

A PRIMER ON ESTATE AND PROBATE ADMINISTRATION

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I. Introduction (Andrew)

- A. The commencement of estate administration.
- B. The use of Revocable Trusts

II. The Probate Process (Jay)

A. Determining whether it is probate or administration proceeding.

1. Probate occurs when the decedent died leaving a will.

- a. The will determines who will serve as the executor.
- b. SCPA §707 provides who is eligible to serve as an executor. Letters testamentary may issue to a natural person or to a person authorized by law to be a fiduciary except:
 - i. An infant (defined in SCPA §103(27) as someone under 18 years of age);
 - ii. An incompetent (defined in SCPA §103(26) as any person judicially declared incompetent to manage his affairs);
 - iii. A non-domiciliary alien (i.e. someone who resides in a foreign country) except a foreign guardian under SCPA §1716(4) or who is serving with one or more co-fiduciaries at least one of whom is a New York resident, subject to the Court's discretion;
 - A domiciliary of another state can serve as executor.
 - iv. A felon;
 - Unless the felon receives a Certificate of Relief from Disabilities.
 - v. One who does not possess the qualifications required by reason of substance abuse, dishonest, improvidence, want of

understanding, or who is otherwise unfit for the execution of the office.

– This is where the action is under SCPA § 707.

c. It is important in the estate planning process and determination of an executor to carefully consider whether any of these factors are present. If the decedent desires to appoint someone who lives in Canada or Italy as an executor, the will should also nominate a New York resident as a co-executor.

2. Administration occurs when the decedent died without a will.

a. Letters of Administration must be granted to persons who are distributees of an intestate decedent who are eligible (under SCPA §707).

b. SCPA §1001 sets forth the particular order in which letters of administration will be granted.

i. Surviving spouse;

ii. Children;

iii. Grandchildren;

iv. Either parent;

v. Brothers or sisters;

vi. Any other persons who are distributees and who are eligible and qualify, preference being given to the person entitled to the largest share in the estate, except as further provided by statute.

– Where there are eligible distributees equally entitled to administer the court may grant letters of administration to one or more of such persons.

3. Appointing the Public Administrator as the fiduciary.

- a. **What is the Public Administrator:** The Public Administrator is an agency of the City of New York that administers the estates of New York County residents who die without a will and no one else is eligible or willing to administer the estates. Each borough of the City of New York has its own Public Administrator, which has its own counsel.
- b. **When does the Court appoint the Public Administrator as the fiduciary:**
 - i. Intestate Estate: There are no distributees or other persons eligible under SCPA §1001 to serve.
 - ii. Testate Estate: The will nominates one or more executors and there is contested litigation regarding who should serve that impedes the administration. For example, a will nominates a testator's two adult children as co-executors. Those adults do not get along, refuse to work together or agree on anything, and accuse each other of being unfit to serve as executor. The Public Administrator can also be appointed when there is a will but no one has offered it for probate or when the nominated executors are ineligible under SCPA §707 and there is no one else to serve.

B. How to Start the Probate Process.

1. Necessary initial filings:

- a. original will and all codicils;
- b. an original death certificate;
- c. a petition seeking probate and letters testamentary (see attached Form P-1 from the New York State Bar Association OCA Forms)
- d. an executed Combined Verified Oath and Designation (see attached form).

2. Issues that can arise when trying to obtain the will:

- a. The executor can only find a copy of a will but believes that the testator did not revoke it. A common example is when the attorney draftsman maintained possession of the original will in his office for safe keeping and it was accidentally destroyed (e.g., thrown away, fire, flood).
 - Under SCPA §1407, the executor can file a copy but will have to prove that the original will was lost or destroyed and was not revoked.
- b. Someone other than the nominated executor is in possession of the original will and refuses to turn it over or file it with the Court.
 - The executor can start a proceeding under SCPA §1401 to compel production of the will.
- c. The will found is not stapled or bound together. (See attached form Attesting Witness Affidavit)

3. Who needs to be identified in the probate petition: (see attached Probate Proceeding Checklist from the NY County Surrogate's Court Website)

- a. Nominated fiduciaries;
 - Need to identify if the nominated executor is also the attorney who prepared the will (SCPA §2307-a).
- b. Distributees entitled to take property under EPTL §§4-1.1 and/or 4-1.2 (which pertains to non-marital children);
 - i. A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation;
 - ii. A spouse and no issue, the whole to the spouse;
 - iii. Issue and no spouse, the whole to the issue, by representation;
 - iv. One or both parents, and no spouse and no issue, the whole to the surviving parent or parents;

