4B. Testamentary Gifts

NEW YORK WILL DRAFTING - FUNDAMENTALS

by

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New York Will Drafting – Fundamentals

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I. OVERVIEW

The Will is the most basic, and often the most important, estate planning document.

It is authorized and governed by statute[1]. The Estates, Powers and Trusts Law (EPTL) is the Will statute. In fact that statute creates a default Will for every citizen of the state through the intestacy provisions of Article 4. Additionally, the Surrogate's Court Procedure Act (SCPA) has significant applicability to the Will drafting process [for example, see SCPA 2307(1)(f) which allows the Will to set the Executor's commissions]. Familiarity with these two statutes is the starting point for New York Will drafting.

In reviewing these statutes, one phrase stands. One phrase is repeated, with slight variations, to the point of realization that it is a cornerstone of the Will drafting process. That phrase is ". . . unless the Will provides otherwise."

Consider the implications of the statement ". . . unless the Will provides otherwise." In all cases, that language is preceded by a rule, and then the draftsman is freed from the rule by being able to draft "otherwise". As a result, there is incredible freedom in the Will

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[1] *"A Will is an oral declaration or written instrument, made as prescribed by 3-2.1 or 3-2.2 to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of, disposes of his body or any part thereof, exercises a power, appoints a fiduciary or makes any other provision for the administration of his estate, and which is revocable during his lifetime." EPTL 1-2.19.*

drafting process. The statute establishes the rules, the defaults and the fail safe provisions, but the draftsman has the freedom to create, to escape the rules. It is understanding and appropriately using this freedom that is the art of estate planning and Will drafting.

This Chapter is organized around the process of creating a comprehensive New York Will for a client. The statutory requirements and framework are the starting points with emphasis on the freedom to draft "otherwise". Offered throughout the material are sample Will clauses and provisions. At the end of this Chapter, as Appendix A, is an entire Will collecting these clauses along with other optional provisions. These clauses are not a complete collection of Will provisions. Rather, they are offered to help clarify some of the descriptive provisions of the text. While forms are merely crutches and one person's stylistic offering, it is very helpful to have a complete collection of well annotated Will clause forms. Seeing someone else's drafting solution to a particular situation saves time and good annotations explain the need for required, technical language to meet tax code requirements as well as assist with legal research.

The organization of the following material loosely follows the process of producing a Will, beginning with the initial gathering of necessary information, proceeding with considerations in the actual drafting, and concluding with the execution process.

A final comment about these materials and Will drafting generally, in addition to understanding the statutory provisions of the EPTL and SCPA, the attorney must be familiar with the estate tax provisions of the Internal Revenue Code. While it is impossible to discuss the creation of a comprehensive Will without including estate tax planning considerations

and options, estate tax planning is not the focus of this Chapter. Other Chapters of this material detail the estate tax planning rules and options. Also, scattered throughout the Chapter are "Practice Comments", "Planning Comments" and "Drafting Considerations". These are some of the author's "stream of consciousness" suggestions for conducting a Will and Estate Planning practice.

II. INFORMATION GATHERING AND INITIAL COUNSELING

A. Information Gathering

A planned Will cannot be prepared without intimate knowledge of the client's family, assets and intentions. The best way to obtain that knowledge is by meeting with the client and using standard questionnaires and checklists to solicit the necessary information, including:

- *Client Biographical Information.* Name, address, birth date, social security number, employer, marital status, etc.
- *Family Tree and Beneficiary Information.* Names, addresses and relationships of all intestate heirs (see EPTL 4-1.1), including birth dates of all minor heirs, and names and addresses of all other beneficiaries and fiduciaries.
- *Asset Information.* Descriptions, titles, beneficiary designations, values, etc. Determine if there are potential inheritances, law suits, claims or other factors that may affect the client's assets and net worth.

- *Client Dispositive Objectives.* How should the estate be distributed (generally); gifts (specific); special asset or beneficiary concerns; alternative distributions for general and specific gifts; fiduciaries (Executors, Trustees and Guardians), etc.

The information gathering process requires that the attorney invest time with the client, either to review the information (if completed by the client or a staff person) or to obtain it originally. After the initial meeting with the client, promptly review the information obtained so that indefinite matters can be followed up. At the conference, or as part of the follow up, request and obtain documents relating to the client's assets to confirm the description, title or beneficiary information. Among the key documents to obtain from the client are deeds, tax returns, life insurance policies, business agreements, trusts, marital property agreements and retirement plan documents. Do not rely upon the client's recollections or statements. Request to see the documents to confirm titles, ownerships and beneficiary designations.

Practice Comment. *It is recommended that the attorney interview the client for the information gathering process. Will planning is a very personal process. Dry, factual information offers the attorney no insight to the client's concerns. At times, as important as what is said, is how it is said. Further, every step of the information gathering process offers the attorney the opportunity to answer client concerns, offer appropriate advice and establish the open, communicative relationship necessary for good planning.*

B. Counseling

To optimally plan the Will, you need to do more than obtain client information and objectives. The client should be educated as to the estate settlement process (probate), settlement expenses (tax exposures and costs), and available planning options. For instance, the client may want to primarily benefit the spouse and therefore request a Will leaving the

entire estate to the spouse. If the client and spouse's estates are large enough to be exposed to estate taxes, you need to inform the client of the estate tax impacts of such a plan on the spouse's estate and explain how the client's applicable federal credit could be utilized to reduce overall tax exposures. Since this chapter does not detail federal estate tax planning options, consult an estate planning text to better understand these concepts. See Section IV., D. "Trust Transfers" and E. "Disclaimers" for some estate tax planning information and strategies.

Moreover, the attorney should discuss the possibility that the spouse may remarry or die shortly after the client's death. Is that a concern to the client? If so, what options are available to address those concerns? Only after the client is properly informed and educated can you help tailor an appropriate Will.

This is also the time to discuss legal fees for the planning process. An estimate of the required legal effort cannot be made until you are fully aware of the client's assets, family concerns and informed objectives. After having educated the client as to the tax exposures and settlement process, the client will better understand the need for comprehensive planning with its attendant fees.

Planning Comment. *Consider putting into writing a brief summary of the client's main concerns and planning objectives. Such a statement will make certain that you and the client are on the same track headed in the same direction.*

Besides stating what the desired results of the planning process are, the statement can address any key planning problems (e.g., closely held business to be transitioned to other family members) and summarize the client's current tax exposures. Further, it should review and comment on any planning suggestions or devices which were discussed, but which the client is not personally interested in utilizing.

The statement will be helpful in drafting the Will and related documents. Once the Will and estate plan are complete, they can be summarized in relation to the written objectives. The client's tax exposures after planning can be recalculated and compared to the pre-planning situation. Finally, the agreed upon objectives and plan could be handy in the future if ultimate estate beneficiaries should question why certain provisions or planning devices were included and why others were not utilized.

Counseling is also a continuing aspect of the estate planning process. A client can have an elaborate, tax planned Will which ends up being largely or totally bypassed as a result of inappropriately titled assets (jointly owned or subject to beneficiary designations other than the estate). For the Will plan to be effective, advise the client as to how present and future assets should be titled, and keep the client appraised of future changes in the tax laws.

Finally, the Will planning process is not limited to preparing a Will. It is the appropriate time to comprehensively review the client's related legal needs. Is there a Power-of-Attorney? What happens if there is a disability? Does the client have sufficient life insurance? Will the estate have sufficient liquidity for its expenses? Are there other potential benefits, inheritances, claims or liabilities that may affect the client's estate? Has the client thought about a Living Will, a Health Care Proxy, long term medical expenses and funeral arrangements? In essence, preparing the Will is an opportunity for a "legal physical" to be certain that all matters that may affect the client's estate plan are addressed.

Practice Comment. *Other commentators have opined, and this author concurs, that the best practice is to budget open time immediately after the initial client appointment. Everything is fresh in your mind, notes that may be incomplete can be fleshed out, initial drafting work or instructions can be prepared and given to staff, information that requires follow-up can be pursued and the summary letter recommended above, that may be the required fee agreement letter as well, can be drafted. If you block an hour for the initial client appointment, consider blocking the following hour to begin the work on the file. It will*

keep the process moving and you will produce a better product for the client. The author knows the personal frustration of not following this advice, of putting the conference notes aside to be picked up a week or more later and trying and remember who the client was and deciphering the sadly incomplete notes taken at the initial conference.

C. Planning

Planning is the application of the attorney's expertise to the client's informed objectives. Generally there is more than one way to meet the client's dispositive objectives (consider the various available marital provisions outlined in any form book for estate planning). All options should be explored, presented, and their comparative administrative and tax results illustrated for the client.

Planning Comment. *A simple way to "test" a proposed plan is to complete a federal estate tax return (Form 706) based on the client's present assets and the proposed Will.*

Recognize the limitations of your expertise. Depending upon the size and complexity of the client's estate, other professionals (accountants, trust officers, financial planners, life insurance agents or other attorneys) may need to be involved and consulted in the planning process. Also, it is good practice to have another attorney review the plan and documents before they are finally executed to make certain the plan is effective and the documents are accurate and complete[2].

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[2]*For an old but still excellent article regarding potential malpractice liability in the estate planning field, with recommendations for conducting an estate planning practice, see "Avoiding Liability for Inadequate Estate Planning" by Lynn Wintriss and Karin M. Beckert, in Probate and Property, March/April 1989, pages 40-42.*

Upon review of the options, further discussions with the client to confirm the client's educated objectives, and agreement on the general dispositive plan, you are ready to draft the detailed Will that will implement the plan.

III. DRAFTING CONSIDERATIONS

All dispositive Will provisions, regardless of the type of gift and the form of the transfer, share certain fundamental drafting concerns. The most basic drafting requirement is clarity. Language must be precise, leaving no room for arguable interpretations.

A. In General

1. What Cannot be Given

Non-testamentary assets (jointly owned property and property subject to separate agreements or valid beneficiary designations) will not be controlled by the Will. However, these assets may substantially affect the Will. For example, the Will may direct that all estate taxes be paid from the client's residuary estate. In that case, the non-testamentary assets pass to their respective beneficiaries without reduction for estate taxes while the beneficiaries of the residuary estate bear the burden of the tax liability.

In addition to the non-testamentary assets, New York has limited forced inheritance statutes. The most important is EPTL 5-1.1-A. This statute sets the minimum provisions that must be made for a spouse absent a Waiver or Release of the spouse's statutory right. EPTL 5-1.1(f). Further, EPTL 5-3.1 defines the personal property items which "are not assets of

the estate but vest in, and shall be set off to such surviving spouse . . . (or) . . . the decedent's children under the age of twenty-one years . . .". Finally, EPTL 5-3.2 creates a potential interest for a child born after the execution of the Will. You must know these statutes.

2. Describe the Gift

Whatever is being given needs to be described as clearly, precisely and accurately as possible. There should be no question as to which ring, what chair or how much money the beneficiary is to receive. In this regard, be aware that if the property specifically disposed of is subject to any lien or charge, unless the Will "expressly or by necessary implication indicated otherwise", the gift carries the lien or charge with it. EPTL 3-3.6. In other words, the beneficiary receives the property in the same condition it was held by the client. A general provision to pay debts will not require the payment of an encumbrance on specifically gifted property. If an encumbrance is to be paid, so that the beneficiary receives the property free of all liabilities, then include a direct provision requiring the Executor to pay the lien prior to transferring the property to the beneficiary.

3. Describe the Beneficiary

Describe individuals by name and relationship to the client. If there may be any remaining question as to the beneficiary, consider including "presently residing at . . ." to further identify the beneficiary.

Organizations should be referred to by their official corporate name and the exact corporate name should be confirmed with the organization to avoid a lapse or litigation.

Know that an unincorporated association cannot receive a gift unless the association/beneficiary incorporates within three years of probate. EPTL 3-1.3(b).

When gifting to a class or group, clearly define the group. Will it include unborn or adopted children? When is the class determined – at the death of the client or when the distribution occurs? Consider the difference in the following language: "To my brothers and sisters who survive me . . ."; as opposed to: "To my brothers and sisters who are alive at the time this Trust terminates . . .". These are different points in time and may lead to very different distributions. Further, if a gift of cash is being made to a group, make it clear whether each member of the group is to receive the stated sum or the sum is to be divided among the members of the group.

A disposition may be made to the Trustee of an existing trust provided: (a) the trust is a written trust; (b) executed and acknowledged in the manner required for the recording of a deed; and (c) was created prior to or contemporaneously with the execution of the Will. EPTL 3-3.7. The ability to "pour-over" assets from an estate to a trust exists even if the trust "is amendable or revocable, or both", and even though the trust was not executed and attested in the manner necessary for a valid Will. EPTL 3-3.7(b). Often such "pour-over" provisions are used when it is desired to incorporate the planning another person has done, or where the client has created a revocable, living trust to avoid probate and the Will is drafted only as a safety valve to transfer any assets that might be in the client's name at death. Carefully draft the pour-over provision to clearly and correctly identify the trust and trustee. You must see

the Trust Agreement which the Will is pouring into, to properly identify it and to be certain the Trustee is not barred from accepting additions. If the Trust is amendable, advise the client that the power to amend may be exercised, substantially changing the dispositive provisions, and that it will be the terms of the trust as amended and as it exists at the time of the client's death (including amendments to the trust after the client's death, if the Will so directs) that will govern.

4. Lapses and Disclaimers

Always consider and affirmatively provide for the absence of the beneficiary (lapse) or the refusal of the beneficiary to accept the gift (disclaimer). If gifting to an individual, is the gift contingent upon the individual surviving the client? If the individual predeceases, will the gift lapse and fall into the residuary or pass to the individual's heirs or to another beneficiary? If a group, is the gift to be "by representation", "per stirpes" or "per capita"? See EPTL 1-2.16, 1-2.14 and 1-2.11. If a charity, is the gift limited to the existence of that charity or should it go to the charity's successor? EPTL 8-1.1.

The general rule is that the beneficiary must survive to take. If the beneficiary fails to survive, the gift fails and falls into the residuary. EPTL 3-3.3 provides that gifts to issue or siblings of the client do not lapse but pass to their issue by representation "unless the will whenever executed provides otherwise." EPTL 3-3.4 seeks to avoid a lapse in the residuary estate where EPTL 3-3.3 does not apply "nor has an alternative disposition thereof been made in the will . . .". Do *not* rely on the statute. Always consider the possibility of the

beneficiary's prior death and affirmatively draft for the alternate distribution. Even if the client wants the statutory disposition, say it in the Will to confirm it is the client's considered distribution.

If a beneficiary disclaims a gift the beneficiary is treated as though the beneficiary predeceased the client. EPTL 2-1.11. The Will's lapse provisions, in the absence of special disclaimer provisions, would then apply. See Section IV., E. "Disclaimers" for the special drafting considerations related to disclaimers.

5. Abatement and Adjustments

In the event there are substantial gifts and the estate lacks sufficient funds (after taxes, expenses and claims) to pay all gifts in full, and if no contrary direction is made in the Will, the residuary estate will abate (be reduced) first, followed by cash gifts on a pro-rata basis. EPTL 12-1.2 and 13-1.3. If there is a chance that the estate will not be large enough to pay all gifts, the client should decide who the priority beneficiaries are and the Will should be drafted to protect them by directing the order in which gifts will abate.

Planning Considerations. *The Will can be crafted to adjust for increases or decreases in the size of the estate between the time the Will is signed and the client dies. Gifts can be made contingent upon the estate being in excess of a certain amount (i.e., "if my estate exceeds $_____ then I make the following cash gifts..."), or the gifts can be set at a certain percentage of the actual estate size (i.e., "I give 5% of my estate to..."). The percentage provision tends to protect the residuary while allowing pre-residuary beneficiaries to maintain their gifts, sharing in either estate shrinkage or growth. Again, precision and clarity in drafting are a must. The "estate size" must be clearly defined (i.e., "my 'estate' shall mean my federal taxable estate as finally determined.").*

Be aware that the percentage provision may create administrative problems. Since the gifts are based on a percentage of the estate after expenses and other deductions, the gifts must await the payment and final settlement of the expenses. Further, the beneficiaries of

the gifts will become interested in the Executor's decisions regarding expense payments and will have a direct financial interest in questioning those decisions. Also, a substantial delay in payment of a disposition (more than seven months after letters have issued) may require the Executor to pay interest on the gift. EPTL 11-1.5(d) and (e). Finally, if a charity is a beneficiary of a percentage gift, the New York State Attorney General becomes an additional interested party in the estate settlement proceeding on behalf of the charity. While not always fair or reflective of the client's desires, it is administratively easier to make specific cash gifts to beneficiaries and charities.

6. Intents

State the client's objectives and intentions to help clarify a complex disposition. By clearly defining the client's intent, the Executor is given guidance, the beneficiaries may be assuaged, and the Court is assisted if future events require interpretation and construction of the document.

7. Confidential Relationships

Gifts to persons in a confidential relationship to the client (for example, the attorney, a doctor, priest, etc.) are suspect and may require a special affidavit or hearing before the Will is accepted by the Surrogate's Court to establish that they were not the result of some undue influence (see the Chapter of these materials on "Ethical Considerations and Attorney's Fees").

8. Public Policy

Where a gift violates public policy (for example, encourages divorce or the commission of a crime) or violates a statutory prohibition, it will not be enforced.

B. Drafting for Specific Assets

1. Tangible Personal Property

Personal property exists in two forms – tangible (things) and intangibles (evidences of things). Cash is a tangible. A certificate of deposit is an intangible. Chairs and art collections are tangibles. Stocks and bonds are intangibles. Intangibles generally represent value, potential liquidity and earning power for an estate. They are relatively easy for an Executor to take control of, protect, manage and distribute.

Tangibles are more problematic. They can be valuable (jewelry, art work, collections, etc.), but unless sold (and obtaining a favorable market may be difficult) generally do not generate income for the estate, requiring instead expenses for insurance and storage. Non-valuable tangibles (used clothing, furniture, personal memorabilia, etc.) present other challenges given their low economic value but potentially high personal value.

As a consequence, consider drafting for the specific disposition of tangible personal property. The direct gift of tangible personal property will avoid:

- its inclusion in a residuary trust, if one is created, where the items would either need to be sold or retained as non-income producing assets;
- the Executor needing to spend time and estate funds to administer;
- the Executor's commissions on value;
- a distribution of these items being deemed an advancement from the residuary estate carrying out estate income (see IRC §§ 661 and 663).

For family items and personal effects that are hard to detail, consider a direct gift to family members (children) "to be divided as they agree", or to one person to be distributed "in accordance with any directions" that the testator may have given in that person's discretion. While this provision may sound simple and direct, consider:

- *Failure to agree.* If the gift is to a group, provide for authority in one person (Executor?) to decide on division or to sell if no agreement is reached within a limited time.
- *Precatory language.* Language that merely "requests" action, while often useful, is not legally enforceable. Be sure to clearly vest title in one or more beneficiaries and acknowledge the legally unenforceable nature of any precatory statement (also be careful not to obligate a beneficiary to make taxable gifts – to redistribute tangible property to another person which has a value greater than the federal annual gift exclusion, which is currently $12,000).
- *Written memorandum.* Do not provide for distribution "in accordance with a memorandum I have left" or similar language referring to another writing. The reference can create problems if the referred to writing is not found and some courts are now requiring that such writings be submitted with the Will or their absence satisfactorily explained.

Sample clause and options for handling tangible personal property appear at Appendix A, Article Third.

Carefully describe the tangible property to be given. Most phrases commonly used ("personal belongings", "personal property", "personal effects", "contents", etc.) have no fixed legal meaning. If questions arise as to what is included in the gift a construction proceeding may be required to determine the client's intent as the phrase was used in the context of the client's Will. For example, see Matter of Jones, 38 NY2d 189; Matter of Rothko, 77 Misc. 2d 168; Matter of Mann, 4 Misc. 2d 387; Matter of Neefus, 110 N.Y.S. 2d 584; Matter of Bloomingdale, 142 N.Y.S. 2d 781. To avoid a construction proceeding, be careful, be precise and express the client's intent, and:

- always include the word "tangible" with personal property since the phrase "personal property" alone may be construed to include intangibles (stocks, bonds, bank accounts, etc.). See Matter of Greene, 25 AD 2d 25; Matter of Turner, 58 Misc. 2d 415, aff'd 34 AD 2d 615.
- always include the term "my" with any specific disposition. (Note the difference between "I give *my* three-carat diamond ring to . . ." and "I give *a* three-carat diamond ring to . . . ". In the former provision "my" helps identify the ring, and if the ring is not owned at death the gift will adeem. In the latter provision if no ring is owned at death, the beneficiary could argue that "a" ring is to be given and require the Executor to acquire such a ring to complete the gift.)

- do not use all encompassing language (for example, "all of my tangible personal property wherever located") whenever there is tangible personal property used in connection with other assets separately gifted (for example, business assets related to particular real estate).

In drafting personal property gifts, keep in mind the family set off property under EPTL 5-3.1. Further, if certain items of personal property are used by the client and in the client's possession, but owned by another person, confirm the other's ownership in the Will to assist the Executor and guide the beneficiaries.

Finally, title to specifically gifted personalty vests at death and consequently the costs of storing, shipping and insuring are the responsibility of the beneficiary. If the client does not want the gift depleted by such costs then direct the Executor to pay all costs associated with protecting and delivering the property to the beneficiary (if required to be paid by the estate then these costs will be deductible administration expenses).

2. Real Estate

Real estate shares some traits with tangible personal property that make it appropriate for specific disposition. Personal residences are not income producing and require expenses for taxes, insurance, and upkeep. Consequently, they are less desirable as estate or trust assets. A specific disposition of real estate will: (1) vest title immediately in the beneficiary, shifting the above costs to the beneficiary; (2) eliminate the asset from the commissionable estate since the Executor is considered to have not received or paid out the

property; and (3) avoid carrying out estate income if the property were to be advanced from the residuary estate (see IRC §§ 661 and 663).

Again, care needs to be exercised in describing the real estate. A potentially over-broad description, such as "all my real estate, wherever located", will pick up business real estate individually owned. Further, questions will arise whether such a description was meant to include related realty holdings and interests such as condominiums, cooperative apartments, association interests, lease holds, and/or real estate investments (real estate investment trusts, limited partnerships, oil and gas interests, etc.). Rather, describe each parcel to be given as precisely as possible. Generally, street address, area, county and State will be enough, but if there may be any questions, include deed references, tax map numbers and possibly even complete legal descriptions.

Whenever making gifts of real estate, also consider:

- Is any tangible personal property inherently related to the real estate such that it should be included? If so, define it carefully. See Matter of Rothko, 77 Misc. 2d 168 for construction of the term "contents" where valuable art work was both displayed and stored at the gifted premises.
- What "fixtures", if any, are not included in the gift. Generally, attached fixtures are part of the real estate. If there may be questions regarding a fixture, make a direct provision.

- The beneficiary will take the real estate subject to all existing liens and mortgages unless the Will provides otherwise. EPTL 3-3.6.
- If the real estate is used as a farm or for a family business, will it continue to be so used and possibly qualify for the special valuation provisions of IRC § 2032A?
- Avoid title vesting in a minor through a lapse or contingent provision.
- Include with the gift any insurance on the property.

If the real estate is not specifically gifted, should it be sold? Absent a direction to sell, it may be unclear whether the Executor should sell the property to facilitate administration and distribution. A direction to sell will entitle the Executor to commissions but make the expenses of sale deductible.

Special planning consideration needs to be given to out-of-state real property. The disposition of real property is governed by the laws of the State where the real property is located. Consequently, out of State real property will require consulting local counsel and either ancillary administration or ancillary probate to convey title in that jurisdiction. To reduce settlement expenses, the out-of-state real estate could be placed in joint names, conveyed to a trust or the remainder interest conveyed out.

3. Stocks

Direct gifts of defined stock can cause problems and should be avoided. Stocks are subject to extreme value fluctuations, splits, dividends, mergers, buy outs, etc., and as a

result, gifts of stock can lead to unintended results or expensive construction proceedings. Further, if the stock is sold by the client, of the clients agent, for the purpose of raising cash for the client's support, then the client's Will plan is altered by the sale.

