is an attorney, whether such person (or such person's law firm) will act as counsel and whether such executor was the draftsman of the Will (22 NYCRR §207.17). A Putnam Affidavit is needed whenever there is a bequest to a person in a confidential relationship to the decedent such as an attorney, doctor, accountant or clergy. In such a case, the attorney should also submit a Putnam Affidavit to explain the circumstances surrounding the gift (see In re Putnam's Will, 257 NY 140, 177 N.E. 399 (1931). In this seminal case, the attorney who drafted the client's Will also designated himself as residuary legatee without explaining the circumstances. The Court concluded that there was an inference of undue influence. Also, if the attorney is designated as the fiduciary, a Weinstock Affidavit may be needed to explain why the decedent appointed the attorney in such

capacity (see Matter of Weinstock, 40 NY2d 1, 351 NE2d 647, 386 NYS2d 1 (1976)).

Any person who is adversely affected by the probating of the Will may file objections to probate (SCPA §1410, 22 NYCRR §207.26). For this reason, the practice of drafting Codicils should be discouraged. If a Will is modified through use of a Codicil, then both the Will and the Codicil must be offered for probate. Anyone whose interest was adversely affected by the Codicil now has standing to object to probate. If instead, a new Will was signed, then the parties adversely affected by the change would not have standing to object since the old Will is not offered for probate. Such party, if not a distributee, will not receive a Notice of Probate and may not discover that he or she has been disinherited. It should be noted that such party will still have standing if he or she is a distributee and will inherit less than his or her intestate share under the Will. In all cases, process must issue to the distributees (or they may be asked to sign a Waiver of Process).

Adversely affected parties and distributees may contest a Will on the following grounds:

- Capacity - standard is that the testator:
  - Understood the nature and extent of his or her assets
  - Knew who he or she would normally be expected to provide for, such as a spouse

- Knew what his or her Will provides.
- Fraud, duress or undue influence
- Forgery
- Will executed without valid Will formalities
- Existence of a later Will

An interested party as defined in SCPA §103(39) may object to the nominated fiduciary by filing objections (SCPA §709). Such document shall indicate why the nominated individual is not qualified and must state the interest of the objecting party.

The executor cannot dispose of any assets before letters testamentary are issued except for the purpose of paying funeral expenses. In such a case the executor can also take necessary action to preserve the estate's assets (EPTL §11-1.3). Therefore, an executor may also file a request for issuance of preliminary letters testamentary which give the preliminary executor all of the fiduciary capacities of an executor with full letters testamentary other than the power to pay or distribute assets to beneficiaries (SCPA §1412). Such a request may be useful when the interested parties are eager to begin the administration process of gathering the assets and paying bills and must act before probate of the Will is complete due to a delay (i.e. parties must appear in Court on return date due to issuance of citation, infants are involved and the Guardian-ad-litem must file a report or the nominated executor cannot determine

necessary parties). The reason for the need for Preliminary letters should be explained in an Affidavit of Urgency that is filed with the Petition. The decree granting probate will include a provision revoking the preliminary letters.

Pursuant to EPTL §1-2.5, a "distributee is a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution." All distributees must be served and the process must include the name of the petitioner and if the Will is nuncupative (SCPA §1403). Preferably, the distributees will sign a Waiver of Process and Consent to Probate which avoids the need to serve them and having a citation issued. Again, good practice is to identify the distributees and obtain contact information when drafting the Will. Any distirbutee which will not sign the Waiver, will need to receive a citation issued by the Court. A Notice of Probate (SCPA §1409) is sent to each beneficiary who is not a distributee. These beneficiaries do not need to be cited.

If the decedent is not survived by any distributees, is survived by only one distributee, or if the distributees are more remote than the issue of the decedent's siblings, then an Heirship Affidavit or Affidavit of Kinship must be filed by a disinterested person. A family tree is required for filing when the distributee's "relationship to [the] decedent is derived through another person who is deceased" and also if "the decedent was survived

by no distributee or only one distributee, or where the relationship of distributees to the decedent is grandparents, aunts, uncles, first cousins or first cousins once removed" (22 NYCRR §207.16). Additionally, an Affidavit of Due Diligence may also be required when complete information cannot be found in order to prove to the Court that all avenues were exhausted to discover the missing relatives (22 NYCRR §207.16(d)). The Attorney General and the Public Administrator must be cited if there are no known distributees. Some Courts have different forms for these related documents, so best practice is to check with the Court as to what is required. Best practice is to obtain family tree information when preparing the Will as well as contact information for a party who can signed the Heirship Affidavit and Family Tree. When expecting problems identifying these distritbutees, a better plan would be to avoid probate and use a Revocable Trust and beneficiary designations to carry out the estate plan.

Once identified, the attorney should also discuss whether or not the beneficiaries wish to disclaim any part of or all of the inheritance. Disclaimers are a form of post mortem planning which allow for altering the beneficial interests of the beneficiaries by the beneficiary refusing to accept the bequest.

As previously discussed, a Notice of Probate (SCPA §1409) is sent to each beneficiary who is not a distributee. If there are charitable bequests

to an unnamed charity or of an unspecified amount, then the Attorney General must also get Notice. Good practice is to include a copy of the Will with this Notice to send a message of transparency and to avoid the beneficiaries calling the attorney and requesting one. As a reminder, the Will is a public record once filed with the Surrogate's Court so the attorney is not sharing confidential information when giving the Will to the beneficiaries. In addition to the Notice of Probate, if the estate has a charitable interest, other than a specific legacy, it must register with the New York State Attorney General's Charities Bureau within six months of Letters Testamentary being issued (EPTL §8-1.4 and 13 NYCRR §92.2).

After the Executor is granted Letters Testamentary by the Court, the attorney should advise the Executor that EPTL §11-1.5(a) provides that an executor is "not required to, pay any testamentary disposition or distributive share before the completion of the publication of notice to creditors or, if no such notice is published, before the expiration of seven months from the time letters testamentary or of administration are granted." The reason for this rule is to ensure that there are sufficient assets to pay the administration expenses, funeral expenses, debts of the decedent and taxes. Even following the expiration of the seven months, the executor may not know of all of the estate's liabilities. Therefore, the executor can partially satisfy the bequests or distributive share and

ensure a reserve large enough to cover anticipated and unanticipated claims and expenses.

The executor can commence an action for wrongful death but it must be brought within two years of the decedent's death (EPTL §5-4.1). If the estate has a charitable interest, other than a specific legacy, it must register with the New York State Attorney General's Charities Bureau pursuant to EPTL §8-1.4 and 13 NYCRR §92.2 within six months of Letters Testamentary being issued.

E. Information Gathering

When the Will is reviewed, the attorney will be able to identify the beneficiaries from the clauses in the Will. Good practice is to obtain contact information when preparing the Will for each person named. While the beneficiary may have moved since the Will was drafted, at least there is a starting point for locating the beneficiary. Family members may have more current information and a search of the internet can also yield contact information.

When meeting with an estate planning client, asking for a detailed asset list is crucial. Attorneys should be provided with a list of all assets including brokerage accounts, cash, house/apartment., life insurance, IRAs, etc. including approximate values and current beneficiaries and how they are owned (i.e., client's name, joint, in trust, etc.). The client should provide copies of insurance policies (life, disability, etc.), current

insurance beneficiary forms together with change of beneficiary forms and current retirement account beneficiary forms together with change of beneficiary forms. If the client has a mortgage or a loan, the client should provide a copy of all documentation pertaining to it. If the client owns real property, a copy of the deed should be given to the attorney. An essential item is a copy of the client's most recent income tax return. The tax return provides clues to assets clients have all but forgotten. An inventory of items in the client's safe deposit box should be given to the attorney and the location of the safe deposit key should be divulged. If the client owns an interest in a corporation or partnership, the client should provide the attorney with copies of all documents relating to such entity, including, but not limited to, operating agreements, shareholder agreements, partnership agreements, certificates of incorporation, by-laws and recent income tax returns. The attorney should inquire as to whether the client has any patents or copyrights. Also, documentation should be given to the attorney with regard to all non-US assets. Finally, the client should provide copies of any trusts which such client created or which were created for such client's benefit.

By having this information before a client dies, the attorney is better able to ascertain which assets held by the decedent will be subject to probate and which are considered non-probate. The attorney's file will serve as a roadmap to locate the assets and how to administer them

upon the client's passing. Also, if there are any complicated assets such as interests in partnerships or corporate entities, obtaining the governing documents and valuation information is much easier while the client is alive to assist in the process versus waiting until after the client dies.

Pursuant to SCPA §103(19), the estate is "[a]ll of the property of a decedent, trust, absentee, internee or person for whom a guardian has been appointed as originally constituted, and as it from time to time exists during administration." EPTL §1-2.63 defines estate as "(a) [t]he interest which a person has in property. (b) The aggregate of property which a person owns." Following the client's death, a list should be prepared of all of the decedent's: 1) real estate, 2) stocks and bonds, 3) mortgages, notes and cash, 4) insurance on the decedent's life, 5) jointly owned property, 6) trust assets, 7) annuities and retirement accounts and 8) any other assets. Each asset will need to be valued as of the decedent's date of death and on the sixth month anniversary of the decedent's date of death for alternate valuation purposes. The assets and their values will be accounted for on the decedent's Federal estate tax return and on the decedent's New York estate tax return.

The value of the probate property is used when filing the probate petition for determining the appropriate fee on the fee schedule (SCPA §2402, 22 NYCRR §207.16). Additionally, an inventory of all probate assets and their values is required for the Inventory which must be submitted to

Court within nine months of the date letters issued to the fiduciary (22 NYCRR §207.20). This Inventory contains information about both probate and non-probate assets.

Property in the decedent's individual name without a named beneficiary is considered probate property and governed by the decedent's Will or if the decedent had no Will, then by intestacy. The remaining assets held in joint name or which have a named beneficiary are considered to be non-probate assets, are not governed by the decedent's Will and are not subject to the jurisdiction of the New York Surrogate's Court. These assets pass by operation of law. Attorneys should focus on how spouses have titled their assets. If all assets are held in joint names, then the carefully drawn Wills are meaningless on the first death as everything will be considered non-probate and pass to the survivor by operation of law.

A form used to name a beneficiary of a particular asset such as an IRA, 401(k) Plan or Life Insurance is beneficiary designation form. These assets pass outside of client's Will and are not subject to probate. At the same time as a client signs such client's Will, the attorney should also have prepared the client's beneficiary designation forms to ensure that these non-probate assets follow the testator's estate plan. Alternatively, a different plan may be considered for these assets. Regardless, a thoughtful and educated decision must be made as to each retirement

account and life insurance policy. By the attorney taking charge of these forms, the attorney can ensure that a decision is made with each one. Filing them with the various companies is crucial and follow-up on any changes that may be needed must be done. Following a client's death, each company should be contacted to verify the name of the beneficiary and to ensure that the accounts are distributed. Date of death values will also need to be obtained for these accounts.

A review of the Will sometimes yields information about previously unknown assets. If the executor is aware of property belonging to the decedent but which is not being turned over to the estate, the executor may bring a petition to discover such withheld property and/or information about such property (SCPA §2103).

F. Laws of Intestacy

An administration proceeding's purpose is to dispose of the decedent's property when he or she dies without a Will and to appoint and empower the administrator to administer the decedent's estate. When a person dies without a Will, such person is considered to have died intestate (SCPA §103(28)). Article 4 of the EPTL governs this situation. The Surrogate's Court has official forms which can be found in the "Green Book" or by using HotDocs. Additionally, a link to many of these forms can be found at http://www.nycourts.gov/forms/surrogates/index.shtml. Before filing the required documents with the Court, best practice is to

verify whether the Surrogate's Court is requiring that the matter be E-Filed. The filing fee schedule can be found at SCPA §2402(7).

Under intestacy, the decedent's assets pass to such person's distributees. Pursuant to EPTL §4-1.1(a)(1), if a decedent is survived by a spouse and issue, the spouse inherits the first $50,000 plus 50% of the balance of the decedent's estate and the issue inherit the remaining 50% of the balance of the decedent's estate. In most cases, this distribution plan is not the plan desired by the decedent. If a proceeding is needed to determine who are the distributees, a petition can be brought under SCPA §2225 to show that all efforts have been made to locate distributees. In order to avoid having a client die intestate, the attorney must remind clients to come in to meet, review drafts and schedule a time to sign the Will.

A further complication is the appointment of an administrator to handle the administration of the decedent's intestate estate. Pursuant to SCPA §1002(1), any person who is interested in the estate, any person agreed upon by all distributees, public administrator, chief fiscal officer of the county, a creditor or a person interested in an action in which the decedent is a party may bring a petition to serve as administrator. This large class of potential appointees can lead to the appointment of someone not familiar with the estate, can lead to litigation if multiple parties wish to serve, can lead to delay as the decision is made as to who

will serve and can cause unnecessary expenses due to the delays and litigation. A Will would avoid this problem since the Will appoints an Executor. Certainly, the interested parties in a probate proceeding can also litigate. However, the risk is minimized as compared to an administration proceeding. It should be noted that SCPA §1001 provides an order of priority to those who are eligible to receive Letters of Administration. The surviving spouse, followed by the children, is given preference. However, it is possible that had the decedent drawn a Will, he or she would not have named the surviving spouse as the decedent's personal representative. This fact again highlights the importance of clients making educated choices as to who is best to serve in fiduciary capacities rather than leaving the decision to the Courts which are governed by Article 10 of the SCPA.

Pursuant to SCPA §708 the designated administrator must file an oath stating that "the fiduciary will well, faithfully and honestly discharge the duties of the office and the trust reposed in him or her and duly account for all moneys or other property which may come into his or her hands." The oath shall also describe the office, and state that the fiduciary is not ineligible to receive letters. Typically, this Oath and Designation is attached to the end of the Administration Petition.

All distributees must be served and the process must include the name of the petitioner (SCPA §1005). Preferably, the distributees will sign

a Waiver of Process and Consent to Administration which avoids the need to serve them and having a citation issued. If the decedent is not survived by any distributees, is survived by only one distributee, or if the distributees are more remote than the issue of the decedent's siblings, then an Heirship Affidavit or Affidavit of Kinship must be filed by a disinterested person. A family tree is also required in this instance. The Attorney General and the Public Administrator must be cited if there are no known distributees. See prior discussion under "Locating and Notifying the Beneficiaries" in this Article.

Once an administrator is appointed by the Court, he or she will have to be bonded (SCPA §805). Had the decedent had a Will, the surety bond requirement could have been waived. Such a waiver would have reduced the cost of administration and is often a "boiler plate" provision in a Will.

If a minor child inherits from a deceased parent, the Court will appoint a guardian of the property of the infant, who can be the surviving parent, and upon the person of the infant if there is no surviving parent (SCPA §1702) upon petition by a person on behalf of the infant (SCPA §§1703, 1704). If there are multiple children under the age of eighteen years, then a separate petition must be brought on behalf of each such infant (22 NYCRR §207.11). A bond is required for the property of the infant (SCPA §1708). If there is no surviving parent, multiple petitions could be

brought by various family members and friends of the infant. The Court will then be forced to decide a matter that would have been better decided by the parents in a Will. Once a guardian is appointed, inherited funds will be held for such child in a guardianship account. Whenever funds are needed for such child, a petition must be made to the Court by the guardian requesting such funds for the support and education of the child (SCPA §1713). The Court in its discretion does not need to grant such request or can opt to grant such request in part. The process is lengthy and costly and can have the disastrous result of the Court denying funds that the infant's parent may have wished such infant to have. Again, the Court is forced to decide a matter that would have been better decided by the parents in a Will or by designated Trustees of a trust for the benefit of such infant. Additionally, the guardian must file an annual account with the Court (SCPA §1719). Such a requirement causes unnecessary costs.

The administrator cannot dispose of any assets before letters of administration are issued. Therefore, the Court can grant temporary letters of administration when there is a delay, an interested party cannot be found or when an interested party is a prisoner of war (SCPA §901). Temporary letters of administration give the temporary administrator all of the fiduciary capacities of an administrator with full letters of administration with whatever limitations are imposed by the Court (such

as distributing assets) (SCPA §903). An Affidavit of Urgency should be filed to explain the reasons for the request.

Under SCPA §1007, when an administrator fails to complete his or her duties and then ceases to serve, the court can appoint letters of administration de bonis non ("d.b.n.") to an eligible person. The proceedings are the same as the application for the original letters of administration. However, the court may refuse to issue letters of administration d.b.n if distribution of the estate is possible under SCPA §2207 which governs the situation where a fiduciary die while in office, even to the point of allowing the fiduciary of a deceased fiduciary the rights and powers of such deceased fiduciary.

H. Sample Forms, Letters and Documents

1. Court Forms: As stated previously, the Surrogate's Court has official forms which can be found in the "Green Book" or by using HotDocs. Additionally, a link to many of these forms can be found at http://www.nycourts.gov/forms/surrogates/index.shtml. Before filing the above documents with the Court, best practice is to verify whether the Surrogate's Court is requiring that the matter be E-Filed.

2. Apply for EIN:

   A. Form SS-4 https://www.irs.gov/forms-pubs/about-form-ss-4

B. EIN Authorization

I, JOHN DOE, understand that by providing my Social Security Number to ATTORNEY, the third party, that I am authorizing ATTORNEY, as the third party, to apply for and receive the EIN on my behalf for the JOHN DOE 2023 IRREVOCABLE TRUST F/B/O JANE DOE and to answer questions about the completion of the Form.

Date: _____, 2023

_____
JOHN DOE

C. On-line apply for EIN:

https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online

3. Receipt, Release, Refunding, and Indemnification Agreement:

---------X

RECEIPT, RELEASE, REFUNDING AND INDEMNIFICATION AGREEMENT

In the Matter of the Settlement of the Account of

Proceedings of Jane Doe and Mary Smith,

as Successor Co-Trustees of The John Doe - Lisa

Jones Trust of 2010 u/a dated January 26, 2010

---------X

WHEREAS

1. John Doe (the "Grantor"), resident of White Plains, New York, created a revocable trust dated January 26, 2010 (the “Trust”) with John Doe as Trustee (the "Trustee") (copy attached as Exhibit A hereto).

2. Pursuant to Paragraph 8.b. of the Trust, if John Doe cannot serve as Trustee, then Jane Doe and Mary Smith shall serve as Successor Co-Trustees. John Doe died on January 6, 2013. As a result of John Doe’s death, Jane Doe and Mary Smith accepted their roles as Successor Co-Trustees (individually as the "Successor Co-Trustee" and collectively as the “Successor Co-Trustees”) (see Certification of Trust attached as Exhibit B hereto).

3. Paragraph 3.a. of the Trust provides that following the death of the Grantor, the Trust property shall be administered for the benefit of

the Grantor's step-daughter, Lisa Jones (the "Lifetime Beneficiary"). All income shall be paid or applied for her benefit and principal distributions are authorized in the discretion of the Successor Co-Trustees for the Lifetime Beneficiary's support, education and health.

4. Paragraph 3.b. of the Trust provides that upon the death of the Lifetime Beneficiary, the balance of the Trust shall be distributed equally to the Grantor's daughters, Jane Doe and Mary Smith (individually, the "beneficiary" and collectively, the "beneficiaries").

5. The Lifetime Beneficiary died on April 23, 2023 (Death Certificate attached as Exhibit C hereto).

6. The value of the Trust as of April 23, 2023 is ONE HUNDRED THIRTY-TWO FIVE HUNDRED NINETY AND TWENTY-TWO HUNDREDTHS DOLLARS ($132,590.22) held as follows (collectively, the "Trust Assets") (statements attached as Exhibit D hereto):

a. Chase Checking Account #_____ in the amount of FIVE THOUSAND FOUR HUNDRED TWENTY-FIVE AND FORTY-THREE HUNDREDTHS DOLLARS ($5,425.43).

b. Chase Savings Account #_____ in the amount of TWELVE THOUSAND SIX HUNDRED SIXTEEN AND EIGHTY-NINE HUNDREDTHS DOLLARS ($12,616.89).

c. JP Morgan Account #_____ in the amount of ONE HUNDRED THIRTEEN SIX HUNDRED EIGHTEEN AND NINETY-SEVEN HUNDREDTHS DOLLARS ($113,618.97).

d. Receivable paid by Jane Doe on September 16, 2020 to correct erroneous bank payment of personal credit card in the amount of NINE HUNDRED TWENTY-EIGHT AND NINETY-THREE HUNDREDTHS DOLLARS ($928.93).

7. The value of the undistributed income owed to the Lifetime Beneficiary as of April 23, 2023 is TWENTY THOUSAND ONE HUNDRED FIFTY AND SIXTY-SEVEN HUNDREDTHS DOLLARS ($20,150.67) (income calculations attached as Exhibit E hereto):

8. The Successor Co-Trustees desire to terminate the Trust as of April 23, 2023 (the "Termination Date") by distributing the Trust Assets in equal shares to the beneficiaries pursuant to the terms of Paragraph 3.b. of the Trust.

9. The Lifetime Beneficiary and each beneficiary (individually the "Beneficiary" and collectively the "Beneficiaries") wish to waive a judicial and a non-judicial accounting and request that the Trust Assets be distributed as hereinafter provided. The Successor Co-Trustees agree to the within waiver on condition that Jane Doe and Mary Smith, as Successor Co-Trustees, as well as the successors and assigns of Jane Doe and Mary Smith, be released, discharged and indemnified in the manner hereinafter set forth.

10. The Successor Co-Trustees desire that the Successor Co-Trustees be discharged from any further liability and accountability with respect to the administration of the Trust through the Termination Date.

NOW, THEREFORE, in consideration of the promises, the covenants and agreements hereinafter made, the parties hereby consent to and acknowledge the following:

A. Each Successor Co-Trustee agrees not to take trustee commissions for the period of the administration of the Trust since inception through the Termination Date.

B. Each Beneficiary acknowledges that each such Beneficiary is aware of all of the acts, doings and proceedings of the Successor Co-Trustees, and that each Beneficiary has had access to all Trust information since its inception, and all other papers, documents, memoranda, records, tax returns and other information in any way

related to or connected with any and all of the acts, doings and proceedings of the Successor Co-Trustees. Each Beneficiary acknowledges and accepts the same, as an account stated among the Beneficiaries and the Successor Co-Trustees. Each Beneficiary and each Successor Co-Trustee hereby represent that they do waive any and all further accountings with respect to the Trust.

C. Each Beneficiary hereby affirms that such Beneficiary received all assets owed to such Beneficiary as a result of both the administration and termination of the Trust.

D. Each Beneficiary hereby represents, covenants and warrants that such Beneficiary has not assigned, alienated, transferred, hypothecated or otherwise encumbered such Beneficiary's interest in the property held by the Trust, and that each Beneficiary knows of no claim of any other person or corporation to ownership of, or to any right to receive the whole or any part of the property held by the Trust.

E. Each Beneficiary releases and discharges the Successor Co-Trustees individually and as Successor Co-Trustees from all liability and further accountability to each Beneficiary with respect to any matter in any way arising out of or related to the Successor Co-Trustees' administration of the Trust through the Termination Date and the distribution of the assets thereof, including the payments provided for herein.

F. Each Beneficiary agrees, to the extent of the value of the property such Beneficiary has received hereunder, to refund to the Successor Co-Trustees an amount equal to such Beneficiary's proportionate share of any debts, expenses, taxes or prior claims.

G. Each Beneficiary does hereby indemnify and agree to defend and hold harmless the Successor Co-Trustees individually and as Successor Co-Trustees from and against any and all costs, expenses, liabilities, claims, damages, actions, causes of action, demands, suits,

proceedings, losses, judgments, executions, or other charges, including, without limitation, reasonable attorney's fees and expenses (including and enforcing the foregoing indemnity and hold harmless agreement) whatsoever arising by reason of or in any way connected with or related to any claims made or actions taken by such Beneficiary or anyone acting on or on behalf thereof, against the Successor Co-Trustees individually and as Successor Co-Trustees by reason of the Successor Co-Trustees having acted as such Successor Co-Trustees through the Termination Date which are attributable to or arise out of or in any manner relate to the Successor Co-Trustees' administration of the Trust and the distribution of the assets thereof through such date or as provided herein, including, without limitation, for anything done or omitted by the Successor Co-Trustees in the performance of the Successor Co-Trustees' duties as Successor Co-Trustees, including for this purpose, the entry of the parties into this instrument and the performance by the Trustee and acceptance by each Beneficiary of the covenants, agreements and conditions contained herein.

H. This Agreement shall be binding upon the parties hereto, their heirs, guardians, executors, administrators, successors and assigns.

I. This Agreement shall be governed by the laws of the State of New York and may only be modified, revoked or amended by a written agreement signed by the parties hereto.

J. The Successor Co-Trustees and each Beneficiary agree and consent that this instrument may be executed in several counterparts and each of such counterparts shall for all purposes be deemed an original but all such counterparts together constitute but one and the same instrument.

_____

Martha Washington, as Executor of the Estate of
Lisa Jones, Lifetime Beneficiary

_____

Jane Doe, Trustee and Beneficiary

_____

Mary Smith, Trustee and Beneficiary

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

On the _____ day _____, in the year 2023 before me, the undersigned, personally appeared Martha Washington, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Signature and Office of individual
taking acknowledgment

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

On the _____ day _____, in the year 2023 before me, the undersigned, personally appeared Jane Doe, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
_____
Signature and Office of individual
taking acknowledgment

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

On the _____ day _____, in the year 2023 before me, the undersigned, personally appeared Mary Smith, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and

acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
_____
Signature and Office of individual
taking acknowledgment

4. Receipt and Release Agreement:

Know all Men by these Presents,

I, MARY SMITH,_ residing at _____, hereby acknowledge the receipt of the sum of FIVE THOUSAND NINE HUNDRED EIGHTEEN AND FIFTY HUNDREDTHS DOLLARS ($5,918.50), said sum subject to changes in market value, from Lisa Jones, as Trustee of the Jane Doe Irrevocable Lifetime Trust (the "Trust") being in full payment and satisfaction of the distribution under Paragraph SIXTH (A)(2) of the Trust, and in consideration of such payment I hereby, for myself and my heirs, executors and administrators, remise, release and forever discharge the said Trustee and the Trustee's heirs, executors and administrator, of and from all claims and demands which I or my heirs, executors and administrators now have or hereafter may have against said Trustee, by

reason of any acts or matters done or omitted to be done by said Trustee in connection with said matter.

Signed, sealed and delivered in the presence of

_____ (L.S.)
Mary Smith

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

On the _____ day _____, in the year 2023 before me, the undersigned, personally appeared Mary Smith, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
_____
Signature and Office of
individual
taking acknowledgment

5. Attorney Disclosure Form under SCPA §2307-a: See Exhibit A of Ethics and Estate Administration later in these materials.

6. Affirmation of Attorney under 22 NYCRR §207.16: See Exhibit B of Ethics and Estate Administration later in these materials.

7. Weinstock Affidavit of Attorney-Draftsman: See Exhibit C of Ethics and Estate Administration later in these materials.

8. Putnam Affidavit: See Exhibit D of Ethics and Estate Administration later in these materials.

This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.

Under IRS regulations we are required to add the following IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) addressed herein. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent.

Assets, Creditor Claims and Debt Considerations

Submitted by Robert F. Baldwin Jr.

1

ROBERT F. BALDWIN, JR.

ABOUT ME

- Baldwin & Sutphen, LLP, Syracuse, New York
- Fellow, American College of Trust & Estate Counsel
- Former President, National Association of Estate Planners & Councils

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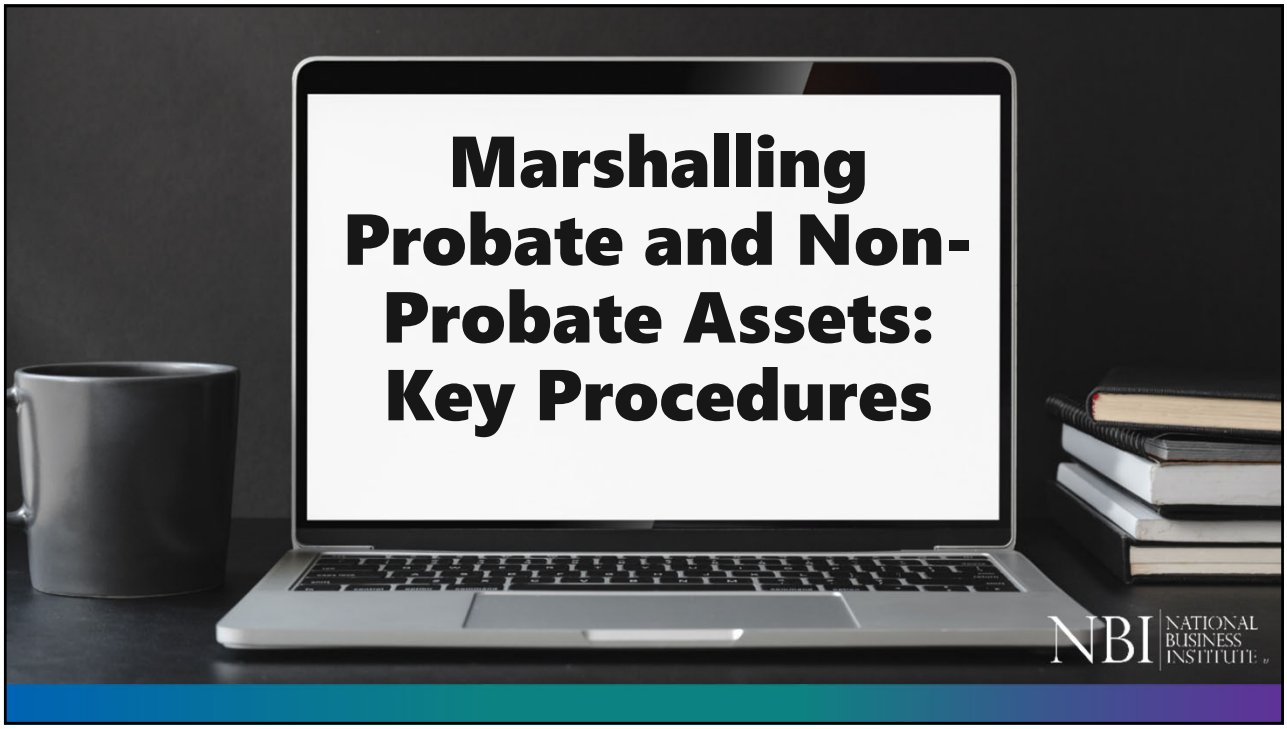

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Marshalling the Assets

- At the beginning of the Estate; ascertain the assets, both probate and non-probate
- If the estate is a large estate, there might be estate tax implications as well as questions about claims, etc.
- If the estate is a smaller estate, the solvency of the estate must be determined.
  - Review the assets and the will, if testate, and possible claims

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Marshalling the Assets

- Look to see if there is a solvency issue. If so, look at claims, priority of distributions and whether assets specifically bequeathed are affected.
- If one or more of the assets are business entities, review any controlling agreements. If a sole proprietorship, obtain court approval to continue. SCPA 2108
- Review tangible items and obtain appraisal if necessary
- Review non-probate property to be sure of beneficiaries.

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Marshalling Assets

- Where looking at tangible property, evaluate possible allocation as exempt property EPTL 5-1.4

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Locating Assets

- How are assets located?
  - Gather financial records – if decedent was "paperless" get computer and codes
  - Review income tax returns – Form 1040 is a great roadmap to determine income-producing assets. Look at Forms 1099 to see identity of bank accounts and investment accounts.
  - Look at real estate tax deductions if available to determine real property owned by the Decedent.

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Locating Assets

- Look at online sources: Image Mate Online for real estate; NYS Comptroller for Unclaimed Property
- Have fiduciary execute a letter of authorization to allow you to discuss maters with banks, insurance companies, investment companies, etc.

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Ownership or Transfer Issues

- Where there are issues present with respect to title and ownership, resort to court proceedings may be necessary:
  - Assets transferred with Power of Attorney before death
  - Beneficiary changes with Power of Attorney
  - Joint account that may be "convenience" accounts.
- Court proceedings are available through SCPA 2103 to discover assets.
  - Facts must be alleged to the Court to raise the issue, such as being wrongfully withheld or transferred.

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Ownership or Transfer Issues

- Jurisdiction must be obtained over the party to be examined. Records can be requested.
- Generally, a citation or order to attend is obtained.
- Upon return date, the person is examined under oath and if there is sufficient evidence, the matter converts to a "turnover" proceeding.
  - Privileges are waived in examination.
  - Dead Man Statute provisions are not applicable.

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Ownership or Transfer Issues

- If the proceedings proceeds under SCPA 2104, further discovery is available and upon application to the Court, further examination of the party may be obtained.
- All discovery pursuant to CPLR Article 31 is available.

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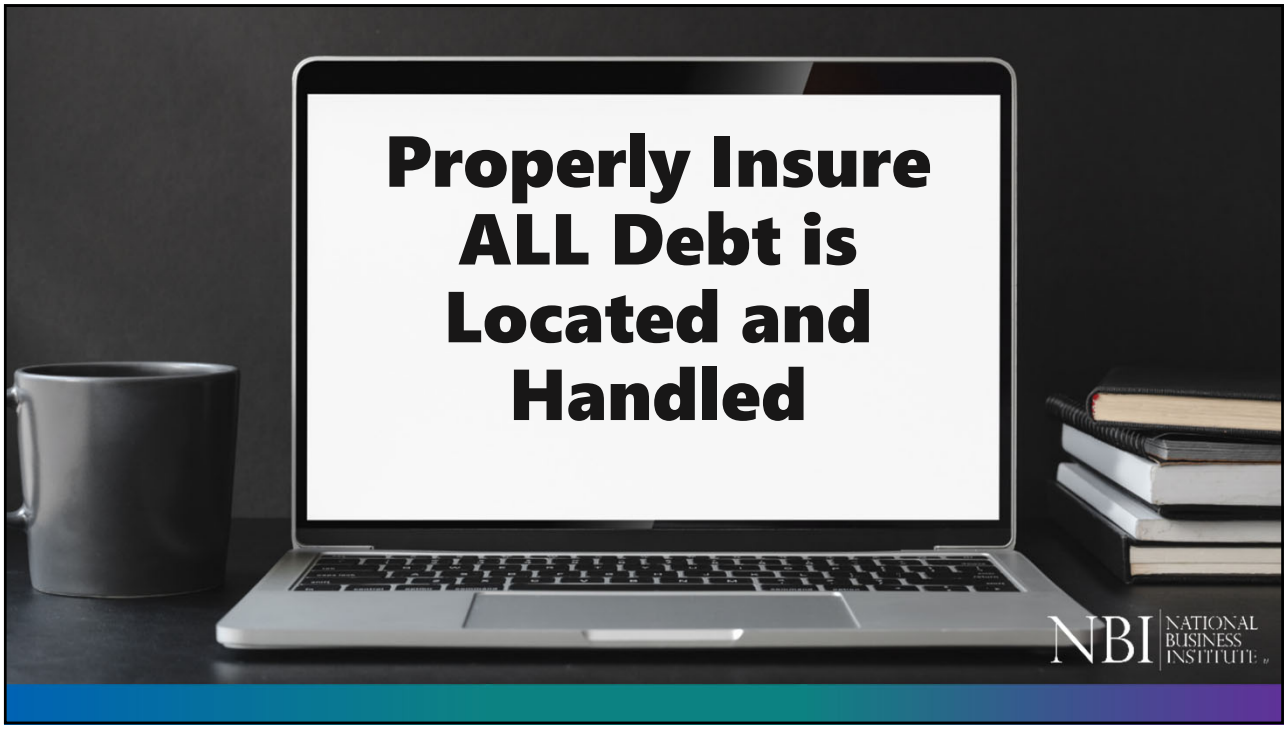

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Review Financial Materials to Ascertain Possible Claims

- Find funeral bill and hospital, ambulance, physician and care facility bills
  - Often hospitals and doctors are late in sending bills, so it is important to ascertain possible claimants.
  - A personal representative is at risk for distributing assets of the estate prior to 7 months from the date letters were issued. SCPA 1702
  - Claims must be filed within 7 months, however knowledge of possible claims, actual or implied, requires inquiries.

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Review Financial Materials to Ascertain Possible Claims

- Review checkbook and/or bank statements to determine possible claimants:
  - Credit card bills
  - Utility bills
  - Automobile loan or lease bills
  - Past income tax liabilities
  - Outstanding real estate tax debt
- It is important to list debts and claims to determine priority and whether debts relate to specifically bequeathed property. EPTL 3-3.6

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What if Assets Don't Cover Bills

- If it is apparent at the beginning of estate administration that there may not be enough assets to cover claims and debts, the fiduciary should be instructed not to pay any bills or debts (except the funeral bill) until the final accounting.
- Debts and claims need to be sorted into levels of priority.
  - Nursing home vs. Department of Social Services
  - Judgment debts
  - Debts to the Federal or New York governments
  - Treat the final accounting as a bankruptcy proceeding.

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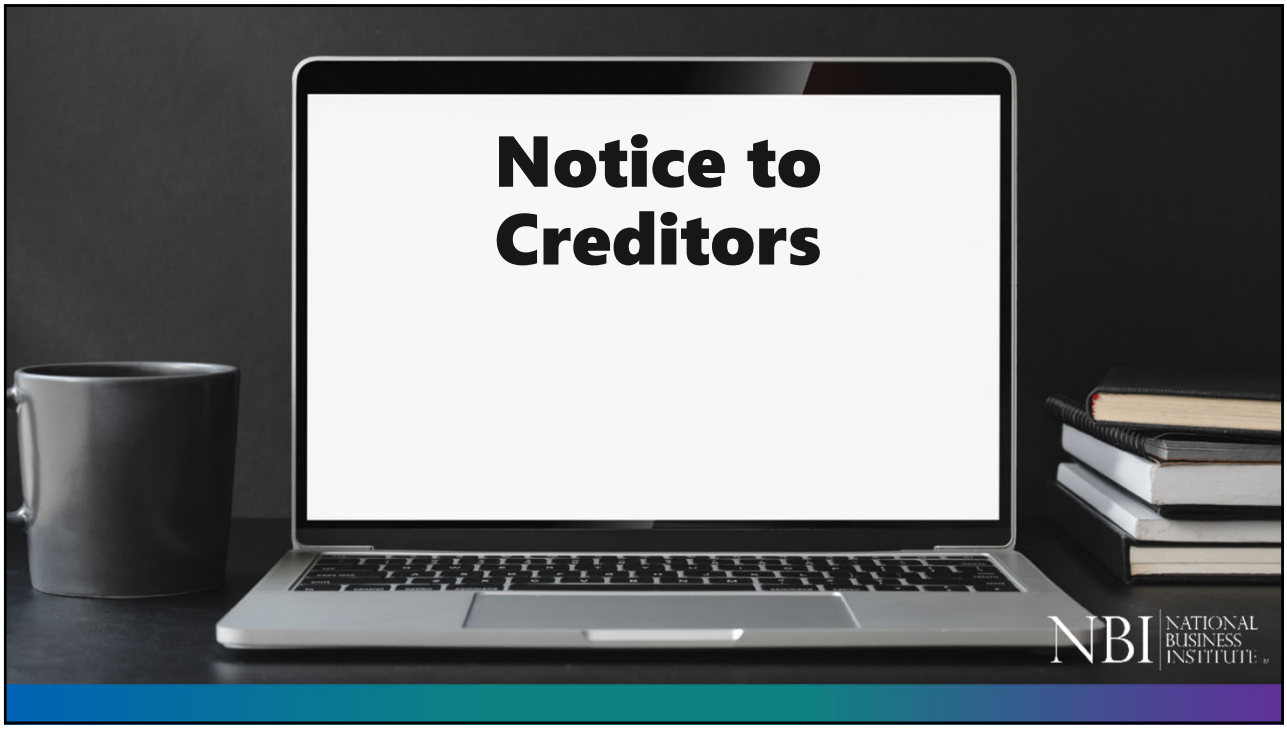

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Required Notices to Creditors

- New York does not require that notices to creditors be published.
- Claims must be in writing and served upon the fiduciary
- Generally claims must be supported by backup information
  - A fiduciary can require an affidavit to support the claim SCPA 1803(1)
- Claims must be served withing 7 months of letters being issued.

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Required Notices to Creditors

- Once the claim is presented, the fiduciary has options:
  - Accept the claim
  - Reject the claim in writing with reasons for the rejection
  - Do nothing – The claim is deemed rejected without further action on the part of the fiduciary SCPA 1806(3)

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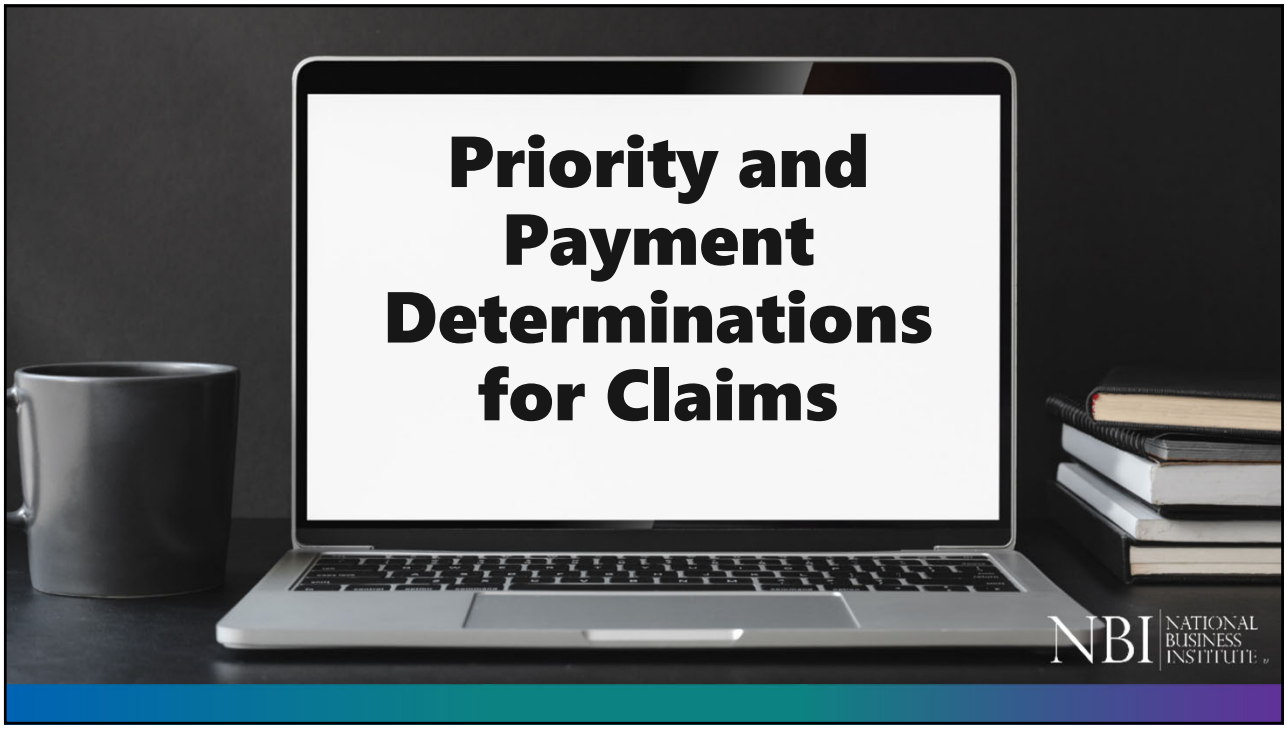

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Priority of Claims

- Care muse be taken with respect to the payment of claims if there may be claims in excess of the assets. Also, claims which relate to debts applicable to property specifically bequeathed must not be paid without review.