- v. Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation;
 - vi. One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving grandparent or grandparents of one parental side, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving grandparent or grandparents of the other parental side, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents;
 - vii. Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the grandparents of one parental side, per capita, and the other one-half to the great-grandchildren of the grandparents of the other parental side, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.
- c. Beneficiaries named in the Will;
 - d. All persons adversely affected by the will or any codicil or the exercise of any power of appointment;
 - What does this mean:
 - Someone would inherit from the decedent as a distributee (such as a child) but the will does not contain any bequest for that person;

- Someone would inherit under another instrument (such as a trust) but for the testator exercising a power of appointment (in the will) given to testator in that instrument and the testator directs that trust property to someone other than the trust beneficiary.
- e. Persons named in any other will of the decedent that is on file with the Court;
- f. If the will pours into a trust, the names of the trust beneficiaries and provide a copy of the trust instrument;
- g. If the will creates any testamentary trusts, the names of the trustees;
- h. The Office the New York Attorney General Charities Bureau if the will leaves any bequest to a charity;
- i. Unknowns
 - Proof is needed that a diligent effort has been made to locate unknown distributees or distributees whose whereabouts are unknown. Often this proof takes the form of an affidavit from a genealogist who has conducted a search.
 - This is often a tripping point. The courts are very cautious in ensuring proper notice is given, and will generally require the executor to give notice through publishing in certain newspapers and journals for a certain period of time, which can be very expensive.
- j. If anyone who is required to be named in the will is under a disability.
 - i. A person is under a disability if they are under 18 years old or incompetent.
 - ii. If a person under a disability has been committed to an institution, the name and address of the institution; if the person under a disability has a court appointed committee, conservator, guardian or other fiduciary, the name and address of said person.
 - iii. The court will appoint a Guardian *ad Litem* to represent the persons under a disability and the unknowns.

- Oftentimes the executor does not want a Guardian *ad Litem*. But the executor is obligated to identify anyone under disability and it is up to the court to decide.
- 4. Other information necessary to include in the probate petition: (See checklist and form petition):
 - a. The value of the estate not including any joint property, insurance that designates a specific beneficiary, or other non-probate assets.
 - i. Common Examples of non-probate assets:
 - Joint-bank account with right of survivorship;
 - Payable on death bank account;
 - IRA account with specifically named beneficiary (not the estate);
 - House owned as joint tenants or tenants in the entirety.
 - ii. The assets do not have to be itemized. The executor will file that detailed information later in an inventory of assets. The petition need only state that the value is “greater than” but “less than” and break down assets into 4 categories: (1) personal property; (2) improved real property in New York State; (3) unimproved real property in New York state; (4) estimated gross rents for a period of 18 months.
 - iii. Ownership of a cooperative in New York is considered personal property not real property.
 - b. Was notice of probate given to all required persons. (See attached Form P-6 from the New York State Bar Association OCA Forms)
- 5. Similar information is needed for letters of administration: (see the attached Administration Proceeding Checklist from the NY County Surrogate’s Court Website; Form A-1 from the New York State Bar Association OCA Forms).

- a. The petitioner must state that a diligent search for a will was conducted and could not be located.
 - What is a diligent search: The executor should look through any files maintained by the testator at home (or other properties owned) and place of business; should investigate whether the testator maintained a safety deposit box; should contact the attorney who prepared the will, any known business associates, family members.
 - b. Unlike with a probate petition, the petitioner must identify any debts and funeral expenses.
6. Other important factors the executor or administrator should consider.
- a. Jurisdiction over Interested Parties: The Court must obtain jurisdiction over all interested parties. This happens in two ways:
 - i. The interested party executes a Waiver and Consent agreeing to the relief requested in the petition (i.e. that the will is admitted to probate and the petitioner is appointed as executor) (see ; or
 - ii. The interested person is served with citation and appears on a return date.
 - b. The executor should have an understanding of the family relationships and attempt to obtain waivers and consents from all beneficiaries. This will speed up the probate process, which is habitually slow. It is not uncommon for the court to reject a petition when it is first submitted and request additional information (even if you follow the checklist closely). Most often, the petition can be corrected by attorney affirmation. It can be several months from when the petition is filed until you receive the decree or citation.
 - c. The refusal of a beneficiary to execute a waiver and consent can be a strong indication that a contested probate proceeding or at the very least, discovery pursuant to SCPA § 1404, is on the horizon.
 - d. Does the will contain an *in terrorem* Clause (a/k/a “no contest clause”).