If a client insists on a specific disposition of stock, then directions should be included regarding the potential changes that could occur to the stock and the drafting should include:

- The term "my" or phrase "if owned by me at the time of my death" or similar language if currently owned stock is intended to be the source of the gift, otherwise the gift may be construed as a general disposition requiring the Executor to acquire the stock [for example, "I give ten (10) shares of ABC Corporation to . . ."]. See Matter of Volckening, 75 Misc. 2d 221.
- Provision should be made for a possible change in the capital structure of the company by way of name change, merger, take over.
- Directions as to stock dividends, splits, and stock options should be considered. Absent a provision to the contrary, "splits" will pass to the beneficiary (Matter of Hicks, 297 N.Y. 924), but stock "dividends" will not (Matter of Howe, 15 AD 2d 396, aff'd 12 N.Y. 2d 870), and shares received as a result of merger probably will pass to the beneficiary. EPTL 3-4.3.
- Avoid general language conveying "all of my stock" which would potentially require a construction proceeding to determine if the gift includes closely held

corporate stock, shares in a cooperative apartment and shares in a real estate association.

- For closely held stock, Shareholder Agreements must be reviewed to determine what restrictions may exist on the transfer of the stock.

4. Business Interests

Businesses in which a client is involved require special planning and drafting. The form of the business enterprise and whether any agreements govern the business will be most important in disposing of the enterprise. The initial determination is whether the client has the power to transfer the interest. If so, does the client want the business to continue and be transferred, or should it simply be liquidated.

(a) Sole Proprietorship

As the client is the sole owner, the business (so long as it is not a profession requiring licensure) can be gifted, held as an asset and operated by the Executor or a Trustee (generally not a good idea), or liquidated. A specific gift of the business simplifies the settlement process. If it is to be gifted, all assets that are related to the business should be included with the gift and clearly identified (real estate, equipment, accounts, insurance, etc.). The gift should also include all business debts. Otherwise, if the Will provides an express provision to pay debts, the Executor may satisfy the business debts out of other estate assets. See Matter of Noll, 273 N.Y. 219. Generally, a business is not an appropriate asset to be retained in the estate or as a trust investment. Nevertheless, it may be necessary for the

Executor to operate the business until a purchaser is found, or until an appropriate liquidation plan is put in place. Consequently, the Executor should be provided with special powers to manage the business (see Appendix A, Article TENTH for sample powers).

(b) Partnership

Under New York Law, the death of a general partner dissolves the partnership unless a partnership agreement provides otherwise. Partnership Law § 62. If a partnership agreement exists, obtain it and review it to properly advise and draft for the client. In no event can a deceased partner name a beneficiary to be a successor partner. Rather, either the partnership agreement will provide for the partnership to continue, with the deceased partner's estate becoming a limited partner, or the deceased partner's interest will be purchased by the remaining partner(s), or the partnership will be dissolved. The client's interest can fall into the residuary or be gifted to a beneficiary. In either case, the estate or beneficiary will either become a limited partner or receive the proceeds of sale or surplus (if any) upon dissolution. If the partnership is insolvent then the client's estate is severally liable for any outstanding partnership obligations with the other partners.

(c) Closely Held Corporation

The ownership interest in a closely held corporation is represented by its stock. If the stock is not subject to a shareholder agreement, it can be given away in such proportions and manner as the client desires. If there is a shareholder's agreement, that agreement will control the options for distribution of the stock. Again, obtain and review the

agreement to determine what, if any, restrictions on the transfer of the client's stock are provided. The Executor will be responsible for the corporation unless there is a shareholder's agreement or other controlling shareholders who continue to operate the business. In either event, the comments above regarding retention of a sole proprietorship apply to a closely held corporation as well, especially the need to provide the Executor and Trustee with the necessary powers to manage and control the corporation.

(d) Limited Liability Company

The ownership interest in a Limited Liability Company (LLC) is a membership interest, governed by a Management Agreement which generally controls the options for transferring the membership interest. As with stock ownership, obtaining and reviewing the governing agreement is key to determining what, if any, restrictions exist as to the transfer of the client's membership interest. Only with a detailed understanding of any restrictions can appropriate drafting be done, avoiding potential turmoil for the estate and beneficiaries and embarrassment for the drafter. And once again, depending on the LLC interest owned by the decedent, and the terms of the Management Agreement, the Executor and any Trustee may need special business powers to manage and operate the LLC for some period of time (again, see Appendix A, Article TENTH for sample powers).

5. Powers of Appointment

A power of appointment allows someone else, in the future, to exercise discretion as to a distribution and therefore adds flexibility to an estate plan. It is most commonly used

with spousal trusts. Often, a trust is created for a spouse's lifetime, and ultimately pays out to the couple's children, grandchildren, or others. While the trust is being administered for the spouse's benefit, changes may occur in the needs and circumstances of the future beneficiaries. By giving the surviving spouse a "limited" power to appoint the trust property among a defined group of beneficiaries (i.e., "all my children and grandchildren"), the client is assured the property will pass to the appropriate family members but the surviving spouse can flexibly respond to that group's changing future needs.

Aside from creating a power of appointment in the client's Will for someone else to exercise, the client may hold a power to appoint. In that situation, the client's Will should either affirmatively exercise the power, or affirmatively not exercise it.

The drafting concerns relating to the exercise or non-exercise, or creation of a power of appointment, are very similar:

- *What kind of power.* General (ability to appoint to self, creditors or estate) or limited (cannot appoint to self, creditors or estate and may be further limited to named individuals or defined class).
- *Exercise.* EPTL 10-6.1(a) describes how a power of appointment is exercised where an express reference to the power is not required. However, "if the donor has expressly directed that no instrument shall be effective to exercise the power unless it contains a specific reference to the power, an instrument not containing such reference does not validly exercise the power". EPTL 10-

6.1(b). Most powers of appointment do, and all should, require a specific reference. If it makes sense to give someone a power of appointment then the exercise of that power should be the result of some affirmative consideration by the holder of the power, rather than inadvertent exercise of the power by a simple residuary provision. Since exercise generally requires specific reference to the power, obtain and review the document creating the power in order to draft for its effective exercise.

- *Non-exercise*. Most powers of appointment do, and all should, contain an alternative distribution in the event the power is not effectively exercised. If the client does not want to exercise a power of appointment which the client holds, consider making the non-exercise an affirmative action by expressly referring to the power and stating that it is intentionally not being exercised. See EPTL 10-6.1(a)(4).
- *Tax Considerations*. The creation, mere possession or actual exercise of a power of appointment can have complex tax consequences. Generally, the holder of a "limited" power of appointment (cannot appoint to themselves, their estate or creditors) is not considered to own the property subject to the power. On the other hand, the holder of a general power of appointment (can appoint to anyone, including the power holder) will be deemed to own, and be subject to estate tax on, the assets controlled by the power of appointment.

Consequently, powers should not be created nor exercised without consideration of their tax results to the holder of the power. Internal Revenue Code provisions that relate to the possession, exercise or disclaimer of a power of appointment include §§ 2041, 2056(b)(5) and (d)(1)(2), 2207, 2514 and 2518.

6. Miscellaneous Assets

A variety of other assets or testamentary concerns require special drafting attention or reference:

- *Copyright Interests*. To convey them specifically refer to them.
- *Cancellation of Debt*. A gift to a beneficiary does not cancel any indebtedness owed by the beneficiary. A direct provision is necessary. Note that forgiveness of a collectible debt does not change its nature as a taxable asset of the estate.
- *Providing an Annuity*. If the client desires to provide a beneficiary with a fixed income, authorize the Executor to either purchase a commercial annuity product or set aside sufficient funds in trust. This allows the Executor to meet the client's intent in the most cost efficient manner, taking into consideration the age and health of the annuitant beneficiary at the client's death.
- *Charitable Provisions*. New York has no limitation on the portion of the estate that can be given to charity, with the exception of the forced inheritances of EPTL 5-1.1-A, 5-3.1 and 5-3.2(a)(2). In making charitable gifts, confirm and

use the charity's exact legal name. Further, inform the client that absent a contrary provision, a successor to the existing charity will receive the gift. Not-for-Profit Corporations § 905(b)(2). If tax deductibility is a concern, confirm that the charity qualifies under IRC §§ 2055 and 2106(a)(2). See EPTL 8-1.1 for the authority vested in the Surrogate's Court to administer charitable gifts and the responsibility of the Attorney General for protecting charitable beneficiaries.

- *Cooperative Apartments*. The ownership interest in a cooperative apartment is not quite real estate nor personal property. See Matter of Carmer, 71 NY 2d 781. A cooperative apartment should be specifically disposed of, in accordance with and after review of shareholder agreements and leases, and should include the ownership as it may be represented by shares of stock, leases or other evidences of title.

IV. TRANSFER OPTIONS

A. Outright Transfers

An outright transfer is a simple, direct gift of defined property to a named beneficiary. The property becomes the beneficiary's. It is appropriate whenever the beneficiary is capable of handling the gift, and estate tax consequences to the beneficiary are not a concern.

B. Conditional Transfers

Often outright transfers are "conditioned" upon the happening of a described event. The most common is the condition that the beneficiary be living (for example, "I give the sum of $1,000 to my friend, Ben F. Sherry, if he survives me."). Most any condition can be attached to a transfer, the primary exception being conditions which are voided for public policy reasons, such as a gift conditional upon the beneficiary divorcing or performing an illegal activity. Common conditions, in addition to survivorship, include obtaining a defined age, surviving for a defined period, or performing some activity on behalf of the testator. In drafting a conditional gift, the condition or event which either qualifies or disqualifies the transfer must be clear, unambiguous and easily ascertainable. Any vagueness may require court intervention. Additionally, always consider and provide for the alternative gift in the event the condition is not met.

C. Life Estate Transfers

A "legal life estate" is created when real or personal property is given to a beneficiary (life tenant) for the term of that beneficiary's (or some other person's) life. SCPA 103(30). Upon the measuring life's death, title to the property vests in another or others (remaindermen). SCPA 103(30). Life estates are most commonly used with real estate to give the life tenant the exclusive use and benefit of the property, but keep it out of the life tenant's estate and away from any creditors of the life tenant. The problem with life estate transfers is the potential for conflict between the interests of the life tenant and the

remaindermen over the care, use and condition of the asset(s). (*Note:* Under SCPA 2201 all accounting provisions applicable to a testamentary trustee can be applied to a life tenant). A more flexible alternative to the legal life estate is the use of a trust, discussed in the following sub-section. Nevertheless, a legal life estate may be appropriate where the assets subject to the life estate are limited, the formalities of a trust would not be appropriate and the life tenant and remaindermen are unlikely to develop conflicts.

Drafting Considerations. *To reduce the potential for conflicts and issues, give directions as to the life tenant's responsibilities toward the property (keep insured, pay taxes, maintain pursuant to a standard or definition) and state whether or not the life tenant should provide a bond to protect the remaindermen (it may be required unless the Will provides otherwise – SCPA 807). Consider also providing for the termination of the life tenant's interest upon the happening of certain conditions (vacating the premises for an extended period, permanent admission to a health care facility, failure to meet responsibilities, etc.).*

Be careful in drafting for the termination of the life estate. How are the remaindermen to take title – jointly with right of survivorship or as tenants-in-common? What if one or more remaindermen have died, will their interests pass to those who do survive or to younger generations which may include minors?

The advantages of trust provisions become apparent when attempting to draft for a life estate. What if the life tenant fails to make a required payment? What is an ordinary repair and maintenance expense? What if a capital improvement is needed or desired? Who should pay mortgages or liens? For these reasons and others, legal life estates should be cautiously created, carefully drafted and considered only when the life tenant and remainderman are likely to be cooperative (such as where a parent is the life tenant and a child or children are the remaindermen).

D. Trust Transfers

"The term 'trust' means any express trust of property, created by a Will, deed or other instrument, whereby there is imposed upon a Trustee the duty to administer property for the benefit of the named or otherwise described income or principal beneficiary, or both." EPTL 11-1.1(a)(2).

Anytime it would be inappropriate to give funds or property to a beneficiary directly, a trust should be considered. Trusts are useful for any one, or a combination of, the following purposes:

- *Estate Planning*. Properly drawn and funded, trusts can save substantial estate taxes for the client and the client's family. Credit Shelter, Marital Deduction, Qualified Terminable Interest Property, Charitable Remainder and Generation-Skipping trusts are all tax oriented trust vehicles that the attorney planner must be familiar with and able to explain to the client.
- *Protection of minor, incompetent or improvident beneficiaries.* Where the beneficiary is too young, mentally incapable or, in the opinion of the client, lacking appropriate financial judgement, a trust can be created to manage and protect the assets for the benefit of the beneficiary.
- *Retention of Control.* The client may simply want to maintain control over the estate by providing protection and benefits to the family or another for a period of time and then providing for the ultimate disposition of the property. A common situation where retention of control is often a concern is in the case of a second marriage. The client may want to provide for and protect the second spouse, but not have assets pass into the full control of the second spouse, potentially disinheriting the client's family or children. A trust can provide for the spouse and deliver the assets to the client's children upon the spouse's death. However, to protect this trust

plan, the second spouse must waive the elective share rights provided by EPTL 5-1.1-A.

Trusts can be incredibly flexible and personal dispositive devices. Since assets are given to a Trustee to hold for the benefit of another or others, the trust can provide for almost any form of management and distribution to beneficiaries the client desires. To draft the trust the attorney must address and have answered a series of planning concerns: What are the purposes of the trust? What property is to be transferred to the trust? How is the trust fund to be invested and managed? What benefits are to be provided the immediate beneficiaries? When will the trust terminate? Who will be the ultimate beneficiaries? How will the trust be paid out?

What are the purposes of the trust? A trust is created for a reason, to manage property for someone too young or incapable, to take advantage of tax benefits, to maintain control, etc. Directly stating the trust's purposes gives the Trustee guidance in the administration and exercise of discretionary powers and explains the benefits to the beneficiaries. For example, a trust created for a minor child may have as a stated primary purpose providing a college education fund. In that case, and depending on the other provisions and the size of the trust, the Trustee may be less inclined to invade principal during the child's minority in order to preserve sufficient funds to meet the expressed intent.

The trust is the client's creation. Often it is meant to accomplish the care and protection the client would have provided if living. Defining the client's primary beneficiaries and

concerns guides the Trustee in administering and investing the trust. Is the trust to provide maximum income to the current beneficiary, or should it be invested for growth for the remainder beneficiaries? For the Trustee to step into the client's shoes and make discretionary decisions far into the future, a statement as to the client's concerns and intents is appropriate.

An intent to qualify for particular tax benefits can be reinforced by "savings" language that requires the trust be administered consistent with the tax code requirements. See Section V., C., 5. "Miscellaneous Provisions" for further discussion of "savings" clauses.

What property is to be transferred to the trust? The Will must define how and to what extent the trust is to be funded. The trust can be funded with particular assets, a flat dollar amount, a percentage of the estate, the residuary estate (whatever that may be), or an adjustable amount to be determined by fiduciary elections or beneficiary disclaimers in order to obtain defined tax benefits. Whatever funding provision is used, make sure the funding will be sufficient to accomplish the client's objectives.

How is the trust fund to be invested and managed? The client may have specific concerns or requirements for the investment of the trust. If so, they should be stated as directions to the Trustee. If not, then the purposes of the trust will tend to define the Trustee's investment policy. Note that if any unusual investment directives (retain particular holdings, continue a business, etc.) are included, then the Trustee should be exonerated for potential liability resulting from such directives (however, see EPTL 11-1.7).

What benefits are to be provided the immediate beneficiaries? The trust will consist of its assets (principal) and the earnings on those assets (income). Until the trust terminates and is fully paid out, directions as to the distribution of income and principal must be provided.

As to income, options include:

- retaining and accumulating all income to a certain date, event or termination;
- forcing out all income to named beneficiaries periodically as provided in the trust (the income can be payable entirely to one person, to a group equally or be "sprinkled" among a group in the Trustee's discretion);
- paying out part of the income and accumulating the remainder;
- paying out or accumulating income in Trustee's sole discretion consistent with the purposes of the trust; and
- discretion to payout or accumulate income until a certain date or event and then forcing out all income.

Depending upon the client's concerns for the income beneficiaries, consider defining how income will be determined and what trust expenses will be chargeable to income. Absent provisions in the Will, EPTL 11-2.1 governs these matters. Be aware that the directions regarding the disposition of income determine how the trust and beneficiaries are taxed on the income.

Options regarding distributions of principal include:

- no authority to invade principal for any reason;

- principal payable in Trustee's discretion consistent with purposes of trust to one beneficiary or group of beneficiaries, equally or unequally. [Note that the Trustee's discretion can be defined broadly or with limitations. If the Trustee is to have the broadest possible discretion then the language authorizing discretionary principal distributions should include "even to the extent of the entire trust". If the discretion is to be limited to maintaining the support of the beneficiary, consider language that defines the level of support to be provided (i.e., "the reasonable health, support and maintenance needs consistent with the standard and quality of living which the beneficiary is accustomed to at the time of my death")];
- principal obtainable at the beneficiary's discretion (either limited or unlimited); and
- principal payable in the form of an annuity or in percentages over time.

Any right to invade principal by the beneficiary will have transfer tax impacts on the beneficiary. If the fund is freely obtainable by the beneficiary then the entire fund will be estate taxable to the beneficiary upon the beneficiary's death. If the beneficiary's right to withdraw is limited to an annual, non-cumulative right to take $5,000 or 5% of the trust principal, whichever is greater, then pursuant to IRC § 2514(e) only the amount that could have been withdrawn, and was not, in the year of the beneficiary's death will be included in the beneficiary's estate. A right to withdraw amounts greater than 5% or $5,000 in any year, which is not exercised in any year by the beneficiary may result in gift tax liability to the beneficiary. See IRC § 2041(b)(2).

In the absence of contrary provisions in the Will, EPTL 11-2.1 will determine what is principal and the allocation of trust expenses to income or principal.

When will the trust terminate? The trust must terminate and payout within the time period provided by the rule against perpetuities. EPTL 9-1.1. Commonly trusts payout as soon as they have accomplished their purposes. That date or event (the death of the beneficiary, the beneficiary attaining a particular age, etc.) must be clearly defined.

Who will be the ultimate beneficiary(s) and how will the trust payout to the beneficiary(s)? The difficulty in drafting for trust terminations is that lapses are more likely given that the trust may exist for a number of years. If the payout is to an individual then alternate beneficiaries must be provided. If the payout is to a group or class then the time the group or class is to be determined becomes important (note the potential difference between "to all my children living at my death", and "to all my children living at the time this trust terminates"). Further, if the trust is payable to a group or class, will it be distributed equally or in other defined proportions, and do the beneficiaries take per capita, per stirpes, or by representation? EPTL 1-2.11, 1-2.14 and 1-2.16.

Because a trust may run for a number of years and the circumstances of the beneficiaries may change over time, consider adding flexibility by giving a power to appoint the trust property to another person (see Section III., B., 5. "Powers of Appointment"). The tax aspects of giving such a power must be considered. IRC § 2041. Also, if the power holder

is given the right to appoint the trust property "in further trust", the rule against perpetuities may be violated. EPTL 9-1.1 and 10-8.1.

E. Disclaimers

Disclaimers can be one of the most useful tools to add flexibility and fine tuning to an estate plan. A disclaimer allows a named beneficiary to refuse acceptance of a gift, or part of a gift, with the result that it passes instead to another without estate or gift tax consequences to the original beneficiary. The disclaimer may also result in reducing the decedent's estate tax or, more often, the disclaiming beneficiary's potential estate tax exposure.

The rules governing disclaimers are contained in IRC § 2518 and EPTL 2-1.11. For planning and drafting purposes, the key provisions of these statutes as they relate to Will provisions are:

- the disclaimer must be made in writing within nine months of the date of death;
- the disclaimant must not have accepted the interest, any benefits from the interest, or any consideration for the disclaimer;
- the interest must pass to another without any control or direction on the part of the disclaimant;
- an interest can be partially or fractionally disclaimed and one disposition may be accepted and another disclaimed;

- the same interest can be successively disclaimed (the primary beneficiary may disclaim and the alternate beneficiary may also disclaim);
- a disclaimer may be made by the fiduciary of an infant, incompetent or decedent, with court approval; and
- the disclaimer, once made, is irrevocable.

Why disclaim a gift? No one can be forced to receive a testamentary gift of property and the decision to disclaim may arise in any of the following contexts:

- the beneficiary does not want the gift or prefers that another receives it;
- the beneficiary should not receive the gift as it may affect the beneficiary's potential eligibility for social programs or be consumed by medical care expenses or other creditors. [Note, however, that a beneficiary who is receiving or is about to apply for medical assistance and disclaims a gift may be denied benefits as a result of the disclaimer for having transferred an available resource without consideration. See 18 N.Y.C.R.R. 360 - 4.4(c)(1)(I)]; and
- the beneficiary can create a more effective estate tax plan by disclaiming.

The result of a disclaimer is to treat the disclaimant as though the disclaimant predeceased the client. As a result, drafting to avoid a lapse in the event the beneficiary does not survive is all the planning that is required to address the first two disclaimer reasons above.

To create a more effective estate tax plan, the disclaimer is often used as an affirmative planning device which requires special drafting. Although the general rule is that the disclaimant cannot retain any beneficial interest in the disclaimed property and is treated as though the disclaimant predeceased the testator, a specific exception exists for spouses. EPTL 2-1.11(e) and IRC § 2518(b)(4)(A). Consequently, a surviving spouse can disclaim an outright gift and, if the Will so provides, the disclaimed property can be directed to a trust for the spouse's benefit. By disclaiming in this circumstance, the surviving spouse keeps the assets disclaimed out of the survivor's estate and sheltered from federal estate taxation by use of the deceased spouse's unified credit.

Flexible, optional estate tax planning can be built into the Will by using three compatible provisions: (1) the residuary estate is simply left outright to the spouse; (2) an unfunded "disclaimer" (shelter[3]) trust is included in the Will; and (3) a disclaimer provision is incorporated which directs any property which the spouse disclaims from the residuary gift to the disclaimer trust (see Appendix A, Articles FOURTH and FIFTH for samples of these provisions). In this way, estate planning decisions can be delayed until the death of the first

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[3]A "shelter" trust as referred to and used in this Chapter is any trust designed to "shelter" the assets placed in the trust from any future federal estate taxation. It can be funded by disclaimer or a direct gift and is "sheltered" from current federal estate taxation by use of the decedent's applicable federal credit and is drafted not to vest any ownership in the beneficiary of the Trust so it avoids any inclusion, and therefore taxation, in the beneficiary's estate.

spouse, implemented at the discretion of the surviving spouse, and will be based upon the tax rules and estate values that exist at that future time.

Even if the Will directs that a shelter trust is to be created and directly funded under the Will [see Appendix A, Article THIRD, paragraph d)], "fine tuning" of the estate plan can occur by providing that the spouse can disclaim additional assets to the trust. Over funding the shelter trust by disclaiming assets to it in excess of the applicable federal credit will result in those assets being federally taxed upon the first spouse's death, but at a rate controlled by the disclaimant. Since the surviving spouse's estate may be potentially exposed to a higher federal estate tax rate, overall tax savings may be generated by paying present taxes at a lower rate. Whether or not this may be an effective decision depends upon several factors relating to "time-value of money" calculations. Disclaiming in this situation generates an immediate tax liability and payment, rather than deferring all liabilities through use of the unlimited marital deduction until the survivor's death. Therefore, the lost earning capacity of the funds used to pay the taxes over the survivor's remaining lifetime needs to be factored into the decision to over-fund the shelter trust. The relative spread in the tax brackets, coupled with the survivor's health and life expectancy are factors bearing on this disclaimer decision. See Appendix A and compare the trust in Article THIRD d) with the trust in Article FIFTH, and the notes within those samples, for additional disclaimer trust planning rules.

The disclaimer "fine tuning" adjustment can be most effective if the two spouses die in relatively short succession. If both die within nine months of each other, and an otherwise qualified disclaimer could still have been made by the survivor, then the survivor's Executor should consider the potential benefits of disclaiming. In this situation there is no time-value of money consideration and the disclaimer can be exercised to the extent necessary to keep both estates in the lowest possible tax brackets (this assumes that both Wills have identical distribution provisions). While the survivor's Executor has the general power to disclaim, the possibility should be planned for in the drafting of the Will. By affirmatively mentioning that the survivor's Executor can disclaim, the Executor will be reminded to consider this possibility and the Will can direct the disclaimed property to the appropriate beneficiary(s) (see Appendix A, Article FOURTH).

Other considerations in planning for the use of disclaimers include:

- For spouses who are reluctant to isolate assets from each other for tax purposes, the entire residuary can be left outright to the survivor with disclaimer and shelter trust provisions included. This plan can be recommended to clients "just in case" the survivor has a change of mind and wants to generate estate tax savings, or in case the spouses die in short succession and the survivor's Executor should have this authority.