- Priority of Claims and Debts:

  - Expenses of Administration
  - Funeral Expenses
  - Debts with statutory preference
  - Real property taxes assessed prior to death
  - Judgements
  - Secured claims
  - General Creditors

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Priority of Claims

- Note that a direction in the Will to pay "just debts" does not revive debts barred by the statute of limitations.
- If a debt is owed to the fiduciary, it should not be paid until the final accounting unless the fiduciary brings an ex parte proceeding to obtain approval. If there are issues regarding availability of assets to pay all claims, the proceeding should not be brought.
- Better to pay the funeral bill and hold others until the end, where there are asset issues.
- Where there is a contingent liability the Surrogate can direct that funds be set aside to pay the liability. SCPA 1804

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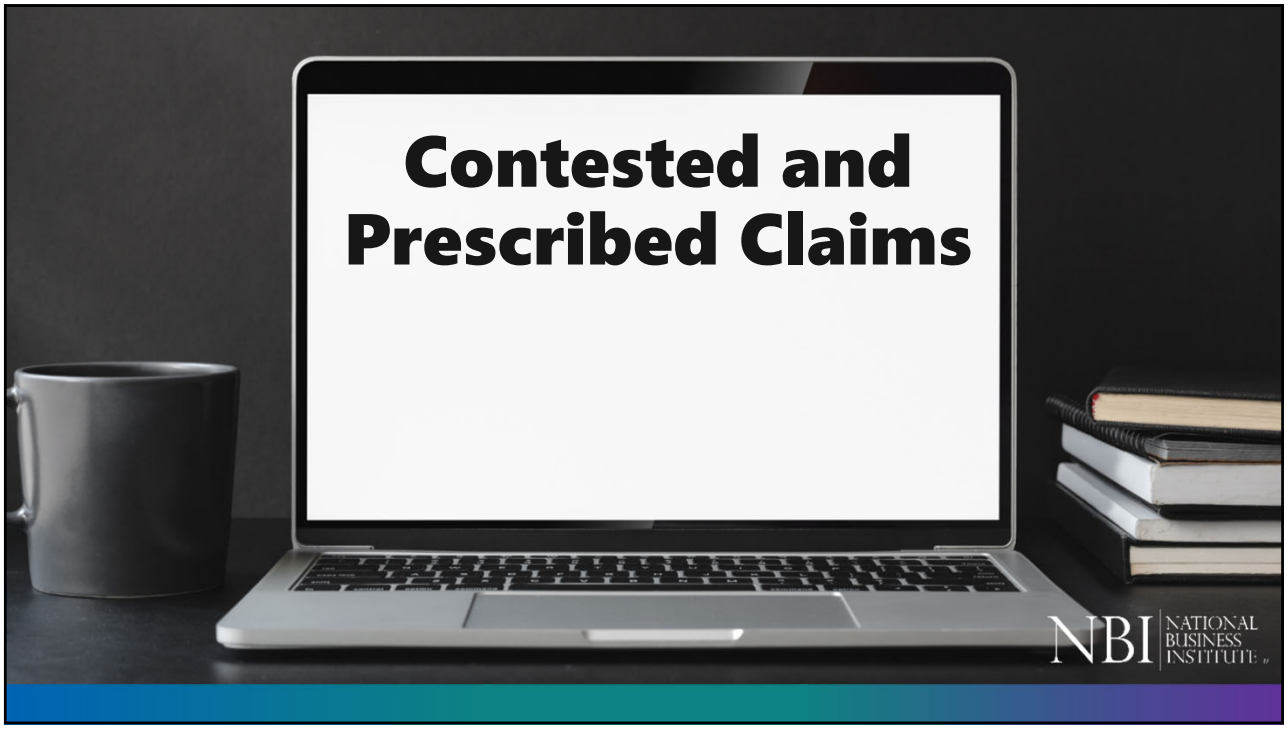

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Contested Claims

- Claims received after the 7 month period where the estate has been fully distributed can be rejected on those grounds, HOWEVER, if the fiduciary knew or had constructive knowledge of the claim, there may be personal liability on the part of the fiduciary. Example: Decedent dies in a hospital and no hospital bill was received In a timely manner. Fiduciary should have inquired of the hospital.

- A claimant may commence a proceeding at any tome to confirm the validity of a claim. SCPA 1806(4)(b). If the claim exceeds $10,000 or 25% of the gross probate estate, those affected must be parties along with the fiduciary and the claimant. The fiduciary may also commence a proceeding to determine the validity of a claim.

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Contested claims

- Where a claim relates to litigation, such as a negligence action, it may be that there is no claim until damages are fixed. Courts often review the litigation, insurance that may provide collateral, and other factors. The Court in Matter of Biel set forth various factors to consider. The Court may then fix an amount to be set aside pending resolution of the litigation.

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Dealing With Creditors

- A list of creditors needs to be complied from the Decedent's records, and claims filed. In recent years, companies such as DCM have been involved in representing credit card companies, banks and other creditors and filing claims.
- The Authorization Letter assists in communicating with creditors.
- Where the claim or bill comes form a physician or hospital, updated copies of the bills can be obtained by direct contact. Review should be made to determine if insurance or Medicare claims have been made and paid.
- Where the creditor is a credit card company, direct contact may often result in a reduction of the amount to settle the debt.

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Insolvent Estates

- Estates are not allowed to file for bankruptcy.
- If there is pending litigation to collect a debt or foreclose on a mortgage, steps must be taken to halt the progress. CPLR 1015. At the death of a party to litigation, the matter halts and any orders issued subsequently must be reversed or withdrawn.
- If a debt relates to specifically bequeathed property, the beneficiary assumes the debt. EPTL 3-3.6
- After payment of the priority debts, such as funeral bill and administration costs, the accounting lists creditors and beneficiaries and sets for the had proposed distribution much like a bankruptcy proceeding.

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Sale of Assets for Creditors

- Review assets in the residuary estate and those specifically bequeathed. Assets with a lien need to be segregated.
- If real property is in the residuary estate or is specifically devised, court approval must be obtained in order to sell the property. SCPA Article 19.
- If a proceeding is brought, all parties to the estate, including parties who have made claims, must be listed as "interested parties."
- The petition lists the condition of the estate, the liabilities, and the anticipated claims and administration expenses.

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Sale of Assets for Creditors

- Where there are multiple parcels of real estate to sell, there is a statutory order of preferences for sale (SCPA 1908):
  - Parcels passing in intestacy
  - Parcels passing under a residuary clause
  - Where multiple parcels devised, those that have not been sold by the devisees
  - Where separate parcels and beneficiaries are involved, both can be sold even if one has been conveyed.
  - If specifically devised parcels are sold, records must be kept to reconcile proceeds and expenses with the beneficiaries.

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ASSETS, CREDITOR CLAIMS AND DEBT CONSIDERATIONS

A. Marshaling Probate and Non-Probate Assets: Key Procedures

1. At the beginning of the administration of an estate, one of The major tasks is to ascertain the assets, whether they are probate or non-probate. The reasons for the necessity of ascertaining the identity of the assets, as well as an approximation of the value of the assets, are several;

a. Initially, if the estate is a large estate, whether the assets are probate or non-probate, there must be a determination as to whether estate taxes are an issue. Currently, the New York's exemption is $5,930,000. If the assets are of a value which exceeds the exemption, or is close, procedures for valuation, including retaining the services of appraisers, accountants, etc. need to start immediately. In addition, if there is an issue of allocation of estate taxes against non-probate assets, that calculation and the identity of the assets and the holders or beneficiaries of those assets must be determined at the outset of the estate administration.

b. If the estate is smaller and there is a possibility of large claims, the solvency of the estate must be determined. If it is possible that assets of the estate must be sold or liquidated in order to pay claims against the estate or debts of the estate, a review of both the assets and the will (in a testate estate) is necessary to be sure that the property being sold was not specifically disposed of in the will.

c. If any of the assets are business entities, and the estate is not the sole owner, reviews of relevant documents such as Operating Agreements, Shareholder Agreements or Partnership Agreements is necessary to determine the ultimate disposition of the interests and whether any third party has rights to acquire the interests. If the business entity is a sole proprietorship, application to the Surrogate's Court pursuant to SCPA §2108 to allow the continuation of the business entity. The reason for the necessity of the application is that the general assets of the estate may be at risk due to debts of the operation of the business entity. The fiduciary would have personal liability for allowing the assets of the estate to be put at risk if they became subject to claims of the business operation. The provisions of SCPA §2108(6) provide that the assets of the business operation shall at all timed be kept separate from the "general assets of the estate as a whole."

d. With respect to tangible personal property, it is important to locate these items and ascertain whether any were specifically bequeathed or whether ultimately a sale of these assets is necessary. In many cases, family members may have removed items from the residence of the decedent under the theory that they had been promised to them by the decedent or that they should belong to them because of their origin. "I gave that to mother so it should come back to me." "These paintings came from our side of the family or the family of dad's first wife, and shouldn't go to my step-mother's side.:

e. With respect to non-probate property, it is important to ascertain whether there are designated beneficiaries and whether those beneficiaries are living or correct. Where, for example, life insurance has as a

designated beneficiary a predeceased spouse with no secondary beneficiaries, the ultimate beneficiary is the estate. Where the beneficiary of an IRA or annuity, for example, is a former spouse, and the beneficiary was not changed after the divorce, EPTL §5-1.4 revokes the designation and the estate may be the ultimate beneficiary. Notification to the administrator of the IRA, annuity or retirement plan is imperative, since failure to so notify may allow the former spouse to collect the proceeds and will create future litigation and possible personal liability for the fiduciary. The same procedure is important for jointly held assets which become held as tenants in common post-divorce even though the title of the assets may not have changed.

f. Finally, with respect to personal property, including automobiles and bank accounts, it is important to determine whether there are exempt assets pursuant to EPTL §5-3.1 which need to be set aside for a surviving spouse or minor children.

2. How are assets located? There are several steps that should be taken at the outset of an estate administration to locate and marshal estate assets:

a. Gathering the financial records of the decedent is a step that needs to be taken immediately after the appointment of the fiduciary. In some cases, having the mail forwarded to the fiduciary or reviewing the paper records kept by the decedent will begin the process and allow the fiduciary to begin to ascertain the identity and location of the assets.

b. In recent years, however, the world has gone "paperless." The next step is to obtain access to the computer, smartphone

or tablet of the decedent to see if records were kept or downloaded regarding financial assets. Some of the most important assets of an individual are the user names and passwords for online financial accounts. In the estate planning process, it is important to make sure that a client has those items listed in a confidential matter somewhere so that they could be utilized if necessary. Otherwise, an application pursuant to EPTL Article 13-A would be appropriate.

c. The next step is to locate and review the most recent personal income tax return of the decedent. There are many valuable schedules which will set forth income-producing assets. Schedule B lists the payors of interest and dividends and where there are available forms 1099-INT or 1099-DIV, account numbers may be obtained. In Schedule E, a decedent's ownership of partnership or LLC or "S" corporation interests would be set forth. If a decedent had sold real property on an installment basis and reported capital gains on an annual basis as principal payments on the note were received, there would be an indication of the transaction on Schedule 6252. The underlying obligation would be an asset of the estate.

d. The backup information for income tax returns also may indicate the identity of some assets. Bank accounts with interest would have forms 1099-INT and if a Schedule B were not completed, those forms would be valuable. Also, there would be receipts for real estate taxes paid. Reviewing those receipts or tax bills would often reveal parcels of real estate other than a decedent's residence, such as a vacation residence, which could also be located in a state outside of New York.

3. Once the identity of assets has been obtained, it is advisable

to obtain from the fiduciary a letter of authorization, which would direct banks and other financial institutions to reveal financial information to the attorney for the estate. Such a letter could state the following:

"As the Executor of the Estate of [decedent], I hereby authorize you to release any and all information regarding *any* account, annuity or life insurance policy you may hold in the name of [decedent], either individually, jointly, or as trustee to [attorney], Esq.,[address], as Attorney for the Estate. A copy of this letter will be deemed to be an original."

Where there is a possibility that unknown accounts could exist with local banks, such a disclosure letter could be sent as part of a fishing expedition to all local banks to locate accounts not otherwise known.

4. Where there are issues with respect to title and ownership of assets, however, resort to court procedures may be necessary. Typical examples are:

a. Assets that were transferred from the decedent by an agent utilizing a power of attorney - were they authorized transfers?

b. Beneficiary changes made utilizing a power of attorney where the non-probate asset might otherwise pass under the decedent's will.

c. Contractual purchase obligations in a business entity at the death of a partner or owner. Is there a buy-out?

d. Joint accounts that may or may not have been "convenience" accounts established or converted to

joint accounts to allow someone to make deposits, pay bills, etc. Often these accounts are initiated at the well-meaning advice of bank personnel without any thought of the ultimate consequences. Perhaps these joint accounts should be probate assets.

5. Where information cannot be obtained through normal means, the SCPA has a discovery procedure available to fiduciaries. SCPA §2103 allows a fiduciary to commence a discovery proceeding by filing a petition.

6. The court must be shown that issues exist which relate to property, and therefore the petition should describe the property as well as the issues surrounding the ownership of the property. Facts supporting the claim that the property belonged to the decedent and is being wrongfully withheld should be alleged, so that the record reflects reasonable grounds for the examination. Where facts cannot be ascertained, setting forth attempts to obtain the information and the possible issues involved should be sufficient to commence the proceeding.

7. For purposes of this proceeding, the "fiduciary" need not be the appointed fiduciary, but rather a person who has obtained limited letters solely for the purpose of initiating the inquiry. *Matter of Teah*, 166 Misc. 2d. 976 (Surr Ct. Bronx Cty 1996) Normally this procedure is initiated where the respondent is the nominated fiduciary.

Example: Son was power of attorney and nominated as executor in deceased father's last will. At death, father's assets were minimal and his residence was sold immediately prior to death. Multiple

investment accounts were changed to "TOD" accounts prior to death. Son indicates that his father wanted this all to happen and refuses to elaborate. Daughter can petition to be appointed as a limited administrator and initiate a §2103 proceeding to obtain financial records, require son to testify under oath as to the transactions, and determine whether good cause exists to revoke the transfers.

8. The proceedings does not always need to be related to property which may or may not belong to the probate estate. For example, where the estate is close to the federal estate tax limit, it may be necessary to determine the value of any lifetime gifts made by the decedent. See *Matter of Laflin*, 128 Misc. 2d 985 (Surr. Ct. Nassau Cty. 1985)

9. Jurisdiction must be obtained over the party to be examined. In some cases, the party may be a third party who possesses information which will enable further inquiry. For example, a financial planner who assisted in the transfers would be able to testify about the various conversations and whether or not the decedent was actually aware of what was happening. The financial planner might initially refuse to discuss the matter, citing a rule of privilege. Any "privilege" disappears once the hearing begins.

10. Jurisdiction may be obtained by issuance of a citation or through an order to attend. Personal service of an order to attend must be served, together with the subpoena fee. A citation may, upon application to the Court, be served by substituted service.

11. Upon return of the citation or order, the respondent is

examined under oath, normally before the Surrogate. At this point, the respondent may file an answer disputing the allegations in the petition and asserting facts showing a valid transfer of title. It would be wise for the petitioner to ask the Court to instruct that an answer be filed.

12. At the conclusion of the examination, if sufficient evidence has been raised to create an issue relative to the title of the property, the matter proceeds to a hearing under SCPA §2104. At this point, an answer must be filed so that the issue is joined. Failure on the part of the respondent to file an answer could lead to a default.

13. During the examination, the provisions of the Dead Man Statute, CPLR §4519, does not apply. Conversations with the decedent can be revealed. If the petitioner examines the respondent regarding such conversations, the examination will not be considered a waiver of the Dead Man Statute objections at a later trial. SCPA §2104(6).

14. The matter proceeds as a "turnover" proceeding under SCPA §2104 and all objections and discovery allowed under the CPLR are available. Further examination of the Respondent will not take place without further order of the Court. All other discovery techniques under CPLR Article 31 are available.

15. At the conclusion of the trial phase of the proceeding, the Court may issue an order directing delivery of the property, direct delivery of the proceeds of the sale of the property or of the value of the property, impress a constructive trust on the property, determine that the respondent is entitled to the property, or determine the rights of other third parties in the property. SCPA §2104(5).

B. Properly Ensure ALL Debt is Located and Handled

1. Review financial materials upon obtaining probate approval and Letters issued.

One of the first steps in opening estate administration, whether it be probate or intestate administration, is to obtain financial records and review them. Logic will produce many of the unpaid debts of a decedent:

a. Funeral bill

b. Hospital bills

c. Ambulance bills

d. Physicians' bills

e. Nursing home or assisted living facility bills

A review of the decedent's past checking account statements (look for automatic withdrawal payments made prior to the decedent's death) and checkbook ledgers or online transaction statements will reveal other possible debts, particularly if the decedent owned real property:

a. Credit card bills

b. Utility bills

c. Automobile loan or lease bills

d. Past income tax liabilities

Many credit card companies and hospitals engage in collection services and claims will be filed promptly against the estate. Other hospitals and facilities may delay sending final bills, even beyond the seven month period. If a fiduciary has constructive knowledge of the existence of a claim against the estate and distributes the estate after the seven month period, there may still be personal

liability if a late claim is filed in a situation where the existence of the debt should have been known. *Estate of Swaab*, 40 Misc. 2d, 767 (N.Y. Cty. Surr., 1963)

2. Listing the known debts is important in that the solvency of the estate will then become apparent. Also, it must be determined whether any debts are related to assets specifically bequeathed. The obligation for payment of the debts which constitute a lien on assets specifically disposed of by a decedent's will pass to the recipient. EPTL §3-3.6.

3. What if the Assets Don't Cover the Bills?

a. If it is apparent at the outset of the estate administration that there may not be sufficient assets to pay all debts, no debt, other than the funeral bill, should be paid. Creditors should be notified, if persistent attempts to collect the debts continue, that no claims against the estate will be paid until the final accounting. As attorney for the fiduciary, you need to advise the fiduciary in writing not to pay claims or "bills" until the final review has taken place. You don't want to be in the position of having a fiduciary paying a claim where there aren't sufficient assets to pay all claims, face a surcharge for failing to pay a "preferred" claimant, and claim "my lawyer never told me."

b. Debts and claims need to be sorted into levels of priority. Since administration expenses have priority over funeral bills, allowance for those expenses should be taken into consideration. In re Mowbray, 4 Misc. 2d 844 (Surr. Ct. Westchester Cty, 1956).

c. Levels of priority are not always readily apparent. For example, in one estate there were claims by the nursing home in which the decedent was residing at the time of his death and the Department of

Social Services of the county in which the decedent resided. The executor paid the nursing home and was surcharged because the Department of Social Services was entitled to a statutory preference under the Social Services Law §104(1) and the payment to the nursing home left the estate without sufficient funds to pay the preferred claim of DSS. In re *Accounting of Robinson* 194 Misc. 2d 695 (Surr. Ct. Nassau Cty. 2003) Just because a debt is owed to the United States or New York State generally, that debt does not receive priority unless there is a specific statutory preference. *In re Estate of Rubin*, 74 Misc. 2d. 503 (Surr. Ct. Erie Cty. 1973).

d. At the time of the accounting, from the assets on hand, deduct administration expenses and funeral expenses and then propose to pay claims in their order of priority. Once each "class" of priority has their claims paid in full, the next "class" can get paid until claims with no priority are reached, and then claims are paid pro rata. Because of arguments that can be made relative to the claims, where the amount of claims exceed the available assets, a proceeding either in the final accounting or under SCPA §1809 should take place.

C. Required Notices to Creditors

1. New York does not have a provision for publication of notice to creditors, as do other states or did New York prior to the enactment of SCPA §1802.

2. On the other hand, New York does have specific procedures for filing claims. See SCPA Article 18.

3. All claims must be in writing and served upon the fiduciary. SCPA §1803(2). Service of the Claim must be personally or by certified mail. Generally, creditors or agencies representing creditors do not utilize certified mail but rather ordinary mail. However, where a fiduciary has actual or constructive knowledge of a claim, the assets of the estate cannot be distributed until the claim is resolved. *Estate of Swaab*, 40 Misc. 2d, 767 (N.Y. Cty. Surr., 1963)

4. Generally the claim must be supported by backup information in the form of an affidavit. It is generally advisable for the fiduciary to require an affidavit to support the claim, particularly if it is paid. A fiduciary can require an affidavit to be filed. SCPA §1803(1). Where there is doubt as to the validity of the claim or uncertainty as to the origin of the underlying obligation giving rise to the claim, it is advisable to require the affidavit.

5. The claims must be presented within seven months of letters being issued or the fiduciary is free to distribute the estate assets without personal liability. Once the claim is presented, any running statute of limitations is tolled. SCPA §1805(3).

6. Once the clam is received, the fiduciary has the option to (a) accept it and pay the claim, (b) accept it and defer payment until the final accounting, (c) reject the claim, or (d) do nothing. If the claim is rejected, specific reasons for the rejection must be stated. SCPA §1806(2). If the fiduciary does nothing, after 90 days the claim is deemed rejected without further action on the part of the fiduciary. SCPA §1806(3).

D. Priority and Payment Determinations for Claims

1. Care must be taken with respect to payment of claims. Initially, if there are or may be multiple claims, and if the assets in the estate may not be sufficient to pay all claims, the ultimate accounting proceeding becomes similar to a proceeding in bankruptcy, where claims are paid pro rata out of the net estate. Payment of a claim in full in such a situation also brings the possibility of a surcharge into the proceedings.

2. As claims are presented, or as claims are known, the statutory order of priority must be contemplated. SCPA §1811. The order of priority is:

a. Expenses of administration.

b. Funeral expenses

c. Debts entitled to a preference under state or federal law. These debts would include back child support, debts owed to the United States, debts owed to New York State and other municipalities. Welfare liens also receive priority. Social Services Law §104(1).

d. Real property taxes assessed prior to death. If the property passes to a beneficiary, that beneficiary must reimburse the estate. SCPA §1811(2(b), unless the testator has expressly or by implication provided otherwise. A question arises if the will of the decedent states that his executor is to pay all of the "just debts and funeral expenses" as soon as possible. Does that include real property tax assessments? Probably not. *Estate of Fogarty*, 165 Misc. 78

(Surr. Ct. Monroe Cty, 1937) There must be extrinsic evidence to show a specific intent, since a general direction to pay debts is not sufficient. See EPTL §3-3.6.

e. Judgments docketed and decrees entered against the decedent.

f. Secured claims

g. General creditors

3. For some time, it has been held that a general direction to pay "just debts" does not revive a debt otherwise barred by the statute of limitations. *Martin v. Gage*, 9 NY 398 (1853).

4. If a debt is owed the fiduciary, that debt cannot normally be paid until the final accounting, at which time it would be subject to Surrogate's Court approval. SCPA §1805. There are exceptions, however. At any time the fiduciary can bring an ex parte proceeding to receive authorization to pay the debt. The Surrogate can authorize payment or may require notice to those affected. Where the fiduciary has advanced funds subsequent to the death of the decedent, however, no court approval is required. *Matter of Reed*, 2002 Misc. LEXIS 882 (Surr. Ct. Broome Cty. 2002). As for the statute of limitations on debts owing the fiduciary, it is tolled from the date of death of the decedent until the first fiduciary accounting.

5. Because of the complexity of the issues surrounding various debts, where there is a question as to whether the estate assets may be sufficient, it is better to pay the funeral expenses and wait until the accounting to pay the remaining debts. This is particularly true where there is a possibility that the debts may be paid pro rata.

6. Where there is a contingent or unliquidated liability, such as a guaranty of the loan of a third party or the outcome of litigation in which the decedent was a party, the Surrogate can direct that funds sufficient to pay the claims be set aside. SCPA §1804. The claimant needs to file an affidavit setting forth the claim with enough particularity that the Surrogate can accurately set aside funds to be held until such time as the claim or claims become fixed. Claims arising after the decedent's death are not subject to this procedure.

E. Contested Claims and Prescribed Claims

1. If a claim is submitted after the 7 month period has passed, the main issue is whether the estate has been distributed. The 7 month period is not a statute of limitations, and claims presented subsequent to that time period are still valid claims. The only relevance of the limitation is that if the fiduciary fully distributed the estate and did not have actual or constructive knowledge of the claim, the fiduciary has no personal liability to the creditor for distributing the assets and closing the estate.

2. If, on the other hand, a fiduciary is aware of the existence of a possible claim and distributes the estate once the 7 month period has passed, there still may be personal liability on the part of the fiduciary. In the Swaab case referenced above, the claim was from a hospital and the court held that since the decedent had died in a public hospital there should have been an awareness of the existence of a debt to the hospital. The fiduciary was therefore surcharged in the amount of the unpaid claim.

3. At any time, a claimant may commence a proceeding to require payment of a claim that was allowed ,SCPA §1806(4), (b), or the fiduciary

or a claimant may commence a proceeding to determine the validity of a claim. SCPA §1809(1). In either case, process would issue to the fiduciary or claimant, as the case may be. If, however, the claim is in excess of $10,000 or is in excess of 25% of the value of the gross probate estate, process must also issue to any person whose "rights or interests" would be affected by the allowance of the claim. SCPA §1809(2). In many cases it is in the fiduciary's interest to initiate such a proceeding. If a fiduciary wrongfully pays an invalid claim, there is the possibility of a surcharge. As for the claimant, there is also the possibility of instituting an action in another court. If the claim is rejected, however, the action must be commenced within 60 days after the rejection or the only option is Surrogate's Court. SCPA §1810.

4. Where the claim relates to an action in negligence or tort, some courts hold that there is no claim or debt until the damages are fixed, because the issues of both liability and amount of damages are so difficult to measure. Others will review various particulars and order funds to be set aside. One factor is whether there is security, such as an insurance policy, to be considered as collateral. The court in *Matter of Biel*, 103 A.D.2d 287 (2nd Dept. 1984) set forth various factors to be considered. Such factors include whether the decedent was survived by a spouse or minor children, whether there is a meritorious claim in excess of the policy limits, whether the claimant would be able to go after the estate beneficiaries easily if they receive funds subject to the claim, how diligent the claimant/plaintiff is prosecuting the claim, and others. The Court will fix the amount to be set aside as well as the length of time for the maintenance of the reserve fund.

F. Appropriately Dealing With Creditors

1. Once the information regarding all known creditors is compiled, the list needs to be organized so that the priority creditors are separated. The contact information needs to be obtained from the decedent's records, including, if possible, a copy of the last statement.

2. If the attorney is going to deal with the creditors, a letter of authorization needs to be signed by the fiduciary, authorizing all creditors to communicate directly with the attorney and provide the attorney with necessary paperwork and copies of bills. If internet connections to the creditor are available, they should be utilized if possible to download information.

a. The details concerning the debts need to be reviewed with the fiduciary. If the creditor is the fiduciary or a family member who needs reimbursement for cash advances, backup receipts and other confirming information needs to be obtained.

b. Where the creditor is a health facility or physician, the Bills need to be reviewed to insure that proper insurance claims have been made and paid. Where the decedent is clearly covered by insurance and/or Medicare, communication directly with the creditor is appropriate to be sure that the claims are proceeding.

c. Where the debts are credit card debts, direct contact with the collection agency involved or the issuer of the card is appropriate and in many cases, a reduced settlement figure can be negotiated.

d. If the debt is owed for taxes, a power of attorney for the state or federal taxing authority should be obtained and with the IRS, for example, Form 4506-T can be submitted requesting full information regarding

the decedent's tax matters for the specified years. Copies of returns can be requested as well.

G. Insolvent Estates

1. A personal representative is not allowed to file for bankruptcy for a decedent's estate. Chapter 11 only allows a "person" to file for bankruptcy. Where there are more debts and expenses than assets, the SCPA accounting proceedings under SCPA Article 22 would suffice and the result would be the same.

2. In the event of foreclosure, however, steps may need to be taken to halt the proceedings so that matters may be resolved. If the foreclosure proceeding had been commenced prior to the decedent's death, the court must be notified, as well as counsel for the creditor. Pursuant to CPLR §1015 the estate would be substituted as a party. No judgment can be entered against a deceased party. CPLR §5016(d). In fact, any order, such as an order of reference for foreclosure sale, is invalid, because the court loses jurisdiction at the death of a defendant where there has not been a substitution of the estate as a party. *Giroux v. Dunlop Tire*, 16 A.D.3d 1068 (4th Dept. 2005). If the foreclosure action has commenced, and the decedent was the owner of the residence which is the subject of the foreclosure, the Estate can be substituted as a party and demand the mandatory settlement conference. CPLR §3408. If the mortgage subject to the foreclosure was a reverse mortgage, the conference may not be available.

3. The outstanding balance of the mortgage, the amount needed to reinstate the mortgage (if a default has been declared) and the market

value of the property all must be determined. Alternatives are:

a. Put the foreclosure "on hold" and take steps to Sell the property, pay off the mortgage, and add the retained equity of the property as an estate asset.

b. Negotiate a "short sale" wherein the creditor agrees to take the net sales proceeds in full satisfaction of the debt owed.

c. Negotiate a deed in lieu of foreclosure, where the property is deeded to the creditor in lieu of foreclosure and the creditor agrees to accept the property in full satisfaction of the mortgage owed.

d. If the property was specifically devised to an estate beneficiary, however, that beneficiary takes the property subject to the debt and the foreclosure proceeding. The fiduciary cannot expend estate funds to defend the foreclosure action or pay mortgage payments or reinstatement costs. EPTL §3-3.6. A general direction in the decedent's will to "pay all of my debts" does not require debts relating to specifically devised or bequeathed property to be paid. *Carpenter v. Carpenter* 131 N.Y. 101 (1892).

H. Sale of Assets to Satisfy Creditors

1. Generally, the fiduciary needs to review the available assets and set aside those specifically disposed of under the will of the decedent and those passing as part of the residuary estate. Also, assets with liens specifically generated by a claim to be paid need to be segregated, and a plan for sale and payment of the claims of creditors in accordance with their priority needs to be devised.

2. Where real estate is involved, however, since New York common law provides that property either specifically devised or passing under a residuary clause vests immediately at death, court approval should be obtained prior to any sale of real estate to satisfy the claims of creditors.

3. The Surrogate's Court Procedure Act provides several miscellaneous proceedings where fiduciaries seek advice or pre-approval of an act. SCPA §1901. Similar judicial advice may be obtained in an accounting proceeding, where the sale is authorized and the net proceeds of sale either added to the estate or specifically disposed of pursuant to the order of the court.

4. Where a petition is filed in an Article 19 proceeding, all parties to the estate, including creditors who have presented claims, must be listed as interested parties.

5. The petition must also contain a statement relating to the "condition of the estate." SCPA §1904(1). This would include a detailed description of the assets of the estate and current liabilities and anticipated claims and administration expenses. Facts detailing the reasons for the sale need to be included as well. The statute lists reasons for which the property may

be sold (SCPA §1902):

(a) Payment of expenses of administration

(b) Payment of funeral expenses

(c) Payment of decedent's debts, other than mortgage liens

(d) Payment of estate taxes

(e) Payment of any debt or legacy charged on the property

(f) Payment and distribution of the shares of the property

(g) Any other purpose the court deems necessary

6. Where there are multiple parcels, there is a statutory order of preferences as to which parcels must be sold (SCPA §1908):

(a) Parcels as to which the decedent died intestate - i.e. not devised

(b) Parcels which descended to distributees but which have not been sold by them. In intestacy, title to the property "descends" as of the date of death, subject to a determination of the identity of the intestate distributees. The sale by the Administrator to raise funds to pay claims should be of property which the distributees had not sold or which were not under contract of sale.

(c) Parcels passing under a residuary clause.

(d) Where there are multiple parcels, the parcels which were specifically devised but which have not been sold by the devisees.

(e) Where a single parcel was devised to one person or group and another to another person or group, both parcels are subject to sale even if one has been conveyed. For this reason, it is critical that the fiduciary examine the state of the estate prior to any distributions, including distributions of real estate.

7. Where assets specifically bequeathed or devised are sold to contribute towards the payment of debts or expenses, records must be kept of the proceeds as well as any income or expenses attributable to the property. Ultimately, the sales proceeds, together with the income and expenses, if any, attributable to the property should be kept separately in order to allocate the funds appropriately to the ultimate beneficiary.

Distributions, Final Accounting and Closing the Estate

Submitted by Michael G. Zapson

MICHAEL G. ZAPSON

Michael G. Zapson is a Partner in the Real Estate Group and Trusts and Estates Group at Certilman Balin Adler & Hyman, LLP. He advises real property owners, national companies, developers, purchasers, sellers, REITs, lenders and brokers. His practice also encompasses real estate and zoning, as well as commercial and estate litigation, estate planning and tax planning. His practice bridges the gap between estate and tax planning for real estate professionals and others. He frequently presents seminars on the topics of land use and development, and trusts and estates.

Active in his community, Mr. Zapson is a board member of the Long Island Chapter of the League of Conservation Voters, the Long Beach Lawyer's Association, the Nassau County Bar Association, and the Association of the Bar of the City of New York.

Mr. Zapson was a member of the Nassau County Legislature where he chaired the Judiciary, Finance, and Public Works Committees. He served as Chairman of the Long Beach Democratic Committee, and is a Past President, Past Vice President and Former Council Member of the City of Long Beach.

Mr. Zapson earned a Juris Doctor from the State University of New York at Buffalo and a Bachelor of Arts from Cornell University. He is admitted to practice in New York, and the U.S. District Courts for the Southern, Eastern and Northern Districts of New York.

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Education
University at Buffalo School of Law, J.D., 1985
Cornell University, B.A., 1982
Bar Admission
New York
Washington D.C.
Court Admission
U.S. District Courts, the Southern and Eastern Districts of New York
Bar Associations
Nassau County Bar Association
Association of the Bar of the City of New York
Long Beach Lawyers' Association
Appointments
Judiciary Committee of the Nassau County Legislature, Former Chair
Finance Committee of the Nassau County Legislature, Former Chair
Public Works Committee of the Nassau County Legislature, Former Chair
Elected Offices
Long Beach Democratic Committee, Chairman, 2008 until 2015
Long Beach City Council Member, Former President/Vice President, 10 years
Nassau County Legislature
Teaching
National Business Institute Seminar, Faculty Member
Speaking Engagements
Provides continuing legal education to attorneys in the arms of Trusts & Estates, Estate Litigation, and Zoning.
Community Involvement
Long Island Chapter of the League of Conservation Voters, Board Member
Long Island Builder's Institute, Member
Certifications
State and Local Government Law

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III. Distributions, Final Accounting and Closing the Estate

A. Documents Needed to Close the Estate
Final Accounting – either judicial or informal
Receipt and Release

1. Distribution of Assets.

   A. Specific bequests of cash and/or property should be distributed.
   B. Sell property which must be liquidated.
   C. Establish any trusts provided in the will.

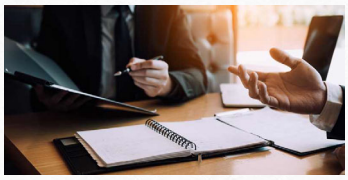
2. Obtain tax clearances from appropriate government agencies.

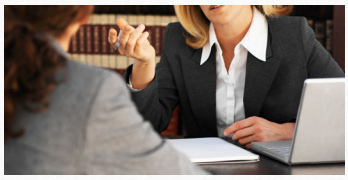
3. File final report/accounting of all receipts, disbursements, and activities of estate and executor.

4. Close estate account and pay any final expenses.

5. Distribute any remaining estate assets.

NYS Requires filing of an inventory





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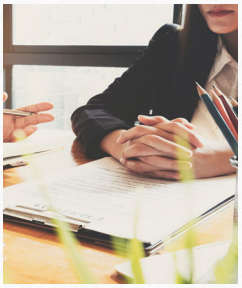
The Executor is tasked with Marshalling all the Assets and Inventorying the Assets

Preparing an inventory of assets is very subjective. In New York preparing the inventory is necessary to conclude the estate. A sample NY Form which is based on the statute NYCRR 22 §207.20 is attached. It is perhaps the simplest court form you will ever file. What is filed with the Court only includes probate assets.

If you look online for Inventory Forms to file it is not uncommon for those forms to be over 20 pages long and require great detail so it really depends on what you need it for. The internet forms have many categories including:

General Information,
Professional Advisors,
Asset Inventory,
Bank Accounts,
Personal Investments,
Business Interests,
Real Estate,
Pension Plans,



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Insurance,

Private Loans and Mortgages,

Interest in other Estates and Trusts,

Personal Effects and other assets,

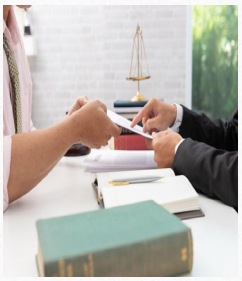
Liabilities,

Mortgages,

Personal Loans and Lines of Credit,

Credit Cards, and

Other Liabilities.



An inventory should not be confused with an accounting. An inventory is a snapshot of estate assets at a point in time. An accounting needs detail of how the estate got to that point in time and how it will be completed.

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

----------x

In the Matter of

Deceased.

----------x

TO BE COMPLETED BY FIDUCIARY or ATTORNEY FOR FIDUCIARY
Total Estate Assets (see below)* _____
Filing fee SCPA 2402(7) _____
Filing fee initially paid _____
Balance (Refund) Due $0.00

INVENTORY OF ASSETS (Rule §207.20)

File No:_____

The undersigned, a fiduciary or attorney for the fiduciary of the above Decedent's estate, certifies that the following constitutes the gross estate for tax purposes and identifies whether non-estate assets exist. Complete below according to the following value categories:

Category A - under $10,000; Category B - $10,000 to under $20,000; Category C - $20,000 to under $50,000; Category D - $50,000 to under $100,000; Category E - $100,000 to under $250,000; Category F - $250,000 to under $500,000; Category G - $500,000 or over.

Date of Death:_____ Date of Letters:_____ Type of Letters:_____

Name of Fiduciary(ies) and, if changed, fiduciary(ies) address: _____

ASSETS INDIVIDUALLY OWNED BY DECEDENT OR PAYABLE TO ESTATE	CATEGORY
1. Real Estate	
2. Stocks and Bonds	
3. Insurance Payable to Estate	
4. IRAs, 401 Ks Payable to Estate	
5. Mortgages or Notes Held by Decedent	
6. Cash	
7. Miscellaneous	
8. Firearms (Check appropriate box)	○ Yes – see attached firearms inventory ○ None
*TOTAL ESTATE ASSETS	

NON-ESTATE ASSETS - CHECK YES OR NO TO EACH OF THE FOLLOWING:

9. Living Trust If yes, set forth the Name of the Trustee(s)	○ Yes ○ No
10. Gifts in Excess of Federal Annual Exclusion Made Within 3 Years of Decedent's Death	○ Yes ○ No
11. Jointly Held Property (Real or Personal)	○ Yes ○ No
12. Insurance Payable to Beneficiary	○ Yes ○ No
13. IRAs, 401K's Payable to Beneficiary	○ Yes ○ No
14. Annuities	○ Yes ○ No
15. Powers of Appointment	○ Yes ○ No
16. Cause(s) of Action Pending If yes, identify Court and Index Number	○ Yes ○ No

Certified to be true on the _____ day of _____, 20____.

Signature

Print Name

Attorney's Name

Attorney's Address

Attorney's Telephone No.

I-1 3/2016

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B. Proper Transfer and Timing of Distributions – Probate and Non-Probate Assets

Assuming the decedent's accounts do not have instructions of their own (joint accounts, trust accounts, etc.), most banks or institutions will require an original death certificate and original letters testamentary. The death certificate really should not be a requirement as in order to get the letters testamentary the court had to have the original death certificate. However, most times they do ask.

Always be prepared to show the original but always, try not to give the original. In New York additional letters testamentary are relatively easy to get whether you need more because have they expired, or an institution requires the original, but sometimes the Court will not provide additional letters testamentary if something is missing in the estate file such as the inventory. Death certificates depending on the municipality can take months to get, so always try to maintain your originals.

How to Keep the Decedent's Business Going

Decedent's business will diminish in value if forced to close. The executor needs to maintain the value of decedent's assets. That does not mean the executor needs to start running the business. Look for a key person or existing management to run the business. Often times the decedent owns the stock in the business meaning the business can continue to be run by the officers, employees and directors. Ultimately, however, decisions will need to be made with regard to selling the business or transferring shares to the beneficiaries.

How to Keep Proper Records

The Executor is responsible to maintain records. This can be easy or difficult depending on what assets are in the estate. Some records may be kept by the attorneys or accountants. Some records may be generated by brokerage houses, and some records may be the responsibility of the executor, such as selling personal items or collecting cash rents. The executor must not comingle estate assets with their own assets. Sometimes this is not as obvious as it sounds such as when two (2) people owned an asset together and always maintained one account. Now the executor should have a separate account for the estate.

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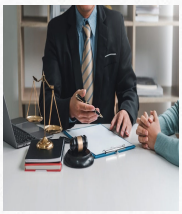
C. Distributions in Kind

Distribution in Kind are payments made in an alternative format such as property or stock instead of cash. Always have stock retitled, property does not have to be if it was joint, but if it's a distribution in kind, the better practice is to do so.

D. Distribution to Minors, Surviving Spouse and Trusts

When there are minors involved, formalities need to be followed or new formalities entered into. Often there is just general language for how distributions to minors should be held. You can change the terms of the Trust for minors if everyone agrees.



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Likewise, distributing to the surviving spouse and trusts should not be rushed into. There may be advantages or disadvantages of giving specific properties to various beneficiaries.

E. Disposition of Unclaimed Assets

While generally there should not be any asset that is unspoken for often there are assets that are unwanted. Management or upkeep of a specific piece of property may be too expensive or too difficult for a beneficiary so that asset needs to be sold. Often this becomes an issue when two or more beneficiaries share an asset and there is a difference of opinion on what to do with it.

- Practice Tip – Ask the Court for direction. While the Court will not tell you what to do, if you file a Petition to sell a piece of property, it will give the parties an opportunity to object or otherwise move and the resulting Court Order protects the Executor from after the fact liability.

F. Fees for Personal Representatives and Attorneys

Commission

SCPA §2307 – provide the calculation for commissions of fiduciaries other than Trustees. The rates are as follows:

5% for receiving and paying out up to $100,000.00;
4% for receiving and paying out on the next $200,000.00;
3% for receiving and paying out on the next $700,000.00;
2.5% for receiving and paying out on the next $4,000,000.00;
2% for receiving and paying out sums above $5,000,000.00.

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The commission is computed separately for receiving and paying out at one half of the statutory rate.