- i. These are increasingly common in New York estate planning documents.
- ii. They are strictly construed and upheld by the Courts.
- iii. An *in terrorem* clause can be as broad or as narrow as the testator desires. If the estate plan includes trusts, the trusts can include an *in terrorem* clause, and the *in terrorem* clause in the will can refer to the trusts.
- iv. Be aware of potential disinheritance if an interested party triggers the *in terrorem* clause.

7. Applying for Preliminary Letters under SCPA §1412 or Temporary Letters of Administration under SCPA § 902:

- a. Preliminary or Temporary Letters are sought when immediate action is needed to administer the estate and a fiduciary must be installed to act on the estate's behalf.
 - i. The deadline for filing an estate tax return is imminent.
 - ii. The decedent engaged in a transaction, such as the sale of property, shortly before death that needs to close imminently.
 - iii. The estate holds a majority corporate interest and immediate corporate action or a vote is required.
 - iv. Preliminary letters are very common in substantial or complex estates.
- b. A Preliminary Executor or Temporary Administrator is needed if a contest is expected. Someone must have authority to act on behalf of the Estate to obtain documents that will be sought in SCPA § 1404 discovery.
 - i. Files maintained by the attorney draftsman
 - ii. Medical records

8. Elective Share:

- a. If the will disinherits the testator's surviving spouse, that spouse has the right to make an election under EPTL §5-1.1-A to take a share of the decedent's estate.
- b. The surviving spouse is entitled to the greater of (1) \$50,000 or the capital value of the estate if less than \$50,000 or (2) one-third of the net estate.
- c. The executor needs to ascertain what assets are calculated for purposes of the elective share, including inter vivos dispositions as testamentary substitutes defined in EPTL §5-1.1-A(b), and what the estate debts, administration expenses, and reasonable funeral expenses are to be deducted.
- d. The right of election must be made within 6 months from the date letters testamentary or letters of administration are issued, but not more than 2 years after the testator's death. Written notice is served on the fiduciary including the preliminary executor if the will has not been admitted to probate, and the original is filed with the Surrogate's Court. The court has discretion to extend the time to file a Right of Election.
- e. A spouse can waive the right of election in an acknowledged writing. (EPTL §5-1.1-A(e)). This can occur in a pre-nuptial or post-nuptial agreement or in a separate waiver instrument.
- f. While spouses cannot be disinherited, children can be.

9. Creditors' Claims (SCPA Article 18):

- a. This Article does not pertain to trusts.
- b. Every claim against an estate (except claims for administration expenses or claims of the United States or State of New York) must be in writing, contain a statement of facts on which the claim is based, and state the amount. The fiduciary may require the claimant to present proof by affidavit of the amount due, all payments thereon, that the claimant knows of no offsets, and other information.

- c. The Notice of Claim is presented to the fiduciary by delivering a copy personally or by certified mail return receipt requested.
- d. The fiduciary must give written notice to the claimant if he is allowing or rejecting the claim. If the fiduciary does not respond within 90 days, the claim is deemed rejected.
- e. The claims can be tried either in the Surrogate's Court or the Supreme Court. If the fiduciary rejects a claim in whole or in part, all issues surrounding that claim will be tried and determined upon the judicial settlement of the account (in the Surrogate's Court). However, the claimant can commence an action at law or in equity in the Supreme Court within 60 days from the date of the rejection.
- f. The fiduciary is charged with knowledge or notice that a claim *may* be asserted even where no written notice of claim has been presented. The fiduciary can petition the court praying that the claimant or possible claimant show cause why the claim should not be disallowed. Conversely, a claimant whose claim has been rejected can petition the court praying that the fiduciary show cause why the claim should not be allowed.
- g. If the executor has a claim against the testator, he cannot pay that debt from any estate property until proved and allowed by the court. The fiduciary may petition the court at any time (SCPA § 1805(2)) for permission to pay a debt the testator owed to him.

C. The Probate Contest.

1. The Citation Return Date:

- a. On the return date of the citation, any interested party may appear personally or through counsel and request examinations pursuant to SCPA § 1404.
- b. This statute entitles them to seek depositions and examinations of the attorney draftsman and attesting witnesses to the will offered for probate.