Planning Comment. *A disclaimer plan, while easy to sell to clients and potentially flexible, should be relied upon cautiously. Since no tax planning is forced, none may occur. The survivor is asked to give up ownership and control of substantial assets for the sake of tax savings to others. Further, this important question is asked and must be answered within*

nine months of the loss of a spouse. Consequently, to encourage a disclaimer, consider having the trust receptacle provide maximum benefits to the survivor, short of becoming estate taxable in the survivor's estate (see Appendix A, Article FIFTH).

Even if the spouse decides to disclaim, there may be an additional problem of having appropriate assets available to disclaim. If all assets are jointly owned, the nine-month period to disclaim runs from the first spouse's death, but then only the decedent's one-half interest can be disclaimed. IRC Reg. 25.2518-2(c)(4). See IRS Letter Ruling 9411014 (daughter can disclaim one-half survivorship interest in stock within nine months of death) and Letter Ruling 9420031 (spouse can disclaim joint interest). Consequently, if this plan is to be used, attention should be given to asset ownerships. Advise the clients to consider eliminating or reducing joint ownerships. Further, beneficiary designations should be reviewed and updated. Life insurances and, if properly planned for, retirement accounts, etc. can name the spouse as the primary beneficiary and name the estate as the contingent beneficiary. In this way the survivor can either simply take the asset as the named beneficiary, or disclaim it to have it paid to the estate to make it available for funding the shelter trust (actually, two disclaimers will be required). First, the spouse would disclaim the beneficiary entitlement and consequently the asset will be paid to the estate. Then the spouse would again disclaim the interest in the estate so that the property ends up in the shelter trust. These changes may cause a probate proceeding to be required upon the first death where one may have otherwise been avoided. However, by showing the tax savings resulting from using the first to die spouse's unified credit, as compared to a simple marital deduction transfer, the potential probate costs may be more than justified.

Note that in the case of potentially using a large retirement account for funding a disclaimer trust under the Will, extreme care and prior planning is required to prevent the account from being entirely and immediately income taxable. If the retirement account is to be used, the alternate beneficiary of the retirement account needs to carefully considered. To get the retirement account to fund the disclaimer trust the disclaimer trust needs to be the named, contingent beneficiary. The beneficiary should never be the account owner's "estate" as an estate has no calculable life expectancy and therefore is not a qualified beneficiary. To plan for the potential disclaimer of a retirement account, the alternate beneficiary should be an IRA qualified trust created under the Will and the beneficiary designation form should name the qualified trust directly as the beneficiary [See Choate, Natalie, Life and Death Planning for Retirement Benefits chs. 4 and 6 (6th ed. 2006)].

- Note the federal requirement that the property must pass without direction on the part of the disclaiming spouse. The regulations provide that if the spouse has a limited power to appoint the shelter trust, the disclaimer will not be qualified since

exercise of the limited power would allow the spouse to direct the property. IRC Reg. 25.2518-2(e)(2). Consequently, the trust which receives the disclaimed property should not give the surviving spouse a limited power of appointment [see Appendix A, Article THIRD d) and Article FIFTH and the planning notes at the end of these respective provisions].

- Disclaimers can be used to effectuate a plan where a Will provides for a shelter trust, but all assets pass outside of the Will through joint tenancies or beneficiary designations. One-half of the joint tenancies can be disclaimed. IRC Reg. 25.2518-2(c)(4). Further, beneficiary designations that were revocable until death are disclaimable. IRC Reg 25.2518-2(c)(3); EPTL 2-1.11(a)(1) and (2)(A). Life insurance generally falls into this category. Prior to filing the claim for the policy benefits the spouse-beneficiary can disclaim the beneficial interest. If the policy is then payable to the decedent's estate (assuming the estate is the named back-up, or there are no named alternative beneficiaries), then the policy proceeds will come back to the Will and be available to fund the credit shelter trust. If there are alternative beneficiaries (children?) they would also need to disclaim in order to have the policy proceeds come into the Will. Further, if the Will provides any marital provisions or other gifts before the shelter trust provision, those interests and beneficiaries will also need to disclaim. Note that all of these disclaimers must be

accomplished within nine months of death and that no disclaimer should be made until it is clear where the disclaimed property will go.

- Disclaimers can be used to create or increase the marital deduction. If the estate is exposed to taxation due to non-testamentary transfers combined with non-marital gifts under the Will, then qualified disclaimers of those interests which result in property passing back to the spouse will increase or create a marital deduction and decrease the estate tax exposure. If the Will establishes powers or rights in a trust that prevent the trust from qualifying for the marital deduction then such powers or rights can be disclaimed to qualify the trust for the marital deduction.
- Aside from estate taxation, disclaimers can be used to alter income tax liabilities. If a spouse disclaims from a trust that provides all income to the spouse to a sprinkling trust, potential long term income tax savings can be generated (the estate tax affect of such a disclaimer would have to be considered and such a plan is only available to the extent that the Will contains a sprinkling trust alternative and directs disclaimed property to that trust).
- Disclaimers can be used to vest remainder interests. If an income only beneficiary of a trust disclaims the income interest, depending upon the trust's other terms, the trust may become immediately distributable to the remainder beneficiaries.
- Where a trust provides an income interest to a spouse, remainder to children and the children have substantial estates of their own, the children may consider disclaiming

their remainder interests to keep the assets out of their estates and pass them directly to their children. The disclaimer must be made within nine months of the first death (the creation of the income trust) and the possibility of generation skipping transfer tax liability must be considered.

Clearly, disclaimers can be very powerful post-mortem planning tools affecting the distribution of assets and the tax exposure of an estate. The statutory timing and execution requirements are critical for the disclaimer to be "qualified" and achieve the desired tax results. While disclaimers are always available, and authorization in the Will is not required, only by careful planning for their potential use in the drafting of the Will can the client control the disposition of the disclaimed property and have available all of the tax saving opportunities that disclaimers offer.

V. THE WILL

Every estate planning client requires a Will to insure the client's transfer intentions. Either it will be the sole transfer document or, in more complex plans, it will integrate with, or back up, other planning documents. Even in plans to avoid the probate process through the use of trusts and/or beneficiary designations, a Will is necessary as an "insurance policy" in the event any part of the plan breaks down or assets not covered by alternate documents or arrangements are in the client's name at death.

The Will can accomplish three important functions: (1) provide information about the client and the client's intentions; (2) transfer (or insure the transfer of) all of the client's assets; and (3) control the administration and settlement of the client's estate. The following materials address these three functions in that order.

A. Introductory Non-dispositive Provisions

1. Client Information (Exordium)

The initial, introductory paragraph to the Will identifies the Will's creator, declares the document to be the creator's Will and revokes all prior Wills.

Sample clause:

> I, {name}, residing at {street address}, {city}, {county}, {state}, declare that this is my Last Will and Testament, and I revoke all prior Wills and Codicils which I have made.

Name. Establishes identity of the client. Use the client's full legal name as it appears on prior legal documents (deeds, tax returns, insurance policies, bank accounts, etc.). If the client has legally or commonly used more than one name, then first type the client's name as the client intends to sign the Will, followed by the phrase "also known as..." and then type any other names or variations on the client's name which the client has regularly used for legal purposes.

Domicile. Giving the client's domicile further identifies the client and *may* be helpful in determining the law which will govern the client's estate and Will. It is generally

not necessary to give the client's full mailing address; listing the area (city, village or town), County and State is sufficient.

Planning Comment. *The most important aspect of domicile is the client's State. State law controls the taxation of the client's estate as well as the validity, interpretation and administration of the Will. The statement of domicile in the Will is only an indication of domicile – it is not controlling. If you determine that the client could be considered a domiciliary of more than one State (i.e., owns residences in more than one State), then advise the client of the risk that two States could assert tax and probate jurisdiction (requiring either additional tax exposures or legal proceedings to establish domicile after the client's death). The client should decide which State is to be the client's domicile, either for personal or tax planning reasons, and then be counseled as to what steps to take to support that decision. Since domicile is largely a question of fact, rather than one of law [Matter of Chivataky, N.Y.L.J. 8/15/77 p. 12, col. 6 (Surr. Ct. Nassau Co.)], it is the client's actions, not statements, that are most important. Objective criteria such as voting history, income tax payments, memberships and licenses, when combined with statements and declarations of the client's intent, determine domicile.*

New York State's aptly named "Estate Tax Domicile Affidavit", Form ET-141, is an excellent resource for planning the client's domicile. It is the document that must be filed with New York to establish that a decedent was not a New York domiciliary. Consequently, it details the actions (facts) which bear on the determination of domicile.

Declare. For the Will to be valid, the client must "at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his Will." EPTL 3-2.1(a)(3). Including this statement in the exordium of the Will does not, by itself, meet the statutory requirements. The client, when signing the Will, needs to verbally declare to the witnesses that the document being signed is the client's Will.

Revocation of Prior Wills and Codicils. A Will can be revoked or altered by the client signing another Will or a writing "clearly indicating an intention to affect such revocation or alteration, executed with the formalities prescribed by this article for the

execution and attestation of a Will." EPTL 3-4.1(a). Further, the revocation of a Will also revokes all codicils to the Will. EPTL 3-4.1(c). Stating that the Will revokes all prior Wills, meets the statutory requirement for revocation and prevents the current Will from being considered a mere alteration of a prior Will.

Practice Comment. *With current word processing equipment, Codicils and any other documents modifying, altering or supplementing a Will are not recommended. It is better practice to simply execute one document that currently reflects all of the client's intents. Multiple testamentary instruments (a Will and its Codicil, for example) require that each document be presented, probated and that all parties named in each document be involved in the probate proceeding. SCPA 1403(1)(c). This can be especially uncomfortable where the Codicil reduces the benefits provided to a beneficiary since the beneficiary will see both the prior Will provision and the new Codicil amendment. Alternatively, if a new Will is done, the beneficiary will only be aware of the current benefit provision.*

A Codicil can be appropriate if the change is minor or administrative in nature (i.e., changing fiduciary powers or appointing a new fiduciary for one that has died), or where the client's present legal capacity may be questionable. Rather than doing a new Will, which might be successfully attacked, a Codicil can be prepared and if the Codicil is denied probate at least the prior Will is still available (assuming its general provisions reflect the client's current desires).

2. Definitions and Identifications

It is helpful to include an introductory paragraph identifying family members and beneficiaries (giving full names or even names, addresses and birth dates). It establishes the key players involved in the document, personalizes the Will and can be useful at the time of probate (in establishing immediate relatives, distinguishing individuals with similar names and possibly providing contact information). Also, it establishes that both the attorney and client were aware of the "natural objects of the client's bounty".

Practice Comment. *The use of definitions and early identifications can make the actual production of the document easier. For example, identifying a spouse and providing*

that the identified spouse will be subsequently referred to as "my spouse" allows the draftsman to use standard clauses without the need for multiple insertions. The fewer times a name is typed, or needs to be inserted, the fewer chances there are for errors.

Aside from identifying family members, other definitional provisions may be helpful. Definitions can be used to clarify and make the drafting less burdensome. For example, if the document will contain the term "per stirpes" it seems appropriate to define that phrase in such a manner that there is no question that the client understood its meaning and effect. Better still, consider drafting in simple, plain language, spelling out distributions in detail and avoiding the use of legal terms.

For some sample definition provisions, see Appendix A, Article FIRST.

3. Funeral Directions and Organ or Body Donations

While some clients may be inclined to provide funeral arrangements and/or organ donations in their Wills, discourage this. Generally funeral arrangements have not only been made but the process completed before the Will is obtained or established (and what do you do if the Will provides for arrangements different from those that have been completed?). Rather, clients should be encouraged to make pre-arrangements and discuss their wishes with their immediate family, possibly leaving a letter of instructions. Further, and beyond the scope of these materials, New York State has statutorily provided for the "Appointment of Agent to Control Disposition of Remains" under Public Health Law §4201. This document can resolve conflicts associated with controlling the disposition of a client's remains if there is the possibility of disputes arising among family members or others.

The same problems arise with organ or body donations. For purposes of a transplant, the effectiveness of the gift requires immediate action. Clients who are so inclined should execute an Anatomical Gift instrument and carry the instrument on their person. Public Health Law § 4303 and 4304. See also the back of the New York State driver's license.

4. Precatory Provisions (Requesting, but not Directing)

Often it is convenient, practical or desirable to make "requests" of beneficiaries. Consider the client who is caring for a parent or a disabled child (beneficiary) but doesn't want to commit assets to a trust for the beneficiary, because the trust is too formal or may affect social programs which the beneficiary is or may become entitled to. The client may have another child or friend who understands the nature of the client's concern and would be similarly committed to looking out for the beneficiary. In such a situation the client may simply want to state in the Will that it is "requested" that the child or friend hold, use or apply some of their inheritance for the beneficiary.

Such language in a Will which "asks" or "requests", but does not "direct", is referred to as "precatory" language and is not legally enforceable. Precatory provisions should be used sparingly; after all, a primary purpose of creating a Will is for the client to control and direct the disposition of the client's property.

Nevertheless, there are circumstances that warrant the use of precatory provisions. To divide and distribute family memorabilia, furniture and furnishings (of little monetary

value) title can be vested in the Executor or one child with the request that the property be distributed as that person sees fit. Certainly, in the right circumstances and with the right people, a moral obligation requesting someone to act on behalf of and as the client would have acted can be as secure as any direct provision in a Will.

If a precatory provision is used, it should clearly state that it is understood to be a mere, unenforceable request. Further, the client should be warned of the problems that may arise (what happens if the person who is to execute the request dies before or shortly after the client?) and that the request may simply not be honored.

Further, precatory provisions are not appropriate for items of substantial monetary value. A request to redistribute jewelry, for instance, where a particular item may have value in excess of the annual per donee gift tax exclusion (currently $12,000) requires the person to whom the request is directed to make a taxable gift.

B. Dispositive Provisions

Anything transferred by a Will is a gift (statutorily referred to as a "disposition" – EPTL 1-2.4). Whether the client "bequeaths", "devises" or "gives, bequeaths and devises all the rest, residue and remainder of my estate, whether real or personal and wheresoever situate", the client is making a gift of the defined property to the defined beneficiary. Nevertheless, while all dispositions can be broadly characterized as "gifts" it is useful for planning and drafting purposes to separate transfers into two broad categories: "pre-residuary" transfers (generally limited, defined gifts) and "residuary" transfers (the remaining estate).

1. Pre-residuary Transfers

Pre-residuary gifts are often the "personality" of a Will. They reflect the client's specific, personal desires to benefit particular relatives, friends or charities. Further, they can provide for the distribution of "emotional" assets, family heirlooms for example. In addition to fulfilling the client's personal desires, pre-residuary gifts can facilitate the economic settlement of the estate. Some of the considerations involved in making pre-residuary gifts include:

- Gifts of items which will be immediately needed by a beneficiary, or which the client wants a particular beneficiary to receive, are most promptly and enforceably passed by a direct provision.
- Gifts of cash can generally be made promptly, giving the beneficiary immediate funds and, unlike advancements of cash from the residuary estate, do not have any income tax impact to the beneficiary (an advancement of funds from the residuary estate is deemed to be composed of, and carries out to the recipient, the estate's income earned to that time – see IRC §§ 661 and 663).
- Specific dispositions (gifts of specified real or personal property) are generally not subject to Executor's commissions since the Executor does not administer these items. SCPA 2307(2).

– Assets that would be particularly troublesome or expensive for the Executor to administer (for example, personal property of minor value or business interests) can be gifted, simplifying the Executor's job and the settlement of the estate.

There are three types of pre-residuary transfers: (1) specific; (2) demonstrative; and (3) general. Their distinctions are important in determining priority of distributions (abatement) and what happens if the subject of the gift no longer exists (ademption).

(a) Specific Dispositions

"...a disposition of a specified or identified item of the testator's property." EPTL 1-2.17. An example of a specific disposition would be "I give all of my Marvel Comic Books to ...".

Priority. Title to the specified item vests as of death and any income earned by the item after death is payable to its beneficiary. EPTL 11-2.1(d)(2). Liability for debts and expenses falls first on the residuary estate, then on general gifts and then on specific dispositions. Consequently, specific dispositions take priority over all other transfers and, other than a disposition to the surviving spouse which qualifies for the marital deduction, are the last to abate. EPTL 13-1.3.

Ademption. The client must own the specified item at the time of death or the gift fails, subject to two exceptions: (1) if casualty insurance proceeds are payable to the estate as a result of the loss of the specified item, then the proceeds are in turn payable to the named beneficiary; and (2) if a Guardian (formerly Committee or Conservator) of an

incompetent has sold the specified item then the beneficiary receives the "traceable" proceeds of such sale. EPTL 3-4.5 and EPTL 3-4.4.

Drafting. To avoid problems, detailed descriptions and identification of the item to be given are required. Specific dispositions can cause settlement problems if the specified item cannot be located or the item is not clearly identified. The beneficiary may demand an explanation as to why not, where it is, what happened to it, when, etc. Moreover, gifts of items that are subject to change, such as "my ten shares of ABC Corporation", can cause difficult interpretational problems. What if ABC issues a stock split, is taken over or is divested? See the provisions of EPTL 3-4.3 to 3-4.5 for the rules regarding ademption and Matter of Strauss, 137 Misc. 2d 686, for the necessity of a construction proceeding regarding a specific gift of stock which was subsequently divested [gifts of stock are more thoroughly discussed at Section III, B), 3) "Stocks"]. Finally, as with all gifts, who gets the item if the primary beneficiary is not alive?

(b) Demonstrative Dispositions

"...a testamentary disposition of property to be taken out of specified or identified property." EPTL 1-2.3. An example of a demonstrative disposition would be "I direct that whatever automobile I own at the time of my death be sold and from the net proceeds of sale I give the sum of $5,000 to...".

Priority. A demonstrative disposition will, like a specific disposition, take priority over a general and residuary disposition. EPTL 13-1.3.

Ademption. If the property out of which the gift is to be paid is not in the estate, the gift fails.

Drafting. Discourage these gifts as they contain the potential for problems. Often these gifts require a sale or liquidation of an item which will entitle the Executor to commissions and, since it is a forced sale, may prevent the Executor from receiving full value. Further, if the gift does adeem (in the above example if the client did not own an automobile at the time of death) the beneficiary may argue that a cash gift in the stated amount was intended.

(c) General Dispositions

"...a testamentary disposition of property not amounting to a demonstrative, residuary or specific disposition." EPTL 1-2.8. Cash gifts are general dispositions. The simplest "general disposition" would be "I give $5,000 to my hairdresser...". A more complex general disposition would be a pecuniary credit shelter trust provision, such as "I give to my Trustee the maximum amount that can be sheltered from federal estate tax using the unified credit and state death tax credit...". See Appendix A, Article THIRD d) for a sample pecuniary credit shelter provision.

Priority. Since there is no designation of a source, the general disposition (cash gift) comes out of the general estate after payment of claims, expenses, taxes and specific and demonstrative gifts, but before any residuary provisions. In other words, a general disposition only takes priority over the residuary estate. EPTL 13-1.3.

Ademption. Since the gift does not require the existence of any specific asset to be effective, it is not subject to ademption.

Drafting. See Section III. "Drafting Considerations" for all of the rules and suggestions there are applicable to these gifts.

2. Residuary Transfers

Depending upon the client's plan, the gift of the remaining estate will be either the largest and most important disposition or a mere safety valve. After payment of all administration expenses, taxes, claims, and after all specific, demonstrative and general dispositions, there must be a provision for the disposition of any remaining assets (which may include lapses of prior gifts and disclaimed gifts).

Priority. None. The residuary estate is the original source for payment of all expenses, unless the Will provides otherwise. Consequently, it abates first and is subordinate to all pre-residuary gifts.

Ademption. Not subject to ademption as it is a general disposition.

Drafting. In most situations, the residuary disposition encompasses the major portion of the client's estate and therefore demands additional drafting attention. The rules and suggestions in Sections III "Drafting Considerations" and IV "Transfer Options" are generally applicable to drafting for the residuary disposition. In addition, some particular drafting concerns that relate to the residuary estate include:

- The effect of all prior provisions on the residuary estate, especially where the residuary beneficiary is intended to be the client's primary beneficiary. If that is the case, consider protecting the residuary by (1) limiting the pre-residuary transfers to some defined portion of the total estate; (2) requiring that estate taxes be allocated in proportion to benefits; and (3) altering the statutory abatement provisions of EPTL 12-1.2 and 13-1.3.
- Lapsed gifts and disclaimed gifts will fall into the residuary unless an alternative disposition is provided.
- Consider the possibility of lapse or disclaimer *from* the residuary. While the statutory provisions of EPTL 3-3.3 and 3-3.4 are designed to prevent a lapse in the residuary, do not rely upon them. Most importantly, they may not reflect the client's intents. However, even if they do, it is better practice to have the client's Will affirmatively state the desired distribution. Otherwise, it will appear as though drafting inadvertence lead to the statutory result and a potential beneficiary could argue that the statutory distribution would not have been the client's desire.
- Under EPTL 10-6.1, a residuary disposition may exercise a client's power of appointment. To avoid the consequences of an affirmative exercise, the residuary clause must state that there is an intent *not* to exercise any such power. EPTL 10-6.1(a)(4). [Note: In creating a power of appointment in

another person, it is better drafting to require that the power holder can only exercise it by directly referring to the power. This protects against an inadvertent exercise of the power. See EPTL 10-6.1(b) and Section III., B., 5. "Powers of Appointment" for further discussion of drafting for the creation and exercise of a power of appointment.]

- If the residuary is to be distributed in shares to more than one beneficiary, consider authorizing the Executor to liquidate the remaining assets to accomplish the distribution. This provision provides guidance to the Executor and may qualify the sale expenses as necessarily incurred in the administration of the estate and therefore estate or income tax deductible.

C. Administrative Provisions

The Will controls the estate settlement process through various administrative provisions. Most directly it controls the settlement process by appointing an Executor who takes charge of the client's assets and orchestrates the estate settlement. Through other non-dispositive, administrative provisions the client guides and assists the Executor, protects the beneficiaries and insures the client's entire dispositive plan.

1. Expenses and Costs

SCPA 1811(1) provides that "the reasonable funeral expenses of the decedent subject to the payment of expenses of administration shall be preferred to all debts and claims against his estate and shall be paid out of the first moneys received by his fiduciary." SCPA

1811(2) directs the fiduciary to "proceed with diligence to pay the debts of the decedent" and goes on to establish the priority order of payment. Consequently, while a provision in the Will requiring payment of these obligations is not necessary, it is recommended. It emphasizes for the client and the beneficiaries that these obligations will need to be met. Drafting considerations applicable to a clause for payment of expenses include:

- Source of payment. Should a particular part of the estate fund these obligations or should they be paid "off the top" as general administration expenses? Note, generally, property qualifying for the marital or charitable deductions should *not* be the source of payment of these expenses. While these expenses are estate tax deductible, if they are paid out of marital or charitable provisions then those deductions will be reduced to the extent of the payments.
- Many commentators recommend against any general direction to pay "debts" or "just debts" since the direction to pay them may obligate the Executor to pay an obligation otherwise unenforceable (for example, an obligation discharged in bankruptcy or for which the statute of limitations has run arguably remains a "debt" or "just debt" although it could not be enforced against the decedent).
- A provision to pay "the expenses of my last illness" is recommended to establish their estate tax deductibility. Rev. Rul. 76-369 and Internal Revenue Service Letter Ruling 7934002. Note: The decedent's final medical expenses

may qualify for a deduction from his/her final personal income tax return if they are paid by the estate within one year after the date of death. IRC § 213(c)(1).

- Review with the client whether or not secured obligations should be satisfied. Unless there is a specific provision directing the Executor to pay liens or mortgages, property specifically bequeathed or passing to a distributee passes subject to the lien. EPTL 3-3.6. A general provision requiring payment of "debts" or "claims allowed" is not a specific direction to satisfy such liens.
- Consider a provision directing the sale of specified assets to facilitate distributions (for example, "I direct my Executor to sell my home and distribute the net proceeds of sale to . . .") in order to secure the deductibility of the sale expenses as administration expenses. If the asset is sold, but was not required to be sold for administrative purposes, the expenses of sale (broker's fees, recording costs, etc.) will not be deductible (on the other hand, this makes the items subject to Executor's commissions).