The commission is calculated on the net received. Therefore, for real property the mortgage or lien is deducted off the top before calculating commissions.

If there are two fiduciaries, they can each take a commission. If there are more than two, they are limited to two commissions to be shared. And no fiduciary can take more than the statutory share for one.

Also, fiduciaries who manage real property are entitled to an additional 5% of the gross rents collected. SCPA 2307(6).

Commissions Attorney – executor

The statute directs that the Testator shall be informed that: any person who serves is entitled to receive statutory commissions, absent an agreement to the contrary; absent execution of a disclosure agreement the attorney is entitled to one-half commissions; and if the attorney/executor renders legal services, he/she is entitled to reasonable compensation for legal services in addition to executor's commission. SCPA §2307-a.

The statute provides an explanation of an acknowledgment of disclosure. The form is to be signed by the testator in the presence of at least one witness, which is not the nominated executor. It is separate from the Will, does not have to be annexed to the Will, and can be executed prior to, concurrently with, or subsequent to a Will which names the attorney as the executor. This section applies to Wills executed after January 1, 1996.

What if an executor is seeking to receive his commission prior to filing his account? An executor may present a petition to the Court that he be permitted to receive a sum on account of the commission due him. SCPA §2310. All persons interested in the estate are to be served.

The Court can award a fee on account which cannot exceed the receiving commissions due the fiduciary.

An executor can also file an Ex Parte Application for advance payment of commissions SCPA §2311.

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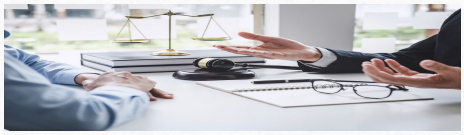
Attorneys fees

Legal fees are given priority even before funeral expenses.

As an attorney, in accordance with Part 1215 to title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York provides requirements for Letters of Engagement. It is to be in writing, explain the scope of legal fees, explain fees to be charged, expenses, billing practices and provide right to arbitrate fee disputes under Part 137 of the Rules of the Chief Administrator. An attorney can enter into a Retainer Agreement so long as it complies with the requirement for a Letter of Engagement.

The exception to this rule of when a Letter of Engagement is required is when: the fee is less than $3,000.00; the services are the same as previously rendered and paid for; Matrimonial matters, are subject to Part 1400 of the Joint Rules of the Appellate Division 22 NYCRR or; where the attorney is not admitted in New York State and no services are to be rendered in New York State.

The Court can "Fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distribute, or any person interested or of an attorney who has rendered legal services in connection with the performance of his duties as a fiduciary or in proceedings to compel the delivery of papers or funds in the hands of an attorney." SCPA 2110.



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Even though there is a Retainer Agreement, the Surrogate is not bound by it. The Court has the power to review attorney's fees. The Surrogate's Court Judges rely on Matter of Potts, 213 App. Div. 59 (N.Y. App. Div. 1925) and apply the following factors: time spent, the difficulty involved, the nature of the services, the size of the estate, professional standing of the attorney, and results obtained.

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See, Lawrence v. Miller, 11 N.Y.3d 588 (2008) and Lawrence v. Miller, 24 N.Y.3d 320 (2014). Court upheld a contingent fee arrangement.

Other Legal Fees

The Court will fix Compensation to a Guardian ad Litem (GAL) who is entitled to fair and reasonable compensation.

The GAL can be paid from the estate, the monies received from the person under a disability or for good cause shown, any other party. SCPA §405.

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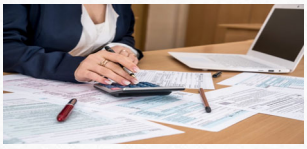
G. Annual Accounting Requirements and Format

The accounting allows the fiduciary to disclose what has been done. To show what has been received and paid and approval of the accounting should remove the party accounting from further liability.

Guardians account annually and at the end of the guardianship.

An executor or administrator usually accounts when the estate is complete although there may be an intermediate accounting.

A trustee accounts at the termination of the trust and throughout the duration of the trust although there are no specific rules as to how often a trustee must account unless it is written into the trust. Trustees should account at the resignation or death of a trustee or a beneficiary.



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H. Final Accounting Checklist

A fiduciary can request that his/her account be judicially settled. A voluntary account is to be filed after 7 months have expired since the date letters were issued to the original fiduciary; where letters have been revoked; at any time within 6 months after letters are issued if real property is to be sold under SCPA Article 19 to pay estate expenses; where his/her last account was not judicially settled within a year. A guardian and a trustee can also file to have his/her account judicially settled.

The SCPA §2210 states all necessary parties that service must be made upon including but not limited to: all unpaid creditors; surety on bond, if any; "all co-fiduciaries who do not join in the petition;" the successor fiduciary, if any; the attorney general, where necessary; the distributes, etc.

The official forms for an accounting are located at www.nycourts.gov. They are: Petition for Judicial Settlement of an Account of Executor, Administrator, Trustee or Other (specify); Accounting by Executor, Administrator, or Other (specify); Final/Intermediate Decree of Judicial Settlement for Executor-Administrator; receipt and Release; Waiver of Citation and Consent in Accounting; and Citation. The forms are a guideline, all accounts must conform to them. They are to be amended and/or modified for each case.

To complete the accounting the fiduciary will require all financial records. He has a duty to keep all financial records and should keep all invoices, tax returns, appraisals, etc. The accounting is to describe what has transpired from the date of death to the date of the account.

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The official forms list the following Schedules to the account that are to be completed:

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If the parties consent to the accounting, they can execute a Waiver of Citation and Consent in Accounting Form. The form states that they have received a copy of the Summary Statement of the Account, consent to a decree settling the account as filed, and waive the issuance and service of a citation in this proceeding.

A Citation fixing a court date is necessary if a Waiver of Citation and Consent in Accounting is not received. The party will have the opportunity to appear in court on the date of the citation and object to the account.

The parties have the right to object to the accounting and examine the fiduciary under oath in the courthouse. As practice when an accounting is sent to all parties, all financial documents are provided upon request in order to have the matter settled sooner rather than later.

In the absence of objections by any party, the Court still has the power to review and question a fiduciary account.

16

I. Estate Closing Procedures

An estate can be settled by an informal accounting, or a non-judicial accounting. If the parties agree to the accounting, they execute a receipt and release agreement. The receipt and release can be filed or recorded. The Court can vacate the release if it determines that the beneficiary lacked full knowledge or did not understand what they signed.

The third way to settle an account is to obtain a decree on the receipt and releases executed by the interested parties. The fiduciary will file a petition, list all interested parties, state all taxes have been paid or none are due, state that he has fully accounted, file the receipt and releases and pray for a decree discharging him. The decree will release and discharge the fiduciary and the surety on the bond, if any, from further liability.

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NEW YORK PROBATE AND TRUST ADMINISTRATION

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Michael G. Zapson

Michael G. Zapson is a Partner in the Real Estate Group and Trusts and Estates Group at Certilman Balin Adler & Hyman, LLP. He advises real property owners, national companies, developers, purchasers, sellers, REITs, lenders and brokers. His practice encompasses real estate and zoning, as well as commercial and estate litigation, estate planning and tax planning. His practice bridges the gap between estate and tax planning for real estate professionals and others. He frequently presents seminars on the topics of land use and development, and trusts and estates.

Active in his community, Mr. Zapson is a board member of the Long Island Chapter of the League of Conservation Voters, the Long Beach Lawyer's Association, the Nassau County Bar Association, and the Association of the Bar of the City of New York.

Mr. Zapson was a member of the Nassau County Legislature where he chaired the Judiciary, Finance, and Public Works Committees. He served as Chairman of the Long Beach Democratic Committee, and is a Past President, Past Vice President and Former Council Member of the City of Long Beach.

Mr. Zapson earned a Juris Doctor from the State University of New York at Buffalo and a Bachelor of Arts from Cornell University. He is admitted to practice in New York, and the U.S. District Courts for the Southern, Eastern and Northern Districts of New York.

Education
University at Buffalo School of Law, J.D., 1985
Cornell University, B.A., 1982

Bar Admission
New York
Washington D.C.

Court Admission
U.S. District Courts, the Southern and Eastern Districts of New York

Bar Associations
Nassau County Bar Association
Association of the Bar of the City of New York
Long Beach Lawyers' Association

Appointments
Judiciary Committee of the Nassau County Legislature, Former Chair
Finance Committee of the Nassau County Legislature, Former Chair
Public Works Committee of the Nassau County Legislature, Former Chair

Elected Offices
Long Beach Democratic Committee, Chairman, 2008 until 2015
Long Beach City Council Member, Former President/Vice President, 10 years
Nassau County Legislature, 5 years

Teaching
National Business Institute Seminar, Faculty Member

Speaking Engagements
Provides continuing legal education to attorneys in the arms of Trusts & Estates, Estate Litigation, and Zoning.

Community Involvement
Long Island Chapter of the League of Conservation Voters, Board Member
Long Island Builder's Institute, Member

Certifications
State and Local Government Law

III. Distributions, Final Accounting and Closing the Estate

A. Documents Needed to Close the Estate
Final Accounting – either judicial or informal
Receipt and Release

1. Distribution of Assets.

   A. Specific bequests of cash and/or property should be distributed.
   B. Sell property which must be liquidated.
   C. Establish any trusts provided in the will.

2. Obtain tax clearances from appropriate government agencies.

3. File final report/accounting of all receipts, disbursements, and activities of estate and executor.

4. Close estate account and pay any final expenses.

5. Distribute any remaining estate assets.

NYS Requires filing of an inventory

The Executor is tasked with Marshalling all the Assets and Inventorying the Assets

Preparing an inventory of assets is very subjective. In New York preparing the inventory is necessary to conclude the estate. A sample NY Form which is based on the statute NYCRR 22 §207.20 is attached. It is perhaps the simplest court form you will ever file. What is filed with the Court only includes probate assets.

If you look online for Inventory Forms to file it is not uncommon for those forms to be over 20 pages long and require great detail so it really depends on what you need it for. The internet forms have many categories including:

General Information,

Professional Advisors,

Asset Inventory,

Bank Accounts,

Personal Investments,

Business Interests,

Real Estate,

Pension Plans,

Insurance,

Private Loans and Mortgages,

Interest in other Estates and Trusts,

Personal Effects and other assets,

Liabilities,

Mortgages,

Personal Loans and Lines of Credit,

Credit Cards, and

Other Liabilities.

An inventory should not be confused with an accounting. An inventory is a snapshot of estate assets at a point in time. An accounting needs detail of how the estate got to that point in time and how it will be completed.

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF

----------x

In the Matter of

Deceased.

----------x

TO BE COMPLETED BY FIDUCIARY or ATTORNEY FOR FIDUCIARY	
Total Estate Assets (see below)*	
Filing fee SCPA 2402(7)	
Filing fee initially paid	
Balance (Refund) Due	$0.00

INVENTORY OF ASSETS (Rule §207.20)

File No:_____

The undersigned, a fiduciary or attorney for the fiduciary of the above Decedent's estate, certifies that the following constitutes the gross estate for tax purposes and identifies whether non-estate assets exist. Complete below according to the following value categories:

Category **A** - under $10,000; Category **B** - $10,000 to under $20,000; Category **C** - $20,000 to under $50,000; Category **D** - $50,000 to under $100,000; Category **E** - $100,000 to under $250,000; Category **F** - $250,000 to under $500,000; Category **G** - $500,000 or over.

Date of Death:_____ Date of Letters:_____ Type of Letters:_____

Name of Fiduciary(ies) and, if changed, fiduciary(ies) address: _____

ASSETS INDIVIDUALLY OWNED BY DECEDENT OR PAYABLE TO ESTATE	**CATEGORY**
1. Real Estate	
2. Stocks and Bonds	
3. Insurance Payable to Estate	
4. IRAs, 401 Ks Payable to Estate	
5. Mortgages or Notes Held by Decedent	
6. Cash	
7. Miscellaneous	
8. Firearms (Check appropriate box)	O Yes – see attached firearms inventory O None
***TOTAL ESTATE ASSETS**	

NON-ESTATE ASSETS - CHECK YES OR NO TO EACH OF THE FOLLOWING:

9. Living Trust If yes, set forth the Name of the Trustee(s)	O Yes O No _____
10. Gifts in Excess of Federal Annual Exclusion Made Within 3 Years of Decedent's Death	O Yes O No
11. Jointly Held Property (Real or Personal)	O Yes O No
12. Insurance Payable to Beneficiary	O Yes O No
13. IRAs, 401K's Payable to Beneficiary	O Yes O No
14. Annuities	O Yes O No
15. Powers of Appointment	O Yes O No
16. Cause(s) of Action Pending If yes, identify Court and Index Number	O Yes O No _____

Certified to be true on the _____ day of _____, 20____.

_____ Signature

_____ Print Name

_____ Attorney's Name

_____ Attorney's Address

_____ Attorney's Telephone No.

I-1 3/2016

B. Proper Transfer and Timing of Distributions – Probate and Non-Probate Assets

Assuming the decedent's accounts do not have instructions of their own (joint accounts, trust accounts, etc.), most banks or institutions will require an original death certificate and original letters testamentary. The death certificate really should not be a requirement as in order to get the letters testamentary the court had to have the original death certificate. However, most times they do ask.

Always be prepared to show the original but always, try not to give the original. In New York additional letters testamentary are relatively easy to get whether you need more because have they expired, or an institution requires the original, but sometimes the Court will not provide additional letters testamentary if something is missing in the estate file such as the inventory. Death certificates depending on the municipality can take months to get, so always try to maintain your originals.

How to Keep the Decedent's Business Going

Decedent's business will diminish in value if forced to close. The executor needs to maintain the value of decedent's assets. That does not mean the executor needs to start running the business. Look for a key person or existing management to run the business. Often times the decedent owns the stock in the business, meaning the business can continue to be run by the officers, employees and directors. Ultimately, however, decisions will need to be made with regard to selling the business or transferring shares to the beneficiaries.

How to Keep Proper Records

The Executor is responsible to maintain records. This can be easy or difficult depending on what assets are in the estate. Some records may be kept by the attorneys or accountants. Some records may be generated by brokerage houses, and some records may be the responsibility of the executor, such as selling personal items or collecting cash rents. The executor must not comingle estate assets with their own assets. Sometimes this is not as obvious as it sounds, such as when two (2) people owned an asset together and always maintained one account. Now the executor should have a separate account for the estate.

C. Distributions in Kind

Distribution in Kind are payments made in an alternative format such as property or stock instead of cash. Always have stock retitled, property does not have to be if it was joint, but if it's a distribution in kind, the better practice is to do so.

D. Distribution to Minors, Surviving Spouse and Trusts

When there are minors involved, formalities need to be followed or new formalities entered into. Often there is just general language for how distributions to minors should be held. You can change the terms of the Trust for minors if everyone agrees.

Likewise, distributing to the surviving spouse and trusts should not be rushed into. There may be advantages or disadvantages of giving specific properties to various beneficiaries.

E. Disposition of Unclaimed Assets

While generally there should not be any asset that is unspoken for often there are assets that are unwanted. Management or upkeep of a specific piece of property may be too expensive or too difficult for a beneficiary so that asset needs to be sold. Often this becomes an issue when two or more beneficiaries share an asset and there is a difference of opinion on what to do with it.

- Practice Tip – Ask the Court for direction. While the Court will not tell you what to do, if you file a Petition to sell a piece of property, it will give the parties an opportunity to object or otherwise move and the resulting Court Order protects the Executor from after the fact liability.

F. Fees for Personal Representatives and Attorneys

Commission

SCPA §2307 – provide the calculation for commissions of fiduciaries other than Trustees. The rates are as follows:

5% for receiving and paying out up to $100,000.00;

4% for receiving and paying out on the next $200,000.00;

3% for receiving and paying out on the next $700,000.00;

2.5% for receiving and paying out on the next $4,000,000.00;

2% for receiving and paying out sums above $5,000,000.00.

The commission is computed separately for receiving and paying out at one half of the statutory rate.

The commission is calculated on the net received. Therefore, for real property the mortgage or lien is deducted off the top before calculating commissions.

If there are two fiduciaries, they can each take a commission. If there are more than two, they are limited to two commissions to be shared. And no fiduciary can take more than the statutory share for one.

Also, fiduciaries who manage real property are entitled to an additional 5% of the gross rent collected. SCPA 2307(6).

Commissions Attorney – executor

The statute directs that the Testator shall be informed that: any person who serves is entitled to receive statutory commissions, absent an agreement to the contrary; absent execution of a disclosure agreement the attorney is entitled to one-half commissions; and if the attorney/executor renders legal services, he/she is entitled to reasonable compensation for legal services in addition to executor's commission. SCPA §2307-a.

The statute provides an explanation of an acknowledgment of disclosure. The form is to be signed by the testator in the presence of at least one witness, which is not the nominated executor. It is separate from the Will, does not have to be annexed to the Will, and can be executed prior to, concurrently with, or subsequent to a Will which names the attorney as the executor. This section applies to Wills executed after January 1, 1996.

What if an executor is seeking to receive his commission prior to filing his account? An executor may present a petition to the Court that he be permitted to receive a sum on account of the commission due him. SCPA §2310. All persons interested in the estate are to be served.

The Court can award a fee on account which cannot exceed the receiving commissions due the fiduciary.

An executor can also file an Ex Parte Application for advance payment of commissions SCPA §2311.

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Extraordinary Services Compensation

If an Executor commences a proceeding under SCPA §2311, the Court can award a greater commission. Only where all "persons whose right or interests are affected by the payment are persons under no legal disability and by acknowledged instrument consented thereto."

G. Annual Accounting Requirements and Format

The accounting allows the fiduciary to disclose what has been done. To show what has been received and paid and approval of the accounting should remove the party accounting from further liability.

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Tax Issues in Probate Administration

Submitted by Michael G. Zapson

IV. Tax Issues in Probate Administration

A. State and Federal Tax Considerations

The executor is responsible for paying any outstanding taxes owed by the estate and any taxes owed by the decedent. The most common taxes are the estate tax (top rate of 40%) and income tax although there can be other taxes including foreign taxes, and excise taxes which are the executor's responsibility as well.

While the current federal estate tax exemption limits estate tax to estates over $12,920,000 (2023) with portability and the reduction of the exemption in 2026 every estate with assets and a surviving spouse should file estate tax returns even if nothing is due. If the first spouse does not file the value of portability could be lost.

Additionally, State estate tax requirements differ from state to state but have lower exemptions than the federal exemption.

Final Income Tax Return of the Decedent and Decedent's Delinquent Taxes

Upon decedent's death often times a new set of professionals get involved. However, I often look to the decedent's accountant to get involved as they are most familiar with decedent's assets. Some actions that may be done include:

Stop making estimated tax payments

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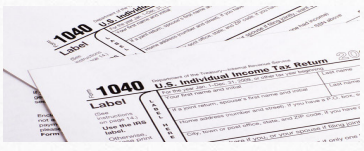
Once a taxpayer dies, he or she is no longer required to make estimated tax payments. Unaware family members often continue to submit the decedent's quarterly estimated tax vouchers, which is not necessary and may require taking funds out of an investment portfolio, where they could otherwise be growing and earning income until the tax is due.

Not only does Regs. Sec. 1.6654-2(e)(7) indicate no joint estimated tax payments can be made after death and the estate has no liability to make further payments, decedent's death ends decedent's reporting period and it is now the estate's responsibility. The decedent's tax year ends on the date of death, so only income received through that date is reportable on the final Form 1040. If the deceased taxpayer was paying an amount each quarter to cover the expected tax liability for that quarter, he or she would no longer need to make those payments after the tax year ends. Remember that the surviving spouse may need to make estimated payments for their own tax liability.

Even if the deceased taxpayer was taking advantage of the prior-year-tax safe harbor in making estimated tax payments and the Form 1040 ends up with a balance due later on, the tax preparer can eliminate filing the Form 2210, Underpayment of Estimated Tax by Individuals, Estates, and Trusts.



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Who signs the form and gets the refund?

A surviving spouse filing a joint return can continue to do so. He or she will just sign as the surviving spouse. If an executor has been appointed by a court to administer the decedent's affairs, that executor or personal representative should sign the return and attach a copy of the certificate that shows the official appointment.

If the return shows an overpayment of tax, and it is not a joint return with the surviving spouse, or there is no court-appointed executor or personal representative, Form 1310, Statement of Person Claiming Refund Due a Deceased Taxpayer, will need to be filed with the return to obtain a refund.

Practice tip – This may require filing for probate where it had not previously been necessary.

A surviving spouse can file a joint return

Yes, a surviving spouse can file a joint return with the decedent for the year of death. Depending on the relative earnings of each spouse, the joint tax rate tables may yield the greatest benefit.

However, if the decedent incurred significant medical expenses during his or her last illness and passed away early enough in the year to be reporting substantially less income, consider filing separately if it would save tax by allowing medical expenses to exceed the adjusted gross income threshold for deduction and create a better overall result for the surviving spouse and family.

Some decedents have savings bonds that have accrued interest rolled into them when earlier issues of bonds were converted to later issues, and many types of bonds accrue interest until maturity. That accrued interest, which usually has never been taxed, will be taxed when the beneficiary of the bond cashes it.

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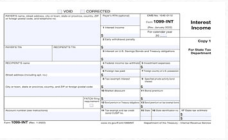
But there is an important exception that allows accrued bond interest to be reported on the decedent's final Form 1040, using a Sec. 454(a) election, which often saves tax over what the child beneficiaries' marginal tax rate would be if they reported all the interest when cashing the bonds.

To comply with the exception takes some planning. First, all the interest accrued through the decedent's date of death is reported on the decedent's final Form 1040. After that, the beneficiaries should cash the bonds. The beneficiaries will receive Forms 1099-INT, Interest Income, for the interest they receive, which may be more than the interest already reported by the decedent if interest continues to accrue on the bonds.



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21

Allocation pre and post-death income

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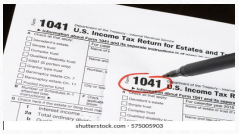
Thought should be given to allocating only the income earned prior to death to the decedent's Form 1040. Any post-death earnings should be reported either on a Form 1041 for the estate or on the beneficiary's return, if it is an asset that is titled to transfer immediately on death. Consider whether the post-death earnings will be reportable by a surviving spouse who is filing jointly with the decedent anyway. Consider moving post-death income to Form 1041 to allow expenses incurred after death, or administrative expenses incurred by reason of the death, to offset this post-death income; and consider whether the cost to prepare the Form 1041 to use expenses to offset the income is justified.



Selecting a Tax Year (and the §645 Election)

Upon the death of the grantor, grantor trust status terminates, and all pre-death trust activity must be reported on the grantor's final income tax return. The once-revocable grantor trust will now be considered a separate taxpayer, with its own income tax reporting responsibility. Sec. 644(a) states that the tax year of any trust (other than trusts exempt from tax and charitable trusts) must be the calendar year.

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22

One of the tax planning tools available to executors, estates and non-grantor trusts is the 663(b) election, also known as the "65-day rule." Simply put, a 663(b) election allows distributions made to beneficiaries within 65 days of year-end to be counted as prior-year distributions.

The tax brackets for estates and non-grantor trusts are 0%, 15%, 25%, 28%, 33% and 39.6%, similar to individuals. The major difference between estates and trusts and individuals is that estates and trusts reach the maximum tax bracket of 39.6% once their taxable income is over $12,400, compared to $431,900 for a couple married filing jointly (MFJ).

Net investment income tax may also be imposed on estates and trusts that have undistributed net investment income and adjusted gross income exceeding $12,400 vs. $431,900 for a couple MFJ.

As a result of these compressed tax brackets, fiduciaries of estates and trusts may want to shift the income from the estates/trusts that are in a high tax bracket to beneficiaries in a lower tax bracket.

Fiduciaries achieve this shifting of income through the mechanism of distributions to beneficiaries. This mechanism in effect flows some or all of the trust income from the trust to the K-1s of beneficiaries who, in turn, report the income on their 1040 form.

The maximum amount of distributions covered by the election is limited to the greater of (1) fiduciary accounting income for the tax year for which the election is made, or (2) distributable net income (DNI).

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B. Tax Deadlines and Extensions


New York State Estate Tax Return ET-706

Form 1040 or 1041

In most cases, the return is due on April 15 of the year following the year of death.

Form 706

Form ET 706 is to be filed within 9 months of death. An extension of 6 months may be obtained, but the estimated payment must be made.

Alternate Valuation dates

The estate can be valued as of the date of death or on the 6 month anniversary of the death.

Because fiduciaries have 65 days after year-end to make 663(b) election distributions, fiduciaries are afforded some flexibility as to the timing of the distributions. They are sometimes able to wait until 1099s are actually issued to determine if a distribution under IRC 663(b) is indeed beneficial.

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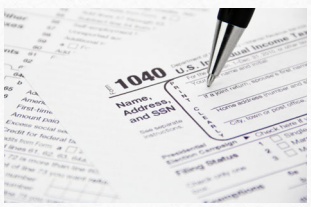
C. Essential Tax Forms and Returns

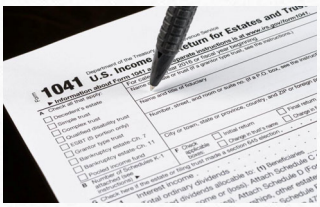
Where is it Taxable? Form 1040 vs. 1041

- Form 1040. It is the executor's responsibility to file final tax return for all taxes from January 1 through the date of death. In most cases, the return is due on April 15 of the year following the year of death. If the decedent has a surviving spouse, the final 1040 can be filed as a joint return using the decedent's income and deductions up to the date of death and the surviving spouse's income and deductions for the entire year use the individual's social security number.

- Form 1041. Not only does the executor have to file the decedent's final income taxes, but the executor will also need to file an income tax return for the estate itself. Form 1041, U.S. Income Tax Return for Estates and Trusts, covers any income generated by the decedent's holdings after death. This form is only required for estates with an annual gross income above $600, so it does not apply to small estates and those that can be closed before $600 worth of income accumulates. Use the estate tax identification number.

Practice tip – File both returns even if tax is only owed on one.





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- Form 706. The federal estate tax return is filed on Form 706, United States Estate Tax Return, and only applies to estates valued at $12,920,000 or more (as of 2023). However, estates below the threshold may end up owing tax if the decedent made sizable gifts to relatives and friends prior to death. If so, the excess over the threshold may be subject to a 40% federal estate tax.

- Practice tip – You want to file even if nothing is owed to protect portability and the value of assets. Sometimes you need to calculate the benefit in a step up in basis or estate tax valuation which can be in 6 months.

- Form 56. You will have to notify the IRS that you will be handling all tax matters on behalf of the estate and the decedent using Form 56, Notice Concerning Fiduciary Relationship.

- State tax forms. New York imposes a state estate tax on larger estates, starting at 3.06% for the first $500,000 and reaching 16%. New York estate tax may be levied when someone dies as a resident of the state, or if someone dies owning property that is physically located in New York. Be aware of the New York State Cliff.

New York has an estate tax "cliff" which means that if an estate exceeds 105% of the New York estate tax exemption then the estate will receive no exemption. The top estate tax rate in New York is 16%. The 2022 New York exemption is $6,110,000. The 105% calculation makes it $6,415,500. Beware.

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D. <u>Deductions and Exemptions</u>

1. Medical Expenses

Medical expenses can be deducted on the final Form 1040 or as a debt on the federal estate return, Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, wherever the greatest benefit is derived. When they are deducted on Form 1040, any expense paid that year can be deducted, whether it was paid before or after death.

The medical expenses that are eligible for deduction on Form 706 are the ones paid only after the date of death. Medical expenses cannot be deducted on Form 1041.

2. Funeral and Burial Expense

Funeral expenses are not tax deductible for individuals, and they are only tax exempt for estates that pay estate tax. For this reason, most cannot claim tax deductions. Plus, the values of estates that have to pay federal or state taxes are very high, so claiming funeral expenses is fairly uncommon.

Which funeral expenses are tax deductible?

Only estates can claim tax write-offs for funeral costs, not individuals. There are several costs that qualify, including:

- Embalming or cremation
- Casket or urn
- Funeral home facility costs

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- Funeral home director fees
- Funeral service arrangements costs, including floral and catering services.
- Transportation costs for the deceased and their immediate family members, including hearse and limousine services
- Minister, rabbi or other religious leader eulogy fees
- Burial plot
- Burial (interment)
- Green burials
- Tombstone, gravestone, or other grave marker

You can deduct expenses paid with estate funds. You cannot claim costs paid by the executor, the next of kin, or a burial or funeral insurance policy.

Keep receipts to prove the estate paid these fees. This way, you will not run into any problems if you are audited by the IRS.

Note that the IRS may not accept all of your requested write-offs. Funerals cost an average of about $9,000 so the IRS may not honor every claim for more expensive funeral service and receptions.

Funeral Expenses that Are Not Tax Deductible

Some funeral costs are personal expenses. They are not eligible for tax deductions by the estate, and individuals cannot claim them on personal tax returns. These include:

- Travel expenses for funeral guests
- Costs paid by a final expense insurance policy
- Fees paid by government programs or other grants, such as burial benefits paid by the Veterans Administration (VA) or the Social Security Lump Sum Death Benefit

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3. Other Expenses

(a) In general. The amounts deductible from a decedent's gross estate as "administration expenses" of the first category (see paragraphs (a) and (c) of § 20.2053–1) are limited to such expenses as are actually and necessarily, incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts, and distribution of property to the persons entitled to it. The expenses contemplated in the law are such only as attend the settlement of an estate and the transfer of the property of the estate to individual beneficiaries or to a trustee, whether the trustee is the executor or some other person. Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions. Administration expenses include (1) executor's commissions; (2) attorney's fees; and (3) miscellaneous expenses. Each of these classes is considered separately in paragraphs (b) through (d) of this section.

(b) Executor's commissions. (1) Executors' commissions are deductible to the extent permitted by § 20.2053–1 and this section, but no deduction may be taken if no commissions are to be paid. In addition, the amount of the commissions claimed as a deduction must be in accordance with the usually accepted standards and practice of allowing such an amount in estates of similar size and character in the jurisdiction in which the estate is being administered, or any deviation from the usually accepted standards or range of amounts (permissible under applicable local law) must be justified to the satisfaction of the Commissioner.

(2) A bequest or devise to the executor in lieu of commissions is not deductible. If, however, the terms of the will set forth the compensation payable to the executor for services to be rendered in the administration of the estate, a deduction may be taken to the extent that the amount so fixed does not exceed the compensation allowable by the local law or practice and to the extent permitted by § 20.2053–1.

(3) Except to the extent that a trustee is in fact performing services with respect to property subject to claims which would normally be performed by an executor, amounts paid as trustees' commissions do not constitute expenses of administration under the first category, and are only deductible as expenses of the second category to the extent provided in § 20.2053–8.

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(c) Attorney's fees—(1) Attorney's fees are deductible to the extent permitted by § 20.2053–1 and this section. Further, the amount of the fees claimed as a deduction may not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate, the law and practice in the jurisdiction in which the estate is being administered, and the skill and expertise of the attorneys.

(2) A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time the deficiency is contested or the refund claim is prosecuted. A deduction for reasonable attorney's fees actually incurred in contesting an asserted deficiency or in prosecuting a claim for refund will be allowed to the extent permitted by § 20.2053–1 even though the deduction, as such, was not claimed on the estate tax return or in the claim for refund. A deduction for these fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

(3) Attorneys' fees incurred by beneficiaries incident to litigation as to their respective interests are not deductible if the litigation is not essential to the proper settlement of the estate within the meaning of paragraph (a) of this section. An attorney's fee not meeting this test is not deductible as an administration expense under section 2053 and this section, even if it is approved by a probate court as an expense payable or reimbursable by the estate.

(d) Miscellaneous administration expenses. (1) Miscellaneous administration expenses include such expenses as court costs, surrogates' fees, accountants' fees, appraisers' fees, clerk hire, etc. Expenses necessarily incurred in preserving and distributing the estate, including the cost of storing or maintaining property of the estate if it is impossible to effect immediate distribution to the beneficiaries, are deductible to the extent permitted by § 20.2053–1. Expenses for preserving and caring for the property may not include outlays for additions or improvements; nor will such expenses be allowed for a longer period than the executor is reasonably required to retain the property.

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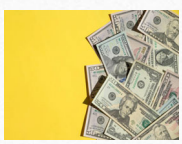
(2) Expenses for selling property of the estate are deductible to the extent permitted by § 20.2053–1 if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution. The phrase "expenses for selling property" includes brokerage fees and other expenses attending the sale, such as the fees of an auctioneer if it is reasonably necessary to employ one. Where an item included in the gross estate is disposed of in a bona fide sale (including a redemption) to a dealer in such items at a price below its fair market value, for purposes of this paragraph there shall be treated as an expense for selling the item whichever of the following amounts is the lesser: (i) The amount by which the fair market value of the property on the applicable valuation date exceeds the proceeds of the sale, or (ii) the amount by which the fair market value of the property on the date of the sale exceeds the proceeds of the sale. The principles used in determining the value at which an item of property is included in the gross estate shall be followed in arriving at the fair market value of the property for purposes of this paragraph. See §§ 20.2031–1 through 20.2031–9. (3) Expenses incurred in defending the estate against claims described in section 2053(a)(3) are deductible to the extent permitted by § 20.2053–1 if the expenses are incurred incident to the assertion of defenses to the claim available under the applicable law, even if the estate ultimately does not prevail. For purposes of this paragraph (d)(3), "expenses incurred in defending the estate against claims" include costs relating to the arbitration and mediation of contested issues, costs associated with defending the estate against claims (whether or not enforceable), and costs associated with reaching a negotiated settlement of the issues.

(e) Effective/applicability date. This section applies to the estates of decedents dying on or after October 20, 2009.



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E. Income Tax and Basis Adjustment for Decedent's Assets

Combined with

F. Real Property Tax Considerations

There are additional tax considerations that must be kept in mind when dealing with real estate. When property is sold for more money than its "cost basis," the seller must pay capital gains tax on that profit. The cost basis is typically the amount for which it was purchased plus certain improvements made to the property.

Step-up in cost basis

If property is gifted, the recipient takes the cost basis of the donor. So, for example, if dad purchased a house in 1975 for $50,000 and sells it in 2020 for $500,000, he's achieved a taxable capital gain of $450,000. If he gives the house as a gift to his daughter in 2020 and she sells it in 2022 for $500,000, she has also achieved a taxable capital gain of $450,000. Her cost basis was the same as her father's because she received the property as a gift. This is known as a "carryover" cost basis. On the other hand, if a person dies while owning property, the cost basis in the hands of the heir becomes the date of death value. So, if dad dies in 2020 when the house is worth $500,000 and his daughter sells the property in 2022 for $500,000, she need not report any capital gain. Her cost basis is the date of death value of the house, or $500,000. Since the sale price was also $500,000, there is no capital gain. This is known as a "step-up" in cost basis. On the other hand, if a person dies while owning property, the cost basis in the hands of the heir becomes the date of death value. So, if dad dies in 2020 when the house is worth $500,000 and his daughter sells the property in 2022 for $500,000, she need not report any capital gain. Her cost basis is the date of death value of the house, or $500,000. Since the sale price was also $500,000, there is no capital gain. This is known as a "step-up" in cost basis.

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This is an excellent reason NOT to gift appreciated real estate to one's children. However, it is possible to gift the appreciated real estate to a trust and maintain the step-up in cost basis. That is because, if the property is considered part of the taxable estate of the deceased donor, the property still gets the benefit of the step-up in cost basis. So, if instead of gifting the property to his daughter outright, dad placed the property into a trust for his daughter's eventual benefit but that was considered part of his taxable estate, and then died in 2020, his daughter's cost basis in the property would be $500,000. We can ensure that the trust is considered part of dad's taxable estate through the rules of section 2036 or 2038. For example, we might give dad the right to live in the house for the rest of his life or the right to change beneficiaries upon his death. Either would cause the house to be considered part of his taxable estate for estate tax purposes. Therefore, it would also suffice to ensure the benefit of the step-up in cost basis.

Section 121 Exemption

While selling a house at a profit typically requires the realization of the capital gain, Section 121 of the Internal Revenue Code allows a capital gains exemption of up to $250,000 for an individual or $500,000 for a married couple if the home was his (or their) personal residence. So, if married couple purchased their personal residence in 1970 for $40,000 and sell it in 2019 for $540,000, they will not have to pay a dime in capital gains tax. If they gift the home to their children and the home is sold, they lose this exemption because the home is no longer the personal residence of the owners.

Instead, a married couple can transfer the home to a trust for the eventual benefit of their children. Because the Internal Revenue Code considers assets in a "grantor trust" to be the grantors' for income tax purposes and because capital gains tax is a type of income tax, a home in a grantor trust where the grantors are the occupiers of the residence, does receive the benefit of the Section 121 exemption. Therefore, where the home is appreciated real estate and the purchasers are living in the home, it is important to ensure that the trust to which they gift it is considered a grantor trust. Careful reading of Sections 674 and 675 of the Internal Revenue Code can suggest manners in which to ensure that the trust is a grantor trust. One frequently used option is to give the grantor the authority to reacquire trust assets by substituting other property of equivalent value, which makes the trust a grantor trust under Section 675(4).

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Property Tax Exemptions

Many state property tax programs allow for property tax relief for owner occupied residences, and many provide additional benefits for seniors who reside in their own homes. A common feature to these programs requires that the house be the primary residence of the owner. By gifting the family home to children or other heirs, a person can lose eligibility for this benefit.

A reliable way to keep this benefit is to gift the assets to a trust, but ensure that the trust and the deed by which the house is transferred to the trust states that the grantor retains a "life estate," or at least the right to live in the house for the rest of his or her life. This can allow the trust object is to be accomplished while maintaining the owner-occupied property tax exemption.

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IV. Tax Issues in Probate Administration

A. State and Federal Tax Considerations

The executor is responsible for paying any outstanding taxes owed by the estate and any taxes owed by the decedent. The most common taxes are the estate tax (top rate of 40%) and income tax although there can be other taxes including foreign taxes, and excise taxes which are the executor's responsibility as well.

While the current federal estate tax exemption limits estate tax to estates over $12,920,000 (2023) with portability and the reduction of the exemption in 2026 every estate with assets and a surviving spouse should file estate tax returns even if nothing is due. If the first spouse does not file the value of portability could be lost.

Additionally, State estate tax requirements differ from state to state but have lower exemptions than the federal exemption.

Final Income Tax Return of the Decedent and Decedent's Delinquent Taxes

Upon decedent's death often times a new set of professionals get involved. However, I often look to the decedent's accountant to get involved as they are most familiar with decedent's assets. Some actions that may be done include:

Stop making estimated tax payments

Once a taxpayer dies, he or she is no longer required to make estimated tax payments. Unaware family members often continue to submit the decedent's quarterly estimated tax vouchers, which is not necessary and may require taking funds out of an investment portfolio, where they could otherwise be growing and earning income until the tax is due.

Not only does Regs. Sec. 1.6654-2(e)(7) indicate no joint estimated tax payments can be made after death and the estate has no liability to make further payments, decedent's death ends decedent's reporting period and it is now the estate's responsibility. The decedent's tax year ends on the date of death, so only income received through that date is reportable on the final Form 1040. If the deceased taxpayer was paying an amount each quarter to cover the expected tax liability for that quarter, he or she would no longer need to make those payments after the tax year ends. Remember that the surviving spouse may need to make estimated payments for their own tax liability.

Even if the deceased taxpayer was taking advantage of the prior-year-tax safe harbor in making estimated tax payments and the Form 1040 ends up with a balance due later on, the tax preparer can eliminate filing the Form 2210, Underpayment of Estimated Tax by Individuals, Estates, and Trusts.

Who signs the form and gets the refund?

A surviving spouse filing a joint return can continue to do so. He or she will just sign as the surviving spouse. If an executor has been appointed by a court to administer the decedent's affairs, that executor or personal representative should sign the return and attach a copy of the certificate that shows the official appointment.

If the return shows an overpayment of tax, and it is not a joint return with the surviving spouse, or there is no court-appointed executor or personal representative, Form 1310, Statement

of Person Claiming Refund Due a Deceased Taxpayer, will need to be filed with the return to obtain a refund.

Practice tip – This may require filing for probate where it had not previously been necessary.

A surviving spouse can file a joint return

Yes, a surviving spouse can file a joint return with the decedent for the year of death. Depending on the relative earnings of each spouse, the joint tax rate tables may yield the greatest benefit.

However, if the decedent incurred significant medical expenses during his or her last illness and passed away early enough in the year to be reporting substantially less income, consider filing separately if it would save tax by allowing medical expenses to exceed the adjusted gross income threshold for deduction and create a better overall result for the surviving spouse and family.

Some decedents have savings bonds that have accrued interest rolled into them when earlier issues of bonds were converted to later issues, and many types of bonds accrue interest until maturity. That accrued interest, which usually has never been taxed, will be taxed when the beneficiary of the bond cashes it.

But there is an important exception that allows accrued bond interest to be reported on the decedent's final Form 1040, using a Sec. 454(a) election, which often saves tax over what the child beneficiaries' marginal tax rate would be if they reported all the interest when cashing the bonds.

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Allocation pre and post-death income

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The 1099's include activity that occurred after the date of death and may include sales of securities whose basis has not been adjusted to date-of-death values.

Thought should be given to allocating only the income earned prior to death to the decedent's Form 1040. Any post-death earnings should be reported either on a Form 1041 for the estate or on the beneficiary's return, if it is an asset that is titled to transfer immediately on death. Consider whether the post-death earnings will be reportable by a surviving spouse who is filing jointly with the decedent anyway. Consider moving post-death income to Form 1041 to allow expenses incurred after death, or administrative expenses incurred by reason of the death, to offset this post-death income; and consider whether the cost to prepare the Form 1041 to use expenses to offset the income is justified.

Selecting a Tax Year (and the §645 Election)

Upon the death of the grantor, grantor trust status terminates, and all pre-death trust activity must be reported on the grantor's final income tax return. The once-revocable grantor trust will now be considered a separate taxpayer, with its own income tax reporting responsibility. Sec. 644(a) states that the tax year of any trust (other than trusts exempt from tax and charitable trusts) must be the calendar year.

An often overlooked yet important distinguishing factor applicable to an estate is its ability to elect a fiscal year other than a calendar year. Electing a fiscal year end may afford the estate or beneficiaries a tax-deferral opportunity and provide the executor with additional time to organize the estate's affairs. This can be especially advantageous when the decedent dies during the latter part of the calendar year.

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Alternate Valuation dates

The estate can be valued as of the date of death or on the 6 month anniversary of the death.

Because fiduciaries have 65 days after year-end to make 663(b) election distributions, fiduciaries are afforded some flexibility as to the timing of the distributions. They are sometimes able to wait until 1099s are actually issued to determine if a distribution under IRC 663(b) is indeed beneficial.

C. Essential Tax Forms and Returns

Where is it Taxable? Form 1040 vs. 1041

- Form 1040. It is the executor's responsibility to file final tax return for all taxes from January 1 through the date of death. In most cases, the return is due on April 15 of the year following the year of death. If the decedent has a surviving spouse, the final 1040 can be filed as a joint return using the decedent's income and deductions up to the date of death and the surviving spouse's income and deductions for the entire year use the individual's social security number.