- c. If the will offered for probate contains an *in terrorem* clause, the potential objectant is also entitled to examine the petitioner, or proponent of the will.
 - d. Seeking and conducting discovery under SCPA § 1404 does not trigger an *in terrorem* clause in a will. SCPA § 1404(4) contains a “safe harbor” provision that allows for examinations of the attesting witnesses, preparer of the will, and the proponent, without triggering the *in terrorem* clause.
 - e. Seeking SCPA § 1404 discovery is common when potential beneficiaries have questions regarding the propounded will.
2. Referral to the Law Department for scheduling orders:
- a. In New York County, the clerk will refer the matter to the law department, which will assign a Court Attorney Referee to the case.
 - b. That referee will usually hold a conference with the parties and set a schedule for the dates to complete the SCPA § 1404 discovery, file objections, and post-objection discovery.
 - c. In New York County, the parties select their own dates (conforming with the Scheduling Order if issued) and locations for the SCPA § 1404 exams. In other counties, the parties must select dates with the Court and conduct the exams in the courthouse (pre-COVID).
3. Executor’s Discovery Responsibilities:
- a. The executor is responsible for obtaining documents that are requested in discovery and producing the witnesses for examination.
 - b. Document discovery may be broad, as it is intended to encompass all matters relevant to potential objections. The executor should be prepared to obtain and produce at least the following:
 - i. Testator’s financial records;
 - ii. Testator’s medical records;

- iii. The file maintained by the attorney-draftsman (prior wills and codicils, draft wills and codicils, notes, communications, attorney invoices and time sheets, e-mails, calendar notations);
 - iv. Relevant correspondence with beneficiaries or distributees; and
 - v. Testator's diaries, calendars, address/telephone books.
- c. The executor could face challenges obtaining documents and witness testimony depending on:
- i. The date of the Will: Financial records may no longer be available from financial institutions depending on record retention policies.
 - ii. The relationship between the testator and the executor: If not a close family member or trusted advisor, the executor may not know what assets exist and where.
 - iii. The relationship between the witnesses and testator or attorney draftsman: If the witnesses are unknown to either, they may be difficult to identify or locate and may be uncooperative. The executor may be required to serve a subpoena to secure the witness testimony.
- d. Discovery is limited by the "three-year/two-year rule" (22 NYCRR 207.27), which is the period from three years before the will was executed to two years after the will was executed or the testator's death if before the two-year period ends.
- i. This can be expanded by the Court upon a motion demonstrating "special circumstances."
 - ii. This is fact-specific inquiry.
 - iii. Applications to expand the three-year/two-year rule are most common when there is an objection that the will was procured by undue influence and the objectant claims that the undue influence occurred prior to the beginning of the three-year period.

D. The Executor's Responsibilities:

1. The executor is responsible for identifying and marshaling assets, and filing an inventory of assets with the Surrogate's Court.
2. Identifying beneficiaries and their bequests.
3. Opening an estate account.
4. Analyzing and responding to creditor claims.
5. Handling tax matters.

III. Estate Tax (Andrew)

IV. Distributions/Accounting/Discharge (Andrew/Jay)

A. Distributions (Andrew)

B. Accounting (Jay)

1. An executor or administrator is required to account:
 - a. There are two types of accounting: Informal v. Formal Judicial Accounting (see attached Checklists from the NY County Surrogate's Court website).
 - b. An informal accounting with the execution of Receipt and Release agreements is preferable to a judicial accounting, which is expensive, time consuming and could result in a contested accounting.
 - c. A contested accounting proceeding can itself become a full-blown litigation.
2. Reinforces the importance of good record keeping by the fiduciary.
3. An accounting discloses all of the transactions made in an estate. It shows what the estate started with and what it ended with:
 - a. Cash collected;
 - b. Securities bought and sold;

- c. Real property transactions (property bought or sold; rents collected);
 - d. Distributions made to beneficiaries;
 - e. Administration expenses (funeral expenses, legal fees, accounting fees, tax preparation fees, banking fees); and
 - f. Calculation of executor commissions.
4. For a judicial accounting, the Court will look to see that the account balances.

C. Discharge: (Jay)

1. Formal discharge as an executor/administrator is obtained from the Court when a final judicial accounting is settled and resolved.
2. If the executor/administrator has successfully accounted informally and received Receipt and Release agreements from all beneficiaries and closing letters from the taxing authorities, does the executor need to seek discharge from the Court?
3. This is a judgment call and the executor/administrator needs to be practical and weigh the costs and potential delay of seeking formal discharge from the Court when all beneficiaries are seemingly satisfied with the administration of the estate.
4. At bottom, an executor/administrator is not done with its task until all who have appeared in the proceeding have executed releases.