2. Tax Apportionment

Depending upon the size of the estate, estate taxes may be the largest single expense involved in the settlement process. Whatever the amount of the taxes, the source of their payment will affect the distribution scheme. EPTL 2-1.8 provides that the tax is to be apportioned among the persons receiving taxable assets or benefits, except "where a testator otherwise directs in his Will, and except where by any instrument other than a Will . . ." a

specific direction is given for the payment of the taxes. This section of the law details how the apportionment of the tax liability is to be made where there is no specific direction in any testamentary document. One of the most important considerations in Will drafting is the provision for estate tax payments.

The purpose of a tax clause in the Will is to determine the source of the tax payment. The "source" must be consistent with the client's plan for the estate's distribution. The client's intents can be subverted where, for example, the client desires that the residuary beneficiary be the primary object of the client's bounty, but the Will provides that all estate taxes are to be paid out of the residuary estate. Depending upon the total quantity and value of non-probate property and pre-residuary distributions, the residuary estate could be substantially burdened leaving little for the primary beneficiary.

The best way to secure an appropriate tax clause consistent with the client's objectives is to calculate the estimated tax liabilities and show the tax payments under various allocation options. In this way, the client can decide who gets what, knowing that the "what" is what is left after taxes have been paid.

There are essentially three available tax apportionment options:

- *No apportionment.* All taxes are to be paid from a defined source, generally the residuary estate (for example, "pay all estate taxes as an administration expense"). This results in no allocation, clearing all non-probate property and pre-residuary gifts from the tax burden. This provision can be appropriate

where there are no substantial non-probate assets and the residuary will be large enough to make the required payment.

- *Full apportionment.* Each and every taxable asset bears its proportionate burden of the tax. This provision is most useful whenever the non-probate estate is uncertain and is generally the fairest and safest tax apportionment provision, but may require more administrative effort from the Executor who must collect tax contributions from the beneficiaries of the non-probate assets.
- *Partial apportionment.* The taxes generated by particular, identified transfers and gifts are specifically shifted to another source (generally the residuary estate) while all other transfers and gifts bear their apportioned tax liability. While the Will can shift the burden on probate transfers, and can specifically exonerate non-probate transfers, it cannot increase the tax to be apportioned to a non-probate asset.

Whenever any estate planning document is prepared that controls assets which might be estate taxable in the client's estate (lifetime trust, insurance trust, QTIP trust under a Will, etc.), it is better practice that the document provide that it bears its own estate tax liability *unless* there is a specific reference to the document in the client's Will (or other planning document) exonerating those assets. This allows each planning document to stand on its own without affecting other documents or the client's Will. Further, it prevents a simple "pay all taxes from my residuary estate" provision from inadvertently burdening the residuary with

estate taxes generated by non-probate property (the general language would not be a "specific" reference). On the other hand, it allows some flexibility in that the client, by specific reference, can intentionally and intelligently shift the tax burden to the probate estate.

If estate taxes are directed to be paid from a fund which otherwise qualifies for the marital or charitable deduction (for example, out of the residuary which is left to the spouse or a charity) it will not be possible to compute the marital or charitable deduction until the taxes are determined. The reason is that only property which actually passes to a spouse or charity qualifies for the marital or charitable deduction. Taxes that are paid out of this gift do not pass to the spouse or charity. What makes this drafting "error" even more problematic is that the taxes cannot be determined until the marital or charitable deduction is set. Note the circular problem that has been created – the tax calculation depends upon the marital/charitable deduction, yet the deduction is what is left after the tax calculation. An "interrelated tax calculation" (the application of an IRS provided algebraic formula) is required and results in the loss of what would otherwise be the full available marital or charitable deduction. To avoid this potential problem, consider using a savings clause that provides "in no event shall taxes be paid from property otherwise qualifying for the marital or charitable deduction", but most importantly, draft clear apportionment language that does not create this situation[4].

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[4]*For an excellent article regarding the complexities of drafting and planning for estate tax apportionment, see "Tax Apportionment Traps" published in the NYSBA Trusts and Estates*

3. Fiduciary Powers

The basic powers required by an Executor to administer and settle an estate are statutorily granted under Part 1 of EPTL Article 11 (for a concise, clear analysis of EPTL 11-1.1, see "The Fiduciaries Powers Act – 25 Years Later – Part I" by Morton Frielicher, New York State Bar Journal, February, 1990). The statute provides that its granted powers may be limited or supplemented by specific provisions in the Will. EPTL 11-1.1(b) and (d). Whether or not the Will should limit or expand the statutory powers depends upon the client's concerns, assets and ultimate estate plan.

Practice Comment. *In counseling clients regarding the granting of fiduciary powers, it is helpful to emphasize the following factors:*

- *only a trustworthy, competent person or institution should be appointed in the first instance.*
- *all Executors are bound, for public policy reasons "to exercise reasonable care, diligence and prudence". EPTL 11-1.7(a)(1).*
- *the Executor is fully accountable for all actions and decisions before being released by the Surrogate's Court Judge.*
- *the future is uncertain and it is impossible to predict what will be "good" assets or investments.*

With these factors in mind, it is reasonable to expand upon the statutory powers in order to provide the Executor with the broadest grant of authority and ability to administer the estate in the most efficient and beneficial manner.

Since the statutory powers in New York are quite complete, and vest in the fiduciary "unless the Will provides otherwise", it is not necessary to detail them in the Will. However,

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if the client dies a non-resident of New York without updating the Will, a direct reference incorporating the powers conferred under Article 11 together with a provision requiring that the Will be interpreted and administered in accordance with New York law, will assure that the fiduciary has the statutory powers.

If three or more fiduciaries are appointed, a majority can exercise any granted power. EPTL 10-10.7. If there are to be multiple fiduciaries, consider delineating their respective powers and authorities.

A successor or substituted fiduciary acquires the original fiduciary's powers, absent a limiting provision in the Will. EPTL 11-1.1(a).

The following authorities must be specifically granted in order for the fiduciary to have the designated ability. Some are generally recommended and should be included in most Wills, the need for others will depend upon the client's assets and plan.

(a) Investments. EPTL 11-2.2(a)(1) provides that a fiduciary may invest "in such securities as would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital...". This section goes on to provide that the Will may restrict or expand this investment authority. If the client desires or needs to limit or expand this general provision, then specific investment provisions should be included. The client could desire to be more conservative than the statute and severely limit and define the investment authority or, more generally, expand the authority due to the client's particular assets. Situations that may require special drafting

include where the client is heavily invested in limited assets and desires that those assets be retained (a closely held business) and where a corporate Executor or Trustee is appointed and the client holds stock of the corporate fiduciary (directions as to the retention, management or liquidation of that stock should be made).

(b) Borrow Funds. If raising cash may be necessary then the ability to borrow and pledge estate assets should be granted. If a corporate fiduciary is appointed then the Executor should have specific authority to borrow from itself.

(c) Lease beyond the statutory period [Executor limited to three years – EPTL 11-1.1(b)(5)(c)].

(d) Abandon property not worth protecting or pursuing (avoids risk that fiduciary will be surcharged for an exercise of reasonable judgement).

(e) Life Insurance. If life insurance is to be payable to the estate or a testamentary trust, consider granting specific powers to collect and administer the insurance proceeds.

(f) Business Interests. If the client owns or may own a closely held corporate business, or sole proprietorship, then the Executor should be granted specific authority to manage and retain the business until the plan for its transition can be implemented. In this regard the Executor needs all the authorities necessary to operate and manage a business including the ability to delegate, employ, reorganize, purchase, sell, invest in, etc.

(g) Special Estate Planning Provisions. Marital Deduction Trusts, Qualified Terminable Interest Trusts (QTIPs), Qualified Domestic Trusts (QDOTs), Charitable Remainder Trusts and Generation-Skipping Trusts (GSTs), due to their technical tax requirements, require a special review of the fiduciary powers. The IRC provisions governing these trusts should be reviewed and the fiduciary powers adjusted accordingly. Also, consider using a savings clause that eliminates, or requires the exercise of, all powers consistent with the IRC provisions. See Section V., C., 5. "Miscellaneous Provisions" regarding the use of savings clauses.

(h) Trustee's Powers. If testamentary trusts are included then, in addition to all authorities granted the Executor, the Trustee should be authorized to terminate and pay-out trusts which become too small and uneconomic to continue to administer, to merge identical trusts for children or others that may be created under the Wills of each spouse, and any other practical authority.

Appendix A, Article TENTH includes sample fiduciary powers.

4. Appointment of Fiduciaries

"A personal representative is a person who has received letters to administer the estate of a decedent". EPTL 1-2.13.

"A creator is a person who makes a disposition of property". EPTL 1-2.2.

"A fiduciary is a person who meets the description, in this part, of a "personal representative" or who is designated by the creator...to act as...a...custodian, guardian, trustee or donee of a power during minority." EPTL 1-2.7.

One of the most important functions of a Will is the naming of fiduciaries – the Executors to settle the estate, the Trustees to administer any Trusts, and the Guardians and persons to manage property for any minors. All of these persons are named to positions of trust. They are entrusted with the confidence of the client to serve on the client's behalf the needs of others. While the Will determines the parameters of their actions and may instruct them as to the intentions of the client, it is ultimately the client's faith in the exercise of their independent judgement that is most important in their selection.

(a) Executors

Function. The Executor executes the Will. To do this, the Executor collects and protects the assets, values and appropriately liquidates assets, pays bills, taxes and expenses, and finally accounts for and distributes the remaining assets as directed.

Selection. An Executor can be any natural person or institution authorized to be a fiduciary, so long as the individual is not an infant, incompetent, a non-domiciliary alien

(with certain exceptions), felon or unable to fulfill the duties due to "drunkenness, dishonesty, improvidence or want of understanding". SCPA 707.

Generally, the Executor must be trustworthy, responsible and diligent. It is the Executor who is in charge of the estate settlement process and must be willing to dedicate the time required to make certain the process moves forward to completion.

Regardless of the directions and powers provided in the Will, the Executor will be called upon to make decisions and exercise judgement. The Executor should be decisive and able to make important decisions (hiring – and firing – of agents, liquidation of assets, handling beneficiaries). Often, the Executor will not personally have all the knowledge and abilities required of the position and will need to hire the necessary professionals to be certain that the estate is administered efficiently with due regard to the estate's legal, tax, financial and other special needs. Above all, the Executor must be impartial, ideally free of conflicts of interest and able to command the respect of all the beneficiaries.

The appropriate Executor(s) will depend upon the client's personal circumstances and the complexity of the estate. The choices are between individuals (family members, friends, associates or advisors), institutions (corporate, professional executors) or some combination of the two.

Individuals. Many clients have strong, negative feelings about naming financial institutions. Most often, the spouse or an adult child will be the preferred choice, followed by another family member, friend, business associate or professional advisor (accountant,

attorney, financial advisor, etc.). These persons are the closest to the client and therefore most able to make the same decisions that the client would have made. Moreover, if the person named is also one of the main beneficiaries under the Will, then that person will tend to be interested in seeing that the estate is correctly and promptly settled. Further, if the person is a beneficiary or "natural object of the testator's bounty" then the commissions payable for serving as executor can be viewed as an additional benefit to be bestowed and the commission payment, if made, is kept in the family. Whoever is named, that individual should have the client's absolute trust, have the time and ability to handle the client's assets, and have the respect of the beneficiaries. Any person who may be placed in the position of having a conflict of interest (a business associate who may be involved in the transfer or liquidation of the business) should be rejected. If the attorney, or any other professional with a confidential relationship to the client, is to be named, special considerations are required. SCPA 2307-a and see the Chapter of these materials on "Ethical Considerations and Attorney's Fees".

Corporate Executor. A financial institution having trust powers (generally a bank or trust company) may be the most appropriate choice for executor. The advantages in selecting a corporate executor are experience, permanence and impartiality. The corporate executor is a professional at estate settlements and has the accounting and investment tools to do the job. With a corporate executor there are no worries about the possible death, illness (mental or physical) or availability (business demands, vacations or general interest) that are

present whenever an individual is named. Finally, a corporate institution is less likely to be swayed by pressure from the beneficiaries and a corporate appointment can prevent the potential "hard feelings" that may be created by appointing one beneficiary over or ahead of others.

The disadvantages of an institution are its lack of flexibility and "warmth" as compared to an individual. Expense may also be a disadvantage. The corporate executor will take the full statutory fee, or a set minimum if the estate is of modest size. While the money used to pay the corporate executor comes out of the estate, and therefore does not stay with the family, the "cost" may be less than it first appears. First, the commissions are tax deductible and will generate tax savings (either at the estate's estate tax bracket rates or income tax bracket, if an election is made to take commissions on the fiduciary return). Further, the institution's investment abilities may result in a better return on estate assets; the institution's record keeping may result in fewer problems with the settlement and accounting proceedings; the institution's experience may result in a more efficient settlement process with less need to incur the accounting and legal expenses an individual might require.

Before appointing a corporate fiduciary, have the document reviewed by the institution to be sure it will accept the appointment, that it has no problems with the terms of the Will, and does not have any special fee requirements (if a minimum or other fee arrangement will be required, the Will should so provide). It can be quite embarrassing to have the Will signed, send an informational copy to the corporate fiduciary and have it

returned because the Corporate Executor requires a change or has a suggestion for improvement.

Co-Executors. The appointment of Co-Executors can offer the best of both worlds – the responsiveness and sensitivity of an individual with the permanence and professionalism of an institution. Where the concern is offending a beneficiary (for instance, there are two adult children), then Co-Executor appointments can prevent hard feelings. If the estate holds assets requiring specialized knowledge, such as a decedent's closely held business interest, then a Co-Executor could be appointed to obtain the specialized knowledge of a particular individual.

Problems with Co-Executors result from administrative difficulties in obtaining signatures and decisions from both, the risk that they will not agree on a decision, and potential doubling of the compensation to be paid. Appropriate drafting provisions can and should address each of these problems. The Will can delegate separate functions to each, specify the compensation each is to receive, and provide for mechanisms to settle disputes. If more than two Executors are appointed then, unless the Will provides otherwise, a majority will control decision making. EPTL 10-10.7. Commissions to be paid to Co-Executors are controlled by SCPA 2313, unless the Will provides otherwise.

Advisors. In appropriate circumstances (generally where the estate has special assets such as businesses, art work or collections) the Will can name an advisor to assist the Executor. The appointment of an advisor raises important questions relating to the

responsibilities of the advisor, control by the Surrogate's Court, compensation, etc. If an advisor is named, then the Will should address all issues relating to the advisor's role. If it does, then the estate will have the benefit of the advisor's expertise and the Executor's responsibilities in that area will be curtailed. See Estate of Rubin, 143 Misc. 2d 303.

Alternates or Successors. If the original Executors are unable or unwilling to serve, or to continue serving or are removed, then successors should be named. In the absence of a Will provision, the Surrogate's Court will appoint the Executor pursuant to SCPA 1418. Alternatively, the Will can give the nominated Executor the power to select a successor. SCPA 1418(1). Even if this is done, the Will should appoint an alternate/successor in case the nominated Executor becomes incompetent or dies without exercising the power.

Compensation. If there is no other provision in the Will, then SCPA 2307 and 2313 will determine the commissions payable to the Executor or Co-Executors. These statutes set the rates, determine the commissionable estate and allocate commissions among co-fiduciaries. However, the Will can otherwise define the compensation to be paid (greater than or lesser than the statute), the assets to be deemed commissionable and the allocation of commissions among Co-Executors. If the Will conditions the appointment of the Executor on the Executor not receiving any compensation, or some payment other than the statutory rate, then accepting the appointment binds the Executor.

Additional compensation should be considered whenever the estate has assets requiring special care or risks, such as the operation of a business.

The compensation paid to a fiduciary is earned (taxable) income to the fiduciary and a deductible expense to the estate. A gift to a fiduciary (meant to be in lieu of compensation) will not be taxable income to the fiduciary, nor will it be deductible to the estate. A fiduciary can always waive payment of commissions. This often occurs in modest estates where the Executor is also a primary, residuary beneficiary and will inherit the otherwise taxable compensation. It can also occur where the fiduciary desires to create the maximum residuary estate for the residuary beneficiaries. In high estate tax bracket estates, even if the residuary beneficiary is the Executor, the estate tax deduction for commissions will be more valuable and beneficial to the residuary beneficiary than the cost of receiving the commissions as income, and should be taken.

Miscellaneous. Should the original, or any successor, be required to obtain a surety bond? Under New York law a corporate fiduciary is not required to obtain a bond. Banking Law § 100-a(5). All other fiduciaries must obtain a bond unless the Will expressly waives the requirement. Generally, the bond should be waived to save the expense. If there is any question regarding the nominee's integrity or responsibility then the nominee should not be appointed in the first instance. Finally, if the estate involves property subject to another jurisdiction (out-of-state real estate or tangible personalty) consider the requirements of that jurisdiction for a qualified Executor and the appointment of an appropriate person.

(b) Trustees

Function. A testamentary Trustee's duties are determined by the Will provisions creating the Trust. Generally those duties include receiving, holding, protecting, investing and record keeping the trust assets. The Trustee administers the trust in accordance with its provisions, paying out income and principal as directed and, upon termination, accounting for the administration. During the administration, the Trustee is responsible for all annual tax returns and reports to the beneficiaries, investing the trust in keeping with the needs of the beneficiaries (both income and remaindermen), and any other administrative provisions. Most importantly, if the Trustee is granted discretionary authorities, the Trustee will be making those discretionary judgments in accordance with the client's expressed intentions in the Will.

Selection. The legal requirements to serve as a Trustee are the same as those for an Executor. SCPA 707. Consequently, the choices for Trustee are also the same: individuals, institutions or a combination. However, different factors bear on the choice of a Trustee. Trusts are generally created to exist for a substantial period of time (for the life of a spouse, until a minor reaches majority, until a child is through college, etc.). The risks of an individual Trustee dying or, and much worse for the trust, becoming incapacitated (not to mention becoming bored, getting ill or simply going on vacation) are increased, as are the benefits of permanence, availability and durability that an institution provides.

Further, the Executor's job is to obtain the assets (including many personal property items) process them and distribute. The Trustee generally is delivered readily investable assets such as cash, stocks and bonds (often as a result of the Executor's "processing") which are to be managed and invested over a long period of time. Investment experience and ability are much more critical factors in selecting a Trustee than knowledge of the client's family and assets.

Individuals. The client may prefer an individual for the approachability, responsiveness and sensitivity an individual may bring to the position. An individual, especially a family member, may be more flexible in dealing with beneficiary needs and requests and less conservative in the investment of the funds. These same reasons, reversed, may recommend an institution. The individual may be less likely to resist inappropriate beneficiary requests and a lack of conservatism in investments could lead to disaster.

Individuals fall into two categories: (1) family and friends; or (2) professional advisors (attorney, accountant, financial planner, etc.). Family or friends are most appropriate where the fund is relatively small, will not be held for a long time and is meant to be used appropriately for the beneficiaries needs. Professional advisors to the client may be appropriate Trustees if the client adamantly wishes to avoid an institution, and has no appropriate family member. The ethical considerations referenced above in naming an advisor as Executor also apply to a Trustee appointment.

Planning Consideration. *In naming an individual, especially a family member, depending upon the authorities and discretions given the Trustee and the Trustee's*

relationship to the beneficiary(s), the trust fund could be income, gift and/or estate taxable to the Trustee. See IRC § 678 and the "string" provisions of §§ 2035 - 2038.

Further, whenever an individual is named, consider empowering the individual to obtain appropriate investment help [see Appendix A, Article TENTH g)].

Corporate Trustee. Banks and trust institutions offer some of the most important traits needed for a Trustee: experience, expertise, permanence, solvency, impartiality. The often cited criticism with institutions is that they tend to be overly cautious, both in terms of discretionary distributions to beneficiaries and in investment return. Keeping an eye toward their ultimate accountability to the remaindermen, institutions tend to pursue a course of conservative investment practices and invasion policies. Generally, these may be acceptable, if not desirable, traits when compared to the risks associated with individuals. As in the Executor appointment, if an institution is named, the document should be reviewed by the proposed institution before it is executed.

Co-Trustees. Again, the best of both worlds (sensitivity and professionalism) can be acquired through appointing an individual and institution as Co-Trustees. They can serve jointly or, more practically, their separate duties, functions and compensation can be defined. The institution can be responsible for those matters the institution is most adept at: investing, record keeping, tax reporting and accounting. The individual can be granted control over discretionary distributions and, possibly, control over the institution through a power to remove and replace. Since the institution will have the more burdensome responsibilities, and probably would not otherwise serve, the institution should receive a full commission or payment consistent with its published schedule of compensation. The

individual may be required to serve without compensation or special compensation can be provided. See Appendix A, Article NINTH (*Option 2*) for a sample clause accomplishing this.

Alternate and Successors. As with Executors, the alternate or successor Trustees should be named or a mechanism for selecting alternates should be provided. Even where an institution is named as a sole Trustee, the possibility exists that at the time of death the named institution may not accept the appointment or, after accepting, may resign. The Will should name alternates and may, for flexibility, provide authority in the beneficiaries or others to appoint a successor.

Planning Consideration. *A general power in a beneficiary to remove and name a new Trustee can have adverse estate tax consequences to the beneficiary as the control of the Trustee may be deemed control of the trust by the beneficiary. See IRS Private Letter Ruling 89-16032. This is not the case where the beneficiary can only name a new Trustee if the Trustee resigns (beneficiary has no power to remove). Consider either limiting and defining the permissible appointees (another bank) or giving another individual, who has no interest in the trust, the power to replace and appoint Trustees.*

Compensation. An individual Trustee is entitled to the statutory rates computed as provided in SCPA 2309, with the commission payment charged one-third to income and two-thirds to principal, unless the Will provides otherwise. If there are multiple Trustees then SCPA 2313 applies unless there is a specific provision otherwise. If the "will provides a specific compensation for a Trustee, he is not entitled to any other allowances for his services". SCPA 2309(10).

A corporate Trustee, if the Will does not provide for specific commissions, is allowed "such commissions as may be reasonable". SCPA 2312. Often corporate Trustees will require particular language providing a minimum annual commission or providing that the actual commissions "shall be as set forth in its published schedule of compensation in effect at the time such compensation is payable". Since the corporate trustee may have specific fee language requirements, this is another reason why the proposed corporate trustee should review the draft Will prior to its execution.

(c) Guardians

A primary motivational force for parents of young children to obtain a Will is for the purpose of naming Guardians for the children. A guardian can be appointed of the person or of the property or of both.

Function. Guardians of a minor child's person are responsible for the child's upbringing. They take over the role of the parents. Guardians of a child's property "shall protect, preserve and manage the property of the infant". SCPA 1723. While a guardian can sell the personal property of an infant (tangibles and intangibles), invest and reinvest, unless restricted by the Will, the guardian cannot sell, lease, exchange or mortgage the infant's real estate without court approval and only then if the Will does not restrict such approval. SCPA 1723 and 1715. Most importantly, the guardian cannot apply funds for the support and education of the infant without court approval. SCPA 1713. (Compare these provisions to the authority of a custodian under the Uniform Transfers to Minors Act under EPTL 7-6.14.)

Because the "court has power over the property of an infant" (SCPA 1701) the guardianship of an infant's property is severely statutorily regulated and the guardian's functions are restricted: annual accountings are required (SCPA 1719); either assets must be held in joint control subject to order of the court or all property must be secured by a bond (SCPA 1708), unless the Will provides otherwise, but even then any property received by the guardian outside the Will must be secured by a bond [SCPA 1711(3)]; and the court, not the guardian, determines the reasonableness and amount of expenditures for the infant [SCPA 1713(2)].

Selection. Since there can be separate guardians of an infant's person and of the infant's property, separate individuals or institutions could be appointed to each position. Because of the custodial, parental role of the guardian of the person, that appointment should be an individual. The most important criterion is parenting. Will the appointee raise the child as the client would? Additional considerations that the client might consider include:

- Time. Do the guardians have the time to take on the added responsibility resulting from caring for the child or children?
- Location. Will the child/children have to be moved to a new area or school system?
- Housing. Do the proposed guardians have enough room to accommodate the child/children? (If not, consider special provisions in the Will to address this matter – minor's funds to be used for improvements or

additions to guardian's home; client's home to be preserved and guardians to move into client's residence, etc.)

- Finances. While the minor's own inheritances should support the minor's needs, the guardian's financial position will affect the infant's overall quality of life.