- Form 1041. Not only does the executor have to file the decedent's final income taxes, but the executor will also need to file an income tax return for the estate itself. Form 1041, U.S. Income Tax Return for Estates and Trusts, covers any income generated by the decedent's holdings after death. This form is only required for estates with an annual gross income above $600, so it does not apply to small estates and those that can be closed before $600 worth of income accumulates. Use the estate tax identification number.

Practice tip – File both returns even if tax is only owed on one.

- Form 706. The federal estate tax return is filed on Form 706, United States Estate Tax Return, and only applies to estates valued at $12,920,000 or more (as of 2023). However, estates below the threshold may end up owing tax if the decedent made sizable gifts to relatives and friends prior to death. If so, the excess over the threshold may be subject to a 40% federal estate tax.

- Practice tip – You want to file even if nothing is owed to protect portability and the value of assets. Sometimes you need to calculate the benefit in a step up in basis or estate tax valuation which can be in 6 months.

- Form 56. You will have to notify the IRS that you will be handling all tax matters on behalf of the estate and the decedent using Form 56, Notice Concerning Fiduciary Relationship.

- State tax forms. New York imposes a state estate tax on larger estates, starting at 3.06% for the first $500,000 and reaching 16%. New York estate tax may be levied when someone dies as a resident of the state, or if someone dies owning property that is physically located in New York. Be aware of the New York State Cliff.

New York has an estate tax "cliff" which means that if an estate exceeds 105% of the New York estate tax exemption then the estate will receive no exemption. The top estate tax rate in New York is 16%. The 2022 New York exemption is $6,110,000. The 105% calculation makes it $6,415,500. Beware.

D. <u>Deductions and Exemptions</u>

1. Medical Expenses

Medical expenses can be deducted on the final Form 1040 or as a debt on the federal estate return, Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, wherever the greatest benefit is derived. When they are deducted on Form 1040, any expense paid that year can be deducted, whether it was paid before or after death.

The medical expenses that are eligible for deduction on Form 706 are the ones paid only after the date of death. Medical expenses cannot be deducted on Form 1041.

2. Funeral and Burial Expense

Funeral expenses are not tax deductible for individuals, and they are only tax exempt for estates that pay estate tax. For this reason, most cannot claim tax deductions. Plus, the values of estates that have to pay federal or state taxes are very high, so claiming funeral expenses is fairly uncommon.

Which funeral expenses are tax deductible?

Only estates can claim tax write-offs for funeral costs, not individuals. There are several costs that qualify, including:

- Embalming or cremation
- Casket or urn
- Funeral home facility costs

- Funeral home director fees
- Funeral service arrangements costs, including floral and catering services.
- Transportation costs for the deceased and their immediate family members, including hearse and limousine services
- Minister, rabbi or other religious leader eulogy fees
- Burial plot
- Burial (interment)
- Green burials
- Tombstone, gravestone, or other grave marker

You can deduct expenses paid with estate funds. You cannot claim costs paid by the executor, the next of kin, or a burial or funeral insurance policy.

Keep receipts to prove the estate paid these fees. This way, you will not run into any problems if you are audited by the IRS.

Note that the IRS may not accept all of your requested write-offs. Funerals cost an average of about $9,000 so the IRS may not honor every claim for more expensive funeral service and receptions.

Funeral Expenses that Are Not Tax Deductible

Some funeral costs are personal expenses. They are not eligible for tax deductions by the estate, and individuals cannot claim them on personal tax returns. These include:

- Travel expenses for funeral guests
- Costs paid by a final expense insurance policy
- Fees paid by government programs or other grants, such as burial benefits paid by the Veterans Administration (VA) or the Social Security Lump Sum Death Benefit

3. Other Expenses

(a) In general. The amounts deductible from a decedent's gross estate as "administration expenses" of the first category (see paragraphs (a) and (c) of § 20.2053–1) are limited to such expenses as are actually and necessarily, incurred in the administration of the decedent's estate; that is, in the collection of assets, payment of debts, and distribution of property to the persons entitled to it. The expenses contemplated in the law are such only as attend the settlement of an estate and the transfer of the property of the estate to individual beneficiaries or to a trustee, whether the trustee is the executor or some other person. Expenditures not essential to the proper settlement of the estate, but incurred for the individual benefit of the heirs, legatees, or devisees, may not be taken as deductions. Administration expenses include (1) executor's commissions; (2) attorney's fees; and (3) miscellaneous expenses. Each of these classes is considered separately in paragraphs (b) through (d) of this section.

(b) Executor's commissions. (1) Executors' commissions are deductible to the extent permitted by § 20.2053–1 and this section, but no deduction may be taken if no commissions are to be paid. In addition, the amount of the commissions claimed as a deduction must be in accordance with the usually accepted standards and practice of allowing such an amount in estates of similar size and character in the jurisdiction in which the estate is being administered, or any deviation from the usually accepted standards or range of amounts (permissible under applicable local law) must be justified to the satisfaction of the Commissioner.

(2) A bequest or devise to the executor in lieu of commissions is not deductible. If, however, the terms of the will set forth the compensation payable to the executor for services to be rendered in the administration of the estate, a deduction may be taken to the extent that the amount so fixed does not exceed the compensation allowable by the local law or practice and to the extent permitted by § 20.2053–1.

(3) Except to the extent that a trustee is in fact performing services with respect to property subject to claims which would normally be performed by an executor, amounts paid as trustees' commissions do not constitute expenses of administration under the first category, and are only deductible as expenses of the second category to the extent provided in § 20.2053–8.

(c) Attorney's fees—(1) Attorney's fees are deductible to the extent permitted by § 20.2053–1 and this section. Further, the amount of the fees claimed as a deduction may not exceed a reasonable remuneration for the services rendered, taking into account the size and character of the estate, the law and practice in the jurisdiction in which the estate is being administered, and the skill and expertise of the attorneys.

(2) A deduction for attorneys' fees incurred in contesting an asserted deficiency or in prosecuting a claim for refund should be claimed at the time the deficiency is contested or the refund claim is prosecuted. A deduction for reasonable attorney's fees actually incurred in contesting an asserted deficiency or in prosecuting a claim for refund will be allowed to the extent permitted by § 20.2053–1 even though the deduction, as such, was not claimed on the estate tax return or in the claim for refund. A deduction for these fees shall not be denied, and the sufficiency of a claim for refund shall not be questioned, solely by reason of the fact that the amount of the fees to be paid was not established at the time that the right to the deduction was claimed.

(3) Attorneys' fees incurred by beneficiaries incident to litigation as to their respective interests are not deductible if the litigation is not essential to the proper settlement of the estate within the meaning of paragraph (a) of this section. An attorney's fee not meeting this test is not deductible as an administration expense under section 2053 and this section, even if it is approved by a probate court as an expense payable or reimbursable by the estate.

(d) Miscellaneous administration expenses. (1) Miscellaneous administration expenses include such expenses as court costs, surrogates' fees, accountants' fees, appraisers'

fees, clerk hire, etc. Expenses necessarily incurred in preserving and distributing the estate, including the cost of storing or maintaining property of the estate if it is impossible to effect immediate distribution to the beneficiaries, are deductible to the extent permitted by § 20.2053–1. Expenses for preserving and caring for the property may not include outlays for additions or improvements; nor will such expenses be allowed for a longer period than the executor is reasonably required to retain the property.

(2) Expenses for selling property of the estate are deductible to the extent permitted by § 20.2053–1 if the sale is necessary in order to pay the decedent's debts, expenses of administration, or taxes, to preserve the estate, or to effect distribution. The phrase "expenses for selling property" includes brokerage fees and other expenses attending the sale, such as the fees of an auctioneer if it is reasonably necessary to employ one. Where an item included in the gross estate is disposed of in a bona fide sale (including a redemption) to a dealer in such items at a price below its fair market value, for purposes of this paragraph there shall be treated as an expense for selling the item whichever of the following amounts is the lesser: (i) The amount by which the fair market value of the property on the applicable valuation date exceeds the proceeds of the sale, or (ii) the amount by which the fair market value of the property on the date of the sale exceeds the proceeds of the sale. The principles used in determining the value at which an item of property is included in the gross estate shall be followed in arriving at the fair market value of the property for purposes of this paragraph. See §§ 20.2031–1 through 20.2031–9.
(3) Expenses incurred in defending the estate against claims described in section 2053(a)(3) are deductible to the extent permitted by § 20.2053–1 if the expenses are incurred incident to the assertion of defenses to the claim available under the applicable law, even if the estate ultimately does not prevail. For purposes of this paragraph (d)(3), "expenses incurred in defending the estate against claims" include costs relating to the arbitration and mediation of contested issues, costs associated with defending the estate against claims (whether or not enforceable), and costs associated with reaching a negotiated settlement of the issues.

(e) Effective/applicability date. This section applies to the estates of decedents dying on or after October 20, 2009.

E. <u>Income Tax and Basis Adjustment for Decedent's Assets</u>

Combined with

F. <u>Real Property Tax Considerations</u>

There are additional tax considerations that must be kept in mind when dealing with real estate. When property is sold for more money than its "cost basis," the seller must pay capital gains tax on that profit. The cost basis is typically the amount for which it was purchased plus certain improvements made to the property.

Step-up in cost basis

If property is gifted, the recipient takes the cost basis of the donor. So, for example, if dad purchased a house in 1975 for $50,000 and sells it in 2020 for $500,000, he's achieved a

taxable capital gain of $450,000. If he gives the house as a gift to his daughter in 2020 and she sells it in 2022 for $500,000, she has also achieved a taxable capital gain of $450,000. Her cost basis was the same as her father's because she received the property as a gift. This is known as a "carryover" cost basis. On the other hand, if a person dies while owning property, the cost basis in the hands of the heir becomes the date of death value. So, if dad dies in 2020 when the house is worth $500,000 and his daughter sells the property in 2022 for $500,000, she need not report any capital gain. Her cost basis is the date of death value of the house, or $500,000. Since the sale price was also $500,000, there is no capital gain. This is known as a "step-up" in cost basis. This is an excellent reason NOT to gift appreciated real estate to one's children. However, it is possible to gift the appreciated real estate to a trust and maintain the step-up in cost basis. That is because, if the property is considered part of the taxable estate of the deceased donor, the property still gets the benefit of the step-up in cost basis. So, if instead of gifting the property to his daughter outright, dad placed the property into a trust for his daughter's eventual benefit but that was considered part of his taxable estate, and then died in 2020, his daughter's cost basis in the property would be $500,000. We can ensure that the trust is considered part of dad's taxable estate through the rules of section 2036 or 2038. For example, we might give dad the right to live in the house for the rest of his life or the right to change beneficiaries upon his death. Either would cause the house to be considered part of his taxable estate for estate tax purposes. Therefore, it would also suffice to ensure the benefit of the step-up in cost basis.

Section 121 Exemption

While selling a house at a profit typically requires the realization of the capital gain, Section 121 of the Internal Revenue Code allows a capital gains exemption of up to $250,000 for an individual or $500,000 for a married couple if the home was his (or their) personal residence. So, if married couple purchased their personal residence in 1970 for $40,000 and sell it in 2019 for $540,000, they will not have to pay a dime in capital gains tax. If they gift the home to their children and the home is sold, they lose this exemption because the home is no longer the personal residence of the owners.

Instead, a married couple can transfer the home to a trust for the eventual benefit of their children. Because the Internal Revenue Code considers assets in a "grantor trust" to be the grantors' for income tax purposes and because capital gains tax is a type of income tax, a home in a grantor trust where the grantors are the occupiers of the residence, does receive the benefit of the Section 121 exemption. Therefore, where the home is appreciated real estate and the purchasers are living in the home, it is important to ensure that the trust to which they gift it is considered a grantor trust. Careful reading of Sections 674 and 675 of the Internal Revenue Code can suggest manners in which to ensure that the trust is a grantor trust. One frequently used option is to give the grantor the authority to reacquire trust assets by substituting other property of equivalent value, which makes the trust a grantor trust under Section 675(4).

Property Tax Exemptions

Many state property tax programs allow for property tax relief for owner occupied residences, and many provide additional benefits for seniors who reside in their own homes. A

common feature to these programs requires that the house be the primary residence of the owner. By gifting the family home to children or other heirs, a person can lose eligibility for this benefit.

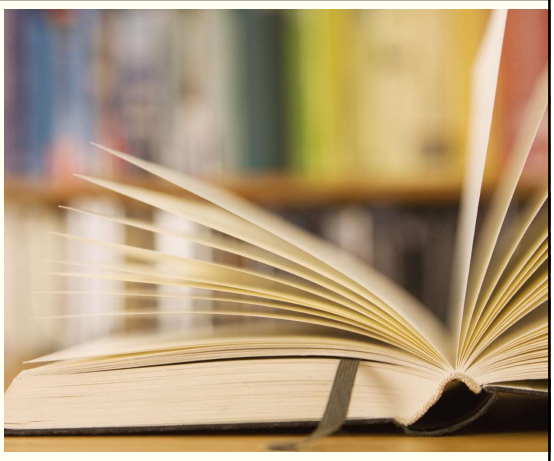
A reliable way to keep this benefit is to gift the assets to a trust, but ensure that the trust and the deed by which the house is transferred to the trust states that the grantor retains a "life estate," or at least the right to live in the house for the rest of his or her life. This can allow the trust object is to be accomplished while maintaining the owner-occupied property tax exemption.

Trust Taxation Issues

Submitted by Antar P. Jones

V: TRUST TAXATION ISSUES

New York Probate and Trust Administration
September 13, 2023
Antar P. Jones, Esq., LL.M (antar@antarlaw.com)



1

INTRODUCTION

(Free) Guides You Should Review.

- IRS Publication 559. Survivors, Executors and Administrators
- IRS Form 1041.
- Instructions to Form 1041.
- IRS Form 1040.
- Instructions to Form 1040
- IRS Form 706.
- Instructions to Form 706.

2

Tax Returns: Annual and Final

What is a trust?

- Created by will or inter vivos declaration
- Trustees take title to property
- To conserve for beneficiaries (who cannot share in or discharge of this responsibility)
- Beneficiaries not associates in joint enterprise for business or profit

3

Basic considerations for the taxation of trusts

Trust income taxed under Subchapter J of the IRC (Federally)

In NY, trust income taxed under New York Tax Law 601-607

4

Basic considerations for the taxation of trusts, 2

Fundamental Principle of Taxation of Trusts.

Basic principle =

- trusts are conduits, and that
- income should be paid once, either by the trust or by the beneficiary

Separate legal entity, generally (for federal tax purposes).

When Created? During an individual's life (*inter vivos*) or at the time of his or her death under a will (testamentary)

Grantor trusts. However, if the trust instrument contains certain provisions, then the person creating the trust is treated as the owner of the trust's assets

5

Determination of Income of a Trust

Trusts income: in much the same manner as an individual

Most deductions & credits allowed to individuals are also allowed to estates and trusts

Exception: a trust is allowed an income distribution deduction for distributions to beneficiaries

6

Distributable Net Income ("DNI")

DNI = Yardstick to measure how much a trust may deduct for distributions

7

DNI Calculations

DNI = taxable income with modifications

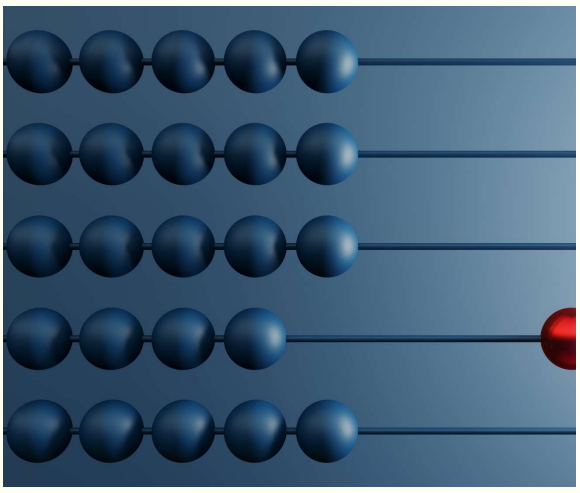
A)Distributions to beneficiaries are not deducted for calculating DNI.

B)Capital gains allocable to corpus and not distributed per IRC § 661 are excluded in calculating DNI.

C)For simple trusts, extraordinary dividends allocated to principal on good faith by fiduciary, are excluded.

D)Tax-exempt interest, reduced by allocated disbursements, are excluded.

Calculate distribution deductions on Schedule B of Form 1041.



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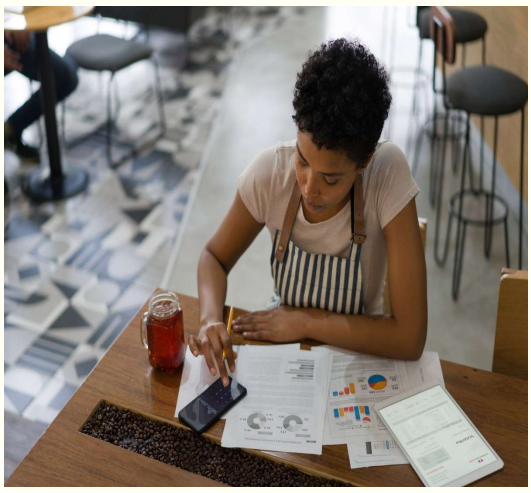
Trusts are “Pass-through” entities

- Trusts receive a distribution deduction on distributions to beneficiaries,
- Sometimes referred to as “pass-through" entities or “conduits”.
- The beneficiary, and not the trust, pays income tax on his or her distributive share of income.
- **Schedule K-1:** used to notify beneficiaries of the amounts to be included on their income tax returns
- **Character of Income:** same in hands of beneficiary as trust

9

Trustees are required to file Form 1041 for annual income



- WHO MUST FILE FORM 1041?
- WHEN TO FILE?
- WHERE TO FILE?
- WHO MUST SIGN?

10

Grantor Trusts

11

Grantor Trusts, *definition*

- **Definition:** A trust is a grantor trust if the grantor retains certain powers of ownership benefits, as described in the grantor trust rules.

12

Reporting Grantor Trusts

Example. The John Doe Trust is a grantor type trust. During the year, the trust sold 100 shares of ABC stock for $1,010 in which it had a basis of $10 and 200 shares of XYZ stock for $10 in which it had a $1,020 basis. The trust doesn't report these transactions on Form 1041. Instead, a schedule is attached to the Form 1041 showing each stock transaction separately and in the same detail as John Doe (grantor and owner) will need to report these transactions on his Form 8949, Sales and Other Dispositions of Capital Assets; and Schedule D (Form 1040). The trust doesn't net the capital gains and losses, nor does it issue John Doe a Schedule K-1 (Form 1041) showing a $10 long-term capital loss.

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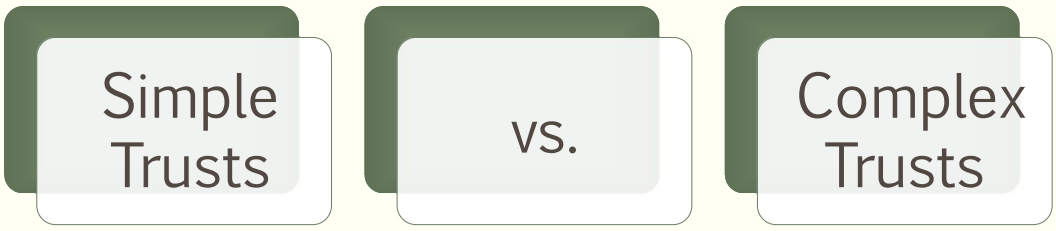
Tax Consequences of Trustee's Actions



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Simple Trusts

All income must be distributed currently.

Cannot accumulate income.

Don't make charitable distributions from income accumulated.

15

Simple Trusts, cont'd

Important case: Manufacturers Hanover Trust v. United States, 160 Ct. Cl. 582, 312 F.2d 785.

Distribution deduction limited to DNI.

Beneficiary includes income only up to DNI.

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Simple Trusts, cont'd 2

Example: Simple trust earns 20X but has DNI valued at 15X. Trust must distribute 20X but will be able to deduct 15X. The beneficiary will get 20X but will include 15X in his income. The remaining 5X will not be taxed.

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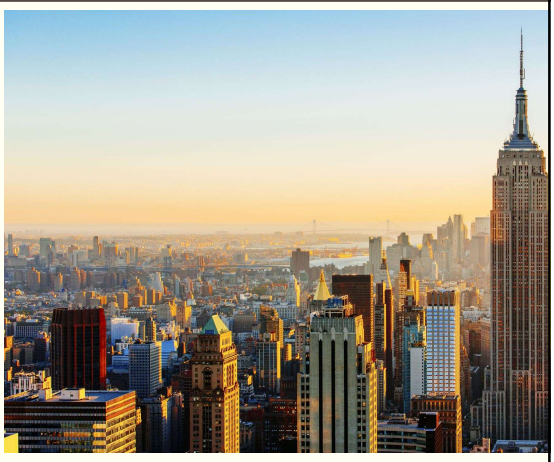
SIMPLE TRUSTS, 3

Notable case: Seligson v. Comm'r.



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Complex trusts

19

Complex Trusts

Trusts that are not simple trusts are complex trusts.

Accumulate income or set aside income for charitable purposes.

Use a two-tiered system where the first tier is for income required to be distributed currently, and the second tier is for income that has been accumulated and distributed during the tax year at issue.

DNI is first allocated to Tier 1, and remaining DNI allocated to Tier 2.

The trust's distribution deduction may not exceed DNI.

20

Charitable Distributions

21

Charitable Distributions

i. Trusts are entitled to a charitable deduction in the computation of gross income, and for gross income paid for charitable purposes per IRC § 642(c)(1).

ii. Distributions of corpus aren't deductible under IRC § 642(c), generally.

iii. Payments to charity need not be "actually paid of receipts during a particular tax year".

iv. Certain venerable trusts may permanently set aside money for chartable purposes. But trusts

22

Application of Rules

23

Rev Rul. 67-117 (Application of Rules)

Example 1.

A)Facts: Tr. with nontaxable stock dividend of $1,000 distributes said value in cash to beneficiary.

B)Outcome: Since the trust has no DNI, the beneficiary is not required to include in his gross income any amount of cash distributed to him.

24

Rev Rul. 67-117 (Application of Rules)

Example 2.

A)Facts: Same as above, but the trust also receives taxable interest of $3,000. The "income required to be distributed currently" = $4,000. The DNI = $3,000.

B)Outcome: Therefore, the amount deductible by the trust and includible in the gross income of the beneficiary is limited to $3,000. Consequently, the $1,000 in cash distributed in lieu of the stock dividend is not includible in the gross income of the beneficiary. The beneficiary must include income to the extent of DNI per IRC § 662.

25

Rev Rul. 67-117 (Application of Rules)

Example 3.

A)Facts. Trust instrument says trustee may accumulate or distribute income. In the taxable year, a nontaxable dividend having a FMV of $1,000 is received by the trust, which in turn, distributes $1,000 in cash to the beneficiary and retains the stock.

B)Outcome: since the trust has no DNI, the beneficiary is not required to include in his gross income any of the cash distributed to him.

26

Rev Rul. 67-117 (Application of Rules)

EXAMPLE 4

A) Facts:

1) Trust instrument says $1,000 is required to be paid annually out of income to beneficiary A.
2) The balance in the trustee's discretion may be accumulated or distributed to beneficiary B.
3) The trust had the following items of income and no expenses:
   - Taxable interest: $2,000
   - Nontaxable stock dividend worth $1,000
   - Total income under state law $3,000
4) During the taxable year, trustee distributes $1,000 in cash to A, and $500 to B.
5) DNI under 643 is $2,000.

A) Outcome:

6) Per IRC § 661(a)(1) and (2), $1,500 is deductible by the trust.
7) $1,000 is includible in the gross income of A and $500 in the gross income of B.
8) Trust's taxable income after deducting $100 for a personal exemption under IRC § 642(b)(2)(A) is $400.

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Bequests

a. General rule.

Gross income [received by a beneficiary] does not include the value of property acquired by gift, bequest, devise or inheritance.

Exception. However, income from property acquired by gift, bequest, devise or inheritance is gross income (of the beneficiary).

- Thus, principal distributed per bequest is not income.
- But income, is income.

- Statute: IRC § 102(a).

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Tax treatment of gifts or bequests

No deduction for trusts for gifts or bequests and not included as income to beneficiary when:

- Gift or bequest is of a specific sum of money;
- Which is request by specific terms of the trust instrument; and
- is properly paid or credited to a beneficiary.

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To qualify as a gift or bequest

i. It must qualify as a gift or bequest of specific sum of money or of specific property; and

ii. The ***terms of the governing instrument must not provide for its payment in more than three installments... .*** (The date when the trust was created is immaterial).

iii. Also, the gift must be ascertainable per date of inception.

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Practical Application (gifts or bequest)

Example: Under the terms of a trust instrument, trust income is to be accumulated for a period of 10 years. During the eleventh year, the trustee is to distribute $10,000 to B, payable from income or corpus, and $10,000 to C, payable out of accumulated income. The trustee is to distribute the balance of the accumulated income to A. Thereafter, A is to receive all the current income until the trust terminates. Only the distribution to B would qualify for the exclusion [for bequests] under IRC § 663(a)(1). **The reason is because B received a gift—it was specific and ascertainable**.

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In-kind distributions in lieu of cash

Rule: If the trust is a simple trust that requires that the trust distributes currently, and the trust distributes property in lieu of cash, the trust shall be treated as having sold the property for its fair market value on the date of distribution.

- Gain or loss will be recognized to the trust.
- Basis of the property in the hands of the beneficiary shall be what the beneficiary paid for it under IRC § 1012.
- Dispositive case: Kenan v. Comm'r
- **Pitfall:** If trust is a simple trust and distributes in-kind property more valuable than income earned during the year, the simple trust may receive complex trust treatment.

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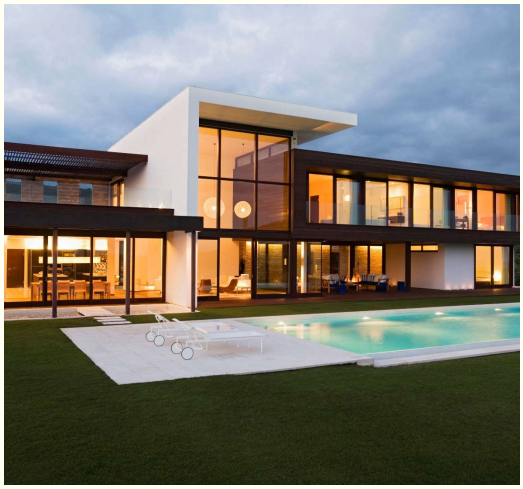
Real Property Taxes



Question: can a trust [or an estate] deduct real estate taxes?

- Probably yes, subject to a maximum deduction of $10,000.
- IRC § 164(b)(6)—limitation imposes by the TCJA and covers trusts from after 12/31/2017 and before 1/1/2026.
- Support for or against this explanation is tortured.
- **Practice tip:** get conservative professional advice.

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Estate and Generation Skipping Taxes

- **Federal exemption amount = $12,920,000 for decedents dying in 2023.**
- Using **Deceased Unused Exemption Amount (DSUE)** can double exemption amt for 2d spouse to die.
- Cf. "Marital Deduction"
- Exemption amt calculated per the "gross estate."
- "Gross Estate" = all property, real or personal, tangible or intangible, wherever situated
- "Gross Estate" will include value of property in revocable trusts settled by Decedent.
- Life Insurance Policies are part of the gross estate.
- Value of real estate (*not* subtracting mortgage) is part of the gross estate.

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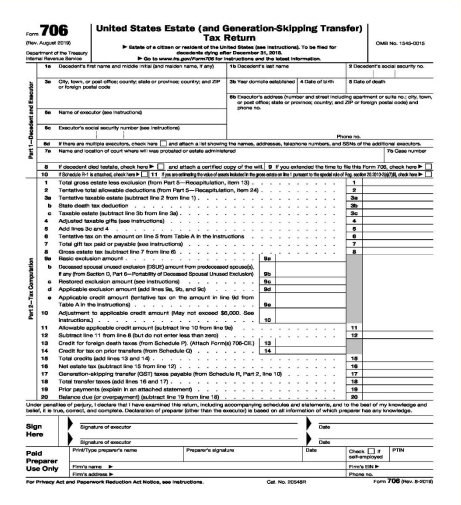
Estate and Generation Skipping Taxes



Form **706** (Rev. August 2019)

United States Estate (and Generation-Skipping Transfer) Tax Return

► Estate of a citizen or resident of the United States (see instructions). To be filed for decedents dying after December 31, 2018.

► Go to www.irs.gov/Form706 for instructions and the latest information.

Department of the Treasury
Internal Revenue Service

OMB No. 1545-0015

Part 1—Decedent and Executor

1a	Decedent's first name and middle initial (and maiden name, if any)	1b Decedent's last name	2 Decedent's social security no.
3a	City, town, or post office; county; state or province; country; and ZIP or foreign postal code	3b Year domicile established	4 Date of birth	5 Date of death
		6b Executor's address (number and street including apartment or suite no.; city, town, or post office; state or province; country; and ZIP or foreign postal code) and phone no.
6a	Name of executor (see instructions)	
6c	Executor's social security number (see instructions)	Phone no.

6d If there are multiple executors, check here ☐ and attach a list showing the names, addresses, telephone numbers, and SSNs of the additional executors.

7a Name and location of court where will was proved or estate administered | 7b Case number

8 If decedent died testate, check here ► ☐ and attach a certified copy of the will. 9 If you extended the time to file this Form 706, check here ► ☐

10 If Schedule R-1 is attached, check here ► ☐ 11 If an estimate for the value of assets included in the gross estate or like / pursuant to the special rule of Reg. section 20.2010-2(a)(7)(ii), check here ► ☐

Part 2—Tax Computation

1	Total gross estate less exclusion (from Part 5—Recapitulation, item 13)			1
2	Tentative total allowable deductions (from Part 5—Recapitulation, item 24)			2
3a	Tentative taxable estate (subtract line 2 from line 1)			3a
b	State death tax deduction			3b
c	Taxable estate (subtract line 3b from line 3a)			3c
4	Adjusted taxable gifts (see instructions)			4
5	Add lines 3c and 4			5
6	Tentative tax on the amount on line 5 from Table A in the instructions			6
7	Total gift tax paid or payable (see instructions)			7
8	Gross estate tax (subtract line 7 from line 6)			8
9a	Basic exclusion amount	9a		
b	Deceased spousal unused exclusion (DSUE) amount from predeceased spouse(s), if any (from Section D, Part 6—Portability of Deceased Spousal Unused Exclusion)	9b		
c	Restored exclusion amount (see instructions)	9c		
d	Applicable exclusion amount (add lines 9a, 9b, and 9c)	9d		
e	Applicable credit amount (tentative tax on the amount in line 9d from Table A in the instructions)	9e		
10	Adjustment to applicable credit amount (May not exceed $8,000. See instructions.)	10		
11	Allowable applicable credit amount (subtract line 10 from line 9e)			11
12	Subtract line 11 from line 8 (but do not enter less than zero)			12
13	Credit for foreign death taxes (from Schedule P). (Attach Form(s) 706-CE.)	13		
14	Credit for tax on prior transfers (from Schedule Q)	14		
15	Total credits (add lines 13 and 14)			15
16	Net estate tax (subtract line 15 from line 12)			16
17	Generation-skipping transfer (GST) taxes payable (from Schedule R, Part 2, line 10)			17
18	Total transfer taxes (add lines 16 and 17)			18
19	Prior payments (explain in an attached statement)			19
20	Balance due (or overpayment) (subtract line 19 from line 18)			20

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than the executor) is based on all information of which preparer has any knowledge.

Sign Here	Signature of executor ►	Date	
	Signature of executor ►	Date	
Paid Preparer Use Only	Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
	Firm's name ►			Firm's EIN ►	
	Firm's address ►			Phone no.	

For Privacy Act and Paperwork Reduction Act Notice, see instructions. Cat. No. 20548R Form **706** (Rev. 8-2019)

Use Form 706.

- **When to file?** You must file Form 706 to report estate and/or GST tax within 9 months after the date of the decedent's death.
- **Extension to file.** Form 4768 (to file or pay)
  - Automatic 6-month extension to file.
  - Unless granted an extension to pay, need to pay even if granted extension to file.
  - Elections under IRC §§ 6163 and 6166.
- **Portability election:** on Form 706
  - If received an extension to file may do portability election w/l 6-month extension.
  - If fail to do that, may seek relief under Treas. Reg. § 301.9100-3.

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Disclosure of trust and trust property on Form 706

- Part 4, Question 13a: "Were there in existence at the time of the decedent's death any trusts created by the decedent during his or her lifetime?"
- Part 4, Question 13b: "Were there in existence at the time of the decedent's death any trusts not created by the decedent under which the decedent possessed any power, beneficial interest, or trusteeship?"

If "Yes" then:

- Provide copy of trust instrument
- Complete Schedule G.

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Generation Skipping Tax.

- **Referred to as "GST" or "GSTT"**
- **Separate transfer tax (will act as a second tax).**
- **Imposed on gifts or estate transfers that "skip" a generation.**
- **Transfers to grandchildren or unrelated persons 37 ½ years younger.**
- **Federal exemption amount = $12,920,000 for decedents dying in 2023**

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New York Estate Tax

- **The basic exclusion amount** for decedents who die between January 1, 2023 through December 31, 2023 is **$6,580,000.00**.
- Form = NYS ET-706.
- A copy of the federal return must be submitted, too.
- **When to file.** You must file Form ET-706 within nine months after the decedent's date of death, unless you receive an extension of time to file the return. An extension of time to file the estate tax return may not exceed six months, unless the executor is out of the country.
- The Tax Department may grant an extension of time to pay the estate tax for up to four years from the date of death, if it is established that payment of any part of the tax within nine months from the date of death would result in undue hardship to the estate. Annual installments may be required

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THE END

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New York Probate and Trust Administration
Live Video Webinars
September 13, 2023

NEW YORK PROBATE AND TRUST ADMINISTATION SEGMENT V: Trust Taxation Issues

Presentation by Antar P. Jones, Esq., LL.M (Taxation)
antar@antarlaw.com (718) 636-2270

INTRODUCTION

(Free) Guides You Should Review.

i. IRS Publication 559. Survivors, Executors and Administrators
ii. IRS Form 1041.
iii. Instructions to Form 1041.
iv. IRS Form 1040.
v. Instructions to Form 1040
vi. IRS Form 706.
vii. Instructions to Form 706.

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A. Tax Returns: Annual & Final

1. **What is a trust?** Before we ask whether and to what extent trusts must file income tax returns, the first question to ask is "what is a trust?"

   a. The instructions to IRS Form 1041 (fiduciary income tax turns) provides that "[a] ***trust*** is an arrangement created either by a will or by an *inter vivos* declaration by which trustees take title to property for the purpose of conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts.[1]

   b. Generally speaking, an arrangement will be treated as a trust under the IRC if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not

[1] Instructions for Form 1041 (2021), p. 4.

associates in a joint enterprise for the conduct of business for profit.[2]

2. **Basic considerations for the taxation of trusts.**

   a. **Federal Legislative Authority to Tax Trusts.** Trusts are taxed pursuant to subchapter J of the Internal Revenue Code. ("IRC").[3]

   b. **Fundamental Principle of Taxation of Trusts.** The basic principle is that trusts are conduits, and that income should be paid once, either by the trust or by the beneficiary.[4]

   c. **Separate legal entity.** As a general rule, a trust is a separate legal entity for federal tax purposes. A trust may be created during an individual's life (*inter vivos*) or at the time of his or her death under a will (testamentary).[5]

   d. **Grantor trusts.** However, if the trust instrument contains certain provisions, then the person creating the trust is treated as the owner of the trust's assets.[6]

      i. The rules for determining when a trust is a grantor trust are found in IRC §§ 671-679. Those rules are commonly referred to as the "Grantor Trust Rules."

3. **The determination of income of a trust**. A trust figures its gross income in much the same manner as an individual.[7] Most deductions and credits allowed to individuals are also allowed to estates and trusts.[8] The exception is, however, that a trust is allowed an income distribution deduction for distributions to beneficiaries.

   a. For **simple trusts** (trusts that are required to distribute income currently and do not have charitable beneficiaries), a deduction is allowed, whether income is actually distributed or not.[9]

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[2] Treas. Reg. § 301.7707-4(a).
[3] See IRC § 641(a).
[4] See, Manufacture's Hanover Trust v. United States, 160 Ct. Cl. 582, 312, F.2d 785.
[5] Instructions for Form 1041 (2021), at 3.
[6] Id.
[7] IRC § 641(b). See Instructions for Form 1041 (2021), at 3.
[8] See Instructions for Form 1041 (2021), at 3.
[9] IRC § 651(a).

b. For **complex trusts** (trusts that are not simple trusts), a deduction is allowed for *all other amounts properly paid, credited, or required to be distributed.*[10]

c. **Distributable Net Income ("DNI")**. DNI is the yardstick amount as to measure how much a trust may deduct of distributions to beneficiaries.

   i. **DNI is taxable income with modifications.**[11]

      A) Distributions to beneficiaries are not deducted for calculating DNI.

      B) Capital gains allocable to corpus and not distributed per IRC § 661 are excluded in calculating DNI.

      C) For simple trusts, extraordinary dividends allocated to principal on good faith by fiduciary, are excluded.

      D) Tax-exempt interest, reduced by allocated disbursements, are excluded.

d. **Calculating the distribution deduction.** The fiduciary must complete Schedule B on IRS Form 1041. The income distribution deduction determines the amount of any distributions taxed to the beneficiaries.[12] The deduction shall be allowed only to the extent of DNI—DNI is the yardstick.[13]

e. **Trusts called "pass-through" entities.** Because trusts receive a distribution deduction on distributions to beneficiaries, they are sometimes referred to as "pass-through" entities[14] or "conduits". The beneficiary, and not the trust, pays income tax on his or her distributive share of income.[15]

   i. **Schedule K-1**. Schedule K-1 (form 1041) is used to notify beneficiaries of the amounts to be included on their income tax returns.

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[10] IRC § 661(a)(2)(B).
[11] IRC § 643(a).
[12] See Instructions for Form 1041 (2021), at 3.
[13] IRC §§ 651(a) and 661(a).
[14] See Instructions for Form 1041 (2021), at 3.
[15] Id.

f. **Character of Income**. The amounts distributed shall have the same character in the hands of the beneficiary as in the hands of the trust.[16]

4. **Trustees are required to file Form 1041 for annual income.**

a. **Who must file Form 1041?** A fiduciary must file a Form 1041 for a domestic trust taxable under IRC § 641 that has:

i. Any taxable income for the year;

ii. Gross income of $600 or more (regardless of taxable income), or

iii. A beneficiary who is a nonresident alien.[17]

b. **When to file?**

i. Note: trusts, with some exceptions[18], are now calendar year taxpayers.

ii. File Form 1041 and K-1(s) by April 15 of the following year.

iii. **Extension of time to file.** If more time is needed to file the Form 1041, use Form 7004, Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns, to apply for an automatic 5½ month extension of time to file.[19]

c. **Where to file?** For New York, New Jersey, and Delaware trusts (among other states, where to file Form 1041 depends on whether the taxpayer is including a check or money order:

i. **If *not* including check or money order**, then the address for filing is Department of the Treasury, Internal Revenue Service, Kansas City, MO 64999-0048.

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[16] IRC §§ 652(b) and 662(b).
[17] See Instructions for Form 1041 (2021), at 5.
[18] Trusts that are exempt from having to adopt a calendar year are: trusts exempt from tax under IRC § 501(a); charitable trusts described in IRC 4947(a)(1); and trusts that are treated as wholly owned by a grantor under the grantor trust rules. See Instructions for Form 1041 (2021), at 9. It is believed that certain venerable trusts are exempt from filing as calendar year taxpayers.
[19] Id, at 8.

ii. **If including check or money order**, then the address for filing is Department of the Treasury, Internal Revenue Service, Kansas City, MO 64999-0148.[20]

d. **Who must sign?** The fiduciary, or authorized representative. A paid preparer must also sign in the enumerated area, also.

e. **Preparing Form 1041.** Before preparing Form 1041, the fiduciary must figure the accounting income of the trust under the will, trust instrument and applicable local law to determine the amount, if any, of income that is required to be distributed, because the income distribution deduction is based, in part, on that amount.

i. Boilerplate provisions in the will or trust instrument *may* act as a guide as to how to calculate trust income.

ii. **The applicable local law in New York for determining trust income is EPTL § 11-2.1.**

5. **Grantor Trusts**. A trust is a grantor trust if the grantor retains certain powers of ownership benefits, as described in the grantor trust rules.[21]

a. In general, a grantor trust is ignored for income tax purposes and all of the income, deductions, etc., are treated as belonging directly to the grantor. This also applies to any portion of a trust that is treated as a grantor trust.[22]

i. If only a portion of the trust is a grantor type trust, indicate both grantor trust and the other type of trust, for example, simple or complex trust, as the type of entities checked in Section A on page 1 of Form 1041.[23]

b. **How to report**.

i. **If the entire trust is a grantor trust:** fill in only the entity information of Form 1041. Don't show any dollar amounts on the form itself; show dollar amounts only on an attachment to the form. Don't use Schedule K-1 (Form 1041) as the attachment.[24]

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[20] Id, at 9.
[21] See, generally, IRC §§ 671-679. See also, Instructions for Form 1041 (2022), at 13.
[22] Id.
[23] Instructions for Form 1041 (2022), at 13.
[24] Id, at 13-14.

ii. **If only part of the trust is a grantor type trust:** the portion of the income, deductions, etc., that is allocable to the non-grantor part of the trust is reported on Form 1041, under normal reporting rules. The amounts that are allocable directly to the grantor are shown only on an attachment to the form. Don't use Schedule K-1 (Form 1041) as the attachment. However, Schedule K-1 is used to reflect any income distributed from the portion of the trust that isn't taxable directly to the grantor or owner. The fiduciary must give the grantor (owner) of the trust a copy of the attachment.

A) Attachment. On the attachment, show:

1) The name, identifying number, and address of the person(s) to whom the income is taxable;

2) The income of the trust that is taxable to the grantor or another person under sections 671 through 678—report the income in the same detail as it would be reported on the grantor's return had it been received directly by the grantor; and

3) Any deductions, credits, or elections that apply to this income. Report these deductions and credits in the same detail as they would be reported on the grantor's return had they been received directly by the grantor. The income taxable to the grantor or another person under sections 671 through 678 and the deductions and credits that apply to that income must be reported by that person on their own income tax return.

B) Example. The John Doe Trust is a grantor type trust. During the year, the trust sold 100 shares of ABC stock for $1,010 in which it had a basis of $10 and 200 shares of XYZ stock for $10 in which it had a $1,020 basis. The trust doesn't report these transactions on Form 1041. Instead, a schedule is attached to the Form 1041 showing each stock transaction separately and in the same detail as John Doe (grantor and owner) will need to report these transactions on his Form 8949, Sales and Other Dispositions of Capital Assets; and Schedule D (Form 1040). The trust doesn't net the capital gains and losses, nor does it issue John Doe a Schedule K-1 (Form 1041) showing a $10 long-term capital loss.