The same person(s) can be the guardian of the property, or another individual or institution could be the separate guardian of the property (an institution would at least avoid the bond expense). The guardian of the property does have important investment authority (SCPA 1723), coupled with an annual duty to account (SCPA 1719) both of which may recommend an institution. Given the restrictions placed on the guardian of the property as to expenditures, while highly secure, it is at best a cumbersome mechanism for meeting the financial needs of minor children.

For any client with sufficient assets, the best plan is to create a trust for the benefit of the client's children. A Trustee can flexibly meet the children's needs for maintenance, support, education, etc., pursuant to the client's specific directions and guidelines in the Will. The trust, coupled with the appointment of a guardian of the person and property of the infant, results in an efficient, flexible plan. The one major power a guardian has is to receive and use social security benefits without court involvement. SCPA 1713(3). This gives the guardian regular funds for daily support needs. Special or additional needs can then be met by the Trustee spending directly for the infant or supplying additional

support to the guardian. Further, unlike a guardianship of property which results in the infant receiving all funds at age eighteen, the trust can run to a more mature age. See the provisions of Appendix A, Article SEVENTH.

Successors. Most often the client will appoint a couple as the guardians. If one should die, and absent any other provision in the Will, the survivor continues as sole guardian. If this is not the result the client wants then the Will must provide that the death of one will terminate the guardianship of both. Since the named guardians may not be living, or survive the entire term of the guardianship, may refuse to qualify [SCPA 1711(2) and SCPA 708], or may renounce the appointment [SCPA 1711(5)], alternate and successor guardians should be named. If the client does not choose the alternates or successors, then the court can appoint them. SCPA 1712.

Compensation. A guardian of the property, upon the settlement of the guardian's accounts, is entitled to the same compensation as an Executor. SCPA 2307(1). The guardian of the person may be allowed compensation for services by the court. SCPA 2307(3). If income is received and paid over, the guardian is entitled to annual commissions at the principal rate. SCPA 2307(4). The statutory provisions govern unless the Will provides a specific compensation which is not renounced. SCPA 2307(5).

Miscellaneous. In a divorce situation, the custodial parent cannot effectively appoint a guardian that will take priority over the surviving, non-custodial parent. Domestic Relations Law § 81. An ineffective appointment results in the appointee becoming a donee

of a power to manage property during minority subject to all the provisions of the guardianship statute. SCPA 1714. Consequently, the attempted appointment will at least secure management of the minor's property by the client's appointee. Further, for the reasons that the non-custodial parent may not be living, or may not seek or desire custody, the custodial parent should name guardians in any event.

A Will cannot appoint a guardian for a mentally retarded child or adult as an adjudication of that status is required. SCPA 1750. Parents of mentally retarded children should be advised to apply for and appoint standby guardians. SCPA 1753.

5. Miscellaneous Provisions

There are a variety of other useful drafting provisions that can facilitate the administration of the estate. All of these provisions share a common thread – the protection of the client's Will plan.

(a) Tax Planning

(i) Survivorship

Where spouses die simultaneously, with no evidence that one outlived the other, the law provides that each spouse's estate is retained and disposed of as though the other predeceased. The statute goes on to provide that it will not apply if a Will makes some other provision. EPTL 2-1.6(a) and (e). If one spouse's estate is substantially larger than the other's, then the statutory provision results in no transfers to the smaller estate and the larger estate being exposed to estate taxation in its bracket. However, if the Will provides that a

defined spouse is presumed to survive (the "defined spouse" being the spouse with the smaller estate) then any marital provisions in the larger estate owner's Will can be implemented to reduce that estate's size and bring it down into a lower tax bracket. However, if everything simply flows to the smaller estate, the bracket problems are simply transferred and magnified. In fact, the Executor of the smaller estate should only receive assets until both estates are approximately equal and then disclaim any further transfers. In this way the ultimate taxation of the combined estates will occur at the lowest possible bracket amount. All spousal planned Wills should have a clause providing that the smaller estate owner is presumed to survive the larger owner, in the event of a simultaneous death, together with a disclaimer provision authorizing the Executor of the smaller estate to disclaim, keeping the disclaimed property out of the deemed survivor's estate, and directing where any disclaimed property should go.

A requirement that any beneficiary (other than a spouse with a smaller estate) must survive the client for a limited period (three months?) in order to receive any disposition will offer some protection if the client and beneficiary are involved in a common accident resulting in the death of both in short succession. Without this provision, if the beneficiary survives, if only for a day or less, the beneficiary is still entitled to the disposition. What was meant to be a gift to the now deceased beneficiary will instead pass to that beneficiary's estate possibly defeating the client's alternative disposition.

(ii) Tax Elections

Administration expenses can be taken by the Executor as estate or income tax deductions. The Executor's decision can reduce the estate's overall tax liabilities, but may affect beneficial interests (electing to take the expenses against income, benefits income beneficiaries at a cost to principal beneficiaries). Unless the Will provides otherwise, a "Warms" adjustment is required (after Matter of Warms, 140 NYS 2d, 169 and now codified in EPTL 11-1.2). Directing that this adjustment not be made gives the Executor the discretion to make the best decision for the estate as a whole without needing to calculate the adjustment and seek reimbursements pursuant to the statute.

(iii) Savings Clause

A "savings clause" is an attempt to "save" what otherwise might be technically deficient drafting. Most often they are used in drafting complex tax clauses. It is a statement of intent that a particular provision qualify for a tax benefit, combined with a direction that the Will, as a whole, be construed and administered to accomplish that intent. While a savings clause may help in ambiguous situations, it will not rewrite a Will to correct bad drafting.

(b) Distribution Protections

(i) Children

In the absence of contrary provisions in the Will, dispositions to children, issue, descendants, heirs, etc., include "adopted children and their issue" and afterborn children. EPTL 2-1.3 and 1-2.10. Further, children born out of wedlock are legitimate

inheritors from the mother and father. EPTL 4-1.2. If any such children are to be excluded from inheriting, then a direct provision to that effect should be included in the Will.

(ii) Disinheritance

A Will not only directs how property is to be disposed, but it may also direct "how it shall not be disposed of...". EPTL 1-2.19. Where a client is not providing for a distributee who is a member of a class that is otherwise provided for (for example, making gifts to three out of four children) it is recommended that a direct statement disinheriting that person be included. By referring to the distributee directly, and if appropriate stating the reason for disinheriting the distributee, it could not later be argued that the client did not know the natural objects of the client's bounty or that the distributee's name does not appear as a result of a drafting error. (Never leave a nominal gift, such as one dollar, to a distributee who is to be disinherited. It is better to directly provide the person is being disinherited than to need to pay the nominal bequest and attempt to obtain a receipt for settlement purposes.)

(iii) In Terrorem Clauses

A gift to a beneficiary/distributee conditioned upon that distributee not filing objections to or contesting the probate of the Will is valid. EPTL 3-3.5(b). Such a provision can be used to discourage contests since the beneficiary/distributee risks losing the provided benefit in the event that the distributee brings an unsuccessful contest proceeding. However, see EPTL 3-3.5 for actions by a distributee that will not result in a breach of such a condition.

(iv) Advancements

EPTL 2-1.5 defines an advancement as an irrevocable gift intended as a complete or partial satisfaction of a beneficiary's interest under the client's Will. For a gift to be treated as an advancement it must be proved by a contemporaneous writing. EPTL 2-1.5(b). If gifts are made or to be made, a provision in the Will as to whether or not they should be treated as advancements may assist the Executor and answer possible concerns of the beneficiaries.

(v) Minors

If any of the Will's direct gifts or anti-lapse provisions may result in property passing to a minor for whom no direct trust provisions are included, then the Will should provide for the convenient administration and management of the minor's property. Absent such provisions, title will vest in the minor and the property will be either deposited into court subject to withdrawal only upon an order of the court [SCPA 2220(3)] or paid to the infant's guardian with all the requirements and restrictions of the guardianship provisions of SCPA Article 17. Alternatively, the Will can authorize the Executor to manage the minor's property until majority, or to appoint and distribute the minor's property to a custodian under the Uniform Transfers to Minors Act. EPTL 7-6.5. The provisions of SCPA Article 17 regarding guardians (their powers, bonding requirements and compensation) should be compared to the Uniform Transfers to Minors Act provisions of EPTL 7-6.

(c) Administration

(i) Virtual Representation

SCPA 315(5) provides that a person under a disability need not be served if another party to the proceeding has the same interest and "the instrument expressly so provides". Including such a clause can facilitate the estate's administration and settlement. This provision will not help in a probate proceeding, however, because the validity of the instrument itself is not yet established. See Matter of Ginsburg, 115 Misc. 2d 122.

(ii) Governing Law

A Will of a non-domiciliary can direct that New York Law apply to the disposition of the non-domiciliary's New York property. EPTL 3-5.1(h).

(iii) Attorney, Accountant and Other Professionals

The Will can request and recommend that the Executor employ a particular attorney, law firm, accountant or other professional in the settlement process. This is a precatory provision. The Will cannot appoint an attorney or other professional. The Executor selects and hires the professionals to assist the Executor. This Will provision merely indicates the client's preference and faith in the named party and as such may be helpful to the Executor.

VI. EXECUTION AND SUMMARY

The Will's ultimate validity depends upon proper execution and safe storage. Additionally, the client's subsequent actions may substantially impact the Will. Titling assets that pass outside of the Will's control can affect the overall distribution plan, as well as the tax apportionment language of the Will.

A. Execution

The Will must be executed in accordance with the provisions of EPTL 3-2.1. The statute requires that the client sign at the end, in the presence of at least two witnesses, declaring that the document is the client's Will. The witnesses must attest that the signature was made in their presence and that they sign their names and affix their addresses at the request of the client. The statute also describes the requirements where the client is unable to sign or the witnesses are not present when the client signs.

To secure the validity of the Will, it is imperative that all the formalities of execution be strictly observed. You should supervise the execution and use a standard checklist and routine to make certain all required elements take place. Other considerations in executing the Will include:

- Using three witnesses. While not required in New York, this could be helpful if the Will is to be probated in a jurisdiction requiring three witnesses.
- Signing only one original Will (if duplicates are signed, all must be obtained for probate).

- Initial all pages. Having the client and the witnesses initial each page protects against page insertions.
- Have all the parties use the same pen, indicating that all were present at the same time.
- Always have the witnesses sign and complete the "self-proving" affidavit prescribed by SCPA 1406. The affidavit is for probate purposes and can greatly speed the probate process assuming there are no objectants.
- If the client is old, and suffering from poor eyesight or blind, then read the Will aloud to the client in the presence of the witnesses and have the attestation clause and 1406 affidavit recite these facts. For elderly clients who have difficulty seeing, but are not blind, consider using a larger type font to make their reading and review of the Will easier.

B. Protection

Since a Will can be revoked by physical destruction [EPTL 3-4.1(a)(2)], the inability to locate the original results in a presumption that the testator revoked the Will. Consequently, a disgruntled beneficiary who has the ability to obtain the original Will can, albeit illegally, effect a revocation. Advise the client to store the original in a secure place, such as the client's safe deposit box, or to leave it with the client's corporate Executor, if any, or you for safekeeping. The disadvantage to the client's safe deposit box is the interference with access upon the client's death. SCPA 2003. As a consequence, many attorneys offer to store and

protect the client's Will. This has the advantage of maintaining a relationship with the client. If you will be storing the Will, the client should be provided with a conformed copy indicating where the original Will is located.

If the client prefers to hold the original, the attorney should obtain a document receipt for your file. This will protect you if the original cannot be located at some future date. Further, advise the client who keeps the original Will *not* to make any changes of any kind to the original, nor to mark it up or make notes on it, any of which may affect its validity or construction.

C. Summary

A Will is as good and as effective as it is current. Changes in the client's assets, family situation or tax laws can render a planned Will inappropriate. You should provide regular, periodic reminders to Will clients to have them review their Wills to make certain the Will reflects the client's current objectives and needs. For Wills with advanced tax planning provisions, maintain a record keeping system so that clients affected by tax law changes can be identified and informed.

Codicils should be avoided. As previously stated, a Codicil requires the probate of two documents (the Will and its Codicil), all parties to both documents must be cited and will be aware of any changes made by the Codicil. If at all possible, prepare a new Will, rather than a Codicil.

A Codicil can be appropriate where there is a need for extreme haste (and with advanced word processing capabilities this is difficult to envision), or the change is minor, or the client's current testamentary capacity may be questionable. If a major change is envisioned and the client's mental capacity may be questioned, consider executing a new Will but keeping the old in case the new one is contested and defeated (assuming the old Will is generally in keeping with the client's present testamentary intents).

Finally, estate planning is a continuing process. After executing the Will, summarize the client's planning and advise the client regarding future actions. Most importantly, counsel the client as to the appropriate title to, and beneficiary designations for, the client's assets.

APPENDIX A

LAST WILL AND TESTAMENT
OF
{client}

I, **{client}**, residing at {street address}, {city}, {county} County, New York, being of sound mind, declare that this is my LAST WILL AND TESTAMENT, and I revoke all prior Wills and Codicils which I have made.

FIRST – DEFINITIONS:

a) Family Members: My spouse's name is _____, and _he is herein referred to as my spouse. I have _____ children, namely _____

_____.

b) Issue: Whenever the term "issue" is used in this Will, it refers to lineal descendants of all degrees from a common ancestor, and will include persons born after the date of this Will and adopted persons.

c)

Option 1...

Per Stirpes: Whenever the term "per stirpes" is used in this Will, I understand that it has the meaning as the term is defined under New York State law under the Estates Powers and Trust Law (EPTL) section 1-2.14 which is as follows:

"The property so passing is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The share of a deceased issue in such nearest generation who left surviving issue shall be distributed in the same manner to such issue."

Option 2...

By Representation: Whenever the term "by representation" is used in this Will, I understand that it means if a beneficiary is left a gift under this Will "by representation" and that beneficiary predeceases me, then the gift is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue.

d) Internal Revenue Code: All references to the Internal Revenue Code (the "Code"), or to any particular provision of the Code, will be to the provisions of the Code and the corresponding Treasury Regulations as they exist as of the effective date of this Will, or as they may be subsequently supplemented or amended.

SECOND – ESTATE OBLIGATIONS:

a) I direct my Executor to pay my funeral expenses, costs of administration, claims allowed in the administration of my estate and expenses of settling my estate.

b) I direct my Executor to pay all transfer, estate and similar taxes payable by reason of my death, on any property or interest in property which is included in my estate for the purpose of computing such taxes. These taxes will be paid from my estate as if they were expenses of administration, and no part will be apportioned or prorated.

Optional (the following language should be added in cases where there is a spouse)...

; provided, however, such taxes will be paid from property not otherwise qualifying for the marital or charitable deduction.

THIRD – GIFTS:

a) I give the following described items of personal property to the following named individuals:

1) My ___{description of item}___ to __{individual}__, if _he survives me.

2) My {description of item} to {individual}, if he survives me; but if not then to {individual}, if he survives me.

b) I give the following sums of money to the following named individuals and organizations:

1) $_____ to {individual}, if he survives me.

2) $_____ to {name of charitable organization}, currently located at _____, if it is in existence at the time of my death.

c) I give all of my remaining tangible personal property not otherwise effectively disposed of, including my personal and household effects, furniture, furnishings, jewelry, any automobiles, boats and collections and all insurance policies on these assets, to my spouse, if my spouse survives me and is competent.

If my spouse does not survive me or is incompetent, then I give all of my remaining tangible personal property . . .

Option 1 (to children, sell if no agreement, add proceeds to residuary)...

to my then living children to be divided by them as they agree. If my children fail to agree on the distribution of my tangible personal property within 120 days after my death, my Executor will sell any property as to which there is no agreement and add any sale proceeds to my remaining estate to be distributed in accordance with the subsequent Article of this Will entitled "Distribution of Remaining Estate."

Option 2 (to children, sell if no agreement, equalize value received by others)...

to my then living children to be divided by them as they agree. If my children fail to agree on the distribution of my tangible personal property within 120 days after my death, my Executor will sell any property as to which there is no agreement. In the event the agreed upon distribution has resulted in an imbalance in the value of property received by my children, I direct my Executor to distribute cash to a child, or children, as the case may be, sufficient to equalize the value of the property received by all of my children. The distribution of cash required to treat all of my children equally will first be made from the proceeds of any sale of my tangible personal property and then from my residuary estate, if

necessary. My Executor will divide the proceeds from the sale of my tangible personal property remaining after the above distribution, if any, equally among my children.

Option 3 (to individual, distribute as instructed)...

to __{individual}__, as h__ absolute property, with the request, however, that _he distribute such property in accordance with the instructions I have given h__.

Option 4...

as follows: _____

_____

_____.

d) If my spouse survives me, I give to my Trustee the maximum amount that can be sheltered from federal estate tax using the applicable federal credit (but without increasing the amount of state death tax paid). In determining this amount, my Executor will use the values finally fixed in the federal estate tax proceeding applicable to my estate, and will take into consideration:

– dispositions under previous articles of this Will and property interests passing outside this Will which do not qualify for any other deduction;

– principal charges to my estate that are not taken or allowed as deductions in computing my federal estate tax; and

– adjusted taxable gifts.

I recognize that this amount may be reduced or eliminated by application of the above considerations, by nondeductible gifts, by payment of estate taxes and charges, and as a result of determinations or elections that my Executor may make pursuant to the terms of this Will or the Internal Revenue Code.

In funding this Trust, I direct my Executor to first use assets which do not qualify for the marital or charitable deduction.

The Trustee will hold, administer and distribute the sum determined under this provision as follows:

{Note: The following trust is designed as a "sprinkle" trust for the client's family. None of these provisions are required for tax purposes and the amount determined under the above language could simply be given outright to others, put in a trust for the benefit of others, or put in a trust for the sole benefit of the spouse.}

1) The Trustee is authorized to accumulate the net income or to pay or apply from the income and principal of the Trust, at any time, to or for the benefit of my spouse and issue (hereinafter referred to as "beneficiaries"), in such amounts and proportions as the Trustee deems advisable, without regard to equality of distribution. *{Optional: My primary purpose in creating this trust is to provide for and secure the support of my spouse. Consequently, while the Trustee may distribute income or principal to my children, or their issue, during the term of this trust, it is my request that the Trustee be most concerned for my spouse.}* Any income not distributed will be added to principal. In exercising its discretion, my Trustee may, but is not required to, take into consideration any other property, resources or income the beneficiaries may have.

2) During my spouse's lifetime, my spouse will have the right during the month of February of each calendar year (including the year of my death), but only during the month of February, to withdraw from the principal of the trust an amount or specific assets which have a value not in excess of the greater of the following: $5,000 or 5% of the market value of the principal of the trust on the date that the request for such withdrawal is made. Such right of withdrawal will be exercised in each case by my spouse notifying the Trustee in writing to that effect, specifying the cash or assets at current market value which my spouse desires to withdraw; and promptly thereafter the Trustee will make such distribution to my spouse. This right of withdrawal will be non-cumulative.

3) Upon the death of my spouse, all remaining principal, and any undistributed income, will be distributed to or for the benefit of one or more of my children, or their issue, in such proportions and in such manner, including in further trust, as my spouse may direct or appoint by direct reference to this limited power of appointment. This limited power of appointment must be exercised by means of a written instrument acknowledged in the manner required for the recording of a deed in New York State and delivered to the Trustee

during the lifetime of my spouse, or by my spouse's Last Will and Testament. In default of my spouse's exercise of this limited power of appointment, then upon my spouse's death, the trust property will be distributed in accordance with the subsequent Article of this Will entitled "Distribution of Remaining Estate."

{Note: The surviving spouse can be given this limited power of appointment so long as the spouse has no control over the funding of this trust. If the spouse may be disclaiming additional assets to this trust, then this power should not be included or should also be disclaimed.}

FOURTH – DISTRIBUTION TO SPOUSE:

I give all the rest of the property owned by me at the time of my death, both real and personal, including all expectancy or remainder interests which I may have and all powers of appointment or disposition, which I hereby expressly exercise in favor of my spouse, to my spouse, if my spouse survives me.

Notwithstanding any provision to the contrary herein, my spouse will have the absolute right to disclaim all or any part of any gift made to my spouse under the terms of this Will as my spouse, in my spouse's sole discretion, sees fit. If my spouse exercises this right to disclaim all or any part of any gift hereunder then that amount or property so disclaimed will pass according to the provisions of the subsequent Article of this Will entitled "Disclaimer Trust."

In the event my spouse dies within nine months after my death without having disclaimed any rights as described above, the Executor of my spouse's estate may file a disclaimer on behalf of my spouse and my spouse's estate within nine months after my death, and in such event the Executor of my estate will distribute the property so disclaimed in accordance with the subsequent Article of this Will entitled "Distribution of Remaining Estate."

FIFTH – DISCLAIMER TRUST:

In the event that my spouse is competent and exercises the right granted to disclaim all or any part of any gift made to my spouse under the terms of this Will, then I give such property to my Trustee to hold, administer and distribute as follows:

{Note: The following trust is designed for maximum benefits to the surviving spouse. None of these provisions are required for tax purposes. Note comment at Article THIRD d).}

a) The Trustee will pay all of the net income to or for the benefit of my spouse, in the Trustee's discretion but at least quarterly, for my spouse's lifetime.

b) In addition to the net income, the Trustee is authorized, at any time to pay or apply from the principal of the trust to my spouse such amounts as the Trustee determines to be necessary for the reasonable health, support and maintenance needs consistent with the standard and quality of living to which my spouse is accustomed at the time of my death. In exercising this discretion, the Trustee may, but will not be required to, take into consideration any other property, resources or income my spouse may have.

c) Additionally, my spouse, so long as my spouse is competent, will have the right during the month of February of each calendar year (including the year of my death), but only during the month of February, to withdraw from the principal of the trust an amount or specific assets which have a value not in excess of the greater of the following: $5,000 or 5% of the market value of the principal of the trust on the date that the request for such withdrawal is made. Such right of withdrawal will be exercised in each case by my spouse notifying the Trustee in writing to that effect, specifying the cash or assets at current market value which my spouse desires to withdraw; and promptly thereafter the Trustee will make such distribution to my spouse. This right of withdrawal will be non-cumulative.

d) Upon the death of my spouse, all remaining principal, and any undistributed income, will be distributed in accordance with the subsequent Article of this Will entitled "Distribution of Remaining Estate."

{Note: For tax purposes, the spouse cannot be given a limited power of appointment over a trust funded by the spouse's disclaimer.}

SIXTH – DISTRIBUTION OF REMAINING ESTATE:

In the event that my spouse dies before me, or if there is any property otherwise directed to this Article, then I give all the rest of my property to my children, per stirpes. Provided, however, if any person to whom a portion of my estate is to be distributed under this Article is less than ___ years of age, then that person's share will not be distributed to

such person, but will be held as a separate trust for such person (hereinafter "beneficiary") in accordance with the subsequent Article of this Will entitled "Trusts for Beneficiaries Under ___ Years of Age."

SEVENTH – TRUSTS FOR BENEFICIARIES UNDER ___ YEARS OF AGE:

The Trustee will hold, administer and distribute any share set aside and directed to this Article as follows:

a) The Trustee may pay or apply to or for the use of the beneficiary so much of the income at any time as the Trustee deems advisable to provide for the beneficiary's health, education, maintenance and support, and will accumulate any surplus income.

b) The Trustee may, in the Trustee's discretion, at any time, pay or apply such portion of the principal and accumulated income, even to the point of completely exhausting the Trust, as the Trustee may deem advisable to provide for the beneficiary's health, education, maintenance and support. In determining the amounts of principal to be so disbursed, the Trustee will take into consideration any other income or support which the beneficiary may have from any other source, and the Trustee's discretion will be conclusive.

c) It is also my intent to provide the beneficiary with a complete education including, without limitation, preparatory, college, graduate, professional, or vocational education. Consequently, the Trustee will pay or apply such portion of the income, principal and accumulated income of the Trust, even to the point of completely exhausting the Trust, as the Trustee deems advisable to provide for all those expenses associated with obtaining an education, including, but not limited to, tuition, books, supplies, transportation, room, board and clothing allowance.

Optional (the following provision is only needed if this trust is for Testator's children)...

d) In the event that the beneficiary is under the care of or residing with the Guardian(s) of the beneficiary's person and property, I authorize my Trustee to pay or apply to the Guardian(s), such sums, including all or any portion of the principal of the beneficiary's Trust, as the Trustee, in the Trustee's discretion, deems appropriate for the beneficiary's health, education, maintenance and support, and to reimburse the Guardian(s) for any sums reasonably expended by the Guardian(s) for the beneficiary.

I specifically direct the Trustee to consider and meet the need, if any, of the Guardian(s) for monies to meet the expense of additional living space and additional maintenance expenses necessary to care for and shelter the beneficiary.

e) When the beneficiary attains the age of ___ years, 1/2 of the beneficiary's trust will be paid or transferred to the beneficiary. When the beneficiary attains the age of ___ years, the beneficiary's trust will terminate and the Trustee will distribute the entire remaining balance of principal and income to the beneficiary.

f) If the beneficiary dies before the beneficiary's trust is fully distributed, then the beneficiary's remaining trust estate will be distributed to the beneficiary's children, per stirpes; or if none, then to the beneficiary's siblings who are my issue, per stirpes; or if none, then to my remaining children, per stirpes.*{; or if none, then in accordance with the subsequent Article of this Will entitled "Alternate Distribution of Remaining Estate."}* Provided, however, if at the time of such distribution a person is then a beneficiary of a trust being held under this Article, *{or is less than ___ years of age,}* then such distribution will be added to the principal of that person's trust, or held in trust for such person, in accordance with all of the terms of this Article.

Optional provision if Testator is not survived by spouse or any issue...

EIGHTH – ALTERNATE DISTRIBUTION OF REMAINING ESTATE:

In the event that my spouse and my issue predecease me, or if we die in a common accident or disaster so that I am not survived by my spouse or any issue, or in the event any property is directed to this Article pursuant to any other provisions of this Will, then I give all the rest of my property, or all the property directed to this Article, as the case may be, as follows:

a) ___% to {individual} and {individual}, equally, or all to the survivor of them.

b) ___% to {individual}, if he is then living; but if not, then to h__ children, per stirpes.

c) ___% to {individual}, {individual}, and {individual}, equally, per stirpes.

d) ___% to {name of charitable organization}, currently located at _____, if it is in existence at the time of my death.

e) Provided, however, if any of the gifts in paragraphs a) through d) above cannot be made because an individual is not then living and did not leave any issue then living, or an organization is not in existence, then the share that individual or organization would have received will be divided among those beneficiaries mentioned and described in paragraphs

a) through d) above who are living or in existence, in the ratio that the percentage of my residuary estate given to each of the living and existing beneficiaries bears to the total of the percentages of my residuary estate given to all living and existing beneficiaries.

NINTH – APPOINTMENTS:

a) Executor: I appoint {individual} to be the Executor of this, my LAST WILL AND TESTAMENT. In the event _he dies, becomes incompetent, resigns, is removed, or otherwise fails to qualify or ceases to act as Executor, then I appoint {individual} to be Executor. In the event _he dies, becomes incompetent, resigns, is removed, or otherwise fails to qualify or ceases to act as Executor, then I appoint {bank or investment company} to be Executor. Any successor to {bank or investment company}, whether through sale or transfer of its business or its Trust Department, conversion, consolidation, merger, resignation as Executor hereunder, or otherwise, will forthwith become the successor Executor hereunder. Whoever is appointed Executor pursuant to this Article will have all the powers authorized by the laws of the State of New York, and will not be required to furnish any bond.

b) Trustee:

Option 1...

I appoint {individual} to be the Trustee of any trust created under this Will. If _he dies, becomes incompetent, resigns, is removed, or otherwise fails to qualify or ceases to act as Trustee, then I appoint {individual} to be Trustee of any trust created hereunder. If _he dies, becomes incompetent, resigns, is removed, or otherwise fails to qualify or ceases to act as Trustee, then I appoint {bank or investment company} to be Trustee of any trust created hereunder. Any successor to {bank or investment company}, whether through sale or transfer of its business or its Trust Department, conversion, consolidation, merger, resignation as Trustee hereunder, or otherwise, will forthwith become the successor Trustee hereunder. The Trustee will not be required to furnish any bond or other security in any jurisdiction or if a bond will be required, the Trustee will not be required to furnish any sureties thereon.

Option 2...

I appoint __{individual}__ (hereinafter "Individual Trustee"), and ___{bank or investment company}__ (hereinafter "Corporate Trustee") to be the Co-Trustees of any trust created under this Will. If __{individual}__ dies, becomes incompetent, resigns, is removed, or otherwise fails to qualify or ceases to act as Trustee, then I appoint __{individual}__ to be the Individual Trustee of any trust created hereunder.

It is my intent to have the Corporate Trustee be solely responsible for the investment and administration of said trusts, and consequently to have all the powers authorized by law and this Will.

The Individual Trustee will be solely responsible for all discretionary distributions of income and principal and will have the power to replace the Corporate Trustee at any time, in the Individual Trustee's sole and absolute discretion. If the Individual Trustee exercises the power to replace the Corporate Trustee, then another Corporate Trustee must be appointed, provided that the successor Corporate Trustee must be a trust company or bank qualified to act as such in the State of New York. This right of removal will be continuing and will be exercised by the Individual Trustee serving the Corporate Trustee with written notice of its removal, which notice will specify the successor Corporate Trustee and certify its willingness to serve as Trustee and will be executed in the manner required for the recording of a deed to real property in the State of New York. Within 60 days, the Corporate Trustee so removed will institute proceedings for the settlement of its accounts and deliver all assets then held to its successor, whereupon it will have full acquittance for all assets so delivered (subject to judicial settlement of its accounts or by agreement with the then current income beneficiaries) and will have no further duties hereunder.

In the event that no Individual Trustee named hereunder will qualify or continue to act as a Co-Trustee then the Corporate Trustee will be empowered to control the discretionary distributions of income and principal in accordance with the trust's provisions.

The Individual Trustee will receive no compensation. I direct that the Corporate Trustee will be entitled to receive as Trustee such compensation as is set forth in its published schedule of compensation in effect at the time such compensation is payable.

The Trustees will not be required to furnish any bond or other security in any jurisdiction or if a bond will be required, the Trustees will not be required to furnish any sureties thereon. Any successor to the Corporate Trustee, whether through sale or transfer of its business or its Trust Department, conversion, consolidation, merger, resignation as Trustee hereunder, or otherwise, will forthwith become the successor Trustee hereunder.

Optional (this provisions is only needed if Testator has minor children)...

c) Guardians: In the event that my spouse dies before me or we die in the same accident or disaster, I appoint {individual} and {individual} to be the Guardians of the person and property of my children during their minority. In the event that only one of the foregoing individuals is alive and qualifies as Guardian, then I appoint such individual as the sole Guardian. In the event that both of the foregoing individuals die, become incompetent, resign, are removed, or otherwise fail to qualify or cease to act as Guardians, then I appoint {individual} to be the Guardian of the person and property of my children during their minority. I direct that no bond or other security be required.

TENTH – POWERS OF FIDUCIARY:

My Trustee and my Executor (hereinafter "the Fiduciary"), including any successors, will have the following powers and discretions with respect to all property, real and personal, forming part of my estate or any trust established by this Will (hereinafter "the Estate"), without limitation by reason of enumeration and in addition to powers conferred by Section 11-1.1 of the Estates, Powers and Trusts Law and other law:

a) To retain any property in the form received; to invest and reinvest the Estate in any kind of property, real or personal, including stocks, bonds, and other securities without being limited to investments authorized for estate or trust funds by any governing laws. Nevertheless, the Fiduciary will make such investments and only such investments as a prudent person would make having primarily in view the needs of the income beneficiaries (both as to amount and regularity of income) as well as the preservation of the Estate.

b) To open and operate such checking, bank, brokerage or other financial accounts as may be expedient in the opinion of the Fiduciary and to deposit any monies in one or more banks or financial institutions in any form of account, whether or not interest bearing and to designate the signing authority for any such accounts opened by the Fiduciary. The signature

of the Fiduciary, as Fiduciary and not in a personal capacity, will be valid and binding upon the Estate.

c) To sell, exchange or otherwise dispose of realty and personalty, publicly or privately, wholly or partly on credit, or for any consideration including stocks, bonds or other corporate obligations and grant options for the purchase, exchange or other disposition of any such property. To make applications for approval by applicable planning boards and zoning board of appeals and other governmental boards and agencies.

d) To make distribution in cash or in kind, or partly in each, including undivided interests, even though shares be composed differently, and allocate particular assets or portions thereof to any one or more of the beneficiaries hereunder, without regard to the income tax basis of such assets.

e) To abandon, in any way, property which in the exercise of the Fiduciary's reasonable judgment the Fiduciary determines to be a burden on the Estate.

f) To determine the manner of ascertaining income and principal and the allocation and apportionment of receipts and disbursements between income and principal.

g) To appoint a bank, trust company, investment firm or brokerage house to act as the custodian or manager of the investments comprising the Estate, or to act as the Fiduciary's agent in respect of the investments comprising the Estate, and, from time to time to terminate any such appointment and make another. In this regard the Fiduciary will fix the remuneration to be paid to any such organization and such remuneration is to be charged to the Estate; provided, however, if the Fiduciary is receiving any compensation for acting as Fiduciary, then the amount of any such remuneration payable to such organization is to be taken into account and deducted from the compensation to which the Fiduciary is annually entitled. In making any such arrangements, the Fiduciary is authorized to place the investments comprising the Estate in custody of such organization, to transfer such investments into the name of such organization or any nominee thereof, and to delegate to such organization any or all of the discretionary powers given to the Fiduciary by this Will.

h) To borrow money and pledge or mortgage any property for any purpose.

i) If any share of my estate vests in ownership in any person then under 21 years of age (a "minor" as defined in the New York Uniform Transfers to Minors Act), or if at the termination of any trust created by this Will, all or a portion of principal of such trust vests in ownership in any minor, I direct my Fiduciary to appoint a custodian under the New York Uniform Transfers to Minors Act and to distribute to that custodian all property to which the minor is entitled by this Will. The provisions of the New York Uniform Transfers to Minors Act, as that act may be amended from time to time, will govern the designation of the custodian, transfer of property to the custodian and management of the property by the custodian. In particular, I acknowledge and direct that: (1) the Fiduciary may be the custodian; (2) all property will be held and administered for the minor until the age of 21; and (3) if the minor dies before the age of 21, then the property will be distributed to the minor's estate.

j) In addition to the above powers, the Fiduciary may, at any time, terminate any of the trusts hereunder and transfer, payover and deliver any and all of the then principal and income of such trust to the person then entitled to the income from such trust, free of trust, if in the Fiduciary's judgment the principal of such trust is so small that it would be inadvisable to continue to hold it in trust.

k) If, at any time after the death of my spouse, there will be a trust under this Will and a trust on substantially similar terms under the Will of my spouse, I authorize the Fiduciary, in the Fiduciary's absolute discretion: (1) to pay over the entire principal of such trust under this Will to the Trustee of such trust under the Will of my spouse, as an addition to the principal of the last-mentioned trust; or (2) to receive, as an addition to the principal of such trust under this Will, the entire principal of such trust under the Will of my spouse.

l) Should the property disclaimed by my spouse include any residence owned by me at the time of my death, I direct the Fiduciary to allow my spouse to use the residence during my spouse's life, and to maintain the residence for the use and benefit of my spouse and to pay from the income of the Trust all taxes, insurance, assessments, repairs and other charges necessary to maintain the residence.

If my spouse advises the Fiduciary that my spouse no longer desires to occupy such property as a home, then the Fiduciary may sell and convey the same, at public or private sale, at such time and price and upon such terms and conditions, including credit, as the Fiduciary may determine. The notification to the Fiduciary will be in writing signed by my spouse and acknowledged in the manner as is required for a deed to be recorded in the State of New York.

Upon receiving written notice of the decision of my spouse to no longer occupy the residence as a home, then the Fiduciary is authorized to acquire a replacement residence, by either purchase or rental. My spouse may choose the replacement residence, regardless of cost, and the proceeds of sale, together with such other Trust assets as are necessary, will be used to acquire the replacement residence.

Any proceeds of sale which are not used in the purchase of a replacement residence will be added to principal. No party dealing with the Fiduciary will be required to ascertain whether or not any of the requirements relating to the sale or purchase of any property have been complied with; nor will any such party be required to look to the application of the proceeds of any sale; and such parties may deal with the Fiduciary as having complete, independent power and authority to consummate any purchase or sale hereunder.

Optional provision regarding business...

m) I presently have an interest in ____{name of business}____, and anticipate that at the time of my death, that I may still have an interest in said company, or may own stock in said company or successors thereto, or that I may own an interest in another business (whether operated in the form of a corporation, a partnership, a limited liability company, or a sole proprietorship), hereinafter referred to as "the Business," and consequently, I expect that some such business enterprise may be owned by me at the time of my death. Since it may be necessary for the Fiduciary to continue to hold and operate each such business as a part of this estate for a period of time following my death, I hereby vest the Fiduciary, including any successors, with the following powers and authority, without limitation by reason of specification, and in addition to powers conferred by Section 11-1.1 of the Estates, Powers and Trusts Law and other law, all of which may be exercised with respect to every such business, whether a corporation, a partnership, a limited liability company, or a sole proprietorship:

1) To retain and continue to operate the Business until all stock and assets have been distributed according to the terms of this Will.

2) To invest additional assets of the estate in the Business.

3) To control, direct and manage the Business. In this connection the Fiduciary, in the Fiduciary's sole discretion, will determine the manner and extent of his or her active participation in the operation of the business, and the Fiduciary may delegate all or any part of his or her power to supervise and operate, to such person or persons as he or she may select, including any associate, partner, officer or employee of the Business.

4) To hire and discharge employees, fix their compensation and define their duties; and similarly to employ, compensate and discharge agents, attorneys, consultants, accountants and such other representatives as the Fiduciary may deem appropriate, including the right to employ any beneficiary in any of the foregoing capacities. If the Fiduciary or any beneficiary should serve as officers, directors or employees of the Business, any salaries or other compensation paid to any of them will be in addition to, and not in lieu of, any fiduciary commissions or estate income receivable by them.

5) To organize a business entity under the laws of this or any other state or country and to transfer thereto all or any part of the Business or other property held in the estate and to receive in exchange therefor such stocks, bonds and other securities as the Fiduciary may deem advisable.

6) To take any action required to convert any business entity to another business entity.

7) To treat the Business as an entity separate from the estate. In the Fiduciary's accountings to any beneficiary, the Fiduciary will only be required to report the earnings and condition of the Business in accordance with standard corporation accounting.

8) To retain in the Business such amount of the net earnings for working capital and other purposes of the Business as the Fiduciary may deem advisable in conformity with sound business practice.

9) To purchase, process and sell merchandise of every kind and description; and to purchase and sell machinery and equipment, furniture and fixtures and supplies of all kinds.

10) To recapitalize or liquidate any business entity in which the estate has a controlling interest, upon such terms as the Fiduciary, in the Fiduciary's sole discretion, determines.

11) Notwithstanding any other provision of this Will, if any trust created under this Will consists in whole or part of stock of an S corporation, as defined in the Internal Revenue Code, the Fiduciary will divide such trust into separate trusts for each income beneficiary, in equal shares, and will pay or apply the entire net income of each such trust holding S Corporation stock to or for the use of the income beneficiary thereof, in annual installments. The income interest of the income beneficiary will terminate on the earlier of the beneficiary's death or the termination of the trust. In no event will the principal of each such trust be payable to anyone other than the income beneficiary during the term of the trust. Upon the termination of the trust during the lifetime of the income beneficiary, the principal of the trust shall be payable to the income beneficiary.

I am aware that certain risks are inherent in the operation of any business. Therefore, the Fiduciary will not be liable for any loss resulting from the retention and operation of any business unless such loss will result directly from the Fiduciary's gross

negligence or wilful misconduct. In determining any question of liability for losses, it should be considered that the Fiduciary is engaged in a speculative enterprise at my express request.

ELEVENTH – ADMINISTRATIVE PROVISIONS:

a) Order of Deaths: In the event my spouse and I die under such circumstances that there is not sufficient evidence to determine the order of our deaths, for the purposes of distribution under this Will, it will be conclusively presumed that my spouse survived me and my estate will be administered and distributed in all respects, in accordance with such presumptions.

{Consider which spouse is to survive for probate purposes, or they should survive each other if each Will has different residuary provisions (i.e., second marriage).}

In the event any other beneficiary and I die under such circumstances that there is not sufficient evidence to determine the order of our deaths, or if any other beneficiary dies prior to 90 days after my death, for the purposes of distribution under this Will, it will be conclusively presumed that I survived any other beneficiary and my estate will be administered and distributed in all respects, in accordance with such presumptions.

b) Health Insurance Portability and Accountability Act Directive: I hereby provide written directive, as required by the Health Insurance Portability and Accountability Act (HIPAA) or any successor legislation, to any and all physicians, hospitals, laboratories and health care providers of any kind, to release all of my medical, mental health and billing information, as the case may be, relating to any past condition, to any Executor named in this Will, whether currently acting or a named successor Executor, when requested to do so by any such Executor.

c) Rule Against Perpetuities: If not sooner terminated pursuant to the terms of this Will, all trusts created hereunder will terminate 21 years after the death of the last survivor of my spouse and descendants in being at the date of my death, and if a trust terminates pursuant to the terms of this paragraph, the principal will be distributed outright to those persons or entities, or both, who are then entitled to receive the income, and in the same proportions as they are respectively entitled to such income.

d) Forfeiture Provision: If any beneficiary contests the validity of this Will or any provision, or institutes or joins in (except as a party defendant) any proceeding to contest the validity of this Will or to prevent any provision from being carried out in accordance with its terms (regardless of whether or not such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such benefits will pass to the residuary beneficiaries of this Will (other than such beneficiary) in the proportion that the share of each residuary beneficiary bears to the aggregate of the effective shares of all residuary beneficiaries. Each benefit conferred in this Will is made on the condition precedent that the beneficiary accepts and agrees to all of the provisions of this Will, and the provisions of this paragraph are an essential part of each and every benefit.

e) Interpretation: Whenever necessary or appropriate, the use of any gender will be deemed to include the other gender and the use of either the singular or the plural will be deemed to include the other.

f) Governing Law: This Will, my estate and any trust created hereunder will be construed and administered according to the laws of the State of New York.

IN WITNESS WHEREOF, I have signed my name this ____ day of _____, 2007.

_____
{client}

WE, the undersigned, certify that on _____, 2007, at ___{city}___, __{county}__ County, New York, **{client}**, in our presence signed, published and declared this Instrument to be h__ LAST WILL AND TESTAMENT. At h__ request and in h__ presence and in the presence of each other, we sign our names as witnesses to the execution of h__ LAST WILL AND TESTAMENT and indicate our residence addresses.

_____ residing at _____

_____

_____ residing at _____

_____

4B. TESTAMENTARY GIFTS (Continued)

Refer to outline by Schlesinger in Section 4A

RIGHT OF ELECTION

by

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I. INTRODUCTION

New York case and statutory law imposes upon New York State resident spouses many duties during life; a spouse cannot avoid some of those duties in death. The surviving spouse is entitled to a minimum share of the deceased spouse's estate.

Most estate planners will need to refer to this chapter only rarely, as most husbands and wives leave most, if not all, of their estates to each other. Where a lawyer is asked by a client to limit or dispense with a bequest to a spouse, however, this chapter will become first in importance. The law carefully defines the amount a surviving spouse is entitled to and from what property it shall be paid. The share to be paid cannot be avoided by most *inter vivos* transfers, but as with any right, it can be affected by the claimant's words and actions.

This chapter discusses Estates, Powers and Trusts Law 5-1.1-A (hereinafter "EPTL")—the right of election statute for decedents dying on or after September 1, 1992. The chapter also contains an overview of EPTL 5-1.1—the right of election statute for decedents dying prior to September 1, 1992.

II. RIGHT OF ELECTION FOR DECEDENTS DYING ON OR AFTER SEPTEMBER 1, 1992—AN OVERVIEW OF EPTL 5-1.1-A

A. Introduction

The right to elect against the will of a deceased spouse, if the surviving spouse does not receive certain minimum interests under such will, was significantly expanded by EPTL 5-1.1-A. These changes apply generally to the estates of decedents who die after August 31, 1992. They affect the manner in which the elective share is measured, its character and the types of property interests that may be used to satisfy it. The already complex EPTL 5-1.1 remains intact and applies to the estates of decedents who died before September 1, 1992.

Discussed below are the provisions of EPTL 5-1.1-A and the revisions which have been made since its enactment.

B. Determination of Elective Share

1. Size and Character of Elective Share

A spouse's elective share equals the greater of (1) $50,000 or (2) one-third of the net estate.[1] Under prior law, the elective share equaled one-third of the net estate if the decedent was survived by issue and one-half of the net estate if the decedent was not survived by issue.[2] As under prior law, the calculation of a spouse's elective share is not based upon the size of her or his own assets, regardless of the source of such assets.

The elective share is a pecuniary amount, not a fractional share of the estate.[3] Thus, income earned by the estate prior to its distribution will not be included, nor will the appreciation or depreciation of estate assets be taken into account. Section 5-1.1 of the EPTL did not specify whether the elective share was a fractional share or a pecuniary amount. New York courts, however, generally treated it as a fractional share.[4]

2. Share of Testamentary Provisions to Which Surviving Spouse is Entitled

a. General Rule

A surviving spouse is entitled to a share of his or her deceased spouse's testamentary provisions equal to the elective share amount, reduced by the capital value of any interest, passing absolutely to him or her (or which would have passed absolutely to the spouse but for the fact that he or she renounced it) by will, in intestacy (under EPTL 4-1.1) or as a testamentary substitute (as defined and discussed below). The amount as so reduced equals the surviving spouse's "net elective share."[5]

b. Net Elective Share

In arriving at the net elective share, only those interests which passed "absolutely" to the surviving spouse (or which would have passed abso-

1 EPTL 5-1.1-A(a)(2).

2 *But see Estate of Bogart,* 160 Misc. 2d 54, 607 N.Y.S.2d 1012 (Sur. Ct., N.Y. Co. 1994) (holding that the elective share of the spouse of a decedent who died after August 31, 1992, and before September 1, 1994, and who was not survived by issue, was one-half of the net estate since the interest could be satisfied by a right of election trust).

3 EPTL 5-1.1-A(a)(2).

4 *See In re Estate of Guterman,* 125 Misc. 2d 59, 476 N.Y.S.2d 1006 (Sur. Ct., Nassau Co. 1984); *In re Goutmanovitch,* 105 Misc. 2d 851, 432 N.Y.S.2d 768 (Sur. Ct., N.Y. Co. 1980).

5 EPTL 5-1.1-A(a)(4), amended by 1993 N.Y. Laws ch. 515, § 3, eff. Jan. 1, 1994.

lutely to the surviving spouse but for the fact that he or she renounced such interest) are taken into account.

If an interest in property passes to the surviving spouse other than absolutely, that interest will not reduce the share to which the surviving spouse is entitled. Unless the decedent provided otherwise, however, if the spouse elects to take his or her elective share, the spouse will no longer be entitled to those interests that passed to him or her other than absolutely. Instead, such interests will pass as if the spouse had predeceased the decedent.[6]

An interest in property is deemed to pass other than absolutely if it consists of less than the decedent's entire interest in the property or constitutes an interest held in a trust or trust equivalent created by the decedent. An interest is deemed to pass absolutely if it is not deemed to pass other than absolutely.[7]

Inasmuch as a property interest that passes other than absolutely will not reduce the surviving spouse's elective share, a decedent no longer can preclude his or her spouse from electing against the will by creating a "right of election" trust, since a trust constitutes an interest that passes other than absolutely. As discussed below, under EPTL 5-1.1, for decedents dying after August 31, 1966, a decedent could satisfy the surviving spouse's elective share with such a trust. Although EPTL 5-1.1-A generally is effective with respect to the estates of decedents dying after August 31, 1992, the elimination of the right of election trust is effective only with respect to the estates of decedents dying after August 31, 1994.[8]

Example:

> Assume a testatrix died after August 31, 1994, leaving a net probate estate of $600,000. In her will, the testatrix, *T*, bequeaths $100,000 to her husband, *H*, outright. *H* elects to take his elective share, which equals one-third of $600,000, or $200,000. Since *H* received the $100,000 absolutely, his net elective share equals $100,000 ($200,000 - $100,000).