C) Option methods. There are three optional methods that may be used to report income from grantor trusts, so long as situation warrants using the particular method.

B. **Tax Consequences of Trustee's Actions.**

1. Distributions.

a. **Simple Trusts.**

i. Definition:

A) All income must be distributed currently.

B) Cannot accumulate income.

C) Don't make charitable distributions from income accumulated.

ii. Important case: Manufacturers Hanover Trust v. United States, 160 Ct. Cl. 582, 312 F.2d 785.

iii. Deduction limited to DNI.

iv. Beneficiary includes income only up to DNI.

A) Example: Simple trust earns 20X but has DNI valued at 15X. Trust must distribute 20X but will be able to deduct 15X. The beneficiary will get 20X but will include 15X in his income. The remaining 5X will not be taxed.

v. Notable case. In Seligson v. Comm'r, 63 T.C.M. (CCH) 3101 (1992), when an estranged son could have received income to be distributed currently from a trust established by his father, but refused to accept the money, the son was required to include the receipt of said income in his taxes, even though he did not receive the same.

b. **Complex Trusts.**

i. Trusts that are not simple trusts are complex trusts.

ii. Complex trusts accumulate income or set aside income for charitable purposes.

iii. Complex trusts use a two-tiered system where the first tier is for income required to be distributed currently, and the second

tier is for income that has been accumulated and distributed during the tax year at issue.

iv. DNI is first allocated to the first tier, and any remaining DNI is then allocated to the second tier.

v. But in any case, the trust's distribution deduction may not exceed DNI.

c. **Charitable distributions**.

i. Trusts are entitled to a charitable deduction in the computation of gross income, and for gross income paid for charitable purposes per IRC § 642(c)(1).

ii. Distributions of corpus aren't deductible under IRC § 642(c), generally.

iii. Payments to charity need not be "actually paid of receipts during a particular tax year".[25]

iv. Certain venerable trusts may permanently set aside money for chartable purposes. But trusts executed after October 9, 1969 may not.[26]

d. **Application of above-rules.** Rev. Rul. 67-117

i. **Example 1**.

A) **Facts**: Tr. with nontaxable stock dividend of $1,000 distributes said value in cash to beneficiary.

B) **Outcome**: Since the trust has no DNI, the beneficiary is not required to include in his gross income any amount of cash distributed to him.

ii. **Example 2**.

A) **Facts**: Same as above, but the trust also receives taxable interest of $3,000. The "income required to be distributed currently" = $4,000. The DNI = $3,000.

B) **Outcome:** Therefore, the amount deductible by the trust and includible in the gross income of the beneficiary is limited to $3,000. Consequently, the $1,000 in cash distributed in lieu

[25] Old Colony Trust Co. v. Comm'r, 301 U.S. 379, 384 (1937).
[26] IRC § 642(c)(2).

of the stock dividend is not includible in the gross income of the beneficiary. The beneficiary must include income to the extent of DNI per IRC § 662.

iii. **Example 3.**

A) **Facts**. Trust instrument says trustee may accumulate or distribute income. In the taxable year, a nontaxable dividend having a FMV of $1,000 is received by the trust, which in turn, distributes $1,000 in cash to the beneficiary and retains the stock.

B) **Outcome:** since the trust has no DNI, the beneficiary is not required to include in his gross income any of the cash distributed to him.

iv. **Example 4.**

A) **Facts:**

1) Trust instrument says $1,000 is required to be paid annually out of income to beneficiary A.

2) The balance in the trustee's discretion may be accumulated or distributed to beneficiary B.

3) The trust had the following items of income and no expenses:

• Taxable interest:	$2,000
• Nontaxable stock dividend worth	$1,000
• Total income under state law	$3,000

4) During the taxable year, trustee distributes $1,000 in cash to A, and $500 to B.

5) DNI under 643 is $2,000.

B) **Outcome:**

1) Per IRC § 661(a)(1) and (2), $1,500 is deductible by the trust.

2) $1,000 is includible in the gross income of A and $500 in the gross income of B.

3) Trust's taxable income after deducting $100 for a personal exemption under IRC § 642(b)(2)(A) is $400.

2. **Bequests.**

a. **General rule**. Gross income [received by a beneficiary] does not include the value of property acquired by gift, bequest, devise or inheritance.[27]

i. **Exception.** However, income from property acquired by gift, bequest, devise or inheritance is gross income (of the beneficiary).

ii. Thus, principal distributed per bequest is not income.

iii. But income, is income.

b. **Tax treatment of gifts or bequests.** No deduction for trusts for gifts or bequests and not included as income to beneficiary when:

i. Gift or bequest is of a specific sum of money;

ii. Which is request by specific terms of the trust instrument; and

iii. is properly paid or credited to a beneficiary.

c. Hence, to qualify as a gift or bequest,

i. It must qualify as a gift or bequest of specific sum of money or of specific property; and

ii. The ***terms of the governing instrument must not provide for its payment in more than three installments... .*** (The date when the trust was created is immaterial).

iii. Also, the gift must be ascertainable per date of inception.

d. **Practical Applications.**

i. **Example:** Under the terms of a trust instrument, trust income is to be accumulated for a period of 10 years. During the eleventh year, the trustee is to distribute $10,000 to B, payable from income or corpus, and $10,000 to C, payable out of accumulated income. The trustee is to distribute the balance of the accumulated income to A. Thereafter, A is to receive all the current income until the trust terminates. Only the distribution to B would qualify for the exclusion [for bequests] under IRC §

[27] IRC § 102(a).

663(a)(1). **The reason is because B received a gift—it was specific and ascertainable**.

3. **In-kind distributions in lieu of cash.** If the trust is a simple trust that requires that the trust distributes currently, and the trust distributes property in lieu of cash, the trust shall be treated as having sold the property for its fair market value on the date of distribution. Gain or loss will be recognized to the trust and the basis of the property in the hands of the beneficiary shall be what the beneficiary paid for it under IRC § 1012.[28]

   a. The dispositive case is Kenan v. Comm'r, 114 F.2d 217 (2d Cir. 1940), where the court held that when cash and securities in lieu of cash were distributed to a beneficiary of a will, gain was realized. The court appeared to deny the argument that the distribution was a mere specific bequest because the beneficiary took no chances as a recipient of securities of a specific amount.

   b. Pitfall: if the trust is a simple trust and distributes in-kind property more valuable than income earned during the year, the simple trust may receive complex trust treatment.

C. **Real Property Taxes**

1. The big question is whether a trust [or an estate] deduct real estate taxes? The answer *appears* to be *yes, subject to a maximum deduction of $10,000*.[29] Notably, IRC § 164(b)(6) is a limitation imposed by the Tax Cuts and Jobs Act and covers trusts from after 12/31/2017 and before 1/1/2026. However, the support for this explanation issued by the IRS is quite tortured. Also, it appears that not all tax professionals agree on the answer.

   a. **Practice Tip:** If whether deductions for taxes by a trust is an issue in your practice, the safest way to go is abide by the above rule. If you are working with an accountant, and the accountant does not believe that a trust needs to abide by the limitation, you should ask the accountant to be conservative and to defend himself/herself with why the $10,000 limitation should not be followed.

D. **Income Taxation**. Discussed above.

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[28] Rev. Rul. 67-74, 1967-1 C.B. 194.

[29] IRC § 164(a)(1) and IRC § 164(b)(6), IRC § 67(e), Treas. Reg. 1.67-4 and IRS Final Treasury Decision, Final Rule, TD 9918, 85 FR 6619, Effect of Section 67(g) on Trusts and Estates [85 Fed. Reg. 66219] (10/19/2020).

E. **Estate and Generation-Skipping Transfer Taxes.**

1. **Federal.** For decedents dying in the year 2023, the Federal estate tax exemption amount is $12,920,000. This means that there will be federal estate tax for estates whose *gross estates* are $12,920,000 and under. However, the second to die of a married couple may have a Federal estate tax exemption amount of up to double that amount if portability (DSUE—the deceased spouse unused exemption amount) is claimed by the estate of the first spouse to die.

   a. Decedent's gross estate. The value of the gross estate of the decedent shall be determined by including to the extent provided for in this part, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.[30]

      i. Included in this amount are the value of life insurance policies and the full fair market value of real property, not discounting the mortgage, so it appears.

   b. If a trust is determined to be part of a Decedent's property, the value of the trust will be used to determine the value of his/her gross estate. The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.[31]

      i. Revocable living trusts are part of a decedent's gross estate.

   c. **Form 706.** Form 706 is the Federal estate tax return.

      i. **When to file**. You must file Form 706 to report estate and/or GST tax within 9 months after the date of the decedent's death.[32]

         A) **Extension to file.** If you are unable to file Form 706 by the due date, you may receive an extension of time to file. Use Form 4768, Application for Extension of Time To File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes, to apply for an automatic 6-month extension of time to file.[33] Note, payment of the estate tax is due on the due date irrespective of obtaining an extension.

         B) **Extension of time to pay Estate and GST taxes.** The estate and GST taxes are due within 9 months of the date of

[30] IRC § 2032(a).
[31] IRC § 2033(a).
[32] Instructions for Form 706 (Rev. 09-2022), p. 2.
[33] Id.

the decedent's death. You may request an extension of time for payment by filing Form 4768.[34]

1) **Elections under 6166 and 6163**. You may also elect under section 6166 to pay in installments or under section 6163 to postpone the part of the tax attributable to a reversionary or remainder interest. These elections are made by checking "Yes" on lines 3 and 4 (respectively) of Part 3—Elections by the Executor and attaching the required statements. If the tax paid with the return is different from the balance due as figured on the return, explain the difference in an attached statement. If you have made prior payments to the IRS, attach a statement to Form 706 including these facts.[35]

ii. **Portability election.** An executor can only elect to transfer the DSUE amount to the surviving spouse if the Form 706 is filed timely, that is, within 9 months of the decedent's date of death or, if you have received an extension of time to file, before the 6-month extension period ends.[36]

A) **Extension to elect portability.** Executors who did not have a filing requirement under section 6018(a) but failed to timely file Form 706 to make the portability election may be eligible for an extension under Rev. Proc. 2022-32, 2022-30 I.R.B. 101 (superseding Rev. Proc. 2017-34, 2017-26 I.R.B. 1282). Executors filing to elect portability may now file Form 706 on or before the fifth anniversary of the decedent's death. An executor wishing to elect portability under this extension must state at the top of the Form 706 being filed that the return is "Filed Pursuant to Rev. Proc. 2022-32 to Elect Portability under section 2010(c)(5)(A)."[37]

B) **Note.** Any estate that is filing an estate tax return only to elect portability and did not file timely or within the extension provided in Rev. Proc. 2022-32 may seek relief under Regulations section 301.9100-3 to make the portability election.[38]

iii. **Disclosure of trust and trust property**. Question 13a of Part 4 of the Form 706 asks the following: "Were there in existence at

[34] Id. at 3.
[35] Id.
[36] Id.
[37] Id. See Rev. Proc. 2022-32.
[38] Id.

the time of the decedent's death any trusts created by the decedent during his or her lifetime?" Question 13b of Part 4 of the Form 706 asks the following: "Were there in existence at the time of the decedent's death any trusts not created by the decedent under which the decedent possessed any power, beneficial interest, or trusteeship?" If the answer is "yes" to either question, instructions to Form 706 provides that the preparer must:

A) Provide a copy of the trust instrument; and

B) Complete Schedule G. (Schedule G asks the preparer to describe the relevant property). Schedule G specifically requires providing information regarding all revocable transfers under IRC § 2038 and says "[t]he gross estate includes the value of any transferred property which was subject to the decedent's power to alter, amend, revoke, or terminate the transfer at the time of the decedent's death. A decedent's power to change beneficiaries and to increase any beneficiary's enjoyment of the property are examples of this. It does not matter whether the power was reserved at the time of the transfer, whether it arose by operation of law, or whether it was later created or conferred. The rule applies regardless of the source from which the power was acquired, and regardless of whether the power was exercisable by the decedent alone or with -30- Instructions for Form 706 (Rev. 09-2022) any person (and regardless of whether that person had a substantial adverse interest in the transferred property). The capacity in which the decedent could use a power has no bearing. If the decedent gave property in trust and was the trustee with the power to revoke the trust, the property would be included in the decedent's gross estate. For transfers or additions to an irrevocable trust after October 28, 1979, the transferred property is includible if the decedent reserved the power to remove the trustee at will and appoint another trustee. If the decedent relinquished within 3 years of death any of the includible powers described above, figure the gross estate as if the decedent had actually retained the powers until death. Only the part of the transferred property that is subject to the decedent's power is included in the gross estate."[39]

    1) Notably, certain revocable trusts may be subject to IRC § 2038. For example, irrevocable trusts created after

[39] Id. at 30-31.

October 28, 1979 that reserve in the decedent the power to remove the trustee at will and appoint another trustee are subject to IRC § 2038.

2) However, as a **Practice Tip**, one should closely review IRC § 2038 and Treas. Reg. § 20.2038-1(a) closely when drafting a trust, and particularly, an irrevocable trust of any person whose gross estate could be considered over the Federal estate tax exemption amount.

2. **New York Estate Tax.** The basic exclusion amount for decedents who die between January 1, 2023 through December 31, 2023 is $6,580,000.00.

   a. The form to use in order file NYS estate tax returns is the NYS ET-706.

   b. **Federal return required**. A copy of the federal return must be submitted – The starting point for the NYS estate tax return is the federal estate tax return. A completed federal estate tax return must be submitted with the NYS estate tax return, even if the estate is below the federal filing threshold.[40]

   c. **When to file.** You must file Form ET-706 within nine months after the decedent's date of death, unless you receive an extension of time to file the return. An extension of time to file the estate tax return may not exceed six months, unless the executor is out of the country. The Tax Department may grant an extension of time to pay the estate tax for up to four years from the date of death, if it is established that payment of any part of the tax within nine months from the date of death would result in undue hardship to the estate. Annual installments may be required [NYS Tax Law § 976(a)]

3. **Generation Skipping Tax**. Not covered. May be discussed in lecture.

F. **Tax Consequences of Paying Retirement Benefits to Trusts.** Not covered.

G. **Tax Basis in the Assets**. May be covered briefly in lecture.

THE END

[40] Instructions to NYS Form ET-706, p. 3 of 6.

What You Need to Know About Trusts

Submitted by Antar P. Jones

VI: WHAT YOU NEED TO KNOW ABOUT TRUSTS

New York Probate and Trust Administration
September 13, 2023
Antar P. Jones, Esq., LL.M (antar@antarlaw.com)

1

Introduction

Reasons for Using Trusts

- i) wealth succession (and business succession),
- ii) planning for incapacity;
- iii) the avoidance of probate;
- iv) tax avoidance;
- v) asset protection;
- vi) planning for obtaining governmental benefits; and
- vii) even for planning for the caring of pets, among others.

Many trusts may serve more than one purpose.

2

Introduction, 2

- **Federal estate exemption amount**. For decedents who die in the year 2023 and who are United States citizens or residents, the Federal exemption amount of $12,920,00
- **Sunset.** In 2026, goes back to $5,000,000 when TCJA sunsets.
- New York State Basic Exclusion Amount = $,6580,000 for decedents who die in 2023.
- **Gift tax annual exclusion:** $17,000 in 2023
- **Marital deduction**
- **Portability**

3

Types of trusts and their purpose

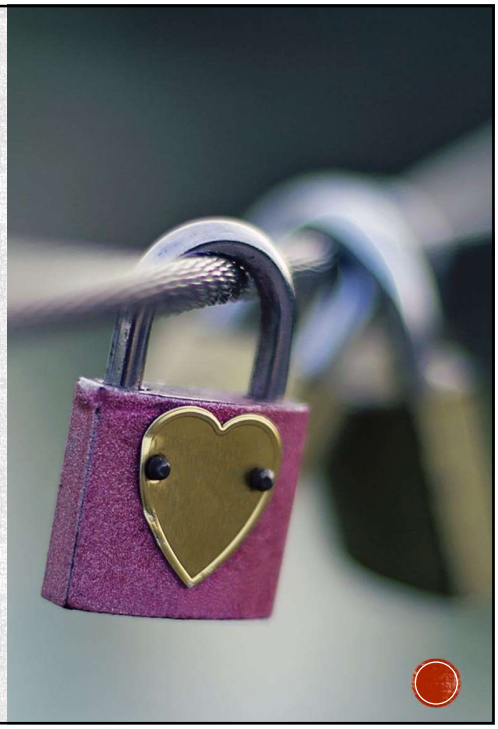
Simple Trust [a "pass-through trust"): A trust may qualify as a simple trust if:

a. The trust instrument requires that all income must be distributed currently;
b. The trust instrument doesn't provide that any amounts are to be paid, permanently set aside, or used for charitable purposes; and
c. The trust doesn't distribute amounts allocated to the corpus of the trust

4

Types of trusts and their purpose, 2

Complex Trust. A complex trust is any trust that doesn't qualify as a simple trust.



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Types of trusts and their purpose, 3

Grantor Trust.

- A trust is a grantor trust if the grantor retains certain powers or ownership benefits [IRC 671-679].
- Can also apply to only a portion of a trust.
- In general, a grantor trust is ignored for income tax purposes and all of the income, deductions, etc., are treated as belonging directly to the grantor.
- This also applies to any portion of a trust that is treated as a grantor trust

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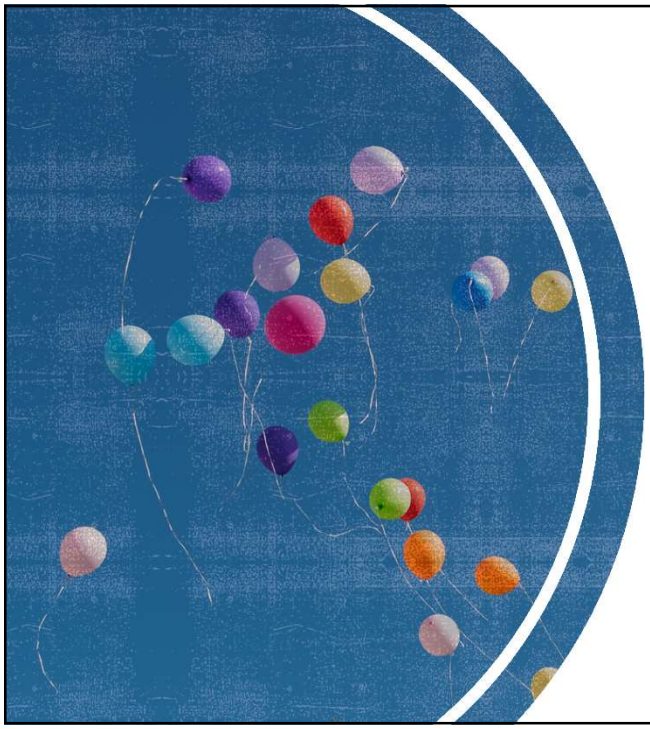

Types of trusts and their purpose, 4

Non-grantor Trust. A trust that is not a grantor trust. A trust whereby a grantor does not have powers of ownership associated with it, per the "grantor trust rules."

7

Types of trusts and their purpose, 5

Lifetime Trust. An express trust, including all amendments thereto, created during the grantor's lifetime.

8

9

Types of trusts and their purpose, 7

Revocable Trust.

- A revocable trust is a trust whereby provisions can be altered or canceled dependent on the grantor or the originator (settlor) of the trust
- A trust that can be "revoked."

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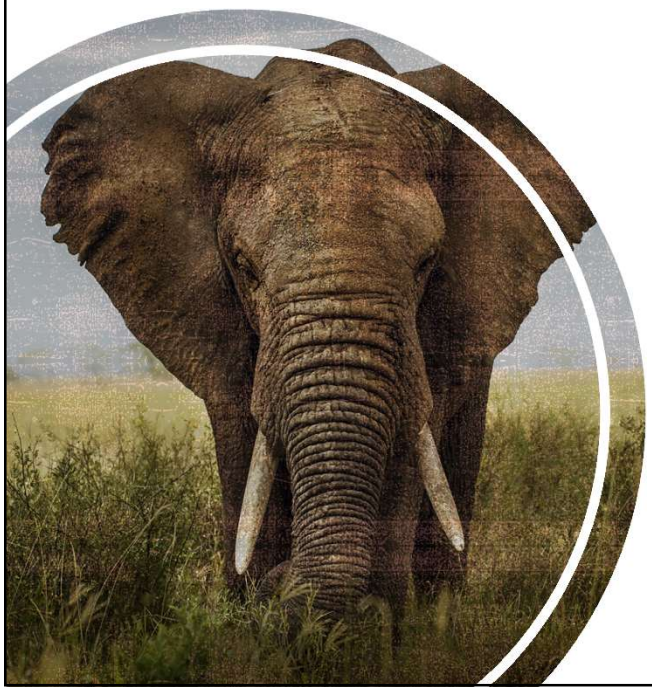


Types of trusts and their purpose, 8

Irrevocable Trust. A trust that cannot be changed or modified without the beneficiary's permission.

11

Types of trusts and their purpose, 9

Intentionally Defective Grantor Trust ("IDGT") is an irrevocable trust that is drafted intentionally to have grantor trust status.

12

Types of trusts and their purpose, 11

Credit Shelter Trusts, By-pass Trusts, and A-B Trusts.

- Tool used by married couples with taxable estates in order to legally maximize their estate tax exemptions.
- Involves making two trusts after first spouse dies.
- Property placed in irrevocable "B" trust up to exemption amount—kids are beneficiaries.
- Property placed in "A" trust to take advantage of the marital deduction.

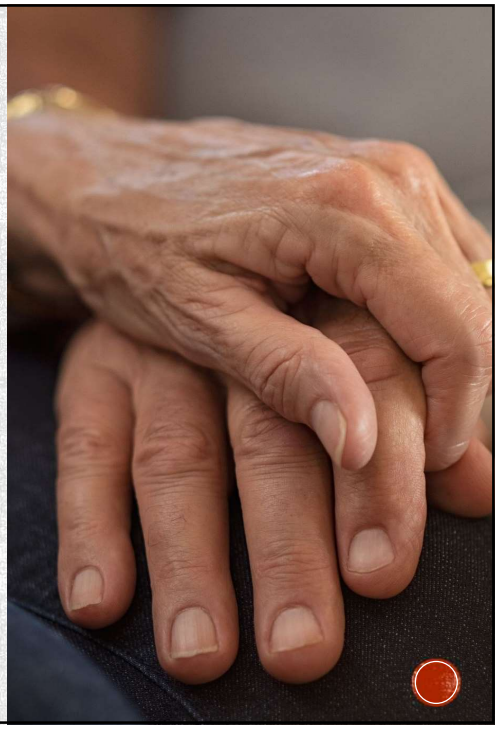
Pitfalls.

- Doesn't take advantage of "portability."
- Costly
- Using stepped-up basis may get a bigger tax advantage.

13

Types of trusts and their purpose, 12

Disclaimer Trusts. A marital disclaimer trust has provisions (usually contained in a will) that allow a surviving spouse to leave assets in a trust for the benefit of their spouse by disclaiming ownership of a portion of the estate that the survivor would have inherited after the death of the first spouse. The disclaimed property is transferred to the marital disclaimer trust, which can then benefit the surviving spouse during their life, without being included in the surviving spouse's estate at death.



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Types of trusts and their purpose, 13

Qualified Terminable Interest Property ("QTIP")

- QTIP property is property of a decedent designated on IRS Form 706 for the use of (and income interest for the benefit of) the surviving spouse for her life, then, upon her death, to beneficiaries described in the trust.
- Described in IRC § 2056(b)((7).
- Such property not be subject to gift and estate tax during the lifetime of the surviving spouse.
- When the surviving spouse dies, such property is included in his estate for estate tax purposes.

15

Types of trusts and their purpose, 13.5

- A **QTIP trust** provides limited access to the trust assets for a surviving spouse.
- Although the surviving spouse may receive income from the trust, he or she cannot decide on the ultimate disposition of the trust assets and cannot withdraw principal from the trust
- However, the QTIP trust can be written to provide the greater of $5,000 or 5% of the trust assets to your surviving spouse annually if you wish.
- Upon the death of your surviving spouse, the trust is distributed according to your ultimate specifications.
- Often referred to as "dead hand" control.
- Most liked in "blended family" situations.

Pitfalls. Need to file a Form 706 to qualify the QTIP property.

16

Types of trusts and their purpose, 14

Qualified Domestic Trusts (QDOTs)

- Generally, married spouses can bequeath an unlimited amount to their spouses upon death through the **"marital deduction."** This was true if the donee spouse was not an American citizen until the Technical and Miscellaneous Revenue Act of 1988 (TAMRA). However, Congress determined that allowing an unlimited marital deduction to noncitizen spouses increased the likelihood that such donee's property would escape the imposing of federal estate tax.
- However, IRC § 2056A permits the marital deduction with respect to transfers to noncitizen spouses unless such property passes into a "qualified domestic trust, or "QDOT."

17

Types of trusts and their purpose, 14.1

QDOT Requirements.

- Except as otherwise provided, the trust instrument must provide for at least 1 trustee that is a United Sates citizen or domestic corporation.
- The trust instrument must provide that no distribution (other than a distribution of income) may be made from the trust unless a trustee who is an individual citizen of the United States or domestic corporation has the right to withhold from such distribution the tax imposed by IRC § 2056A.
- Also, the QDOT must be maintained under the laws of a state of the United States or the District of Columbia, and the administration of the trust must be governed by the laws of a particular state or the District of Columbia.
- In addition, the trust must constitute an ordinary trust, as defined in 26 CFR 301.7701-4(a), and not any other type of entity.
- There are other rules in the regulations.

18

Types of trusts and their purpose, 15

Irrevocable Life Insurance Trusts ("ILITs").

- Typically used to hold life insurance policies and their proceeds, while keeping them out of the estate of the insured.
- Used to minimize the value of the decedent's estate.
- **Pitfalls.** However great care should be taken in establishing an ILIT as doing so properly is extremely technical.
  - Gift tax issues.
  - How will the ILIT obtain the life insurance policy?

19

Types of trusts and their purpose, 15.1

Common Pitfalls with ILITs.

Incidents of Ownership. If the donor has incidents of ownership in the ILIT, the value of the life insurance proceeds can get pulled into the gross estate of the donor. Incidents of ownership include the right to:

A) change a beneficiary;

B) transfer ownership of the policy;

C) change the beneficial ownership in the policy or its proceeds;

D) change the time, place or manner of enjoyment thereof;

E) use the policy value as collateral for a loan;

F) surrender the insurance policy if the decedent created the trust, or

G) any other traditional rights of ownership.

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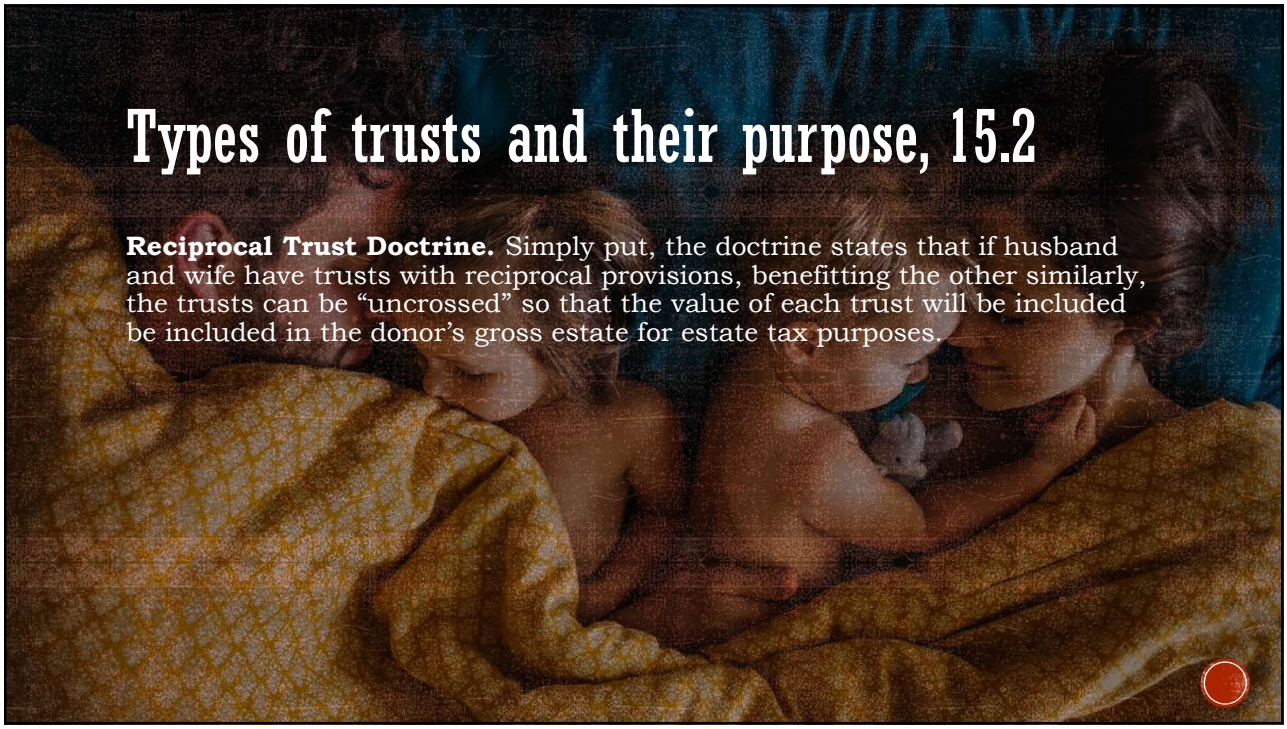

21

Types of trusts and their purpose, 16

Pet Trusts.

- Per EPTL 7-8.1.
- Trusts for the care of a designated domestic or pet animal is valid
- The intended use of the principal or income may be enforced in Court.
- Trust terminates when the animal dies (discuss Netflix documentary).
- Upon death of animal, trust property transferred per instrument or back into the estate of the grantor.
- Courts have discretion as to how much property gets transferred into pet trust.
- Court can appoint a trustee.
- Distribution deductions under IRC §§ 651 and 661 are unavailable.

22

Types of trusts and their purpose, 16.1

Notable Pet Trust Cases.

Matter of Helmsley, 31 Misc. 3d 1233[A] (NY Surr. Ct. NY County, February 18, 2009). The pet trust was reduced from $12 million to $2 million because the trust was overfunded for the carrying out of the decedent's wishes.

Matter of Abels, 44 Misc. 3d 485 (S. Scarpino, NY Surr. Ct. Westchester County, June 27, 2014). The Court did not sanction an early termination of a pet trust and to reduce the allocation thereto because the transferor/decedent "painstakingly" determined her plans and wishes for her pet in her will, and to do otherwise would be to re-write decedent's will.

Rev. Rul. 76-486: "Since a beneficiary is lacking [as there are no lives-in-being], a bequest in trust for a pet animal does not fit into the traditional concept of a trust, as set out in section 301 of the regulations. Such an arrangement, however, should nonetheless be classified as a trust for tax purposed under section 641 of the Code in those jurisdictions where it would not be invalid."

23

Types of trusts and their purpose, 17

Supplemental Needs Trusts. Quick Definition: A **Supplemental Needs Trust** (or **Special Needs Trust**) (often referred to as an "SNT") is a trust created for a chronically and severely disabled beneficiary that "*supplements rather than diminishes*", governmental benefits such as Medicaid.

- Keywords: "*supplements rather than diminishes*"
- Some are enumerated in New York law by statute.

24

Types of trusts and their purpose, 17.1

SNT, Statutory Definition (NY). "Supplemental needs trust" means a discretionary trust established for the benefit of a person with a service and chronic or persistent disability (the "beneficiary") which conforms to certain enumerated criteria.

25

Types of trusts and their purpose, 17.2

SNTs. Purpose: By establishing a SNT, a person, such as a family member may establish a trust for a disabled person without jeopardizing the beneficiary's eligibility for Medicaid, or SSI.

- **SNT's can help a disabled person with assets secure <u>means-tested benefits</u>, such as Medicaid**
- Available only to applicants under the age of 65 with severe disabilities as defined by statute.
- Unless the applicant placed excess assets in the Medicaid SNT for supplemental care, he or she would no longer be eligible for Medicaid, thus relieving the State of a substantial financial burden.

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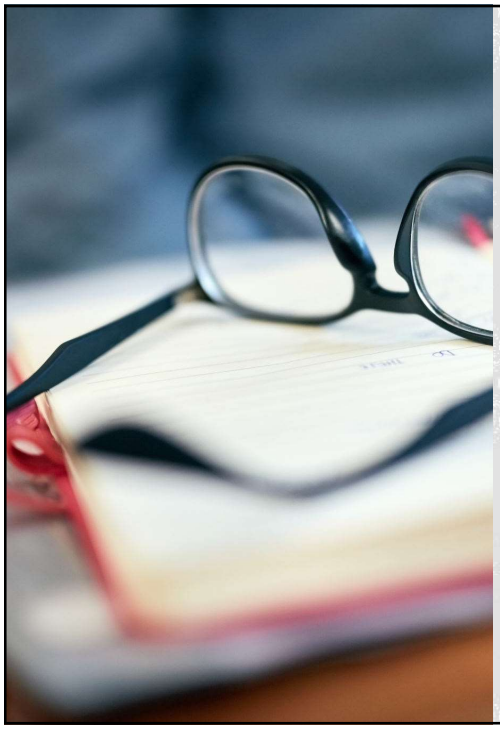


Types of trusts and their purpose, 17.3

1.Third Party SNTs. Those that are established with funds belonging to someone other than the disabled person, or the disabled person's spouse, or someone legal responsible for the expenses of care for the disabled person. There are three types.

A) Purely discretionary trusts (trustee has discretion)

B) Escher type trusts; and Statutory SNTs under EPTL § 7-1.12. (Matter of Escher—seminal case)

C) Statutory SNT's under EPTL § 7-1.12.

27

Types of trusts and their purpose, 17.4

2. **Self-Settled SNTs.** Established with the funds of the disabled person or the disabled person's spouse. They can only be established if certain conditions are met, namely (a) the trust must contain the assets of an individual under age 65; (c) the individual must be "disabled" as defined by 42 U.S.C. § 1382(c)(a); (d) the trust must be established for the sole benefit of such individual with disabilities (or special needs) by the individual himself or herself, a parent, grandparent, or court or legal guardian; and (e) the trust must contain a Medicaid payback provision

28

Types of trusts and their purpose, 18 Honorable mentions.

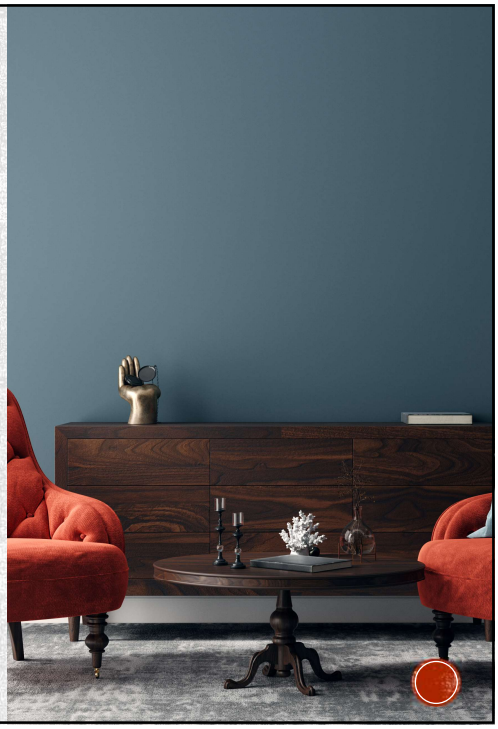
- **Qualified Personal Residence Trusts (QPRTs)**. A QPRT is a specific type of irrevocable trust that allows its creator to remove a personal home from his/her estate for the purpose of reducing the amount of the gift tax that is incurred when transferring assets to a beneficiary.
- QPRTs allow the owner of the residence to remain living on the property for a period of time with "retained interest" in the house; once that period is over, the interest remaining is transferred to the beneficiaries as "remainder interest."
- The settlor of the trust may rent the property from the beneficiaries at that time.

29

Types of trusts and their purpose, 18.1 Honorable mentions.

Dynasty Trusts.

- Generational wealth
- Used by really rich people
- Used in states with long perpetuities periods, such as Alaska (concerning a 1000-year appointment period) Colorado, Florida, Nevada, New Jersey, Rhode Island, South Dakota, Utah, Wyoming, Delaware (for trusts other than those having real property).
- **Pitfalls:** Rigid.



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Types of trusts and their purpose, 18.2 Honorable mentions.

Grantor Retained Annuity Trusts. A grantor retained annuity trust (GRAT) is a "tax-saving device in which a grantor transfers assets into trust and retains an annuity payable for a specified term.

- When these GRATS are structured according to the Tax Code, the transferor avoids incurring any gift-tax liability.
- If the grantor survives to the end of the specified term, any appreciation in the asset's value over the rate specified in I.R.C. § 7520 passes to the beneficiaries without any gift or estate tax.
- If the grantor does not survive, however, the full value of the asset is included in her gross taxable estate.

31

Types of trusts and their purpose, 18.3 Honorable mentions.

Charitable Remainder Trusts. A charitable remainder trust (CRT) is a split-interest trust that allows an individual, during life or at death, to contribute a remainder interest in property to charity while reserving the right to receive income for one or more named noncharitable beneficiaries (which may include the grantor) for a term of years or for life.

- Excellent tax deferral while keeping charitable goals.
- The IRS provides sample documents!
- **Disadvantages.** Complex.

32

Types of trusts and their purpose, 18.4 Honorable mentions.

Flavors of CRTs:

i) Charitable Remainder Annuity Trust (noncharitable beneficiary gets a fixed percent for a term of years or life); or

ii) Charitable remainder unitrusts (CRUTS) pays noncharitable beneficiary a percent value of the trust recalculated annually.

33

Types of trusts and their purpose, 18.5 Honorable mentions.

Charitable Lead Trusts. A charitable lead trust (CLT) is a split-interest trust, created during life or at death, that grants an income interest for a specified period to a charitable beneficiary, with the remainder interest reverting back to the grantor or passing to another noncharitable beneficiary.

- Inter vivos CLTs may reduce estate and gift tax on an appreciating asset and may provide some income tax savings. But the grantor will lose the income from the asset contributed to the CLT.

34

Types of trusts and their purpose, 18.6 Honorable mentions.

Sample forms.

A) **Rev. Proc. 2007-45** provides sample declarations of trust satisfying the requirements for an inter vivos non-grantor charitable lead annuity trust for a term of years, a grantor charitable lead annuity trust for a term of years, annotations for each trust, and sample alternative provisions.

B) **Rev. Proc. 2007-46** provides a sample declaration of trust satisfying the requirements for a testamentary CLAT for a term of years, annotations for the trust, and sample alternative provisions.

C) **In Rev. Proc. 2008-46**, the IRS provided a sample declaration of trust satisfying the requirements for a testamentary charitable lead unitrust for a term of years, annotations for the trust, and sample alternative provisions.

35

Types of trusts and their purpose, 18.7 Honorable mentions.

Asset Protection Trusts

(i) Trusts serve to protect assets from a beneficiary's own extravagance or bankruptcy;

(ii) Trusts serve to protect assets for the benefit of the intended beneficiary by limiting the exposure of the assets to possible claims which may arise in contract or in tort;

(iii) Trusts serve to protect assets from claims of the beneficiary's spouse or ex-spouse; and

(iv) Trusts serve to preserve wealth within an intended class of beneficiaries

36

Types of trusts and their purpose, 18.8 Honorable mentions.

Spendthrift Trusts.

Per state law.

Every trust should have a spendthrift provision.

They can protect regarding the following.

1) Spouse issue.
2) Big, irresponsible spender. Drugs.
3) Gambling
4) Cult
5) Etc.

37

Types of trusts and their purpose, 18.9 Honorable mentions.

Additional issues regarding spendthrift trust provisions.

- EPTL § 7-1.5 concerns itself with spendthrift provisions.
- Spendthrift provisions do not always work.
- The drafter of a spendthrift provision should research the contours of the law thoroughly to determine the extent to which a spendthrift provision can protect trust property.
- Every trust should have a spendthrift provision unless there is a strong reason to not have the same.
- See, EPTL 7-1.5(d). See also, In re Chusid's Estate, 60 Misc. 2d 462, 464 (Kings County Surr. 1969).

38

Types of trusts and their purpose, 18.10 Honorable mentions.

Irrevocable Income Only Trusts (IIOTs). An irrevocable income only trust (commonly known as an IIOT) is a non-crisis planning tool. An IIOT is a first-party irrevocable trust that is used to protect assets when a client wants to plan for the possible future need of nursing home care.

- Distributions to the grantor are limited to only income.
- Distribution of principal to the grantor is prohibited under the trust terms;
- however, there is no restriction on payment of principal to a third party(ies) such as a child if the practitioner chooses to draft the trust as such

39

40

Jurisdiction

- The **Supreme Court** is a court of general jurisdiction. Thus, can hear issues regarding trusts. But other court may have jurisdiction per the legislature's enactment of laws.
- Surrogate's Court has jurisdiction of the affairs of dead people.
- Surrogate's Court has jurisdiction over lifetime trusts(?).

Venue.

- Place of trial in county which parties resided when it was commenced.
- Residence of trustee deemed in county she was appointed as well as where she resides.

41

Jurisdiction, 2

SCPA 1501 covers the following trusts:

- **(a)** A trust created by the will of a domiciliary.
- **(b)** A trust relating to real or personal property, without regard to the domicile of the testator or the grantor, where if a testamentary trust the will creating the trust was admitted to probate in any surrogate's court of this state or where the **situs** of the trust or any real property held by the trust is within this state and if a testamentary trust the will creating the trust was duly proved or established or admitted to probate within a foreign country or state, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States where it was executed or where the testator was domiciled at the time of his death.
- **(c)** A lifetime trust of which the supreme court would also have jurisdiction.

42

Jurisdiction, 3

Trust Situs.

- Testamentary Trusts. Situs of a trust of personal property shall be deemed New York State if the personal property is in the state at the time of decedent's death ***and*** is held and administered in the state in accordance with the will.
- Lifetime Trust of a Non-domiciliary. If personal property is within New York State at the time of the creation of the lifetime trust ***and*** is held and administered in the state in accordance with the lifetime trust.
- **Exception.** The situs will not be New York State if the will, lifetime trust, or the laws of the domicile of the testator or the domicile at the time trust was created expressly provides otherwise, ***if*** such property is brought into New York state for administration.

43

Jurisdiction, 4

Surrogate May Decline to Entertain Jurisdiction. A surrogate may decline to entertain jurisdiction of a trust created by will or lifetime trust of a non-domiciliary

- Concerning such trusts, every application to the Court to entertain jurisdiction shall state whether any previous application for such relief as been made in New York and shall state the disposition of it and be accompanied by a copy of the will and the foreign letters, or of the lifetime trust with proof of its authenticity. If entertained, the court will record the will or instrument in its office.

44

Jurisdiction, 5

- **Notable Case.** Appeals court reversed a surrogate's court's order that it had subject matter jurisdiction over inter vivos charitable remainder trust to order trustee to render accounting to charitable remainder beneficiary since (1) grantor was not state domiciliary when action was commenced, (2) trustee was not in state, and (3) assets were not in state, one of which was required for jurisdiction under N.Y. Surr. Ct. Proc. Act §§ 207(1), 209(6); and further N.Y. Surr. Ct. Proc. Act § 1501(1)(c) did not expand that jurisdictional requirement in the case of inter vivos trusts. In re Estate of Witherill, 306 A.D.2d 674, 761 N.Y.S.2d 698, 2003 N.Y. App. Div. LEXIS 6630 (N.Y. App. Div. 3d Dep't 2003).

45

DUTIES AND POWERS OF THE TRUSTEE

Trustees need to do the following:

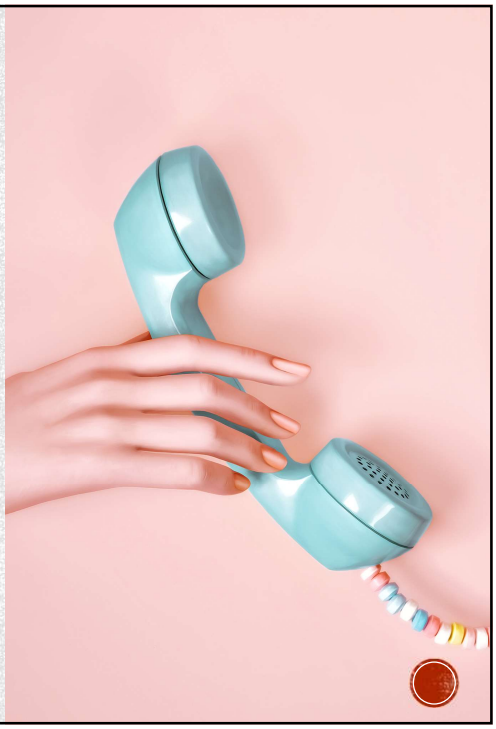
- **Manage Property.** Prudent Investor Act.
- **Manage Distributees**
- **File Tax Returns**
- **When needed, litigate**
- **Make distributions**
- **Communicate material facts with beneficiaries**

46

COMMUNICATING WITH BENEFICIARIES

List of duties/requirements trustees must have when communicating with beneficiaries.

- Trustees must be honest with beneficiaries.
- A trustee has a duty to communicate material facts with beneficiaries.
- "A trustee must not delegate his or her investment authority to a beneficiary or others."
- Trustees must treat beneficiaries fairly, especially between income beneficiaries and remaindermen, and between beneficiaries with differing rights.



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Practical Advice in Communicating with Beneficiaries

Closely review the trust instrument or testamentary trust provisions in the will. Pay close attention to:

i. The dispositive distribution provisions.

ii. The (presumably) boilerplate trustee powers provisions.

iii. To the best of your ability, review the law as it relates to the trust instrument.

iv. Determine what you will need to do, if anything to obtain the power to act as trustee.

48

Practical Advice in Communicating with Beneficiaries, 2

- Learn what property the trust owns and what property, you as trustee may need to marshal.
- Review the following:
  i. The recent few years of tax returns of the trust, decedent, or decedent's estate, as it may relate to the trust.
  ii. Any bank account or stock portfolio statements relating to the trust.
- Really try to get along with beneficiaries.
- Document everything.

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NEW YORK PROBATE AND TRUST ADMINISTATION
SEGMENT VI: What You Need to Know About Trusts

Presentation by Antar P. Jones, Esq., LL.M (Taxation)
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INTRODUCTION

Estate planners often use trusts to achieve a desired result for their clients. The reasons for using trusts in estate planning are numerous, but may include: i) wealth succession (and business succession), ii) planning for incapacity; iii) the avoidance of probate; iv) tax avoidance; v) asset protection; vi) planning for obtaining governmental benefits; and vii) even for planning for the caring of pets, among others. Many trusts may serve more than one purpose.

Tax issues that affect trusts include: the Federal estate tax and the basic exemption amount. Accordingly, for decedents who die in the year 2023 and who are United States citizens or residents, the Federal exemption amount of $12,920,000—meaning that estates that have $12,920,000 or less, do not need to pay a Federal estate tax. However, this amount is scheduled sunset on January 1, 2026. At such time, the Federal exemption amount is scheduled to be $5,000,000. However, it is quite possible that Congress will legislate a new amount before the sunset.

New York State also has an estate tax basic exclusion amount. For decedents who are New York State residents and who die during the year 2023, said amount is $6,580,000.

Estate planners should also consider the marital deduction. Married couples can defer estate taxes on the first spouse to die by

outright transfers to the surviving spouse.[1] I am not aware of any marital deduction in New York.

Portability of Deceased Spousal Unused Exclusion (DSUE). IRC § 2010(c)(4) authorizes estates of decedents dying after December 31, 2010, to elect to transfer any unused exclusion to the surviving spouse. The amount received by the surviving spouse is called the deceased spousal unused exclusion (DSUE) amount. If the executor of the decedent's estate elects transfer, or portability, of the DSUE amount, the surviving spouse can apply the DSUE amount received from the estate of the surviving spouse's last deceased spouse (defined later) against any tax liability arising from subsequent lifetime gifts and transfers at death. Note. A nonresident surviving spouse who is not a citizen of the United States may not take into account the DSUE

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A. Types of Trusts and their purpose.

Trust, definition. No definition given in the IRC. However, the instructions to IRS Form 1041 (fiduciary income tax turns) provides that "[a] ***trust*** is an arrangement created either by a will or by an *inter vivos* declaration by which trustees take title to property for the purpose of conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts.[2] Generally speaking, an arrangement will be treated as a trust under the IRC if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.[3]

The Surrogate's Court Procedure Act (the "SCPA")—the body of law concerning Surrogate's Court procedure in New York defines a "trust" as "a testamentary trust or a lifetime trust."[4] The Estates Powers and Trusts Law (the "EPTL")—the body of law concerning substantive matters concerning testamentary interests only

[1] Internal Revenue Code ("IRC") Section 2056(a).
[2] Instructions for Form 1041 (2021), p. 4.
[3] Treas. Reg. § 301.7707-4(a).
[4] SCPA § 103 (50).

provides the definition for a "lifetime trust"—as an express trust and all amendments thereto created other than by will and shall not include; a trust for the benefit of creditors, a resulting or constructive trust, a business trust where certificates of beneficial interest are issued to the beneficiary, an investment trust, voting trust, a security instrument such as a deed of trust and a mortgage, a trust created by the judgment or decree of a court, a liquidation or reorganization trust, a trust for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, or a trust created in deposits in any banking institution or savings and loan institution.

1. **Simple Trust** [a "pass-through trust"): A trust may qualify as a simple trust if:
   a. The trust instrument requires that all income must be distributed currently;
   b. The trust instrument doesn't provide that any amounts are to be paid, permanently set aside, or used for charitable purposes; and
   c. The trust doesn't distribute amounts allocated to the corpus of the trust.[5]

2. **Complex Trust.** A complex trust is any trust that doesn't qualify as a simple trust as explained above.[6]

3. **Grantor Trust.** A trust is a grantor trust if the grantor retains certain powers or ownership benefits [IRC 671-679]. This can also apply to only a portion of a trust. In general, a grantor trust is ignored for income tax purposes and all of the income, deductions, etc., are treated as belonging directly to the grantor. This also applies to any portion of a trust that is treated as a grantor trust.[7]

4. **Non-grantor Trust.** A trust that is not a grantor trust. A trust whereby a grantor does not have powers of ownership associated with it, per the "grantor trust rules."

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[5] 2020 Instructions for Form 1041 and Schedules A, B. B, J, and K-1, p. 17.
[6] Id.
[7] For a more detailed description circumstances by which a trust is treated as a grantor trust, see Treas. Reg. § 1.671-1(a).

5. **Lifetime Trust.** An express trust, including all amendments thereto, created during the grantor's lifetime other than certain other enumerated trusts.[8]

6. **Testamentary Trust.** A trust created by will.

7. **Revocable Trust.** A revocable trust is a trust whereby provisions can be altered or canceled dependent on the grantor or the originator (settlor) of the trust.[9] A trust that can be "revoked."

8. **Irrevocable Trust.** A trust that cannot be changed or modified without the beneficiary's permission.[10]

9. **Intentionally Defective Grantor Trust ("IDGT")** is an irrevocable trust that is drafted intentionally to have grantor trust status.

10. **Distributable Net Income** or "DNI" means, with respect to any taxable year, the taxable income of an estate or trust computed with certain enumerated modifications described in IRC § 643(a).

11. **Credit Shelter Trusts, By-pass Trusts, and A-B Trusts**. This is a tool used by married couples with taxable estates in order to legally maximize their estate tax exemptions.[11] The strategy involves creating two trusts after the first spouse passes. The deceased spouse's portion of the couple's property—at least up to the federal exemption amount (now $12,920,000) is placed in the B trust. The B trust is irrevocable and will pass to beneficiaries other than the surviving spouse (usually, the couple's children).[12] The surviving spouse must follow the trust's plan without overly benefiting from its operation, but this trust often passes income to the surviving spouse to live on for the rest of his/her life.[13]#The remaining assets are placed in the A trust, taking advantage of the marital deduction, where the surviving spouse will have control over them. When the

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[8] SCPA § 103 (31).
[6] https://www.investopedia.com/terms/r/revocabletrust.asp.
[10] htpps://222investopedia.com/terms/i/irrevocabletrust.asp.
[11] https://www.law.cornell.edu/wex/credit_shelter_trust
[12] Id.
[13] Id.

surviving spouse passes, the assets will go to the beneficiaries of the trust.

a. **Pitfalls.**

i. Portability. One can achieve the same results of a credit shelter trust in certain circumstances simply by using portability and transferring the DSUE of the first spouse to die (provided the surviving spouse does not remarry).

ii. Use of specific language when drafting a credit shelter trust. The IRS will not respect the credit shelter trust unless specific language is used.[14] Also, the surviving spouse's use of the bypass trust must be limited.[15]

iii. Cost. Credit shelter trusts can be costly to draft and implement. It may be more cost-effective to obtain a stepped-up basis in the property instead.[16] Thus, a thoughtful analysis should be conducted.

12. **Disclaimer Trusts.** A marital disclaimer trust has provisions (usually contained in a will) that allow a surviving spouse to leave assets in a trust for the benefit of their spouse by disclaiming ownership of a portion of the estate that the survivor would have inherited after the death of the first spouse. The disclaimed property is transferred to the marital disclaimer trust, which can then benefit the surviving spouse during their life, without being included in the surviving spouse's estate at death.[17]

13. **Qualified Terminable Interest Property ("QTIP") Marital Trusts**. QTIP property is property of a decedent designated on IRS Form 706 for the use of (and income interest for the benefit of) the surviving spouse for her life, then, upon her death, to beneficiaries described in the trust. It is described in IRC § 2056(b)((7). Such property will not be subject to gift and estate tax during

[14] Id.
[15] Id.
[16] Id.
[17] https://www.fidelity.com/viewpoints/wealth-management/insights/marital-disclaimer-trusts.

the lifetime of the surviving spouse. When the surviving spouse dies, such property is included in his estate for estate tax purposes. A QTIP trust provides limited access to the trust assets for a surviving spouse. Although the surviving spouse may receive income from the trust, he or she cannot decide on the ultimate disposition of the trust assets and cannot withdraw principal from the trust.[18] However, the QTIP trust can be written to provide the greater of $5,000 or 5% of the trust assets to your surviving spouse annually if you wish. Upon the death of your surviving spouse, the trust is distributed according to your ultimate specifications.[19]

a. Often referred to as "dead hand" control.

b. Most liked in "blended family" situations.

c. Because of discount issues affecting QTIP trusts and the need to file an IRS Form 706, it is more advantageous to use such arrangements with larger estates.

14. **Qualified Domestic Trusts.**

a. Generally, married spouses can bequeath an unlimited amount to their spouses upon death through the **"marital deduction."**[20] This was true if the donee spouse was not an American citizen until the Technical and Miscellaneous Revenue Act of 1988 (TAMRA). However, Congress determined that allowing an unlimited marital deduction to noncitizen spouses increased the likelihood that such donee's property would escape the imposing of federal estate tax.

b. However, IRC § 2056A permits the marital deduction with respect to transfers to noncitizen spouses unless such property passes into a "qualified domestic trust, or "QDOT."

c. Requirements.

[18] https://www.wilmingtontrust.com/library/article/the-benefits-of-qtip-trusts.
[19] Id.
[20] IRC § 2056(a).

i. Except as provided in the regulations, the trust instrument must provide for at least 1 trustee that is a United Sates citizen or domestic corporation; and

ii. The trust instrument must provide that no distribution (other than a distribution of income) may be made from the trust unless a trustee who is an individual citizen of the United States or domestic corporation has the right to withhold from such distribution the tax imposed by IRC § 2056A.

iii. Also, the trust must meet the requirements the Secretary provides by regulation in order to ensure the collection of any tax imposed, notably:

A) The executor of the decedent's estate and the U.S. Trustee shall establish in such manner as may be prescribed by the Commissioner on the estate tax return and applicable instructions that these requirements have been satisfied or are being complied with. [21]

B) The QDOT must be maintained under the laws of a state of the United States or the District of Columbia, and the administration of the trust must be governed by the laws of a particular state or the District of Columbia.[22] Thus, the records must be kept in a state of the United States or the District of Columbia.[23] (What about Puerto Rico, U.S. Virgin Islands or Guam?).

C) The trust may be established pursuant to an instrument executed under either the laws of a state of the United States or the District of Columbia or pursuant to an instrument executed under the laws of a foreign jurisdiction, such as a foreign will or trust, provided that such foreign instrument designates the law of a particular state of the United States or the District of Columbia as

[21] 26 CFR 20.2056A-2(a).
[22] Id.
[23] Id.

governing the administration of the trust, and such designation is effective under the law of the designated jurisdiction.[24]

D) In addition, the trust must constitute an ordinary trust, as defined in 26 CFR 301.7701-4(a), and not any other type of entity.[25]

E) **Qualified Marital Interest Requirements.**

1) **Property Passing to QDOT.** If property passes from a decedent to a QDOT, the trust must qualify for the federal estate tax marital deduction under section 2056(b)(5) (life estate with power of appointment), section 2056(b)(7) (qualified terminable interest property, including joint and survivor annuities under section 2056(b)(7)(C)), or section 2056(b)(8) (surviving spouse is the only noncharitable beneficiary of a charitable remainder trust), or meet the requirements of an estate trust as defined in § 20.2056(c)-2(b)(1)(i) through (iii).[26]

2) **Property Passing Outright to Spouse.** If property does not pass from a decedent to a QDOT, but passes to a noncitizen surviving spouse in a form that meets the

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[24] Id.

[25] Id. See, 26 CFR § 301.7701-4(a), which defines "ordinary trusts" stating: "[i]n general, the term "trust" as used in the Internal Revenue Code refers to an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts. Usually, the beneficiaries of such a trust do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. However, the beneficiaries of such a trust may be the persons who create it and it will be recognized as a trust under the Internal Revenue Code if it was created for the purpose of protecting or conserving the trust property for beneficiaries who stand in the same relation to the trust as they would if the trust had been created by others for them. Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

[26] 26 CFR § 20.2056A-2(b)(1).

requirements for a marital deduction without regard to section 2056(d)(1)(A), and that is not described in 26 CFR 20.2056A-2(b)(1) relating to property passing to a QDOT, the surviving spouse must either actually transfer the property, or irrevocably assign the property, to a trust (whether created by the decedent, the decedent's executor or by the surviving spouse) that meets the requirements of 26 CFR 20.2056A-2(c) concerning statutory requirements, and the requirements of § 20.2056A-2T(d) (pertaining, respectively, to statutory requirements and regulatory requirements imposed to ensure collection of tax) prior to the filing of the estate tax return for the decedent's estate and on or before the last date prescribed by law that the QDOT election may be made (see § 20.2056A-3(a)).[27]

3) **Property Passing under a Nontransferable Plan or Arrangement.** If property does not pass from a decedent to a QDOT, but passes under a plan or other arrangement that meets the requirements for a marital deduction without regard to section 2056(d)(1)(A) and whose payments are not assignable or transferable (see § 20.2056A-4(c)), the property is treated as meeting the requirements of this section, and the requirements of § 20.2056A-2T(d), if the requirements of § 20.2056A-4(c) are satisfied. In addition, where an annuity or similar arrangement is described above except that it is assignable or transferable, see § 20.2056A-4(b)(7).[28]

F) **Statutory Requirements**. The requirements under IRC § 2056A(a)(1)(A) and (B) must be satisfied.[29]

[27] 26 CFR § 20.2056A-2(b)(2).
[28] 26 CFR § 20.2056A-2(b)(3).
[29] 26 CFR § 20.2056A-2(c).

G) **Additional Requirements to Ensure Collection of Tax.**

1) Certain security arrangements must be made for the payment of tax under IRC § 2056A(b)(1).[30]

2) If the U.S. trustee is an individual United States citizen, the individual must have a tax home (as defined by IRC 911(d)(3)) in the United States.

3) There are strict and thorough annual reporting requirements for QDOTs.[31] And,

iv. In addition to the other requirements, an election under IRC § 2056A by the executor of the decedent must be applied to such trust.[32]

d. Tax Treatment of Trust.

i. Imposition of Estate Tax. There is an imposition of estate tax on (A) any distribution before the date of death of the surviving spouse from a qualified domestic trust; and (B) the value of the property remaining in a QDOT on the date of death of the surviving spouse.

ii. Amount of Tax. In general, in the case of any taxable event, the amount of estate tax imposed shall be an amount equal to the tax imposed under the estate tax regime, modified certain sums.

e. Certain Lifetime Distributions are Exempt from Tax:

i. Income distributions.

ii. Hardship exception.

f. Due date.

i. Tax on distributions. Due on the 15th day of the 4th month following the calendar year in which

[30] 26 CFR § 20.2056A-2(d).
[31] 26 CFR § 20.2056A-2(d)(3).
[32] IRC § 2056A(a)(3).

the taxable even occurs. But the estate tax on distributions during the calendar year in which the surviving spouse dies shall be due and payable not later than the date the estate tax is due and payable.

ii. Tax at death of spouse. Due and payable on the date 9 months after the date of such death.

g. Marital deduction allowed if resident spouse becomes a citizen.[33]

15. **Irrevocable Life Insurance Trusts**. An irrevocable life insurance trust (ILIT) is typically used to hold life insurance policies and their proceeds, while keeping them out of the estate of the insured. As life insurance can explode the size of a decedent's estate, using such a trust may minimize the value of the decedent's estate. If the policy is owned by the insured it will be part of the gross estate of the insured under IRC §§ 2031 and 2042. However great care should be taken in establishing an ILIT, as doing so properly is extremely technical.

a. Gift Tax. Gift tax issues are one of the primary concerns in drafting and administering ILITS. If the grantor can make transfers under the gift tax annual exclusion amount, no imposition of a gift tax or estate tax will occur with respect to donor or spouse.

i. To qualify for the gift tax annual exclusion, the gift must be a present interest gift under IRC § 2503(b). To qualify as such, the donee must have the unrestricted right to the immediate use, possession, or enjoyment of the transferred property of the income from the property.[34]

ii. **Transfers of Life Insurance Policies to ILITs**. Such transfers are gifts. However, whether such transfers are "present interest" gifts that may be subject to the annual exclusion depend on the terms of the policy.

[33] 26 CFR 20.2056A-1(b).
[34] 26 CFR 25.2503-3(b).

A) **Fixed Income Interest Trusts**. If a trust creates a fixed income interest in a beneficiary so that the beneficiary has the right to all of the income payable at least annually, then, as a general rule, a portion of the value will qualify for the annual exclusion. However, the IRS takes the position that a gift to a life insurance policy is a future interest and no annual exclusion is allowed.[35]

B) **Discretionary Trusts.** If the terms of the trust provide for discretionary payments of income and/or principal or for payments to beneficiaries that are contingent on future events, transfers to the trust will not qualify as gifts of present interests.[36] However, if the beneficiaries are granted Crummey withdrawal powers, the transfers qualify as gifts of present interests and thus, the IRC § 2503(b) annual exclusion should be available.[37]

iii. **Direct and Indirect Contributions to an ILIT for Premium Payments.** Premium payments are completed gifts. The terms of the trust determine whether such payments are gifts of present interest qualifying for the annual exclusion.[38] For example, if the trust terminates at the death of the grantor, then the premium payments are gifts of present interest and are eligible for the annual exclusion.[39] However, if the ILIT continues after the death of the grantor, the premium payments are gifts of future interests.[40] Nevertheless, the use of Crummey withdrawal powers may allow such transfers to qualify for the annual exclusion.[41]

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[35] 26 CFR 25.2503-3(c), Ex. 2. See Phillips v. Comr., 12 T.C. 216 (1949).
[36] U.S. v. Ryerson, 312 U.S. 405 (1941); Phillips v. Comr, T.C. 216 (1949); Bloomberg BNA Estates, Gifts and Trusts Portfolios: Trusts, Portfolio 807-2nd: III, B. (1) (b).
[37] Bloomberg BNA Estates, Gifts and Trusts Portfolios: Trusts, Portfolio 807-2nd: III, B. (1) (b).
[38] Id. at B. (2).
[39] Rev. Rul. 76-490, 1976-2 C.B. 300. See also 26 CFR 25-2503-(c), Ex. 6.
[40] Rev. Rul. 79-47, 1979-1 C.B. 312.
[41] In addition, the right to withdraw the insurance policy by the beneficiary will qualify the payments of premiums on the policy held by the trust as eligible for

iv. **Crummey Withdrawal Powers**. Crummey Withdrawal Powers are rights given to one or more beneficiaries of an ILIT. It is the unrestricted right to the immediate use, possession, and enjoyment of the contribution to the trust during a specified period of time, whether or not exercised, and will make the gifts to the ILIT gifts that qualify for the IRC § 2503(b) annual exclusion.[42]

A) **Crummey Power Requirements.**

1) **Beneficial Interest**. The holders of the withdrawal powers must have beneficial interests in the trust and not discretionary or contingent remainder interests.[43]

2) **Reasonable Opportunity to Exercise and Notice.** To qualify a transfer to a trust for the IRC § 2503(b) gift tax annual exclusion, the IRS also requires that a beneficiary be given prompt notice of his or her right to withdrawal and a reasonable opportunity to exercise such power before it lapses.

3) **IRS Says 30 Days Reasonable Notice.[44]**

a) Case Law Says 15 Days Reasonable Notice.[45]

b. **Common Pitfalls with ILITs.**

i. **Incidents of Ownership.** If the donor has incidents of ownership in the ILIT, the value of the life insurance proceeds can get pulled into the

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the gift tax annual exclusion. See Halstead v. Comr., 28 T.C. 1069 (1957). However, if the beneficiary dies before the insured, the policy will be included in the beneficiary's gross estate because the power to withdraw the policy is a general power of appointment under IRC § 2041. See Bloomberg BNA Estates, Gifts and Trusts Portfolios: Trusts, Portfolio 807-2nd: III, B. (2) (a).

[42] Crummey v. Comr., 397 F.2d 82 (9th Cir. 1968); See also Gilmore v. Comr., 213 F.2d 520 (6th Cir. 1954); Kieckhefer v. Comr., 189 F.2d 118 (7th Cir. 1951).

[43] Bloomberg BNA Estates, Gifts and Trusts Portfolios: Trusts, Portfolio 807-2nd: III, B. (2) (a) (2).

[44] PLRs 200130030, 200123034, 200011054, 199912016, 9311021, 9232013, 9218040, 9030005, 8712014, 8134135, 8103074.

[45] Cristofani Est. v. Comr., 97 T.C. 74 (1991).

gross estate of the donor. Incidents of ownership include the right to:

A) change a beneficiary;

B) transfer ownership of the policy;

C) change the beneficial ownership in the policy or its proceeds;

D) change the time, place or manner of enjoyment thereof;

E) use the policy value as collateral for a loan;

F) surrender the insurance policy if the decedent created the trust, or

G) any other traditional rights of ownership.[46]

ii. **Reciprocal Trusts Doctrine.** Simply put, the doctrine states that if husband and wife have trusts with reciprocal provisions, benefitting the other similarly, the trusts can be "uncrossed" so that the value of each trust will be included be included in the donor's gross estate for estate tax purposes.

16. **Pet Trusts.**

a. **The legislature promulgated a statute for trust for pets in 1996. The statute is currently, Section 7-8.1 of the Estates Powers and Trusts Law (the "EPTL").**

i. Trusts for the care of a designated domestic or pet animal is valid.[47]

ii. Principal and income. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed

[46] 26 CFR 20.2056-1(c)(4).
[47] EPTL 7-8.1(a).

by a court upon application to it by an individual, or by a trustee.[48]

iii. The trust shall be terminated when the living animal beneficiaries of such trust are no longer alive.[49]

iv. Except as otherwise provided in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals.[50]

v. Upon termination, the trustee shall transfer unexpended trust property as directed by the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor.[51]

vi. Court has discretion. A court may reduce the amount of the property transferred if it determines that the amount substantially exceeds the amount required for the intended use. The amount of reduction passes pursuant to EPTL § 7-8.1.[52]

vii. Court can appoint trustee. If there is no trustee designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.[53]

viii. Distribution deductions under IRC §§ 651 and 661 are unavailable. Such distributions are not taxed to anyone under IRC §§ 652 and 662.

b. **Notable Cases**. Many cases concern tensions between the executors, human beneficiaries of the

[48] Id.
[49] Id.
[50] EPTL 7-8.1(b).
[51] EPTL 7-8.1(c).
[52] EPTL 7-8.1(d).
[53] EPTL 7-8.1(e).

estate and the trustee or caretaker of the animals of the pet trust.

i. Matter of Abels, 44 Misc. 3d 485 (S. Scarpino, NY Surr. Ct. Westchester County, June 27, 2014). The Court did not sanction an early termination of a pet trust and to reduce the allocation thereto because the transferor/decedent "painstakingly" determined her plans and wishes for her pet in her will, and to do otherwise would be to re-write decedent's will.

ii. Matter of Helmsley, 31 Misc. 3d 1233[A] (NY Surr. Ct. NY County, February 18, 2009). The pet trust was reduced from $12 million to $2 million because the trust was overfunded for the carrying out of the decedent's wishes.

iii. Matter of Duke, NYLJ, Aug. 6, 1997 at 24, col 6 (NY Surr. Ct. NY County 1997). Although this case was decided prior to the enactment of EPTL § 7-8.1, the Court upheld the validity of a pet trust under decedent's will after the Doris Duke Charitable Foundation—the residuary beneficiary attempted to invalidate it. The Court acknowledged the tax savings if the money going to the trust was instead directed to the petitioner, especially in light of the allegation that The Doris Duke Foundation for the Preservation of Endangered Wildlife and The Doris Duke Foundation for the Preservation of New Jersey Farmland was willing to take care of the dog. The Court stated "[t]hose factors, however, cannot justify invalidating an otherwise proper disposition."

iv. Rev. Rul. 76-486: "Since a beneficiary is lacking [as there are no lives-in-being], a bequest in trust for a pet animal does not fit into the traditional concept of a trust, as set out in section 301 of the regulations. Such an arrangement, however, should nonetheless be classified as a trust for tax purposed under section 641 of the Code in those jurisdictions where it would not be invalid."

17. Supplemental Needs Trusts. Quick Definition: A **Supplemental Needs Trust** (or **Special Needs Trust**) (often referred to as an "SNT") is a trust created for a chronically and severely disabled beneficiary that "*supplements rather than diminishes*", governmental benefits such as Medicaid.[54] However, as shall be described below, states, such as New York, describe what a SNT is by statute.[55]

A) In Matter of KeyBank, N.A., the Court stated that "a[] [SNT] is a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability, EPTL § 7-12(a)(5), that is designed to enhance the quality of a disabled individual's life by providing for special need without duplicating services covered by Medicaid or destroying Medicaid eligibility."[56]

b. **Quick Purpose of SNT's**: Medicaid and other governmental benefit programs consider the resources and income of an individual for purposes of determining eligibility for assistance and the amount of such assistance. But by establishing a SNT, a person, such as a family member may establish a trust for a disabled person without jeopardizing the beneficiary's eligibility for Medicaid, or SSI.[57]

i. **SNTs can secure state-funded services and enhance the quality of a disabled person's life**. SNTs are a planning device authorized by federal and state law to insulate assets of a chronically ill and severely disabled individual "for the dual purpose of securing or maintaining eligibility for state-funded services, and enhancing the disabled persons' quality of life with supplemental care paid by his or her trust assets."[58]

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[54] 12 Warren's Heaton on Surrogate's Court Practice § 211.01.
[55] See EPTL § 7-1.12(a)(5).
[56] 58 Misc. 3d 235, 243 (Surr. Ct. Saratoga County, 2017) citing Cricchio v. Pennisi, 90 NY2d 296, 303 (1997); and Matter of Abraham XX, 11 NY3d 429 (2008).
[57] 12 Warren's Heaton on Surrogate's Court Practice § 211.01.
[58] Matter of KeyBank, N.A. at 243.

ii. **SNT's can help a disabled person with assets secure means-tested benefits, such as Medicaid**. "The SNT is designed to address the unique and difficult situation faced by severely disabled individuals with assets that are sufficient to end their Medicaid eligibility but insufficient to account for their medical costs."[59]

c. **How SNTs Work?** "The SNT is available only to applicants under the age of 65 with severe disabilities as defined by statute. Unless the applicant placed excess assets in the Medicaid SNT for supplemental care, he or she would no longer be eligible for Medicaid, thus relieving the State of a substantial financial burden. In order to further Medicaid's purpose of providing medical assistance to needy persons, the State agrees to continue paying Medicaid costs—in instances where it would otherwise be relieved of this obligation—in exchange for the *possibility* of reimbursement upon the recipient's death. The State in a sense is like an insurer calculating risk. For every recipient who depletes the trust before death, the State can expect some trusts to have sufficient assets upon a recipient's death to offset the additional costs of continuing Medicaid payments for these severely disabled individuals who otherwise would be ineligible Moreover, the State's right to reimbursement occurs only upon the death of the beneficiary—at a time when the life-enhancing purpose of the trust can no longer be effectuated. The Medicaid SNT reflects a policy decision to balance the needs of the severely disabled and the State's need for funds to sustain the system."[60]

d. **Statutory Definition (NY)**. "Supplemental needs trust" means a discretionary trust established for the benefit of a person with a service and chronic or persistent disability (the "beneficiary") which conforms to certain enumerated criteria.[61]

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[59] Matter of Woolworth, 903 N.Y.S.3d 218, 220 (App. Div. 4th Dept. 2010) citing Cricchio v. Pennisi, at 303.
[60] Id., at 221.
[61] EPTL § 7-1.12(a)(5).

i. **"Discretionary"** does not appear to be defined by New York law. However, it appears that a "discretionary trust" is one in which the settlor gives the trustee authority over the trust, including the authority to use discretion in the timing and amount of income or corpus payments to the beneficiary.[62]

ii. **"Person with a severe and chronic or persistent disability"** as defined in EPTL § 7-1.12 (4) means a person with mental illness, developmental disability, or other physical or mental impairment.

e. **Types of SNTs.** Two types

i. **Third Party SNTs.** Those that are established with funds belonging to someone other than the disabled person, or the disabled person's spouse, or someone legal responsible for the expenses of care for the disabled person.[63] There are three types.

A) Purely discretionary trusts

B) Escher type trusts[64]; and

C) Statutory SNTs under EPTL § 7-1.12.

ii. **Self-Settled SNTs.** Established with the funds of the disabled person or the disabled person's spouse. They can only be established if certain conditions are met, namely (a) the trust must contain the assets of an individual under age 65; (c) the individual must be "disabled" as defined by 42 U.S.C. § 1382(c)(a); (d) the trust must be

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[62] Pfannenstiehl v. Pfannenstiehl, 475 Mass. 104 (Mass. Supr. Jud. Ct 2016), Texas Commerce Bank Nat'l Ass'n v. United States, 908 F.Supp. 453 (TX S. D. 1995).

[63] 12 Warren's Heaton on Surrogate's Court Practice § 211.01 [2].

[64] Matter of Escher, 94 Misc. 2d 952 (Surr. Ct. Bronx County 1978). Escher is the seminal case in New York which established the right of a parent to create a discretionary trust for a disabled adult child without jeopardizing the child's financial eligibility for government benefits which are "means-tested." 10 B.U. Pub Int. L.J. 91. Thus, a settlor's clear intent to ***supplement rather than supplant*** public benefits for a third party should be honored (12 Warren's Heaton on Surrogate's Court Practice § 211.01 [2] citing Escher.

established for the sole benefit of such individual with disabilities (or special needs) by the individual himself or herself, a parent, grandparent, or court or legal guardian; and (e) the trust must contain a Medicaid payback provision.[65]

18. Other trusts (notable mentions).

    a. **Qualified Personal Residence Trusts (QPRTs)**. A QPRT is a specific type of irrevocable trust that allows its creator to remove a personal home from his/her estate for the purpose of reducing the amount of the gift tax that is incurred when transferring assets to a beneficiary.[66] QPRTs allow the owner of the residence to remain living on the property for a period of time with "retained interest" in the house; once that period is over, the interest remaining is transferred to the beneficiaries as "remainder interest."[67] The settlor of the trust may rent the property from the beneficiaries at that time.[68]

    b. **Dynasty Trusts**. A dynasty trust is a long-term trust created to pass wealth from generation to generation without incurring transfer taxes, such as estate and gift taxes.[69] They are often used by very wealthy families to take advantage of the generation-skipping tax exemption of $12.92 million (in 2023).[70] In order to act as a dynasty trust, the trust must be kept "alive"—meaning withdrawals that heirs or beneficiaries take cannot be so large as to deplete the account.[71] If the trust is not depleted by the beneficiaries, and state law does not otherwise limit

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[65] Bernard A. Krooks and Joel Krooks, Guardianships and Special Needs Trusts (NY)(Current as of 8/11/2022) (LEXIS) citing 42 U.S.C. § 1396p(d)(4)(A), NY SSL § 366, subd 2(b)(2)(iii)(A); and 18 NYCRR § 360-4.5(b)(5)(a).
[66] https://www.investopedia.com/terms/q/qualified-personal-residence-trust.asp.
[67] Id.
[68] Del Brocoolo v. Torres, 4 Misc. 3d. 510, 513 (Nassau County Supr. Ct. 2004).
[69] https://www.fidelity.com/viewpoints/wealth-management/insights/dynasty-trusts.
[70] Id.
[71] Id.

the duration of the trust, then, at least theoretically, a dynasty trust could last forever.[72]

i. Dynasty trusts must operate in jurisdictions with long or infinite perpetuities periods. Those states include: Alaska (concerning a 1000 year appointment period) Colorado, Florida, Nevada, New Jersey, Rhode Island, South Dakota, Utah, Wyoming, Delaware (for trusts other than those having real property).

c. **Grantor Retained Annuity Trusts**. A grantor retained annuity trust (GRAT) is a "tax-saving device in which a grantor transfers assets into trust and retains an annuity payable for a specified term."[73] When these GRATS are structured according to the Tax Code, the transferor avoids incurring any gift-tax liability. If the grantor survives to the end of the specified term, any appreciation in the asset's value over the rate specified in I.R.C. § 7520 passes to the beneficiaries without any gift or estate tax. If the grantor does not survive, however, the full value of the asset is included in her gross taxable estate.[74] This GRAT structure is specifically provided for in the regulations under special valuation rules.[75]

d. **Charitable Remainder Trusts**. A charitable remainder trust (CRT) is a split-interest trust that allows an individual, during life or at death, to contribute a remainder interest in property to charity while reserving the right to receive income for one or more named noncharitable beneficiaries (which may include the grantor) for a term of years or for life[76]

i. **Why use a CRT?**

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[72] Id.
[73] Larson v. Comm'r, (In re Est. of Levine), 2022 Us. Tax. Ct. LEXIS 12, pp. 11-12 citing Estate of Hurford v. Commissioner, T.C. Memo. 2008-278, T.C. Memo 2008-278, 96 T.C.M. (CCH) 422, 425 n.2 (citing Bittker et al., Federal Estate and Gift Taxation 80-81 (9th ed. 2005))
[74] Larson at 12, citing Treas. Reg. § 20.2036-1(c)(2)(i).
[75] Id. citing Treas. Reg. § 25.2701-1 to 25.2701-8.
[76] Bloomberg BNA.

A) Excellent tax deferral while meeting donor's charitable goals.

B) The IRS has provided annotated sample documents that cover most of the possible permutations of the CRT, easing the drafting process and highlighting the optional provisions and their tax consequences.[77]

ii. **Disadvantages**. They are complex.

iii. **Types of CRTs**.

A) **Charitable remainder annuity trusts (CRATs)** pay the noncharitable beneficiary a fixed percent or amount for a term of years or the lifetime of one or more beneficiaries.[78]

B) **Charitable remainder unitrusts (CRUTs)** pay the noncharitable beneficiary a percent of value of the trust recalculated annually.[79]

e. **Charitable Lead Trusts**. A charitable lead trust (CLT) is a split-interest trust, created during life or at death, that grants an income interest for a specified period to a charitable beneficiary, with the remainder interest reverting back to the grantor or passing to another noncharitable beneficiary.[80]

i. Inter vivos CLTs may reduce estate and gift tax on an appreciating asset and may provide some income tax savings. But the grantor will lose the income from the asset contributed to the CLT.[81]

ii. Sample forms.[82]

A) **Rev. Proc. 2007-45** provides sample declarations of trust satisfying the requirements for an inter vivos non-grantor charitable lead annuity trust for a term of years, a grantor charitable lead annuity trust for a term of years,

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[77] BNA Portfolio 865-3rd 1:I.
[78] Id.
[79] Id.
[80] BNA definition.
[81] Id.
[82] Id.

annotations for each trust, and sample alternative provisions.

B) **Rev. Proc. 2007-46** provides a sample declaration of trust satisfying the requirements for a testamentary CLAT for a term of years, annotations for the trust, and sample alternative provisions.

C) In **Rev. Proc. 2008-46**, the IRS provided a sample declaration of trust satisfying the requirements for a testamentary charitable lead unitrust for a term of years, annotations for the trust, and sample alternative provisions.

f. **Asset Protection Trusts**. Trusts may provide important asset protection benefits that supply further reason why a client might be interested in transferring property in trust, rather than outright: (i) trusts serve to protect assets from a beneficiary's own extravagance or bankruptcy; (ii) trusts serve to protect assets for the benefit of the intended beneficiary by limiting the exposure of the assets to possible claims which may arise in contract or in tort; (iii) trusts serve to protect assets from claims of the beneficiary's spouse or ex-spouse; and (iv) trusts serve to preserve wealth within an intended class of beneficiaries (i.e., the descendants of the settlor).[83]

i. **Spendthrift Trusts.** A spendthrift provision in a trust is a provision which restrains the transfer of a beneficiary's interest in the trust.[84] A spendthrift trust is designed to protect beneficiaries who cannot manage their money.[85]

1) Spouse issue.

2) Big, irresponsible spender. Drugs.

3) Gambling

4) Cult

5) Etc.

[83] BNA 810-4th.VI.
[84] Characteristics and Uses of Trusts, at 6.
[85] Id.

A) **Possible provisions of a spendthrift trust**.

1) "The principal of the trusts hereunder, and the income therefrom, so long as the same are held by Trustee, shall be free from the control, debts, liabilities and assignments of any beneficiary interested therein, and shall not be subject to execution or process for the enforcement of judgments or claims of any sort against such beneficiary."[86]

2) "No beneficiary of any trust created by this Trust Agreement shall have the power to anticipate, transfer, sell, assign, or encumber any payment or distribution of either principal or income to be made under the provisions of such trust, and any anticipation, transfer, sale, assignment or encumbrance of any interest of any such beneficiary, whether of income or principal, whether by voluntary act or by operation of law, shall be void, and no payment or distribution shall be made by the Trustee to such beneficiary. If, notwithstanding the above, it shall be held that the interest, whether of income or principal, of any beneficiary of any trust under this Trust Agreement has vested in any vendee, transferee, assignee, receiver or trustee in bankruptcy of such beneficiary, whether by voluntary transfer or by operation of law, then to the extent of such transfer, sale, assignment, or encumbrance, such interest shall cease, and the Trustee may thereupon apply any payment or distribution, whether of income or principal thus attempted to be sold, transferred, assigned, levied upon or taken, to the use of the beneficiary who would have been entitled thereto in the absence of such transfer, assignment, levy or encumbrance, or to the use of such beneficiary's family, as the Trustee, in his uncontrolled discretion, may deem best."[87]

B) EPTL § 7-1.5 concerns itself with spendthrift provisions.

C) Spendthrift provisions do not always work.[88]

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[86] Revocable Trust (Minimally funded, Grantor as Sole Initial Trustee and Income Beneficiary) (NY) (LEXIS).
[87] Waheed v. Kirwan, 2023 N.Y.Misc. LEXIS 663 at 4-5 (Supr. Ct. New York County 2023).
[88] See, EPTL 7-1.5(d). See also, In re Chusid's Estate, 60 Misc. 2d 462, 464 (Kings County Surr. 1969).

D) The drafter of a spendthrift provision should research the contours of the law thoroughly to determine the extent to which a spendthrift provision can protect trust property.

E) Every trust should have a spendthrift provision unless there is a strong reason to not have the same.

g. **Irrevocable Income Only Trusts (IIOTs)**. An irrevocable income only trust (commonly known as an IIOT) is a non-crisis planning tool.[89] An IIOT is a first-party irrevocable trust that is used to protect assets when a client wants to plan for the possible future need of nursing home care.[90] Distributions to the grantor are limited to only income.[91] Distribution of principal to the grantor is prohibited under the trust terms; however, there is no restriction on payment of principal to a third party(ies) such as a child if the practitioner chooses to draft the trust as such.[92] The transfer of assets into this trust will result in a transfer penalty if the grantor requires and seeks nursing home Medicaid benefits during the 60-month look-back period. However, if the grantor applies for Medicaid benefits during the look-back period, the trust assets are not considered available for eligibility purposes.