If instead *T* had provided for the $100,000 to be held in trust for *H*'s benefit for his life, with the remainder to go to her children, the $100,000

6 EPTL 5-1.1-A(a)(5)(A).

7 EPTL 5-1.1-A(a)(5)(B).

8 See III.C., "Wills Executed after August 31, 1966," *infra*, regarding the availability under EPTL 5-1.1 of right of election trusts for decedents dying after August 31, 1966, and before September 1, 1992.

would be deemed to pass to *H* other than absolutely. Accordingly, *H*'s net elective share would equal $200,000 since the amount passing into trust would not reduce the elective share amount. However, by exercising his right of election, *H* relinquishes his interest in the trust, unless *T* provided in her will that the trust can continue despite *H*'s decision to take his elective share.

C. Net Estate of Decedents Dying After August 31, 1992

A decedent's estate consists of the property passing under her or his will or in intestacy, plus the "testamentary substitutes" described in EPTL 5-1.1-A(b)(1).[9] A decedent's estate includes all property of the decedent wherever situated.[10] A decedent's net estate is determined by reducing the decedent's estate by debts, administration expenses and reasonable funeral expenses.[11]

1. Estate Taxes

All estate taxes are to be disregarded. The surviving spouse, however, is not relieved of contributing the amount of such taxes, if any, apportioned against her or him under EPTL 2-1.8. Presumably, the reference to apportionment under EPTL 2-1.8 includes apportionment pursuant to a direction in the decedent's will, which is one method of apportionment permitted by EPTL 2-1.8.

Unless the decedent has provided otherwise, generally no taxes would be apportioned against the surviving spouse to the extent that property passing to her or him qualified for the marital deduction.[12] In most cases, property interests that satisfy the elective share will also be eligible for the marital deduction. Exceptions include property passing outright to a surviving spouse who is not a United States citizen and cash bequests that, pursuant to a direction under the will, are used to purchase an annuity for the spouse. Even if the spouse's share is eligible for the marital deduction, a contribution to the estate's estate taxes may be required insofar as the estate taxes are attributed to pre-death transactions rather than to property included in the gross estate.

2. Debts

Not all obligations are treated as debts for purposes of defining the net estate. If they were, an individual could easily defeat her or his spouse's

9 *See* EPTL 5-1.1-A(a)(1).

10 EPTL 5-1.1-A(c)(7).

11 EPTL 5-1.1-A(a)(2).

12 EPTL 2-1.8(c)(2).

right of election simply by executing a contract to bequeath her or his estate to some other individual or individuals. New York courts, for example, have held that an obligation contained in a separation agreement to bequeath a portion of an individual's estate or specific assets to a former spouse is subordinate to a subsequent spouse's right of election.[13] The beneficiary of a contract to make a bequest is viewed by the courts as a legatee rather than as a creditor. In contrast, a decedent's obligation under a separation agreement to make post-death alimony payments is treated as a debt that reduces the estate subject to the right of election.[14] The distinction between the two is tenuous. A debt that matures on the death of a decedent spouse seems to fall somewhere between the two. It is unclear how it will be treated under EPTL 5-1.1-A.

D. Testamentary Substitutes

1. Generally

Estates, Powers and Trusts Law 5-1.1-A(b)(1) sets forth a much more expansive list of *inter vivos* dispositions which qualify as testamentary substitutes than does the corresponding portion of EPTL 5-1.1.[15] Unlike EPTL 5-1.1, EPTL 5-1.1-A does not specifically exclude certain transactions (e.g., various retirement plan payments, life insurance proceeds,[16] United States Savings bonds and other government obligations) from being testamentary substitutes.[17]

A transaction described in clauses (A)–(H) of EPTL 5-1.1-A(b)(1) generally will constitute a testamentary substitute whether it was effected before or after marriage. A significant exception to this general rule applies to irrevocable transactions (other than those described in clause (G) regarding retirement plans); such transactions constitute testamentary substitutes only if they are effected after marriage.[18]

13 *See In re Dunham's Estate*, 36 A.D.2d 467, 320 N.Y.S.2d 951 (3d Dep't 1971); *In re Erstein's Estate*, 205 Misc. 924, 129 N.Y.S.2d 316 (Sur. Ct., N.Y. Co. 1954); *In re Hoyt's Estate*, 174 Misc. 512, 21 N.Y.S.2d 107 (Sur. Ct., N.Y. Co. 1940).

14 *See In re Lewis's Will*, 4 Misc. 2d 937, 123 N.Y.S.2d 859 (Sur. Ct., Westchester Co. 1953).

15 See IV., "Right of Election," *infra*, for a discussion of testamentary substitutes under EPTL 5-1.1.

16 As originally drafted, EPTL 5-1.1-A would have specifically included life insurance. This provision was eliminated in the version of the statute as finally passed.

17 *See* EPTL 5-1.1(b)(2); *In re Scheiner*, 141 Misc. 2d 1037, 535 N.Y.S.2d 920 (Sur. Ct., Kings Co. 1988) (Treasury bills found not to be testamentary substitutes under EPTL 5-1.1(b)(1)).

18 *See* EPTL 5-1.1-A(b)(1).

2. Testamentary Substitutes Created by EPTL 5-1.1-A

a. Gratuitous Transfers

Gratuitous transfers of property made after August 31, 1992, and within one year of the decedent's death are treated as testamentary substitutes, except to the extent that such transfers are excludable from gift tax by operation of Internal Revenue Code section 2503(b) (hereinafter "I.R.C.") (the $10,000 per donee annual exclusion) and I.R.C. section 2503(e) (the exclusion for amounts paid for tuition or medical care). The amount excluded from gift tax, under I.R.C. section 2503(b), as a result of the spouse's election to split the gift also is not taken into account in determining the aggregate transfers within one year of death.[19]

Gifts *causa mortis* are not encompassed within EPTL 5-1.1-A(b)(1)(B) because, as under prior law, they are specifically designated as testamentary substitutes under clause (A). Also excluded from the operation of clause (B) are transfers of interests in retirement plans and releases of presently exercisable general powers of appointment, which are specifically dealt with in clauses (G) and (H), respectively.[20] Accordingly, the one-year cutoff does not apply to these other testamentary substitutes.

b. Disposition of Property and Contractual Arrangements

Dispositions of property and contractual arrangements made by the decedent, in trust or otherwise, are testamentary substitutes insofar as the decedent retained the right to the income from, or the possession or enjoyment of, the property for her or his life, for any period not ascertainable without reference to her or his death or for a period that does not in fact end before her or his death, except to the extent that such disposition or contractual arrangement was for an adequate consideration in money or money's worth.[21] This provision is not applicable to dispositions made before September 1, 1992.[22]

Also included as testamentary substitutes are dispositions of property and contractual arrangements made by the decedent, in trust or otherwise, to the extent the decedent, at the time of her or his death, retained—either

19 EPTL 5-1.1-A(b)(1)(B).

20 *See* II.D.2.c., "Property Payable under a Thrift," and d., "Property Subject to a Presently Exercisable General Power of Appointment," *infra*.

21 The exception for dispositions or contractual arrangements to the extent they were for adequate consideration was added by 1993 N.Y. Laws ch. 515, § 3, eff. Jan. 1, 1994.

22 EPTL 5-1.1-A(b)(1)(F)(i).

alone or in conjunction with any person who does not have a substantial[23] adverse interest—by the express provisions of the disposing instrument, the power to revoke the disposition or the power to consume, invade or otherwise dispose of the principal thereof.[24] This provision is the same as that set forth in EPTL 5-1.1(b)(1)(E) except that it specifically includes contractual arrangements, and it applies to a power exercisable in conjunction with another person only if that person does not have a substantial adverse interest in the property.[25]

The scope of the language "a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof" was at issue in *In re Estate of Reynolds*.[26] Although the case involved the former statute (EPTL 5-1.1), the same language is used in the new statute (EPTL 5-1.1-A(b)(1)(F)(ii)). In *Reynolds*, the decedent created an irrevocable *inter vivos* trust in order to qualify for Medicaid benefits, pursuant to which the trustee could invade principal. The settlor retained, until one day before her death, the right to change beneficiaries to anyone except herself or her estate, and on that date the trust was terminated. A unanimous Court of Appeals held that the limited right to appoint beneficiaries left her with meaningful control during her lifetime and would allow her to circumvent her husband's right of election "in contravention of the statute's explicit and intended protection." A majority of the Appellate Division had disagreed with the surrogate's conclusion that the trust was a testamentary substitute under EPTL 5-1.1, as the settlor had relinquished the right to appoint herself or her estate as beneficiary and there was no power to change beneficiaries at the time of death. The dissent in the Appellate Division, citing *In re Estate of De Vita*[27] and *In re Riefberg*,[28] believed the decedent retained sufficient control over the trust assets.

23 The reference to a "substantial adverse interest," rather than "adverse interest," was added by 1993 N.Y. Laws ch. 515, § 3, eff. Jan. 1, 1994.

24 EPTL 5-1.1-A(b)(1)(F)(ii).

25 *See Estate of Boyd*, 161 Misc. 2d 191, 613 N.Y.S.2d 330 (Sur. Ct., Nassau Co. 1994) (holding that life insurance contracts do not come within this provision in light of the legislative history regarding life insurance). *See* footnote 16, *supra*. *See also In re Martorana*, N.Y.L.J., Oct. 11, 1995, p. 31, col. 4 (Sur. Ct., Suffolk Co.); *In re Callahan*, N.Y.L.J., Sept. 23, 1994, p. 26, col. 5 (Sur. Ct., Dutchess Co.). It is interesting to note that the *Boyd* court subsequently determined that counsel fees for the surviving spouse are not properly payable from the estate and must be borne by the spouse personally, since the primary issue in the construction proceeding was not to determine the intent of the testator from an ambiguous provision in the will, but rather to determine the extent of the surviving spouse's right of election by statutory construction. *In re Boyd*, N.Y.L.J., Apr. 30, 1996, p. 35, col. 1 (Sur. Ct., Nassau Co.).

26 214 A.D.2d 944, 626 N.Y.S.2d 603 (4th Dep't 1995), *modified*, 87 N.Y.2d 633, 2 N.Y.S.2d 147, 664 N.E.2d 1209 (1996).

27 141 A.D.2d 46, 532 N.Y.S.2d 796 (2d Dep't 1988).

28 58 N.Y.2d 134, 459 N.Y.S.2d 739, 446 N.E.2d 424 (1983).

If the donor of a charitable remainder trust retains a life interest in a unitrust, annuity trust, pooled income fund, charitable gift annuity or the life use of a personal residence or farm, the exercise by the donor's spouse of the right of election would cause a portion of the trust or annuity interest to be diverted from the charitable remainder beneficiary. This would occur because the new statute provides for "ratable" contribution by both testamentary beneficiaries and beneficiaries of testamentary substitutes.[29] If the possibility of the right of election being exercised by the surviving spouse is more than 5 percent, the charitable deduction may be disallowed. Grantor retained annuity trusts and unitrusts (GRATS and GRUTS) and residence GRITS (grantor retained interest trusts) may also be retained life estates, and thus testamentary substitutes, if the grantor spouse dies before the expiration of the term. A waiver of the right of election by the nondonor spouse at the time of the creation of the retained interest would resolve the problem.

In *In re Estate of Wechsler*,[30] an irrevocable *inter vivos* trust created by a decedent and his sister was held not to be a testamentary substitute because the decedent did not retain possession or enjoyment of the trust assets until the date of death, as the trust gave the decedent no right to revoke the trust, appoint new beneficiaries, or to consume, invade or dispose of the corpus. The court further held that the illusory trust doctrine ceased to exist in elective share cases with the enactment of the testamentary substitute concept in 1966.

c. Property Payable under a Thrift, Savings, Retirement, Pension, Deferred Compensation, Death Benefit, Stock Bonus or Profit-Sharing Plan, Account, Arrangement, System or Trust

Property payable under a thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust are testamentary substitutes.[31] This provision covers both qualified plans under I.R.C. section 401 as well as nonqualified plans. As to qualified plans with respect to which payment must be in the form of a joint and survivor annuity for the participant and her or his spouse, or if the participant dies after the annuity starting date, if the spouse is entitled to a survivor's annuity, only one-half the value of the decedent's interest in the property constitutes a testamentary substitute. Although the other half also passes to the surviving spouse, it is not charged against his or her elective share. Estates, Powers and Trusts Law 5-1.1-A(b)(1)(G) does not apply if the decedent designated the benefi-

29 EPTL 5-1.1-A(c)(2).

30 225 A.D.2d 785, 640 N.Y.S.2d 184 (2d Dep't 1996).

31 EPTL 5-1.1-A(b)(1)(G).

ciary or beneficiaries of the plan benefits on or before September 1, 1992, and did not change the beneficiary designation thereafter.[32]

Note that a spouse's waiver of the right to receive any such survivor annuity constitutes a waiver against the testamentary substitute. (Technically, a spouse must sign a consent to the participant's waiver of such benefit.[33])

d. Property Subject to a Presently Exercisable General Power of Appointment

Any interest in property, to the extent it was subject to a presently exercisable general power of appointment (within the meaning of I.R.C. section 2041) held by the decedent immediately before death or which the decedent, within one year prior to her or his death, released or exercised in favor of someone other than herself or himself or her or his estate, is a testamentary substitute.[34]

A release that results from a lapse of the power of appointment, which is not treated as a taxable release for federal estate tax purposes, is not within the scope of clause (H). Accordingly, the lapse within one year prior to the decedent's death of a noncumulative annual right to withdraw the greater of $5,000 or 5 percent of the value of the trust that lapses does not constitute a testamentary substitute. If, however, an individual dies with an unexercised right to withdraw 5 percent of the property held in a trust, the property subject to the power of appointment is a testamentary substitute. The requirement that the power be "presently exercisable" pro-

32 This section was amended by 1993 N.Y. Laws ch. 515, § 3, eff. Jan. 1, 1994. Prior to this amendment, the provision excluded transactions effected on or before September 1, 1992, from being deemed testamentary substitutes. *See In re Farlow*, 174 Misc. 2d 629, 666 N.Y.S.2d 388 (Sur. Ct., Monroe Co. 1997). When the decedent married in 1995, the spouses automatically replaced the estate as beneficiary of the decedent's pension plan, without the decedent doing anything affirmatively. The court held that the marriage did as a matter of law cause a change in designated beneficiary sufficient to make it a testamentary substitute. Thus, 50% of it had to be included in the estate against which the spouse could elect and be offset against her elective share.

By decision and order, dated July 7, 2000, the Appellate Division, Fourth Department, affirmed an Order of the Surrogate's Court, Livingston County (Alonzo, S.), that held that the decedent's retirement plans under TIAA/CREFF were not testamentary substitutes for purposes of calculating the elective share of the decedent's surviving spouse, holding that the conversion of the annuity contracts to the three payout contracts merely provided the method of payment for the plan beneficiaries during the decedent's lifetime, and not a new retirement plan. Inasmuch as the beneficiaries of the plan remained unchanged from the plan's inception on November 3, 1964, to the decedent's date of death, the plan did not qualify as a testamentary substitute pursuant to EPTL 5-1.1-A(b)(1)(i). *In re Estate of Alent*, ___ A.D.2d ___, 709 N.Y.S.2d 902 (4th Dep't 2000).

33 EPTL 5-1.1-A(e)(4). *See In re Bowans*, N.Y.L.J., Apr. 1, 1999, p. 27, col. 4 (Sur. Ct., Bronx Co.) (involving a change of beneficiary and a *pendente lite* order during a matrimonial action).

34 EPTL 5-1.1-A(b)(1)(H).

tects property subject to a testamentary general power of appointment from characterization as a testamentary substitute.

3. Testamentary Substitutes Carried Over from EPTL 5-1.1

The testamentary substitutes carried over from EPTL 5-1.1 are

1. gifts *causa mortis*,[35]
2. Totten trust bank savings accounts,[36]
3. joint bank accounts[37] and
4. property held in joint tenancy with right of survivorship, or as tenants by the entirety.[38]

Unlike EPTL 5-1.1(b)(1)(D), however, clause (E), at subdivision (ii), also includes property held by a decedent and payable on death to a person other than the decedent. Accordingly, United States Savings bonds, whether jointly owned or owned by the decedent and payable on death to another, can constitute a testamentary substitute.[39]

As under prior law, a decedent's interest in jointly owned property constitutes a testamentary substitute under clause (D) or (E) to the extent she or he furnished the consideration for such property.[40] The spouse has the burden of establishing the proportion of the decedent's contribution. Unlike prior law, however, where the spouse is the other joint owner, it will be conclusively presumed that the proportion of the decedent's contribution is only one-half.[41] As a result, the spouse is deemed to own one-half in her or his own right and also has the right to elect to take one-third of the other (the decedent's) half interest. Note, however, *In re Estate of Solomon*,[42] in which it was held that a residence purchased by the decedent and his wife prior to September 1, 1966, as tenants by the entirety did not constitute a testamentary substitute under clause (E) since it was not a "disposition of property . . . made after August 31, 1966." Similarly in *In*

35 EPTL 5-1.1-A(b)(1)(A). *See* EPTL 5-1.1(b)(1)(A).

36 EPTL 5-1.1-A(b)(1)(C). *See* EPTL 5-1.1(b)(1)(C).

37 EPTL 5-1.1-A(b)(1)(D). *See* EPTL 5-1.1(b)(1)(C).

38 EPTL 5-1.1-A(h)(1)(E)(i). *See* EPTL 5-1.1(b)(1)(D).

39 *See* II.D.1, "Testamentary Substitutes, Generally," *supra*.

40 EPTL 5-1.1-A(b)(2).

41 *Cf.* EPTL 5-1.1(b)(3).

42 163 Misc. 2d 805, 622 N.Y.S.2d 412 (Sur. Ct., Nassau Co. 1994).

re Estate of Cahill,[43] where a contract to sell the property held as tenants by the entirety was entered into on March 28, 1966 with the closing on November 17, 1966, it was held that it was not a testamentary substitute as equitable title passes on contract, and thus, the house had been "disposed of" before August 31, 1966.

E. Other Changes Incorporated in EPTL 5-1.1-A

As under prior law, third-party transfers of property that may be subject to the right of election are protected. A corporation or other person may pay or transfer funds or property to the person otherwise entitled to it, unless the corporation or other person has been served with an order of the surrogate's court or other court having jurisdiction enjoining such transfer.[44] Section 5-1.1-A(b)(4) of the EPTL specifically provides that any corporation or other person paying or transferring property described in clause (G) (regarding retirement benefits) is held harmless and free from liability for so doing.

As under prior law, unless the decedent has provided otherwise, the recipients of property constituting testamentary substitutes are required to contribute ratably to the spouse's share.[45] Distributees of intestate property come within the scope of this provision.[46] The recipients making such ratable contributions can do so in cash, in the specific property received from the decedent, or partly in each.

F. Time for Election

The election must be made within six months of the issuance of letters testamentary or letters of administration, but in no event later than two years after the date of decedent's death.[47] If the spouse defaults in making a timely election, the surrogate's court may relieve the spouse from such default and authorize the election for a period of up to 12 months from issuance of letters, provided there has been no decree settling the account of the personal representative.[48]

43 175 Misc. 2d 702, 669 N.Y.S.2d 498 (Sur. Ct., Nassau Co. 1998).

44 EPTL 5-1.1-A(b)(4).

45 EPTL 5-1.1-A(c)(2). *See* EPTL 5-1.1(d)(3).

46 EPTL 5-1.1-A(c)(2).

47 EPTL 5-1.1-A(d)(1). Under EPTL 5-1.1(e), there was no cutoff at two years. Therefore, if letters did not issue for years, the spouse still had six months thereafter to exercise her or his right of election.

48 EPTL 5-1.1-A(d)(2).

G. Waiver of the Right of Election

1. General Rule

The rules governing a spouse's waiver of her or his right of election under EPTL 5-1.1-A(e) basically are the same as under EPTL 5-1.1(f). The waiver may be made at any time before or after the marriage of the parties. The waiver may be a general waiver or may be limited to a particular will or a particular testamentary substitute. An effective waiver must be in writing, subscribed by the waiving party and acknowledged before a notary.

A waiver may be a conditional waiver, and it may be unilateral. There is no requirement for consideration or that the waiver be fair or reasonable or not unconscionable.

2. Mechanics of Waiver

a. Statutory Requirements

The mechanics of waiving the right of election have not changed under EPTL 5-1.1-A. The spouse of a decedent, prior to the decedent's death, may waive or release a right of election against a particular or any last will, or against a testamentary substitute made by the decedent.[49] If the decedent's spouse waives all rights in the estate of the decedent, he or she waives or releases a right of election against the decedent's last will or other testamentary provisions.[50]

A waiver must be in writing, signed by the maker, and acknowledged[51] or proved in the manner required by New York State law for the recording of a conveyance of real property.[52] A waiver is effective, according to its terms, whether executed before or after the spouse's marriage.[53] The waiver may have been executed before, on or after September 1, 1966. It can be unilateral (i.e., executed only by the maker) or bilateral (i.e., executed by both spouses). The waiver can be with or without consideration and can be absolute or conditional. An antenuptial agreement which had

49 EPTL 5-1.1-A(e); *see* EPTL 5-1.1(f)(1).

50 EPTL 5-1.1-A(e); *see* EPTL 5-1.1(f)(1).

51 *In re Estate of Saperstein*, 254 A.D.2d 88, 678 N.Y.S.2d 618 (1st Dep't 1998). The Appellate Division affirmed a finding of waiver, even though the waiver was not acknowledged, as it could be proven after death, pursuant to N.Y. Real Property Law § 304, by the attorney who was the subscribing witness.

52 EPTL 5-1.1-A(2).

53 EPTL 5-1.1-A(3).

not been acknowledged at the time of death may *not* thereafter be acknowledged by the surviving spouse or other witnesses since a right of election attaches and should be determined at death.[54]

A waiver that is not understood by the waiving party is ineffective. For a waiver of election to be valid, the language must clearly indicate that the election right in particular is being waived.[55] Thus, a general release of less than all rights in the decedent's estate does not constitute waiver of the right of election.[56] Moreover, a spouse can waive the elective share without waiving other rights—for example, other rights under the will, intestate rights or the right to claim exempt property.[57]

b. Waiver by Marital Agreement

A right of election may be waived by a pre- or post-nuptial agreement that is procedurally executed and acknowledged in accordance with EPTL 5-1.1-A(e)(2) or 5-1.1(f)(2).[58] In *In re Estate of Greiff*,[59] the N.Y. Court of Appeals held that if a party challenging the validity of a prenuptial agreement can show "that the pre-marital relationship between the contracting individuals manifested 'probable' undue and unfair advantage," the burden shifts to the proponent of the agreement to show that it was free from "fraud, deception or undue influence."

In re Buzen,[60] analyzing *Greiff*, found that the respondent could not sustain her threshold burden of showing an inequality leading to probable undue influence and unfair advantage. At issue was the validity of a reciprocal prenuptial agreement executed by the decedent and the respondent, when they were 84 and 73 years old, respectively, which contained express mutual waivers of the right of election. One attorney had drafted the agreement and advised the couple, and they had each seen the other's list of assets.

54 *In re Henken*, 139 Misc. 2d 12, 526 N.Y.S.2d 334 (Sur. Ct., Westchester Co. 1988), *aff'd*, 150 A.D.2d 447, 540 N.Y.S.2d 886 (2d Dep't 1989).

55 *In re Le Roy*, 118 Misc. 2d 382, 461 N.Y.S.2d 161 (Sur. Ct., Onondaga Co. 1983).

56 9A Rohan, *N.Y. Civ. Prac.* ¶ 5-1.1(34)(i), p. 5-252.28 (hereinafter "Rohan").

57 *In re Schwartz*, 94 Misc. 2d 1024, 405 N.Y.S.2d 920 (Sur. Ct., Queens Co. 1978), *aff'd*, 68 A.D.2d. 891, 413 N.Y.S.2d 1023 (2d Dep't 1979); *In re Nelson*, 51 Misc. 2d 375, 273 N.Y.S.2d 333 (Sur. Ct., Erie Co. 1966).

58 *In re Sunshine*, 51 A.D.2d 326, 381 N.Y.S.2d 260 (1st Dep't), *aff'd*, 40 N.Y.2d 875, 389 N.Y.S.2d 344, 357 N.E.2d 999 (1976); *In re Steinfeld*, N.Y.L.J., Aug. 1, 1980, p. 13, col. 3 (Sur. Ct., N.Y. Co.).

59 92 N.Y.2d 341, 680 N.Y.S.2d 894 (1998), *rev'g* 242 A.D.2d 723, 663 N.Y.S.2d 45 (2d Dep't 1997), *rev'g* N.Y.L.J., July 18, 1996 (Sur. Ct., Kings Co.).