B. Jurisdiction.

1. The Supreme Court is a Court of general jurisdiction.[93] Thus, it may hear all trust matters. However, the legislature is permitted to create other courts that may have jurisdiction over other matters, and those matters may be originated in those courts.[94]

   a. **Venue.** Except as otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced, or if no parties reside in the state, in any county designated by plaintiff.[95]

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[89] Bernard A. Krooks, Esq., Elder Law Planning (NY) (LEXIS 2023).
[90] Id.
[91] Id.
[92] Id.
[93] New York State Constitution, Article VI., § 7.a.
[94] New York State Constitution, Article VI., § 7.b.
[95] CPLR § 503.

i. The residence of the trustee shall be deemed in the county she was appointed as well as the county in which she resides.

b. "The surrogate's court shall have jurisdiction over all actions and proceedings relating to the affairs of decedents, probate of wills, administration of estates and actions and proceedings arising thereunder or pertaining thereto, guardianship of the property of minors, and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law."[96]

i. Thus, it appears the New York State Constitution provides that the Surrogate's Court does have jurisdiction over issues concerning **dead people** and their **wills** (i.e.—testamentary trusts) "*and such other actions and proceedings, not within the exclusive jurisdiction of the supreme court, as may be provided by law.*"

c. The Surrogate's Court Procedure Act ("SCPA")—the procedural law for Surrogate's Court practice in New York applies to lifetime trusts, regardless of when the lifetime trust was created. SCPA § 104.

d. However, the main provisions concerning trusts in the SCPA can be found in its Article 15. Specifically, it says that the SCPA applies to

i. A trust created by the will of a domiciliary.

ii. A trust relating to real or personal property, without regard to the domicile of the testator or grantor;

A) where if a testamentary trust the will creating the trust was admitted to probate in any New York surrogate's court or

B) where the *situs* of the trust or any real property held by the trust is within New York and if a testamentary trust, the will creating the trust was duly proved or established or admitted to probate in another jurisdiction where it was executed or where the testator was domiciled at the time of his death.[97]

[96] Id, at § 12.d.
[97] SCPA § 1501 1(b).

C) A lifetime trust of which the supreme court would have jurisdiction.

e. Situs.

i. Testamentary Trusts. Situs of a trust of personal property shall be deemed New York State if the personal property is in the state at the time of decedent's death ***and*** is held and administered in the state in accordance with the will.

ii. Lifetime Trust of a Non-domiciliary. If personal property is within New York State at the time of the creation of the lifetime trust ***and*** is held and administered in the state in accordance with the lifetime trust.[98]

iii. **Exception.** The situs will not be New York State if the will, lifetime trust, or the laws of the domicile of the testator or the domicile at the time trust was created expressly provides otherwise, ***if*** such property is brought into New York state for administration.

A) **Practice Tip**. One should note that many, if not most trusts (and wills) will have a provision providing for which state law shall applies. Some trusts may have a provision as to which jurisdiction disputes shall be resolved.

iv. **Venue.**

A) If original probate of the will of a non-domiciliary has been had in any county of this state jurisdiction of the trust created under the will shall be vested in the surrogate's court of that county. If ancillary proceedings in respect of any phase of the estate of a non-domiciliary have been had in any county of the state, jurisdiction of the trust shall be vested in the surrogate's court of that county."

B) If there has been no original probate or ancillary proceeding in any county of New York State, jurisdiction is in the county of the real property of the trust, or if no real property, where the trustee resides or has a principal place of business.

[98] SCPA § 1501 2.

1) But if there is more than one possible venue, it is in the county of the surrogate's court first entertaining the matter.[99]

v. **Surrogate May Decline to Entertain Jurisdiction.** A surrogate may decline to entertain jurisdiction of a trust created by will or lifetime trust of a non-domiciliary.[100]

A) Concerning such trusts, every application to the Court to entertain jurisdiction shall state whether any previous application for such relief as been made in New York and shall state the disposition of it and be accompanied by a copy of the will and the foreign letters, or of the lifetime trust with proof of its authenticity. If entertained, the court will record the will or instrument in its office.

f. **Notable Case.** Appeals court reversed a surrogate's court's order that it had subject matter jurisdiction over inter vivos charitable remainder trust to order trustee to render accounting to charitable remainder beneficiary since (1) grantor was not state domiciliary when action was commenced, (2) trustee was not in state, and (3) assets were not in state, one of which was required for jurisdiction under N.Y. Surr. Ct. Proc. Act §§ 207(1), 209(6); and further N.Y. Surr. Ct. Proc. Act § 1501(1)(c) did not expand that jurisdictional requirement in the case of inter vivos trusts. In re Estate of Witherill, 306 A.D.2d 674, 761 N.Y.S.2d 698, 2003 N.Y. App. Div. LEXIS 6630 (N.Y. App. Div. 3d Dep't 2003).

g. **The Takeaway**. Jurisdiction is important in resolving trust disputes in New York, because if the Court, whether Supreme Court or Surrogate's Court in New York would not have jurisdiction over a dispute that is not yet litigated, then perhaps New York attorneys should not attempt to resolve the matter. If a New York court may have, or does have jurisdiction, then the parties may use their New York attorneys to attempt in resolving the matter.

i. If a potential client approaches a New York attorney to resolve a matter, the New York attorney should first conduct an analysis by:

[99] SCPA § 1501 3.
[100] SCPA § 1501 4.

A) Closely reviewing the trust instrument or the will as to whether it directs the jurisdiction and under which law disputes shall be resolved,

B) Determining where property of the trust is located.

C) Determining where the grantor and trustee reside, and in the case of a testamentary trust, where the creating will was probated.

C. Duties and Powers of the Trustee.

1. **Eligibility.** Trustees, like other fiduciaries must be eligible to serve per SCPA § 707. Persons ineligible to serve are:

   a. Infants

   b. Incompetents;

   c. Non-domiciliary aliens;

   d. Felons;

   e. Ones who do not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.[101]

2. Trustees should be chosen in order to further the purpose of the trust.

   a. The proper age.

   b. Trustees must be very honest.[102]

   c. Temperament to administer the trust property.

   d. Skill to either personally administer trust property or to enlist individuals who can. However, certain large or complex trusts may be beyond the competence of even a smart and competent layman.

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[101] Id.

[102] Chief justice Benjamin Cardozo noted that fiduciaries are "held to something stricter than the morals of the marketplace. Not honesty alone, by the punctilio of an honor the most sensitive." Meinhard v. Salmon, 249 N.Y. 458 (N.Y. 1928).

e. Resources. Some trusts will require resources in order to properly mange the trust property (actuaries, accountants, investigators, property managers, auctioneers, etc.).

f. In New York, a trustee can be a corporation.

g. The settlor should consider the purpose and the function of the trust. For example, if the trust is a non-grantor trust, then the settlor should not appoint the settlor's spouse. Otherwise, the trust will be a grantor trust and that will frustrate the purpose of the trust.

h. The trustee should be someone or some entity that will get along well enough with the beneficiaries so there will not be costly litigation or other problems that hurt the purpose of the trust or will injure the trust property.

i. Costs. Trustees are entitled to commissions. A corporate trustee will probably cost more than a trustee earning statutory commissions. Some family members may decide to forego commissions. However, the settlor should think which trustee will do the best job in light of the costs.

3. Keep in mind the following:

a. **Manage Property**. Trustees of most trusts will need to manage trust property.

i. Real property: collect rents, maintain, and secure real property.

ii. Investments. Sell and manage stock portfolios, as required, and in keeping with the Prudent Investor Act (EPTL 11-2.3).

A) The Prudent Investor Act also requires a trustee such as petitioner with "special investment skills" to "exercise such diligence in investing and managing assets as would customarily be exercised by prudent investors of discretion and intelligence having special investment skills".[103] Even under this standard, however, " 'it is not sufficient that hindsight might suggest that another course would have been more beneficial; nor does a mere error of investment judgment mandate a surcharge' ".[104]

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[103] EPTL 11-2.3 [b] [6].

[104] Matter of JPMorgan Chase Bank N.A., 122 A.D.3d 1274, 1277 citing Matter of HSBC Bank USA, N.A. [Knox], 98 AD3d 300, 309, 947 NYS2d 292 [2012], lv dismissed 20 NY3d 860, 985 NE2d 430, 961 NYS2d 834 [2013], quoting Matter of Bank of N.Y., 35 NY2d 512, 519, 323

B) "A trustee must not delegate his or her investment authority to a beneficiary or others."[105]

iii. Intellectual property. Marshall, manage, sell, distribute the same.

b. **Manage Distributees**. Trustees need to manage distributees. Trustees must treat beneficiaries fairly, especially between income beneficiaries and remaindermen, and between beneficiaries with differing rights.

c. **File Tax Returns**. Most trustees need to timely file tax returns and pay all taxes regarding the trust.

d. **When needed, litigate**. Trustees will need to, from time to time, commence and defend lawsuits.

e. **Make distributions**. Trustees need to make distributions to the beneficiaries pursuant to the terms of the trust instrument. However, trustees must also make sure that remaindermen are treated fairly.

f. **Communicate material facts with beneficiaries**. A trustee has a duty to communicate material facts with beneficiaries.[106]

D. Valuation of Assets. Not discussed.

E. Funding a Trust. Not discussed.

F. Communicating with beneficiaries.

1. **List of duties/requirements trustees must have when communicating with beneficiaries.**

a. Trustees must be honest.[107] Thus, they also must be honest with beneficiaries.

NE2d 700, 364 NYS2d 164 [1974]; see Matter of Chase Manhattan Bank, 26 AD3d 824, 828, 809 NYS2d 360 [2006], lv denied 7 NY3d 824, 855 NE2d 1167, 822 NYS2d 753 [2006], reconsideration denied 7 NY3d 922, 860 NE2d 993, 827 NYS2d 691 [2006]).

[105] Matter of JPMorgan Chase Bank N.A., 122 A.D.3d 1274, 1278 citing Matter of Saxton, 274 AD2d 110, 120, 712 NYS2d 225 [2000]; see Matter of Roche, 233 App Div 236, 237 [1931], mod on other grounds 259 NY 458, 182 NE 82 [1932].

[106] Matter of JPMorgan Chase Bank NA, 122 A.D.3d 1274, 1278 (App. Div.4th Dept. 2014) citing Matter of Janes, 223 AD.2d 20, 32 (1996); Matter of Wood, 177 AD2d 161, 167 (1992), citing Restatement [Second} of Trusts § 170.

[107] Meinhard v. Salmon, 249 N.Y. 458 (N.Y. 1928).

b. A trustee has a duty to communicate material facts with beneficiaries.[108]

c. "A trustee must not delegate his or her investment authority to a beneficiary or others."[109]

d. Trustees must treat beneficiaries fairly, especially between income beneficiaries and remaindermen, and between beneficiaries with differing rights.

2. **List of practical advice from a trustee with over twelve years of experience managing a multi-million dollar trust.**

a. Closely review the trust instrument or testamentary trust provisions in the will. Pay close attention to:

i. The dispositive distribution provisions.

ii. The (presumably) boilerplate trustee powers provisions.

iii. To the best of your ability, review the law as it relates to the trust instrument.

iv. Determine what you will need to do, if anything to obtain the power to act as trustee.

b. Learn what property the trust owns and what property, you as trustee may need to marshal.

c. Review the following:

i. The recent few years of tax returns of the trust, decedent, or decedent's estate, as it may relate to the trust.

ii. Any bank account or stock portfolio statements relating to the trust.

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[108] Matter of JPMorgan Chase Bank NA, 122 A.D.3d 1274, 1278 (App. Div.4th Dept. 2014) citing Matter of Janes, 223 AD.2d 20, 32 (1996); Matter of Wood, 177 AD2d 161, 167 (1992), citing Restatement [Second} of Trusts § 170.

[109] Matter of JPMorgan Chase Bank N.A., 122 A.D.3d 1274, 1278 citing Matter of Saxton, 274 AD2d 110, 120, 712 NYS2d 225 [2000]; see Matter of Roche, 233 App Div 236, 237 [1931], mod on other grounds 259 NY 458, 182 NE 82 [1932].

d. Upon doing the above steps, you will have a better opportunity to have healthy communications with the beneficiaries.

e. "You're a trustee? You're gonna get sued!" A college professor once told me. How to avoid? Communicate *prudently* with beneficiaries.

f. Really try to get along with beneficiaries.

   i. Beneficiaries often complain that institutional and non-family member trustees are distant, unavailable and do not help them in accordance with the settlor's desires. Accordingly, try to put yourself in their shoes, even if you do not agree with their requests.

   ii. Try to develop fairly strong (but professional) relationships with your beneficiaries so that when you do have a problem with a beneficiary (and you will), you will have an architecture to solve your problem with the beneficiary.

g. Before taking any action with respect to selling, buying or distributing assets, you should always ask yourself how your actions as trustee may prejudice an income beneficiary or a remainderman, or a beneficiary with a minority interest in the trust.

h. Document your interactions with the beneficiaries in order to protect yourself and to remember what you said previously to a beneficiary.

i. Document your actions so that when beneficiaries may call them into question later, you have a record of doing the same.

j. Similarly, make a point of obtaining advice from professionals (such as financial advisors, accountants, attorneys, doctors, psychologists, and the like) when necessary, so that your actions can be supported by the advice, even if you ultimately don't follow that advice.

k. Document your actions which are based on professional advice. Try to take actions that are supported by authority.

G. Amending and Modifying the Trust. Not discussed.

H. Trust Administration Checklist. Not discussed.

I. Sample Forms and Documents. Discussed in part, above.

THE END

Accounting/Distributions in Trust Administration

Submitted by Michael G. Zapson

VII. Accounting/Distributions in Trust Administration

A. Notices of Proposed Actions

As a general rule the trust agreement controls if and when any notice of a proposed action is to be taken most instruments have a long and comprehensive list of trustee powers. If it does not, the trustee must look to the provisions of EPTL 11-1.1 for what are permissible powers.

EPTL 11-1.1 provides broad but not unlimited powers. There are some restrictions on real estate for example. A trustee can only lease real property for 10 years without court permission. The trustee must petition the court for permission to do so or for any action prohibited by the Will or Trust Agreement that the trustee believes will be of benefit to the trust.

B. Uniform Principal and Income Act

New York's version of the Uniform Principal and Income Act is contained in EPTL 11A. It governs the allocation of expenses and receipts between income and principal. It does not override case law. The provisions in the governing instrument will override the act.

C. Trust Provisions Concerning Distributions

Beneficiaries get money—officially known as distributions–from a trust in one of three basic ways:

- Outright distributions: receive the funds in a lump payment or two, with no restrictions
- Staggered distributions: receive the funds over a certain time period or at periodic intervals, often in a set sum each time; or after a specific event, such as graduation from college, reaching the age of majority, becoming a parent

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- Discretionary distributions: receive the funds in amounts and at times determined by the trustee often in accordance with the grantor's instructions and stated wishes

Tax Status is within the Grantor's Control

Whether beneficiaries pay tax on monies received from a trust depends on how the distribution is classified. If the funds are deemed as coming from the trust's income—that is, earnings on its assets—the beneficiary does owe income tax on them. Whether it's taxed as regular income or capital gains depends on the nature of the funds (cash, dividends, etc.) If the funds are considered part of the trust's principal, however, the beneficiary does not owe tax on them—because they're considered a return of money that presumably was already taxed before it went into the trust.

The IRS has established a sort of last in, first out (LIFO) pecking order for classifying distributions: The amount is considered to be from the current year's income first, then from the accumulated principal.

D. Managing, Selling and Distributing Property and Assets

Usually a trust will provide a trustee with substantial powers. If the trust fails to provide for the fiduciaries powers then EPTL 11-1.1 provides the trustee with permissible powers for managing selling and distributing properties and assets.

The trustees' statutory powers are broad but not unlimited. When the trust is silent or the trustee wants to deviate from the trust, or statute, the trustee can petition the court for permission.

PRACTICE TIP – If in doubt petition the court and give the interested parties an opportunity to consent or object.

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E. Investing Assets

The test for determining whether a trustee breached its fiduciary duty to prudently invest trust assets is prudence, not performance, and mere inferior investment performance cannot be the basis for a finding of imprudence. The Prudent Investor Act (PIA) which governs investments made or held on or after January 4, 1995 expressly provides that the prudent investor standard authorizes a trustee to delegate investment and management functions if consistent with a duty to exercise skill including special investment skills. The PIA provides that it is the duty of a trustee to diversify assets unless the trustee reasonably determines that it is in the interest of the beneficiaries not to diversify taking into account the purposes in terms and provisions of the governing instrument. However, diversification is generally not required under the prudent person standard. A fiduciary should be entitled to rely on an investment directive from the beneficiaries in contravention of the normal policy of the fiduciary with respect to diversification of an investment for a reasonable period of time or until such time there is demonstrated disagreement among the beneficiaries, provided that the fiduciary does not completely avoid responsibility to periodically advise the beneficiaries of time tested formulas for protecting their investments from the inroads of a fluctuating market.

The Prudent Investor Act encourages Trustees to invest for total return.

F. Distinctions Between Trust Fiduciary Accounting and Income Tax Accounting

Income tax accounting involves all income producing assets however a fiduciary accounting also involves non-income producing assets. The simplest example of which may be the ownership of stock. The tax accounting does not report the ownership or increased value of stock until it is sold. The fiduciary accounting would report the increase/decrease in stock price regardless of whether it was sold.

A fiduciary accounting is a comprehensive report of the trust during a specific time period, it could by a year, or 10 years, or the duration of the trust. The tax accounting is filed annually.

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For tax purposes it is often beneficial to distribute the income and have it taxed at the beneficiaries' tax rate rather than the trust tax rate. A fiduciaries' accounting may not draw such a distribution and may even have a conflict between income beneficiaries and the ultimate beneficiaries.

Bottom line tax returns do not take the place of a fiduciaries' accounting.

G. Determining Trustee Fees

The trustee of a testamentary trust may, and usually does take commissions for receiving and paying principals at the settlement of the account. Advance commissions can be requested through a special proceeding. Annual commissions can be retained but annual statements to current income beneficiaries who have not waived statements and to the other interested person who have demanded statements must be provided. If a trustee fails to take annual commissions, they are not waived although to the extent income from the year he failed to take commissions does not remain in the trust he has waived the commissions payable from that income.

A Trustee is entitled to statutory commissions. The governing statute for Trustee commissions is SCPA §2308 (pre 8/31/56) and §2309. Trustees receive annual commissions and commissions on settlement of the Trust Account.

Inter vivos trustees are treated the same as testamentary trustees unless the trust instrument provides otherwise.

Communication with Creditors

A Trustee can not make distributions until all known creditors or persons interested have had an opportunity to be heard. It is important therefore if you are aware of claims of creditors to speak with them or bring them into court. A court can determine the priority of claims, amount of reserve that should be held, or other relevant relief.

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H. Distribution to Beneficiaries

There is no standard way of distributing trust assets to beneficiaries, but rather the grantor, the person who creates the trust (also known as the settlor or trustor), determines how the trust assets should be disbursed. The trust can pay out a lump sum or percentage of the funds, make incremental payments throughout the years, or even make distributions based on the trustee's assessments. Whatever the grantor decides, their distribution method must be included in the trust agreement drawn up when they first set up the trust. This flexibility and control over how the beneficiaries receive assets are what make a trust an integral estate planning option.

As discussed, there are three primary ways for a beneficiary to receive a distribution from a trust:

- Outright distributions
- Staggered distributions
- Discretionary distributions

Upon all trust funds being distributed, the trust is typically dissolved or terminated. A revocable trust may be created to distribute assets after the grantor's death (and close shortly after), while an irrevocable trust can continue to exist for years, even decades. The longer a trust is open, the more costly it becomes due to extended maintenance costs.

Distribute Trust Assets Outright

The grantor can opt to have the beneficiaries receive trust property directly without any restrictions. The trustee can write the beneficiary a check, provide money in another form, and transfer real estate by drawing up a new deed or selling the house and giving the beneficiaries the proceeds. This type of trust distribution is straightforward, but it doesn't come with any protections – a spendthrift beneficiary may squander their inheritance very quickly.

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Beneficiaries can receive trust assets over time based on rules that you set. For example, the grantor may choose to distribute funds on a timed basis, perhaps quarterly or monthly, or only after certain triggering events, such as when the beneficiary turns 18 or gets married.

Distribute Trust Assets at the Trustee's Discretion

You can have your trustee determine when and what a beneficiary receives from the trust. A discretionary trust is commonly created for a beneficiary who has trouble managing their money. (Examples of discretionary trusts might include a spendthrift trust or special needs trust.)

If you decide to distribute trust funds this way, then take extra consideration when picking a trustee since they will be making decisions.

I. Trust Termination

Trust termination can be controlled in two ways. The instrument may provide for termination upon a date certain, or upon the happening of a particular event. Also, the instrument may state how the corpus is to be distributed, or it may reserve to the settlor, or grant to someone else, the power to appoint the trust property upon termination. Second, the settlor may control trust termination by reserving in the trust instrument a right to revoke or modify the trust. A settlor of a revocable trust reserves the right to change the disposition of the trust property, or to use the trust proceeds for his own purposes if his wishes change. Modification of a testamentary trust will be prohibited if the Will does not authorize modifications and amendments.

Although the terms of the trust instrument generally control termination, trusts sometimes terminate under circumstances other than those contemplated by the settlor. Unforeseen events may require termination, such as the named beneficiary renouncing his interest in the trust.

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Alternatively, the trust purpose may be completed or may become impossible to complete. If no further purpose would be served by continuing the trust, a court may order termination. Also, courts permit termination even of irrevocable trusts (whose purposes have not been completed) upon consent of the settlor and all beneficially interested parties.

The creator of an inter vivos trust has the statutory right not only to revoke the trust upon the consent of all persons beneficially interested but also to amend the trust upon the consent of all persons beneficially interested.

When a settlor creates a trust, he makes an irrevocable disposition of property unless he reserves a right to revoke or modify the trust. The failure of a settlor to reserve a right to revoke or modify means that the settlor may not unilaterally change the terms of the trust. However, settlor may still be able to revoke or modify if he obtains the consent of all those beneficially interested in the trust.

The Estates, Powers and Trusts Law declares that the right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust.

Notwithstanding, courts have occasionally permitted revocation even when the settlor has failed to reserve an express right to revoke. A court may imply a right to revoke if settlor can establish that the absence of an explicit reservation of the right to revoke was the product of either undue influence or of the settlor's physical or mental condition.

If the settlor is the sole beneficiary of the trust, a right to revoke is unnecessary because, absent express restrictions in the trust, a settlor and all beneficiaries may always terminate a trust by mutual agreement. A court will also imply a right to revoke in those instances in which the

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settlor retains discretion, even after execution of the trust instrument, to choose all of the trust beneficiaries.

Changes in the settlor's needs, however, are insufficient grounds for revocation of a trust in which no right to revoke is reserved. Only if the trustee determined that the principal was necessary to maintain the settlor could the rights of remaindermen be cut off. As a result, absent such a determination by the trustee, the consent of the beneficiaries was necessary to revoke the trust.

If the settlor did not make provisions as to how the revocation of a revocable trust is to be accomplished, the settlor may revoke in any manner that demonstrates a clear intention to revoke. The settlor may revoke the trust in his will, as well as by instrument designed to have effect during settlor's lifetime. In this respect, the court treated the revocable trust much as courts have come to treat Totten trusts of savings bank accounts.

If the settlor spelled out a mechanism for revocation or modification of the trust in the trust instrument, failure to comply with the terms of the trust instrument will generally make the revocation or modification ineffective.

To treat the will as a revocation of the trust, the court has to draw inferences from the similarity of the property subject to differing distributions in the trust and will. Courts have been unwilling to draw these inferences. If the will by its terms purported to revoke the trust. To hold that the will did not validly revoke the trust would require the court to ignore the clear intent of the settlor. The issue does not appear to have been litigated, perhaps because testators, well enough advised to revoke the trust explicitly, are also well enough advised to revoke in accordance with the terms of the trust.

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Just as a settlor may provide that the trust is revocable only in certain ways, a settlor may provide for revocation only at certain times for instance after a beneficiaries death.

When a settlor explicitly reserves a right to revoke without the consent of beneficiaries, he need not resort to EPTL 7-1.9(a) as a basis for trust termination. When the trust instrument makes no provision for revocation, EPTL 7-1.9(a) applies. On occasion, however, the terms of a trust instrument may restrict the settlor's right to revoke the trust even if he obtains the consent of all trust beneficiaries. The question then is whether the statute permits termination despite the more restrictive language in the trust instrument.

Thus, a trust settlor may vest in any person of his choosing the power to block termination of a trust, whether or not that person has a beneficial interest in the trust.

EPTL §10-6.6 is known as the decanting statue. It introduces increased complexities with respect to both drafting and administration. When drafting a trust consider whether if a power of invasion is granted a trustee, whether the creator of the trust or the testator wishes to negate the decanting authority.

This provision is available only to a trustee who has absolute discretion to invade principal. If discretion is limited a new trust cannot be created. This section was originally enacted to authorize trustees of irrevocable inter vivos trust to seek permission to terminate trusts and create substantially identical new trusts to take maximum advantage of the generation skipping tax. However, it has been used to change jurisdictions, protect from liability, merge trusts to save expenses create separate trusts for separate beneficiaries needs, convert to a supplemental needs trust.

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The exercise of the power to appoint shall be evidenced in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty (30) days after the date of service unless the persons entitled to notice consent in writing to a sooner effective date. On day thirty (30) it becomes irrevocable, but the trustee prior thereto can revoke the decanting by giving notice prior thereto to the same interested persons.

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VII. Accounting/Distributions in Trust Administration

A. Notices of Proposed Actions

As a general rule the trust agreement controls if and when any notice of a proposed action is to be taken most instruments have a long and comprehensive list of trustee powers. If it does not, the trustee must look to the provisions of EPTL 11-1.1 for what are permissible powers.

EPTL 11-1.1 provides broad but not unlimited powers. There are some restrictions on real estate for example. A trustee can only lease real property for 10 years without court permission. The trustee must petition the court for permission to do so or for any action prohibited by the Will or Trust Agreement that the trustee believes will be of benefit to the trust.

B. Uniform Principal and Income Act

New York's version of the Uniform Principal and Income Act is contained in EPTL 11A. It governs the allocation of expenses and receipts between income and principal. It does not override case law. The provisions in the governing instrument will override the act.

C. Trust Provisions Concerning Distributions

Beneficiaries get money—officially known as distributions–from a trust in one of three basic ways:

- Outright distributions: receive the funds in a lump payment or two, with no restrictions
- Staggered distributions: receive the funds over a certain time period or at periodic intervals, often in a set sum each time; or after a specific event, such as graduation from college, reaching the age of majority, becoming a parent
- Discretionary distributions: receive the funds in amounts and at times determined by the trustee often in accordance with the grantor's instructions and stated wishes

Tax Status is within the Grantor's Control

Whether beneficiaries pay tax on monies received from a trust depends on how the distribution is classified. If the funds are deemed as coming from the trust's income—that is, earnings on its assets—the beneficiary does owe income tax on them. Whether it's taxed as regular income or capital gains depends on the nature of the funds (cash, dividends, etc.) If the funds are considered part of the trust's principal, however, the beneficiary does not owe tax on them—because they're considered a return of money that presumably was already taxed before it went into the trust.

The IRS has established a sort of last in, first out (LIFO) pecking order for classifying distributions: The amount is considered to be from the current year's income first, then from the accumulated principal.

D. Managing, Selling and Distributing Property and Assets

Usually a trust will provide a trustee with substantial powers. If the trust fails to provide for the fiduciaries powers then EPTL 11-1.1 provides the trustee with permissible powers for managing selling and distributing properties and assets.

The trustees' statutory powers are broad but not unlimited. When the trust is silent or the trustee wants to deviate from the trust, or statute, the trustee can petition the court for permission.

PRACTICE TIP – If in doubt petition the court and give the interested parties an opportunity to consent or object.

E. Investing Assets

The test for determining whether a trustee breached its fiduciary duty to prudently invest trust assets is prudence, not performance, and mere inferior investment performance cannot be the basis for a finding of imprudence. The Prudent Investor Act (PIA) which governs investments made or held on or after January 4, 1995 expressly provides that the prudent investor standard authorizes a trustee to delegate investment and management functions if consistent with a duty to exercise skill including special investment skills. The PIA provides that it is the duty of a trustee to diversify assets unless the trustee reasonably determines that it is in the interest of the beneficiaries not to diversify taking into account the purposes in terms and provisions of the governing instrument. However, diversification is generally not required under the prudent person standard. A fiduciary should be entitled to rely on an investment directive from the beneficiaries in contravention of the normal policy of the fiduciary with respect to diversification of an investment for a reasonable period of time or until such time there is demonstrated disagreement among the beneficiaries, provided that the fiduciary does not completely avoid responsibility to periodically advise the beneficiaries of time tested formulas for protecting their investments from the inroads of a fluctuating market.

The Prudent Investor Act encourages Trustees to invest for total return.

F. Distinctions Between Trust Fiduciary Accounting and Income Tax Accounting

Income tax accounting involves all income producing assets however a fiduciary accounting also involves non-income producing assets. The simplest example of which may be the ownership of stock. The tax accounting does not report the ownership or increased value of stock until it is sold. The fiduciary accounting would report the increase/decrease in stock price regardless of whether it was sold.

A fiduciary accounting is a comprehensive report of the trust during a specific time period, it could by a year, or 10 years, or the duration of the trust. The tax accounting is filed annually.

For tax purposes it is often beneficial to distribute the income and have it taxed at the beneficiaries' tax rate rather than the trust tax rate. A fiduciaries' accounting may not draw such a distribution and may even have a conflict between income beneficiaries and the ultimate beneficiaries.

Bottom line tax returns do not take the place of a fiduciaries' accounting.

G. Determining Trustee Fees

The trustee of a testamentary trust may, and usually does take commissions for receiving and paying principals at the settlement of the account. Advance commissions can be requested through a special proceeding. Annual commissions can be retained but annual statements to current income beneficiaries who have not waived statements and to the other interested person who have demanded statements must be provided. If a trustee fails to take annual commissions, they are not waived although to the extent income from the year he failed to take commissions does not remain in the trust he has waived the commissions payable from that income.

A Trustee is entitled to statutory commissions. The governing statute for Trustee commissions is SCPA §2308 (pre 8/31/56) and §2309. Trustees receive annual commissions and commissions on settlement of the Trust Account.

Inter vivos trustees are treated the same as testamentary trustees unless the trust instrument provides otherwise.

Communication with Creditors

A Trustee can not make distributions until all known creditors or persons interested have had an opportunity to be heard. It is important therefore if you are aware of claims of creditors to

speak with them or bring them into court. A court can determine the priority of claims, amount of reserve that should be held, or other relevant relief.

H. Distribution to Beneficiaries

There is no standard way of distributing trust assets to beneficiaries, but rather the grantor, the person who creates the trust (also known as the settlor or trustor), determines how the trust assets should be disbursed. The trust can pay out a lump sum or percentage of the funds, make incremental payments throughout the years, or even make distributions based on the trustee's assessments. Whatever the grantor decides, their distribution method must be included in the trust agreement drawn up when they first set up the trust. This flexibility and control over how the beneficiaries receive assets are what make a trust an integral estate planning option.

As discussed, there are three primary ways for a beneficiary to receive a distribution from a trust:

- Outright distributions
- Staggered distributions
- Discretionary distributions

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days after the date of service unless the persons entitled to notice consent in writing to a sooner effective date. On day thirty (30) it becomes irrevocable but the trustee prior thereto can revoke the decanting by giving notice prior thereto to the same interested persons.

Ethics and Estate Administration

Submitted by Leslie E. Levin

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NBI New York Probate and Trust Administration Ethics and Estate Administration

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A. BREACH OF FIDUCIARY RESPONSIBILITY

- A lawyer should provide competent representation to a client which includes legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- A lawyer is permitted to study and become qualified so long as such preparation is not charged to the client and will not result in an unreasonable delay.
- Attorney also needs to make sure to stay on top of technology used to provide services to clients or to store or transmit confidential information.

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BREACH

- To maintain a claim for breach of fiduciary duty, a plaintiff must allege:
  1) the existence of a fiduciary duty owed by the defendant;
  2) a breach of that duty; and
  3) resulting damages.
- Privity may be found to exist between the negligently practicing attorney, and the personal representative of an estate.
- When a plaintiff alleges fraud within the context of a malpractice claim against an attorney, the claim of fraud must allege facts separate from those used to allege malpractice.
- Elements of fraud must be alleged with specificity and particularity.

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B. AVOIDING CONFLICTS OF INTEREST

- In New York, ethical issues relating to an attorney are often governed by the New York Rules of Professional Conduct ("NY RPC").
- Who is your client? Particularly problematic with spouses.
- All information will be shared with both spouses and that no secrets can be kept.
- Estate planning engagement letter should also include waiver of conflict language between spouses in order to satisfy the written informed consent requirement of NY RPC RULE 1.8.

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CONFLICT OF INTEREST

- When representing a married couple, there are potential conflicts of interest present as plans including trusts, inherited family assets and children from prior marriages can affect how the plan evolves and can adversely affect one spouse.
- The attorney should explain the pros and cons of any plan developed that could adversely affect one of the spouse so that there is informed consent to any estate plan.

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CONFLICT OF INTEREST

- Attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, not the estate.
- The attorney does not answer to the beneficiaries of the estate but instead to the Executor.
- When there is a conflict between the two, the attorney is responsible for duties owed toward the Executor.
- If Executor-client acts contrary to the interests of the estate, then resign.

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CONFLICT OF INTEREST

- There are times that the attorney should not agree to represent the client.
- Conflict of interest can arise when the attorney who drafted the decedent's Will is also the attorney representing the Executor of the decedent's estate.
- Attorney should avoid being both the drafter of the will and an executor or legatee of that same Will.
- Under Surrogate's Court Procedure Act ("SCPA") §2307-a, when a client nominates the attorney as executor, the client must sign an acknowledgment of disclosure which is filed at the time of probate.

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CONFLICT OF INTEREST

- Executor must file a statement that the Executor is an attorney, whether such person (or such person's law firm) will act as counsel and whether such Executor was the draftsman of the Will (22 NYCRR §207.16).
- A Weinstock Affidavit may be needed to explain why the decedent appointed the attorney as fiduciary (see *Matter of Weinstock*, 40 NY2d 1, 351 NE2d 647, 386 NYS2d 1 (1976)).
- A Putnam Affidavit is needed whenever there is a bequest to a person in a confidential relationship to explain the circumstances surrounding the gift (see *Matter of Putnam's Will – Smith v. Mitchell*, 257 NY 140 (1931)).

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C. CONFIDENTIALITY

- Client expects that the conversations and correspondences regarding personal matters to stay private and never be made public.
- Attorney-client privilege exists to facilitate the full and frank communication between attorney and client.
- Unless client waives privilege, attorney cannot disclose information obtained from client.

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CONFIDENTIALITY

- The Court, in *United States v. United Shoe Machinery Corp.* , 89 F. Supp. 357 (D. Mass. 1950), provided five elements commonly found in attorney-client privilege:
  1) Must be a client, or must have sought to become a client;
  2) Other party must be acting as a lawyer;
  3) No non-clients may be included in the communication;
  4) Communication must have occurred for the purpose of securing a legal opinion, legal service, or assistance in some legal proceeding; and
  5) the privilege may be claimed or waived by the client only.

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CONFIDENTIALITY

- Attorneys should be aware that their perception of a client's mental capacity (or incapacity) may not always be protected by attorney client privilege.
- Another well-known exception to attorney-client privilege is the crime-fraud exception, in which attorney-client privilege may be circumvented if the attorney is revealing the information to relieve such attorney of accusations of wrong doing.
- Communications between attorney and client will remain confidential even after the client's death.
- A lawyer may not disclose information obtained from the decedent during the decedent's estate planning unless the disclosure is impliedly authorized or would further the interests and intent of the client.

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CONFIDENTIALITY

- NY RPC RULE 1.6(c) governs the attorney's obligation to take necessary steps to ensure that confidential information and all communications is kept securely.
- In this age of hacking and identity theft, clients must be reassured that sensitive information is kept securely.
- In the event of a breach, if data is leaked, then the attorney must advise the client.
- Attorney must keep the client advised of important information such as decisions and material developments in the matter.
- Clients can best make decisions when those decisions are educated decisions because the attorney has shared the necessary information with the client.

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D. FEE AGREEMENTS

- NY RPC 1.5 governs how an attorney gets paid.
- 22 NYCRR 1215 states that every New York attorney must provide every client with a written letter of engagement unless an exception applies.
- 1) Include a precise description that will avoid later confusion as to what the attorney will be doing for the client.
- 2) Expenses must be disclosed.
- Matters below $3,000 do not need a letter.
- The attorney must submit an affidavit of legal services with all invoices.

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FEES

- When the client gives the attorney property to hold, the attorney is now holding funds for the client as a fiduciary.
- Funds must be kept separate from other personal or business funds by using an attorney trust account, which is typically a checking account or an Interest On Lawyer Account (IOLA).
- Attorney trust accounts must be held in a New York bank and only members of the New York bar can be signatories.
- The interest on an IOLA is used to provide legal services for the poor and programs to improve justice.

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This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.

Under IRS regulations we are required to add the following IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) addressed herein. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent.

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In New York, ethical issues relating to an attorney are often governed by the New York Rules of Professional Conduct ("NY RPC") which replaced the New York Rules of Responsibility and became effective on April 1, 2009. They were then adopted by the Appellate Division of the New York State Supreme Court and are published as Part 1200 of the Joint Rules of the Appellate Division (22 N.Y.C.R.R. Part 1200).

A. BREACH OF FIDUCIARY RESPONSIBILITY

To protect potential clients from less-qualified attorneys, New York promulgated:

> NY RPC RULE 1.1: COMPETENCE
>
> (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it. (c) lawyer shall not intentionally: (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

A lawyer is permitted to study and become qualified so long as such preparation is not charged to the client and will not result in an unreasonable delay.

Not only does a lawyer need to stay up to date on legal skills, but the attorney also needs to make sure to stay on top of technology. Comment 8 to this Rule states: "To maintain the requisite knowledge and skill, a lawyer should … (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."

Attorneys should always act in a manner best suited to aid their client, but some attorneys not only fail, but actively deceive their clients, betraying their trust. For example, in Matter of Weinstock, two attorneys, father and son, drafted a Will for an 82-year-old man and appointed themselves as co-executors, which the court found as attorney misconduct, tainting the drafting process and breaching the attorneys' duty to their elderly client. 40 NY 2d 1 (1976). To maintain a claim for breach of fiduciary duty, a plaintiff must allege:

(1) the existence of a fiduciary duty owed by the defendant;

(2) a breach of that duty; and

(3) resulting damages.

Romanoff v Romanoff, 2017 N.Y. Misc. LEXIS 832 (Sup. Ct. N.Y. Cty. 2017) (citing Jones v Voskresenskaya, 125 AD3d 532, 533 (App. Div. 1st Dept. 2015).

Indeed, being able to identify the attorney-client relationship may even play a crucial role in litigation involving malpractice claims. An illustrative example may be found in Betz v. Blatt, in which the legal malpractice claim against one law firm and its attorneys was dismissed under CPR §3211(a) because the firm did not undertake a duty of undivided loyalty to the estate and its beneficiaries. Both the retainer agreement and the facts indicated that the firm was retained solely to defend the former executor and not to administrate the estate. Betz v. Blatt, 116 A.D.3d 813 (App. Div. 2d Dep't 2014). In the estate planning setting, attorneys should especially be wary, because privity may be found to exist between the negligently practicing attorney, and the personal representative of an estate. In Schneider v. Finmann the personal representative of an estate was entitled to maintain an estate planning malpractice action against estate planning attorneys regarding enhanced estate tax liability because privity, or a relationship sufficiently approaching privity, existed between the personal representative and the estate planning attorneys; the claim comported with Estates, Powers and Trusts Law ("EPTL") §11-3.2(b).) Schneider v.

Finmann, 15 N.Y.3d 306 (2010). In light of the Schneider ruling, the Third Department held,

> [i]n New York, a third party, without privity, cannot maintain a claim against an attorney in professional negligence, absent fraud, collusion, malicious acts or other special circumstances. Although a limited exception has been carved out with respect to an action brought by the personal representative of an estate, strict privity remains a bar against beneficiaries and other third-party individuals estate planning malpractice claims absent fraud or other circumstances." Sutch v Sutch-Lenz, 129 A.D.3d 1137 (App. Div. 3d Dep't 2015).

The Sutch ruling helped solidify the privity requirement following Schneider.

Attorneys should also be aware that when a plaintiff alleges fraud within the context of a malpractice claim against an attorney, the claim of fraud must allege facts separate from those used to allege malpractice, or risk dismissal of the fraud claim as "duplicative." Bonin v Wells, Jaworski & Liebman, LLP, 2017 NY Slip Op 32097(U) (Sup. Ct. N.Y. Cty. 2017) (citing Dinhofer v Medical Liab. Mut. Ins. Co., 92 AD3d 480, 481 (App. Div. 1st Dep't 2012)). Furthermore, the elements of fraud must be alleged with specificity and particularity. CPLR 3016(b).

B. AVOIDING CONFLICTS OF INTEREST

Being able to answer the question “Who is your client?” is the first essential ingredient in establishing the attorney-client relationship and is worth serious thought when faced with issues of a lawyer’s ethical duties to their clients, confidentiality and conflicts of interest.

NY RPC RULE 1.8 CURRENT CLIENTS: SPECIFIC CONFLICT OF INTEREST RULES

> (a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:
>
> (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer’s role in the transaction, including whether the lawyer is representing the client in the transaction.
>
> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

When representing a married couple, there are potential conflicts of interest present as plans including trusts, inherited family assets and children from prior marriages can affect how the plan evolves and can

adversely affect one spouse. In order to ensure complete transparency and to ensure that necessary information is shared, the clients must be told that all information will be shared with both spouses and that no secrets can be kept. Also, the estate planning engagement letter should also include waiver of conflict language between spouses in order to satisfy the written informed consent requirement. The attorney should explain the pros and cons of any plan developed that could adversely affect one of the spouse so that there is informed consent to any estate plan.

The attorney retained by an estate fiduciary for the performance of estate duties is the attorney for the fiduciary, not the estate. Matter of Scanlon, 150 N.Y.S.2d 511 (Surr. Ct, Kings Cty, 1956). This principle is crucial for determining to whom an attorney owes the attorney's duty of care and loyalty. The attorney does not answer to the beneficiaries of the estate but instead to the Executor. When there is a conflict between the two, the attorney is responsible for duties owed toward the Executor. As a result, when making decisions about administering the estate, the attorney should protect the Executor by ensuring that Receipts, Release, Refunding and Indemnification Agreements are signed before making distributions to beneficiaries and ensuring that all decisions are properly papered in case of a dispute at a later point during the administration. At a minimum the one-page Receipt and Release Agreement should be

prepared. However, there are times when an attorney may also face issues regarding the Executor-client acting contrary to the interests of the estate

> to further the executor's individual interests, the lawyer's obligation is clear: to call upon the executor to act as the executor's fiduciary obligation requires, to decline to assist the misconduct in any way, and to consider whether the [attorney] is permitted or required to withdraw as counsel if the executor declines to do so. NYSBA Ethics Opinion 649.

Indeed, being able to identify the attorney-client relationship may even play a crucial role in litigation involving malpractice claims. An illustrative example may be found in Betz v. Blatt, in which the legal malpractice claim against one law firm and its attorneys was dismissed under CPR §3211(a) because the firm did not undertake a duty of undivided loyalty to the estate and its beneficiaries. Both the retainer agreement and the facts indicated that the firm was retained solely to defend the former executor and not to administrate the estate. Betz v. Blatt, 116 A.D.3d 813 (App. Div. 2d Dep't 2014).

Inherent in any attorney-client relationship is the expectation that the attorney will afford the care and loyalty the client is owed for placing the client's trust and personal affairs in the hands of the attorney. That is why there are also times that the attorney should not agree to represent the client whether it is during the client's lifetime or with regard to representing the Executor of the estate. For example, if the attorney is

a partner in a business venture with the client or will be with the client's estate. The attorney's interest as an individual in the company may cloud professional decisions that need to be made on behalf of the client or estate.

NY RPC RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

Sometimes a conflict of interest can arise when the attorney who drafted the decedent's Will is also the attorney representing the Executor of the decedent's estate.

NY RPC RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or

(5) the testimony is authorized by the tribunal.

(b) A lawyer may not act as advocate before a tribunal in a matter if:

(1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or

(2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

Therefore, if there is any hint that there will be a Will contest or other issue that pertained to the decedent during the decedent's lifetime, the attorney may have to decline to represent the Executor or withdraw as counsel once it becomes apparent that a matter will be litigated in

connection with the estate whereupon the attorney will be called as a witness.

An attorney should aid the client in weighing their options in terms of selecting their estate's fiduciary, the role of the attorney, how the attorney will be compensated, and other intricacies which may arise, but generally an attorney should avoid being both the drafter of the will and an executor or legatee of that same Will. The opinion from the ACTEC Commentaries on the Model Rules of Professional Conduct (5th Ed., 2016) addresses this issue by stating that, "[e]xcept in limited and extraordinary circumstances, an attorney should not serve as draftsman of a will that names the lawyer as an executor and as a legatee." (at page 125 (New York: N.Y. Op. 610 (1990)). Such "limited and extraordinary circumstances" include a close familial relationship between the testator and the drafter, or where the gift is relatively small in relation to the size of the estate and the professional relationship between the decedent and the drafter is longstanding. Id. In general, an attorney cannot suggest that the client should nominate the attorney as Executor. However, the client may want a specific attorney to act as fiduciary precisely because of the personal or familial ties that the attorney and client may share, giving rise to possible issues regarding ethics, undue influence and conflict of interest. Therefore, before agreeing to being named as a fiduciary in the Will, discussions should be had with the client

about alternatives and the pros and cons of naming an attorney versus a family member or other individual. If the client truly believes that the attorney is the best person for the job, then the client can name the attorney to such role, such as when the attorney has unique knowledge of the client's personal affairs or there is a lack of family members appropriate for the position. "When the client is considering appointment of the lawyer as fiduciary, the lawyer must inform the client that the lawyer will receive compensation for serving as fiduciary, whether the amount is subject to statutory limits or court approval, and how the compensation will be calculated." ABA's Formal Opinion No. 02-426 (Page 4). Under Surrogate's Court Procedure Act ("SCPA") §2307-a, when a client nominates the attorney as executor, the client must sign an acknowledgment of disclosure stating that the client was informed that:

1) Any person can serve as an executor;

2) Any person serving as an executor is entitled to statutory commissions;

3) Any attorney, including the attorney-executor, is entitled to legal fees for legal work performed on behalf of the estate; and

4) Absent execution of the acknowledgment of disclosure, an attorney who serves as executor will be entitled to only one-half of

the statutory commissions he would otherwise be entitled to receive.

This disclosure must also be filed at the time of probate. Some attorneys may prefer to include references to actions as a Trustee for further disclose, although technically, a serving as a Trustee is not covered under SCPA §2307-a. The form which is included as Exhibit A references both the attorney's role as Executor and as Trustee. Additionally, the Executor must file a statement that the Executor is an attorney, whether such person (or such person's law firm) will act as counsel and whether such Executor was the draftsman of the Will (22 NYCRR §207.16 see Exhibit B). In addition, if the attorney is designated as the fiduciary, a Weinstock Affidavit may be needed to explain why the decedent appointed the attorney in such capacity (see Matter of Weinstock, 40 NY2d 1, 351 NE2d 647, 386 NYS2d 1 (1976)). In Weinstock, the attorneys did not act in a manner best suited to aid their client. In fact, in this case, the attorneys actively deceived their client, betraying their client's trust. The two attorneys, father and son, drafted a Will for an 82-year-old man and appointed themselves as co-executors, which the court found as attorney misconduct, tainting the drafting process and breaching the attorneys' duty to their elderly client. 40 NY 2d 1 (1976). The legacy from that case, is to ensure that attorneys are not acting against the best interest of their clients and that is why the affidavit is needed to explain

the relationship and the facts surrounding the appointment. See Exhibit C attached for sample form of Weinstock Affidavit.

A Putnam Affidavit is needed whenever there is a bequest to a person in a confidential relationship to the decedent such as an attorney, doctor, accountant or clergy. In such a case, the attorney should also submit a Putnam Affidavit to explain the circumstances surrounding the gift (see Matter of Putnam's Will – Smith v. Mitchell, 257 NY 140 (1931)). In this seminal case, the attorney who drafted the client's Will also designated himself as residuary legatee without explaining the circumstances. The Court concluded that there was an inference of undue influence. See Exhibit D for sample form of Putnam Affidavit.

C. CONFIDENTIALITY

When a client approaches an attorney seeking the attorney's expertise, the client expects that the conversations and correspondences regarding personal matters to stay private and never be made public. Through the common law, courts have been able to establish attorney-client privilege to facilitate the full and frank communication between attorney and client. Years of court rulings finally became codified as Federal Rule of Evidence 501, which codifies the groundwork for establishing privileges:

Federal Rule of Evidence Rule 501. Privilege in General:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

New York State also codified laws regarding attorney-client privilege, embodied as New York Civil Practice Law and Rules ("CPLR") § 4503:

> (a) 1. Confidential Communication Privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist

between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

2. Personal Representatives.

(A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and

(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.

(B) For purposes of this paragraph, "personal representative" shall mean

(i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate's court procedure act, and

(ii) the guardian of an incapacitated communicant if and to the extent that the order appointing

such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; "beneficiary" shall have the meaning set forth in subdivision eight of section one hundred three of the surrogate's court procedure act and "estate" shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate's court procedure act.

(b) Wills and revocable trusts. In any action involving the probate, validity or construction of a will or, after the grantor's death, a revocable trust, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will, revocable trust, or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

The Court, in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950), provided five elements commonly found in attorney-client privilege that lawyers should bear in mind:

1) the person asserting the privilege must be a client, or must have sought to become a client at the time of disclosure;

2) the person connected to the communication must be acting as a lawyer;

3) the communication must be between the lawyer and the client exclusively – no non-clients may be included in the communication;

4) the communication must have occurred for the purpose of securing a legal opinion, legal service, or assistance in some legal proceeding, and not for the purpose of committing a crime; and

5) the privilege may be claimed or waived by the client only.

Attorneys should be aware that their perception of a client's mental capacity (or incapacity) may not always be protected by attorney client privilege. United States v. Kendrick, 331 F.2d 110 (4th Cir. 1964). In United States v. Kendrick, the admission of trial counsel's opinion of his client's demeanor was not protected by attorney-client privilege, because they related to "objectively observable matters which were not within the privilege and which the attorney and client had no reason to believe were confidential." Id.

Another well-known exception to attorney-client privilege is the crime-fraud exception, in which attorney-client privilege may be circumvented if the attorney is revealing the information to relieve such attorney of accusations of wrongdoing. One of the leading cases on the crime-fraud exception features claims brought by stock purchasers of a publicly held company which implicated the former attorney of the law

firm which facilitated the public offering. Meyerhofer v. Empire Fire & Marine Insurance Co., 497 F.2d 1190 (2d Cir. 1974), cert. denied, 419 U.S. 998 (1974). The Court held that the attorney's attempt to clear his name of any wrongdoing by revealing information to the plaintiffs was within the crime-fraud exception and did not violate the Model Code of Professional Responsibility. Id.

The Supreme Court held that communications between attorney and client will remain confidential even after the client's death, to prevent worries about one's reputation, civil liability, or possible harm to friends and family that posthumous disclosures may raise. Swidler & Berlin v. U.S., 524 U.S. 399 (1998). This rule also ensures that clients will feel comfortable disclosing all information about a matter to the attorney which enables better representation. However, the Court did recognize an exception to this rule when settling an estate because "the privilege, which normally protects the client's interest, could be impliedly waived in order to fulfill the client's testamentary intent." Id. at 405. A lawyer may not disclose information obtained from the decedent during the decedent's estate planning "unless the disclosure is impliedly authorized or would further the interests and intent of the client." Peter Geraghty, "Testamentary Intent and Confidentiality After the Death of a Client," October 2014 Eye on Ethics. The attorney should seek a waiver from the Executor and/or heirs in this instance. The theory is that if the decedent

were alive, the decedent would likely waive the privilege under the same facts and circumstances. See, ABA Formal Opinion 91 (1933) and Informal Opinion 1293 (1974), which stated that client confidences and secrets should be preserved indefinitely after the client's death.

> [T]he general rule with respect to confidential communications between attorney and client for the purpose of preparing the client's will is that such communications are privileged during the testator's lifetime and, also, after the testator's death unless sought to be disclosed in litigation between the testator's heirs, legatees, devisees, or other parties, all of whom claim under the deceased client. United States v. Osborn, 561 F.2d 1334, 1340 (9th Cir. 1977).

In New York, NRPC 1.6 provides the following:

NY RPC RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;

(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;

(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, information protected by Rules 1.6, 1.9(c), or 1.18(b).

ABA Model Rules of Professional Conduct Rule 1.6 also governs and the commentaries to this Rule provide that:

Obligation After Death of Client. In general, the lawyer's duty of confidentiality continues after the death of a client. Accordingly, a lawyer ordinarily should not disclose confidential information following a client's death. However, if consent is given by the client's personal representative, or if the decedent had expressly or impliedly authorized disclosure, the lawyer who represented the deceased client may provide an interested party, including a potential litigant, with information regarding a deceased client's

> dispositive instruments and intent, including prior instruments and communications relevant thereto. A lawyer may be impliedly authorized to make appropriate disclosure of client confidential information that would promote the client's estate plan, forestall litigation, preserve assets and further family understanding of the decedent's intention. Disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness.

NY RPC RULE 1.6(c) quoted above governs the attorney's obligation to take necessary steps to ensure that confidential information and all communications is kept securely. In this age of hacking and identity theft, clients must be reassured that sensitive information is kept securely. Attorneys should install software to securely send identifiable information such as social security numbers. In the event of a breach, if data is leaked, then the attorney must advise the client. New York State Bar Association Comment 17 to NY RPC Rule 1.6 states:

> When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to

> use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

In fact, in 2016, NY RPC Rule 1.6(c) was amended to read as it does today because of these concerns caused by the effect of new technology on the practice of law. N.Y. State Bar Association Ethics Opinion 782 (2004) provided that if a lawyer uses technology to communicate with clients, then the lawyer must use reasonable care when communicating which includes weighing the risks in using the technology.

In addition to keeping information secure, the attorney must keep the client advised of important information such as decisions and material developments in the matter. The attorney must communicate with the client to ensure that the client understands the estate plan, necessary steps to implement it and also understand the necessary procedures and actions in an estate administration. Clients can best make decisions when those decisions are educated decisions because the attorney has shared the necessary information with the client.

NY RPC RULE 1.4 COMMUNICATION

> (a) A lawyer shall:
>
> (1) promptly inform the client of:
>
> (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

D. FEE AGREEMENTS

NY RPC 1.5 governs how an attorney gets paid by codifying Matter of Freeman, 34 N.Y.2d 1 (1974) and Matter of Potts, 213 A.D. 59, 62 (App. Div. 4th Dep't 1925):

NY RPC RULE 1.5: FEES AND DIVISION OF FEES

> (a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

On March 4, 2002, New York enacted 22 NYCRR 1215 which states that every New York attorney must provide every client with a written letter of engagement unless an exception applies:

1215.1 Requirements.

(a) Effective March 4, 2002, an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter:

(1) if otherwise impractible; or

(2) if the scope of services to be provided cannot be determined at the time of the commencement of representation.

For purposes of this rule, where an entity (such as an insurance carrier) engages an attorney to represent a third party, the term client shall mean the entity that engages the attorney. Where there is a significant change in the scope of services or the fee to be charged, an updated letter of engagement shall be provided to the client.

(b) The letter of engagement shall address the following matters:

(1) explanation of the scope of the legal services to be provided;

(2) explanation of attorney's fees to be charged, expenses and billing practices; and

(3) where applicable, shall provide that the client may have a right to arbitrate fee disputes under Part 137 of this Title.

(c) Instead of providing the client with a written letter of engagement, an attorney may comply with the provisions of subdivision (a) of this section by entering into a signed written retainer agreement with the client, before or within a reasonable time after commencing the representation,

provided that the agreement addresses the matters set forth in subdivision (b) of this section.

1215.2 Exceptions.

This section shall not apply to:

(a) representation of a client where the fee to be charged is expected to be less than $3,000;

(b) representation where the attorney's services are of the same general kind as previously rendered to and paid for by the client;

(c) representation in domestic relations matters subject to Part 1400 of this Title; or

(d) representation where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services are to be rendered in New York.

Pursuant to this rule, the first part of the engagement letter should include a precise description that will avoid later confusion as to what the attorney will be doing for the client. If the attorney will be handling a wide variety of items, then the attorney may wish to use a broader term such as estate administration as opposed to preparing and filing probate petition. "If the lawyer will be handling a specific transaction, for example, the letter of engagement should make clear whether the lawyer will handle any litigation arising out of the transaction. If the lawyer will be handling a litigation matter, the letter should state whether the lawyer will also handle any appeal." Roy Simon, "Letters of

Engagement Are Now Mandatory," NYPRR March 2002. If the representation takes a different turn, for example the attorney was going to settle and then settlement discussions broke down and now the attorney is hired to litigate, then the engagement letter must be updated or a new engagement letter should be signed.

In the second part of the letter, expenses must be disclosed even when the lawyer intends to bill a flat rate. Best practice is to list all of these expenses with their charges such as photocopying, express services, long distance, computer research, travel expenses, court reporter and transcript fees, filing fees, expert witness fees, etc. for example, "Photocopies will be charged at 15 cents per page." Attorneys should note that ABA Op. 93-379 (1993) provides that a lawyer may not markup expenses for the actual cost of "services provided by third parties," which would include court reporters or expert witnesses, unless the lawyer "incurs costs additional to the direct cost of the third-party services."

Since the requirement states an exception for matters below $3,000, there are times where estate planning or even small estate administration matters may initially appear to be below an estimated $3,000. However, to be safe, best practice is to require the engagement letter in all circumstances. Also, the estate planning engagement letter should also include waiver of conflict language between spouses. This issue comes in less frequently in estate administration. With regard to

estate administration, if the attorney is expected to speak with the Executor's siblings or children on a regular basis to gather and share information, then waiver language should be included in the letter.

The engagement letter rule does contain sanction provisions nor does it provide that "a violation of the rule will cause a referral to the disciplinary authorities." Roy Simon, "Letters of Engagement Are Now Mandatory," NYPRR March 2002. Regardless that there is no set punishment for not following this rule, the rule protects the attorney from clients who argue that an attorney did not do the work that the attorney was hired to do and courts will often not enforce oral contracts. In fact, SCPA §2110 provides that the Court

> is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested or of an attorney who has rendered legal services in connection with the performance of his duties as a fiduciary or in proceedings to compel the delivery of papers or funds in the hands of an attorney.

The attorney must submit an affidavit of legal services. 22 NYCRR §207.45 provides the requirements of this affidavit which includes the term of the engagement letter (see Exhibit E):

> (a) In any proceeding in which the relief requested includes determination of compensation of an attorney or the allowance of expenses of counsel, there shall be filed with the petition an affidavit of services which shall state when and

by whom the attorney was retained; the terms of the retainer; the amount of compensation requested; whether the client has been consulted as to the fee requested; whether the client consents to the same or, if not, the extent of disagreement or nature of any controversy concerning the same; the period during which services were rendered; the services rendered, in detail; the time spent; and the method or basis by which the requested compensation was determined. The affidavit also shall state whether the fee includes all services rendered and to be rendered up to and including settlement of the decree and distribution, if any, thereunder and whether the attorney waives a formal hearing as to compensation.

(b) Except when the SCPA otherwise provides or when compelling reasons exist for so doing, the court shall not fix attorneys' compensation or make allowances to parties for counsel expenses unless a proceeding is instituted under SCPA 2110 or unless, in an accounting, the petition and citation state that an application will be made for determination of compensation, the allowance of counsel expenses and the amount thereof.

(c) Reports, affidavits and statements relating to fixation of fees and allowances shall be served upon the petitioner and upon all attorneys, guardians ad litem and parties appearing in person (other than those who have theretofore filed waivers). Proof of such service shall be filed with the court.

(d) In any proceeding for the determination of kinship in which an attorney appears for any party not a resident of the United States, the attorney shall institute a proceeding pursuant to SCPA 2110 for the fixation of his or her

compensation and shall comply with the provisions set forth in subdivisions (a) through (c) of this section.

Standard practice is to include a copy of the engagement or retainer letter and a copy of all invoices as exhibits to the Affidavit. Additionally, the Affidavit should provide the cost of photocopying and indicate that the attorney is submitting the expense pursuant to Matter of Diamond, NYLJ, July 14, 1993, at 30, col 1, affd 219 AD2d 717 (1995). Without this statement, the Court often denies the expense completely. If the attorney has been paid prior to filing the Affidavit, then the Court may reduce the fees in which case the attorney must repay the estate. Good practice is to wait to be paid until the Order is issued by the Court. Another option when there is little concern about estate litigation is to be paid throughout the administration of the estate and request that the beneficiaries sign a Receipt and Release Agreement upon dissolution of the estate which includes legal fees specifically or which offers the opportunity for the beneficiaries to review estate expenses.

Legal fees cases brought under 22 NYCRR 1215 were typically decided in three different ways: 1) Attorney fees were determined in quantum meruit, 2) Attorney could keep collected fees but could not collect future fees, and 3) Attorney awarded no fees. In Seth Rubenstein, P.C. v Ganea, 2007 NY Slip Op 02923 [41 AD3d 54] (April 3, 2007 Appellate Division, Second Department), the Court found:

> We find that a strict rule prohibiting the recovery of counsel fees for an attorney's noncompliance with 22 NYCRR 1215.1 is not appropriate and could create unfair windfalls for clients, particularly where clients know that the legal services they receive are not pro bono and where the failure to comply with the rule is not willful (see Matter of Feroleto, supra at 684). Our holding would be different were this matter a matrimonial action governed by the more stringent disciplinary requirements of 22 NYCRR 1400.3 and Code of Professional Responsibility DR 2-106 (c) (2). Here, Ganea concedes in her reply brief that "she did not think all legal services received would be free." Rubenstein's failure to comply with 22 NYCRR 1215.1 was unintentional, no doubt attributed to the promulgation of the rule only seven weeks prior to his retention. Accordingly, the {**41 AD3d at 64} Supreme Court correctly held that Rubenstein could seek recovery of attorneys' fees upon the theory of quantum meruit. [FN7].

A later case, Barry Mallin & Assoc. P.C. v Nash Metalware Co. Inc., 2008 NY Slip Op 28007 [18 Misc 3d 890] (January 10, 2008 Civil Court of The City Of New York, New York County), did not award fees because it found that unlike in Rubenstein, the attorney could not prove that the client understood that there was a fee arrangement for the services provided:

> Public policy dictates that courts pay particular attention to fee arrangements between attorneys and their clients, as it is important that a fee contract be fair, reasonable, and fully known and understood by the client (see Jacobson v Sassower, 66 NY2d 991, 993, 499 NYS2d 381, 489 NE2d 1283 [1985]; Shaw v Manufacturers Hanover Trust Co., 68 NY2d 172,

176, 507 NYS2d 610, 499 NE2d 864 [1986]; Matter of Bizar & Martin v U.S. Ice Cream Corp., 228 AD2d 588, 644 NYS2d 753 [2d Dept 1996]). If the terms of a retainer agreement are not established, or if a client discharges an attorney without cause, the attorney may recover only in quantum meruit to the extent that the fair and reasonable value of legal services can be established (see Matter of Cohen v Grainger, Tesoriero & Bell, 81 NY2d 655, 658, 602 NYS2d 788, 622 NE2d 288 [1983]; Campagnola v Mulholland, Minion & Roe, 76 NY2d 38, 43, 556 NYS2d 239, 555 NE2d 611 [1990]; Matter of Schanzer, 7 AD2d 275, 182 NYS2d 475 [1st Dept 1959], affd 8 NY2d 972, 204 NYS2d 349, 169 NE2d 11 [1960]).

The Appellate Division cautioned attorneys who fail to comply with rule 1215.1 because it may be difficult for them to meet the burden of proof in proving the terms of the agreement and [*5] the reasonable value of the services as follows:

"Attorneys who fail to heed rule 1215.1 place themselves at a marked disadvantaged, as the recovery of fees becomes dependent upon factors that attorneys do not necessarily control, such as meeting the burden of proving the terms of the retainer and establishing that the terms were fair, understood, and agreed upon. There is never any {**18 Misc 3d at 896} guarantee that an arbitrator or court will find this burden met or that the fact-finder will determine the reasonable value of services under quantum meruit to be equal to the compensation that would have been earned under a clearly written retainer agreement or letter of engagement." (41 AD3d at 64.)

In order to avoid this type of situation, the attorney should take the time to prepare the engagement letter and hold off work until the letter is signed by the attorney and the client.

When the client gives the attorney property to hold, the attorney is now holding funds for the client. The attorney is acting as a fiduciary and must keep the funds separate from other personal or business funds by using an attorney trust account, which is typically a checking account or an Interest On Lawyer Account (IOLA). Attorney trust accounts must be held in a New York bank and only members of the New York bar can be signatories. The interest on an IOLA is used to provide legal services for the poor and programs to improve justice.

NY RPC RULE 1.15: PRESERVING IDENTITY OF FUNDS AND PROPERTY OF OTHERS; FIDUCIARY RESPONSIBILITY; COMMINGLING AND MISAPPROPRIATION OF CLIENT FUNDS OR PROPERTY; MAINTENANCE OF BANK ACCOUNTS; RECORD KEEPING; EXAMINATION OF RECORDS.

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow

or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

(3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.

(4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable;

(3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and

(4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

(d) Required Bookkeeping Records.

(1) A lawyer shall maintain for seven years after the events that they record:

(i) the records of all deposits in and withdrawals from the accounts specified in Rule 1.15(b) and of any other bank account that concerns or affects the lawyer's practice of law; these records shall specifically identify the date, source and description of each item deposited, as well as

the date, payee and purpose of each withdrawal or disbursement;

(ii) a record for special accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts, and the names of all persons to whom such funds were disbursed;

(iii) copies of all retainer and compensation agreements with clients;

(iv) copies of all statements to clients or other persons showing the disbursement of funds to them or on their behalf;

(v) copies of all bills rendered to clients;

(vi) copies of all records showing payments to lawyers, investigators or other persons, not in the lawyer's regular employ, for services rendered or performed;

(vii) copies of all retainer and closing statements filed with the Office of Court Administration; and

(viii) all checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips.

(2) Lawyers shall make accurate entries of all financial transactions in their records of receipts and disbursements, in their special accounts, in their ledger books or similar records, and in any other books of account kept by them in the regular course of their

practice, which entries shall be made at or near the time of the act, condition or event recorded.

(3) For purposes of Rule 1.15(d), a lawyer may satisfy the requirements of maintaining "copies" by maintaining any of the following items: original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection.

(e) Authorized Signatories.

All special account withdrawals shall be made only to a named payee and not to cash. Such withdrawals shall be made by check or, with the prior written approval of the party entitled to the proceeds, by bank transfer. Only a lawyer admitted to practice law in New York State shall be an authorized signatory of a special account.

(f) Missing Clients.

Whenever any sum of money is payable to a client and the lawyer is unable to locate the client, the lawyer shall apply to the court in which the action was brought if in the unified court system, or, if no action was commenced in the unified court system, to the Supreme Court in the county in which the lawyer maintains an office for the practice of law, for an order directing payment to the lawyer of any fees and disbursements that are owed by the client and the balance, if any, to the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(g) Designation of Successor Signatories.

(1) Upon the death of a lawyer who was the sole signatory on an attorney trust, escrow or special

account, an application may be made to the Supreme Court for an order designating a successor signatory for such trust, escrow or special account, who shall be a member of the bar in good standing and admitted to the practice of law in New York State.

(2) An application to designate a successor signatory shall be made to the Supreme Court in the judicial district in which the deceased lawyer maintained an office for the practice of law. The application may be made by the legal representative of the deceased lawyer's estate; a lawyer who was affiliated with the deceased lawyer in the practice of law; any person who has a beneficial interest in such trust, escrow or special account; an officer of a city or county bar association; or counsel for an attorney disciplinary committee. No lawyer may charge a legal fee for assisting with an application to designate a successor signatory pursuant to this Rule.

(3) The Supreme Court may designate a successor signatory and may direct the safeguarding of funds from such trust, escrow or special account, and the disbursement of such funds to persons who are entitled thereto, and may order that funds in such account be deposited with the Lawyers' Fund for Client Protection for safeguarding and disbursement to persons who are entitled thereto.

(h) Dissolution of a Firm.

Upon the dissolution of any firm of lawyers, the former partners or members shall make appropriate arrangements for the maintenance, by one of them or by a successor firm, of the records specified in Rule 1.15(d).

(i) Availability of Bookkeeping Records: Records Subject to Production in Disciplinary Investigations and Proceedings.

The financial records required by this Rule shall be located, or made available, at the principal New York State office of the lawyers subject hereto, and any such records shall be produced in response to a notice or subpoena duces tecum issued in connection with a complaint before or any investigation by the appropriate grievance or departmental disciplinary committee, or shall be produced at the direction of the appropriate Appellate Division before any person designated by it. All books and records produced pursuant to this Rule shall be kept confidential, except for the purpose of the particular proceeding, and their contents shall not be disclosed by anyone in violation of the attorney-client privilege.

(j) Disciplinary Action.

A lawyer who does not maintain and keep the accounts and records as specified and required by this Rule, or who does not produce any such records pursuant to this Rule, shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings.

EXHIBIT A

I, JOHN DOE, have designated an attorney, _____, as my Executor in my Will dated _____, 20___.

Prior to signing my Will I was informed that:

(i) subject to limited statutory exceptions, any person, including an attorney, is eligible to serve as my executor.

(ii) absent an agreement to the contrary, any person, including an attorney, who serves as an executor for me is entitled to receive statutory commissions for executorial services rendered to my estate.

(iii) if such attorney serves as my executor and she or another attorney affiliated with such attorney renders legal services in connection with the executor's official duties, she is entitled to receive just and reasonable compensation for those legal services, in addition to the commissions to which an executor is entitled.

(iv) absent execution of this disclosure acknowledgment, an attorney who serves as an executor shall be entitled to one-half (1/2) commissions she would otherwise be entitled to receive.

_____

_____

(Witness) JOHN DOE

Dated: _____, 20___

EXHIBIT B

STATE OF NEW YORK
SURROGATE'S COURT: WESTCHESTER COUNTY

----------X

Probate Proceeding, Will of	File No.: _____
JANE DOE	AFFIRMATION OF ATTORNEY
Deceased.	22 NYCRR §207.16

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Mary Doe, hereby affirms under penalty of perjury, that:

A. I am an attorney-at-law duly admitted to practice in the courts in the State of New York. I am a partner at Law Firms R Us, with offices at 123 Main Street, White Plains, New York 10601. I make this Affirmation for the benefit of the Surrogate, Westchester County, pursuant to SCPA 2307-a and 22 NYCRR 207.16(e).

B. Your affirmant is appointed as the Co-Executor of the Last Will and Testament of Jane Doe dated April 15, 1997 (the "Will) and First Codicil to the Last Will and Testament dated December 27, 2002 (the "Codicil").

C. Jane Doe died on _____, 20___, a resident of 456 Main Street, city of White Plains, County of Westchester, and State of New York.

D. Your affirmant is offering said Will and Codicil for probate.

E. The law firm of Lawyer & Attorney LLP prepared and supervised the execution of said Will and Codicil.

F. Jane Doe nominated your affirmant as the Executor. Your affirmant was not the attorney draftsperson, a then-affiliated attorney or employee thereof of Lawyer & Attorney LLP.

G. Your affirmant and her law firm, Lawyers R Us, will not be rendering any legal services with respect to the Estate of Jane Doe.

H. The decedent at the time of executing her Last Will and Testament was competent in all respects, possessed testamentary capacity and was not under any restraint; her Last Will and Testament was made at her direction and in accordance with her express wishes; and she was explicit and insistent that she wanted your affirmant to act as the Executor.

Dated: _____, 20___
White Plains, NY

_____

Mary Smith

STATE OF NEW YORK
SURROGATE'S COURT: WESTCHESTER COUNTY
----------X
Probate Proceeding, Estate of ATTORNEY AFFIDAVIT

PURSUANT TO
EVA DOE, 22 NYCRR §207.16(e)

Deceased. File No.:_____
----------X
State of New York)
ss.:
County of Westchester)

MARY SMITH, duly sworn, deposes and says:

A. I am an attorney-at-law duly admitted to practice in the courts in the State of New York. I make this Affidavit for the benefit of the Surrogate, New York County, pursuant to 22 NYCRR §207.16(e).

B. EVA DOE died on _____, 20___, a resident of 456 Main Street, city of White Plains, County of Westchester, and State of New York.

C. Your deponent is affiliated with or an employee of Lawyers R Us who represents the Estate of EVA DOE, and as such, your deponent will be rendering legal services with respect to the Estate.

D. Your deponent is the draftsperson of the decedent's Last Will and Testament dated October 4, 2012 being offered for probate.

Dated: _____, 20____

_____

MARY SMITH

Sworn to before me this _____
day of _____, 20____

_____

Notary Public

EXHIBIT C

STATE OF NEW YORK
SURROGATE'S COURT : WESTCHESTER COUNTY

----------X

Probate Proceeding, Will of WEINSTOCK

AFFIDAVIT OF

ATTORNEY- DRAFTSMAN

EVA DOE,

deceased. File No.:

_____

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

Mary Smith, being duly sworn, deposes and says, that:

A. I am an attorney-at-law duly admitted to practice in the highest courts in the State of New York. I am a Partner at the firm of Lawyers R Us with offices at 123 Main Street, White Plains, New York 10601.

I make this Affidavit because I am the attorney-draftsman of the Last Will and Testament of Eva Doe and the Executor therein.

B. Eva Doe died on _____, 20___, a resident of 456 Main Street, city of White Plains, County of Westchester, and State of New York. (hereinafter, the "Decedent").

C. On the 4th day of October, 2012, the Decedent executed her Last Will and Testament, which Will is being offered for probate by your Petitioner. I drafted said Last Will and Testament of Eva Doe at her direction and in accordance with her express instructions. By the terms of said Last Will and Testament, the Decedent bequeathed her residuary estate to one (1) or more qualifying charitable organizations which preferably support Jewish causes, preferably in Israel, or the arts, preferably in Israel, as her Executor shall select.

D. The Decedent nominated me as Executor. At the time of such nomination, I advised the Decedent that by acting as such Executor, I would be entitled to commissions and also attorney's fees in connection with the administration of her estate. The Decedent understood this and still wanted me to act as Executor. The Decedent signed an Attorney Disclosure Form conforming with the requirements of New York Surrogate's Court Procedure Act §2307-a.

E. I have been the Decedent's attorney for over fourteen (14) years and she asked me to act as Executor in order to assist in the administration of her estate. I agreed to act as Executor in order to provide her estate with legal, business and financial expertise.

F. The Decedent at the time of executing her Last Will and Testament was competent in all respects, possessed testamentary capacity and was not under any restraint; her Last Will and Testament was made at her discretion and in accordance with her express wishes; and she was explicit and insistent that she wanted me to act as Executor.

_____

Mary Smith

Sworn to before me this
_____ day of _____, 20____

_____

Notary Public

EXHIBIT D

SURROGATES COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

----------X

PROBATE PROCEEDING OF Putnam Affidavit

File Number:

JOHN DOE, DECEASED

----------X

STATE OF NEW YORK)

: SS.

COUNTY OF NEW YORK)

George Doe being duly sworn deposes and says:

1. I am over the age of eighteen and reside in New York County and am fully familiar with the facts set forth herein.

2. I am an attorney admitted to the bar of the State of New York where I have practiced law since 1981, first in the area of transactional real estate and co-operative conversions and then as a commercial litigator. I submit this affidavit in support of my Petition for the issuance of Letters Testamentary to me (the "Petition") as proponent of my father, John Doe's Will dated July 30, 2014 (the "Will"). The Will is being filed with this Court simultaneously herewith. My father died on August 3, 2017.

3. I am his youngest son, the draftsman of his Will and the beneficiary of one-third (1/3) of his residuary estate and the sole devisee of the Stock

and Proprietary Lease appurtenant to Apt 1A at 123 Main Street, New York, N.Y. 10024 (the "Apartment). Accordingly, I submit this affidavit in specific response to the issues raised in The Matter of Putnam, 257 N.Y. 140. 177 N.E. 399 (1931) and its progeny, and to describe the circumstances surrounding the bequest to me of his Apartment and one-third (1/3) of his residuary estate.

4. My mother, Jane Doe, died on January 8, 1992. Accordingly, as my father's only distributees and beneficiaries under his Will, my two (2) brothers, James Doe and Bob Doe, are the only persons who are adversely affected by such bequest since the balance of my father's estate is divided into equal thirds for his three (3) children. My brothers, however, were fully aware of, and are in full accord with the bequest of the Apartment to me and to my serving as Executor, and have signed Waivers and Consents on September 28, 2017.

5. My father was born in Tarnow, Poland in 1912, to Tom and Sara Doe and arrived in this country in July of 1939. He re-established his father's men's apparel business in New York, which continued successfully for seventy years. He had a rigid unwillingness to ever rely on "strangers," including for legal and tax advice born out of his war experiences. Inevitably, as the transactional attorney in the family, I had always been drawn into the legal issues arising out of my father's business. For the last ten (10) years of his life, my father made a point of leaving his home for lunch with me at the same local restaurant, every day until the day before his death.

6. My father remained in amazingly robust health until the date of his death at age 103. He insisted - even at the age of 90 - on traveling to Europe by himself, revisiting the places he had come to love with my mother and living in the Apartment entirely alone following my mother's death, refusing any help except for a weekly housekeeper. He shopped for himself, prepared his own meals and paid his bills. In 2010, at the age of 98, my father finally agreed to accept the assistance of three (3) home companions.

7. Although he had been diagnosed with heart failure, my father was largely asymptomatic. His medication consisted of beta blockers, statins and diuretics. He never took any sleep medication or psychotropic medications. My father's appetite remained remarkably robust until the day of his death. I examined my father's emailed medical report and accompanying labs of July 26, 2014 – four days before the execution of his will. The physician notes "[E]verything looks fine with respect to the labs."

8. My father maintained continuing mental acuity and read the New York Times daily and followed the stock market on television. At no point was his long-term memory impaired or his ability to recognize, acknowledge and identify his immediate and extended family members as well as neighbors, doormen and waiters who became part of his daily routine. He was fully ambulatory until the last four months of his life when he finally consented to use a wheelchair for his daily luncheon outings with me.

9. My father purchased the Apartment in 1985. In 2011 my Father wanted to transfer title of the Apartment to me as part of his estate plan. He was frustrated in this effort by the Apartment Corporation which refused to register title of the shares in the Apartment Corporation's books or issue a proprietary lease in my name since I was not going to take occupancy immediately. Similarly, a proposed transfer by my father to an inter vivos trust with a gift over of the Apartment at my Father's death to me was also rejected by the co-op board on the grounds that a trust could not take occupancy.

10. After discussing the intransigence of the co-op board in its refusal to permit transfers to trusts or inter vivos gifts to me, as a non-occupant, my father asked me to "make a will" for him so that I could live in the Apartment after he died. It was unthinkable for him that the home which he shared with my mother for 64 years would be sold to a third party. I strenuously urged my father to have another attorney prepare his Will,

particularly since I was to be a beneficiary. However, he insisted on using me because I was his son.

11. The conversations with my father, me and my brothers, explosive with humor and provocation, were always focused on the matters which had always been of consistent concern to him throughout his life: finances and the health and welfare of his family and extended family. At all times my father was fully aware of the nature and extent of his assets and that I and my brothers were his natural beneficiaries. He was acutely aware that the Apartment was a valuable asset and that both my brothers owned homes which he had assisted them in purchasing them over thirty years ago. He was aware that I, his youngest son, owned no home or apartment and that my father's own assets had diminished at the time of his retirement and even more dramatically after the 2008 collapse of the stock market. Accordingly, he had never been able to help me purchase a home or provide tuition assistance to my daughter as he had provided assistance to my brothers and their children. He frequently reminded my brothers of these facts at family gatherings.

12. Based on these discussions over a course of months, I prepared the Will and presented it to him for review several days before it was signed. When I arrived at my father's apartment on July 30, 2014, all of the witnesses were present and I noticed that my father was scrutinizing one provision on the first page of the Will repeatedly. He asked me what the term "contents" meant with reference to the gift of the Apartment to me and whether it included "the paintings" on the wall. What he was referring to was my brother, James's valuable collection of German Expressionist prints and drawings which had been on the walls of the Apartment since he had started collecting. I advised my father that the "paintings" were purchased and owned by James as reflected on his bills of sale and accordingly were not my father's property.

13. I once again summarized the Will for my father, explained the gift of the Apartment solely to me and the division of his residuary estate in equal thirds to his sons. After following my direction that he declare to

the three (3) witnesses that this document was, in fact, his Will, my father signed the Will and initialed each page, asking why I had searched frantically for a pen with blue ink. I explained that it was important for me to be able to distinguish an original from copies.

14. My father, the decedent, at the time of executing his Last Will and Testament was competent in all respects, possessed testamentary capacity and was not under any restraint; his Last Will and Testament was made at his discretion and in accordance with his express wishes; and he was explicit and insistent that he wanted me to inherit the Apartment and to act as Executor.

15. For the foregoing reasons, I respectfully request that the Petition be admitted to probate and that Letters Testamentary be issued to me, George Doe, together with such other and further relief as this court should deem just and proper.

_____

George Doe

Sworn To Before Me this ____

day of _____20___

_____

Notary Public

EXHIBIT E

SURROGATES COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Accounting by JOHN DOE, JR. as the Administrator CTA of the Estate of JOHN DOE	AFFIDAVIT OF LEGAL SERVICES PURSUANT TO 22 NYCRR §207.45 File No.: _____

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STATE OF NEW YORK)
: ss.:
COUNTY OF WESTCHESTER)

MARY SMITH, being duly sworn deposes and says:

1. I am special counsel with Lawyers LLP (the "Firm"), the attorneys for the Administrator CTA of the Estate of John Doe.

2. This affidavit is submitted in support of a request for approval of attorney's fees and disbursements incurred in the above proceeding for the period JULY 1, 2015 through FEBRUARY 28, 2021 (the "Period").

3. The Firm was retained by the Administrator CTA for the purpose of assistance with estate disputes and with regard to estate administration (copy of executed Retainer Letter attached as "Exhibit A"). As evidenced by the attached Retainer Letter dated March 29, 2013, the terms of the retainer with regard to Billing and Fees are as follows:

a. John Doe, Jr., in his capacity as Administrator CTA of the Estate of John Doe, retained Lawyers LLP to provide legal services with respect to estate disputes and estate administration, including matters before the Surrogate's Court of the State of New York.

b. In determining the value of the firm's services, each lawyer and legal assistant is assigned hourly rates and maintains careful records of how his or her time is spent. A schedule of the ranges of our current billing rates for partners, associates and legal assistants is attached. These assigned rates are adjusted from time to time and may change during the course of the engagement. The firm's custom is to revise rates annually at the beginning of the calendar year.

c. Time is billed in increments of six minutes. The time spent and the hourly rates are the principal factors considered in determining the value of the firm's services.

d. Lawyers LLP endeavors to serve clients with the most effective support systems available, while at the same time allocating the costs of such systems in accordance with the extent of usage by individual clients. Therefore, in addition to fees for legal services, we will also charge separately for disbursements, including long distance telephone, telecopier, messenger, courier and other communication costs; photocopying; document retrieval; computer research facilities; secretarial overtime, if required by the urgency of the matter; and other costs and expenses advanced by the firm on your behalf. Some disbursement costs are passed through to you directly and some have an administrative mark-up. Large disbursement billings from sources outside our firm will be forwarded to you for direct payment.

e. SCHEDULE OF FEES

Partners/Counsels $365 to $530 per hour

Associates $195 to $350 per hour

Paralegals $170 per hour

4. Details of the billing and actions I and my colleagues have taken as attorneys for the Administrator CTA during the Period are set forth in billing form (see Exhibit B). The Exhibit shows dated work on the file by

attorneys in the office of the Firm, together with the hourly rates charged in connection with the administration of the estate during the Period.

5. Our contemporaneous time records showed that I have spent a total of 55.90 hours, Robert Jones, Esq. has spent 4.70 hours, Anthony Clark, Esq. has spent 8.20 hours, Sally Newman, paralegal, has spent 50.50 hours, and Jane O'Connor, paralegal, has spent 3.50 hours. The Firm spent a total of 122.80 hours on this matter during the Period. This time was billed by the Firm at the standard hourly rates of its personnel at the time the services were rendered resulting in a total of $34,412.50 of legal fees and disbursements in the amount of $2,845.61.

6. The legal services rendered to the Administrator CTA for the Period include the following:

a. Telephone calls and emails with Court, attorneys and clients.

b. Preparing and filing accounting and petition.

c. Letters to Court, clients, financial institutions and to beneficiaries.

d. Preparing and filing affirmations, affidavits, decree, waivers and citations.

e. Court appearances.

f. Review of Court filings, real estate transactions, bank statements and judgment issues.

g. Discussion with attorney regarding judgment issues.

h. Calculations of moneys owed under settlements, and of commissions.

i. Research on various issues.

7. The disbursements incurred during the Period include the following:

a. Photocopying (pursuant to Matter of Diamond, NYLJ, July 14, 1993, at 30, col 1, affd 219 AD2d 717 (1995) 861 copies were made at $0.15 per page for a total charge of $129.15).

b. Postage and Federal Express.

c. Print copy (1,188 print copies were made at $0.15 per page for a total charge of $178.20).

d. Court costs including filing fees.

9. The Administrator CTA has been informed of the legal fees and disbursements incurred during the Period by receipt of each invoice sent to him and by providing him with a copy of the Draft invoice and he has consented to the same.

10. The attorney waives a formal hearing as to compensation.

WHEREFORE, your deponent request that the court approve fees for the Period to Lawyers LLP in the amount of $34,412.50 of legal fees and disbursements in the amount of $2,845.61.

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_____

MARY SMITH

Sworn to before me this

_____ day of _____, 20____.

_____

Notary Public

This presentation is for informational purposes only and is not intended as a substitute for legal, accounting or financial counsel with respect to your individual circumstances.

Under IRS regulations we are required to add the following IRS Circular 230 disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding any penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction(s) or tax-related matter(s) addressed herein. This communication may not be forwarded (other than within the recipient to which it has been sent) without our express written consent.

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