60 N.Y.L.J., Apr. 2, 1999, p. 25, col. 1 (Sur. Ct., Nassau Co.).

In discussing the Court of Appeals decision, the *Buzen* court stated that *Greiff* stands for the proposition that the spouse who contests an antenuptial agreement has a threshold burden of proving, by a fair preponderance of the credible evidence, a fact-based particularized inequality between the parties, which demonstrates probable undue influence and unfair advantage. If this mutual burden is sustained, then the burden of going forward shifts to the proponent of the antenuptial agreement, to prove the agreement was free from fraud, deception or undue influence.

The court stated that it did not read *Greiff* as having a revolutionary impact on the antenuptial agreements. The sole novelty to *Greiff* appears to be its holding that a couple who are engaged to be married stand in a fiduciary relationship. The challenger to the agreement still bears the mutual burden of proving a fact-based particularized inequality between the parties that manifests probable undue influence and unfair advantage. Some of the relevant factors in this regard are the following:

– detrimental reliance on the part of the poorer spouse

– relative financial positions of the parties

– the formality of the execution ceremony itself

– full disclosure of assets as a prerequisite to a knowing waiver

– the physical or mental condition of the objecting spouse at the time of execution

– superior knowledge/ability and overmastering influence on the part of the proponent of the agreement

– the presence of separate, independent counsel for each party

– the circumstances in which the agreement was proposed and whether it is fair and reasonable on its face

– the provision for the poorer spouse in the will[61]

The *Buzen* court also stated that while the absence of separate independent counsel is a significant factor, it is not dispositive, as *Greiff* did not override *In re Sunshine*.[62]

61 *Buzen*, N.Y.L.J., Apr. 2, 1999, p. 25, col. 1 (citations omitted).

62 40 N.Y.2d 875, 389 N.Y.S.2d 344 (1976).

In *Greiff*, the Court of Appeals reversed the Second Department, which had dismissed the petition challenging the prenuptial agreement, and remitted the matter to the Appellate Division to determine "whether, based on all of the relevant evidence and standards, the nature of the relationship between the couple at the time they executed their prenuptial agreements rose to the level to shift the burden to the proponents of the agreements to prove freedom from fraud deception or undue influence."[63] The Appellate Division ruled that the petition be denied and the proceeding dismissed, finding that

> [t]he petitioner did not demonstrate by a preponderance of the evidence, that the premarital relationship between her and the [decedent] manifested "probable undue and unfair advantage.". . . Under these circumstances, it was the petitioner's burden to establish that her execution of a prenuptial agreement whereby she waived her right to an elective share was procured through the decedent's fraud or overreaching. The record does not support the petitioner's claim that she was not advised of the effect of the prenuptial agreement, failed to comprehend it, or entered into it unwillingly.[64]

Fraud or overreaching occurs if the decedent misrepresented his or her assets or the nature of his or her holdings or otherwise concealed information at the time of entering the contract with the spouse. Regardless of any increase in the decedent's assets after the date of the agreement, the contract will be held valid, unless at the time of its execution, the provision made for the surviving spouse was disproportionate to the decedent's means.[65] The fact that, at the time of entering the agreement, the surviving spouse was not fluent in English, was not well educated, did not have a lawyer, and did not read or receive a copy of the document does not establish fraud or overreaching on the decedent's part.[66] If the spouse was not prevented from reading the agreement and could have understood its contents, the agreement is valid, notwithstanding that the surviving spouse chose not to read it.[67] The burden of proof is on the party alleging fraud.[68]

63 *Estate of Greiff*, 92 N.Y.2d at 347.

64 *In re Estate of Greiff*, 262 A.D.2d 320, 321, 691 N.Y.S.2d 541 (2d Dep't 1999) (citations omitted).

65 *In re Phillips*, 293 N.Y. 483, 58 N.E.2d 504 (1944); *In re Sunshine*, 51 A.D.2d 326, 328, 381 N.Y.S.2d 260 (1st Dep't), *aff'd*, 40 N.Y.2d 875, 389 N.Y.S.2d 344, 357 N.E.2d 999 (1976).

66 *Sunshine*, 51 A.D.2d at 328; *In re Steinfeld*, N.Y.L.J., Aug. 1, 1980, p. 13, col. 3 (Sur. Ct., N.Y. Co.).

67 *Sunshine*, 51 A.D.2d at 328; *In re Steinfeld*, N.Y.L.J., Aug. 1, 1980, p. 13, col. 3 (Sur. Ct., N.Y. Co.).

68 *In re Patterson*, N.Y.L.J., Sept. 11, 1981, p. 6, col. 4 (Sur. Ct., N.Y. Co.).

c. Waiver by Separation Agreement

If there is a valid waiver of the election right embodied in a separation agreement between the decedent and the surviving spouse, and the parties are separated at the time of executing the agreement and remain so until the decedent's death, the agreement and the waiver embodied therein are effective.[69] A failure to separate, or a subsequent reconciliation between the parties, will wholly revoke the separation agreement and cancel unexecuted portions thereof.[70] This holds true even if the parties have inserted a severability clause in the separation agreement.[71]

d. Conflicts of Interest and Ethical Considerations: When Is There a Need for Independent Counsel?

The question of whether a spouse should waive his or her right of election generally arises in the context of estate planning for the married couple. The question of whether such joint representation constitutes a conflict of interest raises significant ethical considerations. In that regard, note that Code of Professional Responsibility, Ethical Consideration 5-15 ("EC") establishes the rule that all conflict doubts should be resolved by refusing multiple representation. The Code does, however, allow for multiple representation.

There are two types of representation. One type has been called "show and tell," where the spouses agree beforehand that every confidence will be shared and that neither spouse may proceed in secret if it may affect the other. The other type is known as "priestly" representation, where everything is separate and secret—the lawyer will represent each spouse separately and keep every confidence, and he or she may take action on behalf of one spouse to the detriment of the other. The key to any form of multiple representation is disclosure and prior agreement.[72] It is preferable that the consent be in writing.

Since, after September 1, 1994, trusts do not qualify for satisfaction of the elective share, the parties must be so informed. A waiver of the right of election can render a trust effective. Although such waiver, for EPTL purposes, need not meet the test, N.Y. Domestic Relations Law section 236(B)(3) (hereinafter "DRL") provides that the terms of a prenuptial agreement must be fair and reasonable at the time of its making and not

69 *In re Wilson*, 50 N.Y.2d 59, 427 N.Y.S.2d 977, 405 N.E.2d 220 (1980).

70 *Id.*; *In re Whiteford*, 35 A.D.2d 751, 314 N.Y.S.2d 811 (3d Dep't 1970).

71 *Wilson*, 50 N.Y.2d 59.

72 *See* Code of Professional Responsibility Disciplinary Rule 5-105 ("DR").

unconscionable when later enforced. Full disclosure and separate attorneys are not required under the DRL or the EPTL.[73]

After a decedent's death, even if no attorney-client relationship exists, the spouse is entitled to reasonably believe that the attorney is looking out for his or her interests.[74] As to malpractice actions, the law of New York still refuses to extend attorney malpractice liability to a harmed party who was not the client to whom the duty of proper performance was directly owed, with the exception in New York for third parties reasonably expected to rely on an accountant's proper professional performance. In *Viscardi v. Lerner*,[75] the Second Department granted summary judgment against beneficiaries who lost their inheritance based on the attorney's malpractice in drawing the testator's will contrary to the testator's written instructions to the attorney. The testator had instructed that the spouse was to receive an elective share outright, whereas the will was negligently drafted to provide for the spouse to receive an intestate share. That intestate share was the entire estate, so that the residuary beneficiaries were left with no inheritance. The court considered and rejected the cases in Illinois, Wisconsin, California and Connecticut where the privity concept would not have barred the suit. The court also recognized the inroads that have been made in the privity arena as to other professionals (accountants), but declined to whittle down the privity requirement in the area of legal malpractice.

In *Kramer v. Belfi*,[76] the Second Department granted summary judgment against beneficiaries who sought damages against the attorney for negligently drafting the will and for advising the executor in connection with the administration of the estate. In neither *Kramer* nor *Viscardi* was the attorney retained by the beneficiaries, and the court reasoned that the attorney owed the beneficiaries no duty, absent fraud, collusion or malice.

73 In *Levine v. Levine*, 56 N.Y.2d 42, 451 N.Y.S.2d 26, 436 N.E.2d 476 (1982), New York's highest court held that the fact that both parties to a separation agreement were represented by a lawyer who was a relative of the husband by marriage was not by itself sufficient to establish coercion or overreaching, thereby requiring rescission of the agreement which the court had determined was fair.

74 *In re Ziegler's Estate*, 265 A.D. 820, 37 N.Y.S.2d 420 (2d Dep't 1942), *aff'd*, 290 N.Y. 916, 50 N.E.2d 303 (1943).

75 125 A.D.2d 662, 510 N.Y.S.2d 183 (2d Dep't 1986).

76 106 A.D.2d 615, 482 N.Y.S.2d 898 (2d Dep't 1984); *but see Estate of Spivey v. Pulley*, 138 A.D.2d 563, 526 N.Y.S.2d 145 (2d Dep't 1988) (court applied privity concept where a witness to a will was required to testify as a subscribing witness and did not receive a residuary bequest under the will). In *Rossi v. Boehner*, 116 A.D.2d 636, 498 N.Y.S.2d 318 (2d Dep't 1986), the Appellate Division held that, absent privity of contract, the attorney's failure to carry out the client's instructions to prepare a will naming a new beneficiary does not render the attorney liable to the beneficiary. *See Mali v. De Forest & Duer*, 160 A.D.2d 297, 553 N.Y.S.2d 391 (1st Dep't 1990); *Victor v. Goldman*, 74 Misc. 2d 685, 344 N.Y.S.2d 672 (Sup. Ct., Rockland Co. 1973), *aff'd*, 43 A.D.2d 1021, 351 N.Y.S.2d 956 (2d Dep't 1974); *Maneri v. Amodeo*, 38 Misc. 2d 190, 238 N.Y.S.2d 302 (Sup. Ct., Dutchess Co. 1963).

Despite the current state of New York law, a wise practitioner should proceed as though the privity defense is unavailable.

H. Location of Decedent's Assets; Inclusion of Foreign Realty

For right of election purposes, the decedent's estate shall include all property of the decedent wherever situated.[77] Thus, the surviving spouse has a right of election against real and other property of the decedent located outside New York State. *In re Stanley*[78] was a case in which the foreign real property was held to be included in the elective share base, even though, at the time of the decedent's death (1982), foreign real property was excluded from this base. The court based its ruling on the testator's intent not to restrict his wife to the smallest benefits and the well-settled rule of construction, which favors giving the spouse a greater share of the estate than the plain meaning of the will might otherwise indicate.

I. Proceedings to Determine Validity or Effect of Election

N.Y. Surrogate's Court Procedure Act 1421 (hereinafter "SCPA") sets forth the procedure to be followed to obtain a judicial determination of the validity or effect of a surviving spouse's election. The party seeking such determination must present to the court in which the decedent's will was probated or from which letters of administration issued, a petition showing his or her interest, the names and addresses of other interested parties, and the question about which he or she requests judicial determination.

Interested parties include anyone with an interest in the transactions described in EPTL 5-1.1-A or 5-1.1. Naming and serving the trustee of an express trust may be sufficient, and the petitioner may not have to name the beneficiaries thereof.[79] If the court entertains the application, process must issue to all such named interested parties to show cause why the judicial determination should not be made. On the return of process, evidence will be submitted and the court will make a decree.[80] If the fiduciary of the decedent has not obtained possession of a fund or property

77 EPTL 5-1.1-A(c)(7), 5-1.1(d)(8). This latter section was amended by 1986 N.Y. Laws ch. 246, eff. Sept. 29, 1986 (applying to "the estates, and to instruments making dispositions or appointments thereof, of persons living on its effective date or born subsequent thereto, without regard to the date of execution of any such instrument; except that this act shall not impair or defeat any rights which have accrued under dispositions or appointments in effect prior to its effective date").

78 N.Y.L.J., Nov. 24, 1993, p. 23, col. 1 (Sur. Ct., N.Y. Co.).

79 SCPA 1421(4).

80 SCPA 1421(2).

included in the net estate under EPTL 5-1.1-A or 5-1.1 (e.g., the property comprising a testamentary substitute), the court will fix the liability of anyone having an interest in such property or having possession thereof, whether as trustee or otherwise.[81] A judicial determination of the validity or effect of the spouse's election can also be made in a proceeding for the judicial settlement of the accounts of a fiduciary.[82]

A spouse who seeks a right of election has *no* right to file a *lis pendens* against real property that will pass to his or her residuary estate under N.Y. Civil Practice Law and Rules 6501.[83]

III. FEDERALLY CONFERRED SPOUSAL RIGHTS TO PENSION PLANS

The Retirement Equity Act of 1984[84] ("REA") provides spouses with certain rights in certain qualified plans. Such qualified plans must provide spouses of plan participants with benefits in the form of a qualified preretirement survivor annuity ("QPSA") or a qualified joint and survivor annuity ("QJSA").[85] The QJSA and QPSA requirements apply to all tax-exempt retirement plans except individual retirement plans ("IRAs") or defined contribution plans which have minimum funding requirements, other than money purchase plans or target benefit plans. Also, with respect to otherwise covered defined contribution plans, if the plan participant has not elected a life annuity as the form of payment and, upon the death of the participant, the surviving spouse is entitled to a lump sum, the QJSA and QJPA requirements do not have to be met.[86] As indicated, these rules do not apply to an IRA, but a rollover to an IRA from a defined benefit plan is impossible without spousal consent.

The federal law provides basic rules for participant elections and spousal consent. Thus, qualified plans must allow a participant, during the applicable election period, to elect (1) to waive either the QPSA or the QJSA form of benefits and (2) to change the designated beneficiary through the substitution or addition of a new beneficiary.[87] Unless an election adopts

81 SCPA 1421(5).

82 SCPA 1421(3).

83 *Cassia v. Cassia*, 125 Misc. 2d 606, 480 N.Y.S.2d 84 (Sup. Ct., Westchester Co. 1984).

84 Pub. L. No. 98-397, 98 Stat. 1426.

85 *See generally* Robert S. Baldwin, Jr., *ERISA vs. Pre-nuptial Agreements*, NYSBA Tr. & Est. L. Sec. Newsl., vol. 27, no. 3, pp. 9–11 (Fall 1994).

86 I.R.C. § 401(a)(11)(B).

87 *See generally* M. Robyn Cotrona, *A Crack in the Antenuptial Shield: Antenuptial Agreements and Survivor Benefits from Qualified Retirement Plans*, N.Y.S. B.J., pp. 40–43, 58 (Feb. 1995).

the requisite QPSA or QJSA form of benefits, it will be effective only if the participant's spouse expressly consents to it by executing, before a notary public or a plan representative, a written acknowledgment of the participant's election and the effect of said election. Unless a qualified domestic relations order provides otherwise, spousal consent is not a requirement when the participant has secured an order stating that he or she is legally separated or has been abandoned according to local law.

The provisions of section 1144(a) of the Employee Retirement Income Security Act[88] (hereinafter "ERISA") state that federal law supersedes all state laws that relate to an "ERISA plan." As a result, courts have, with one exception, held that neither state laws nor any antenuptial agreements executed in accordance with state law supersede the provisions of ERISA.[89] Accordingly, the safest course of action, when the participant and spouse-to-be are not yet married, is not to rely on an antenuptial agreement as a valid consent to the waiver of survivor benefits. Spousal consent that conforms to both the REA's requirements and the qualified plan's governing instrument should be obtained after marriage, and the antenuptial agreement should so require.

88 29 U.S.C. §§ 1001–1168.

89 *See In re Estate of Bloom-Kartiganer*, 194 A.D.2d 959, 599 N.Y.S.2d 188 (3d Dep't 1993) (reversing the Surrogate of Ulster County, holding that a retirement savings plan's provision that designation other than spouse required spousal consent did not apply to an unmarried person, and her later marriage did not nullify the then-existing designation of a person other than her spouse); *In re Estate of Hopkins*, 214 Ill. App. 3d 427, 158 Ill. Dec. 436, 574 N.E.2d 230, 234 (2d Dist.), *appeal denied*, 141 Ill. 2d 542, 162 Ill. Dec. 489, 580 N.E.2d 115 (1991) (rejecting the Treasury regulation and upholding the surviving spouse's consent in an antenuptial agreement to the waiver of survivor benefits even though the purported spousal consent did not comply with requirements for a valid spousal consent to the waiver of those benefits); *see also Pedro Enters. Inc. v. Perdue*, 998 F.2d 491 (7th Cir. 1993) (holding that, under ERISA, antenuptial agreements are not effective to waive spouses' rights to survivor benefits); *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir.), *cert. denied*, 508 U.S. 912 (1992) (court looked to the terms of the antenuptial agreement itself rather than to the Treasury regulation in holding that the purported spousal consent, as provided in the antenuptial agreement, was ineffective because it did not comply with REA's prescriptions); *Callahan v. Hutsell, Callahan & Buchino, P.S.C.*, 813 F. Supp. 541, 543 (W.D. Ky. 1992), *vacated without opinion*, 14 F.3d 600 (6th Cir. 1993) (finding any premarital waiver to be ineffective; the district court refused to order specific performance of the spouse's promise to execute a waiver after marriage on the basis that the consent documents were never given to the spouse).

V. DISQUALIFICATION AS A SURVIVING SPOUSE

A. General Considerations

Section 5-1.2 of the EPTL sets forth the conditions under which a person is disqualified as a surviving spouse and thereby barred from any election right under EPTL 5-1.1-A and 5-1.1. A person disqualified under EPTL 5-1.2 will also be barred from intestate rights under EPTL 4-1.1 and from family exemption rights under EPTL 5-3.1. Moreover, under EPTL 5-1.3, where a testator left a will executed before September 1, 1930, the disqualified spouse cannot claim any intestate share in the decedent's assets by virtue of marriage to the testator after the date of will execution. Finally, if damages are owed to the estate due to the decedent's death by wrongful act, the disqualified spouse is barred from receiving such damages as a distributee under EPTL 5-4.4. The burden of proving disqualification of the surviving spouse is on the person asserting it.[226]

B. Divorce, Annulment or Dissolution under Decree Valid in New York State

A husband or wife is disqualified as a surviving spouse if

> [a] final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, was in effect when the deceased spouse died.[227]

It does not matter that the decree was obtained outside New York State. If the decree is recognized as valid in New York, neither spouse can claim an elective share.[228]

Termination of marriage is recognized as valid in New York State if the termination was valid wherever it was obtained.[229] A New York court usually will give full faith and credit to a decree obtained in another state if it was obtained bilaterally and the other state had jurisdiction to issue such

226 *In re Maiden*, 284 N.Y. 429, 31 N.E.2d 889 (1940); *In re Carr*, 134 N.Y.S.2d 513 (Sur. Ct., Chautauqua Co. 1953), *aff'd*, 284 A.D. 930, 134 N.Y.S.2d 280 (4th Dep't 1954); *In re Chandler*, 175 Misc. 1029, 26 N.Y.S.2d 280 (Sur. Ct., Kings Co. 1941); 38 N.Y. Jur. 2d, *Decedents' Estates* § 214, p. 475 (1984).

227 EPTL 5-1.2(a)(1).

228 *In re Locke*, 21 A.D.2d 248, 250 N.Y.S.2d 181 (3d Dep't 1964).

229 Rohan, ¶ 5-1.2(3), p. 5-252.259.

decree.[230] Moreover, a decree obtained in a foreign country will be recognized as valid in New York State if the foreign court, under its own law, had jurisdiction to issue a decree and if one party physically appeared before the court and the other party appeared by lawyer.[231]

The surrogate's court may determine the validity of any decree terminating a marriage.[232] A divorced spouse has the right to challenge the validity of the decree, and such spouse must be cited in a probate proceeding.[233] A decree entered after the decedent's death does not affect the election rights of the surviving spouse, since they became fixed upon the decedent's death.[234]

C. Void Marriages

A husband or wife is disqualified as a surviving spouse if the marriage was void as incestuous under Domestic Relations Law section 5 or bigamous under DRL section 6.[235] The legal effect of a void marriage is as if the transaction never took place; thus, no court declaration is required to dissolve such marriage.[236] Neither party ever acquires rights in the property of the other.[237]

The DRL prohibitions against incestuous or bigamous marriages reflect, for the most part, a public policy in New York State that cannot be avoided by contracting a marriage out of state.[238] New York will, however, recognize as valid marriages contracted out of state between an uncle and niece or between an aunt and nephew because such marriages, while void under DRL section 5, are not repugnant to the public policy of New York State.[239]

230 *Milbank v. Milbank*, 29 N.Y.2d 844, 262 N.Y.S.2d 856, 277 N.E.2d 788 (1971); Rohan, ¶ 5-1.2(3), p. 5-252.259.

231 *Rosensteil v. Rosensteil*, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 209 N.E.2d 709 (1965), *cert. denied*, 384 U.S. 971 (1966).

232 EPTL 5-1.2(a)(1).

233 *In re Bock*, 70 Misc. 2d 470, 333 N.Y.S.2d 801 (Sur. Ct., Erie Co. 1972).

234 *Bennett v. Thomas*, 38 A.D.2d 682, 327 N.Y.S.2d 139 (4th Dep't 1971); *In re Wenger*, 119 Misc. 2d 758, 464 N.Y.S.2d 341 (Sup. Ct., N.Y. Co. 1983).

235 EPTL 5-1.2(a)(2).

236 Rohan, ¶ 5-1.2(11)(a), p. 5-252.282.

237 *Id.*

238 *In re May*, 305 N.Y. 486, 114 N.E.2d 4 (1953); *Cunningham v. Cunningham*, 206 N.Y. 341 (1912); *In re Bronislawa*, 90 Misc. 2d 183, 393 N.Y.S.2d 534 (Fam. Ct., Kings Co. 1977).

239 *May*, 305 N.Y. 486. *Campione v. Campione*, 201 Misc. 590, 107 N.Y.S.2d 170 (Sup. Ct., Queens Co. 1951).

D. Divorce, Annulment or Dissolution under Decree Not Valid in New York State

If the husband or wife of a decedent has obtained, outside New York State, a decree of divorce from the decedent, of annulment of the marriage or a decree dissolving the marriage because of absence, but the decree is not recognized as valid in New York, the spouse procuring such decree is nevertheless disqualified.[240] Thus, while neither party has a right of election if a foreign decree terminating the marriage is recognized as valid in New York State, when the decree is not so recognized, only the person who obtained it will be barred from an election right.[241] If, however, the party who did not seek the decree nevertheless takes advantage of it—for example, by remarrying—that party may also be barred from a right of election.[242] Furthermore, if cooperation of the nonseeking party was necessary to obtain the invalid decree, the cooperative, nonseeking party will be disqualified.[243] A post-death annulment does not bar a surviving spouse's right of election.[244]

E. Valid Judgment or Decree of Separation Against Spouse

A person is disqualified as a surviving spouse if a final decree or judgment of separation, recognized as valid in New York State, was rendered against that spouse and was in effect when the deceased spouse died.[245] Under this provision, if a separation judgment or decree was obtained, it is only the person against whom it was rendered who is barred from a right of election. The party obtaining the judgment or decree retains the right to elect.[246]

A reconciliation of the parties accompanied by an intent to abandon a separation agreement voids the agreement. Such conduct, however, would have no effect on a judgment or decree of separation, termination of

240 EPTL 5-1.2(a)(3).

241 *See In re Garces*, 134 Misc. 2d 168, 510 N.Y.S.2d 448 (Sur. Ct., Nassau Co. 1986).

242 *In re Bingham*, 178 Misc. 801, 36 N.Y.S.2d 584 (Sur. Ct., Kings Co. 1942), *aff'd*, 265 A.D. 463, 39 N.Y.S.2d 756 (2d Dep't), *motion for leave to appeal denied*, 266 A.D. 669, 41 N.Y.S.2d 180 (1943).

243 *In re Mane*, 40 Misc. 2d 805, 244 N.Y.S.2d 183 (Sur. Ct., N.Y. Co. 1963).

244 *Parente v. Wenger*, 119 Misc. 2d 758, 464 N.Y.S.2d 341 (Sup. Ct., N.Y. Co. 1983).

245 EPTL 5-1.2(a)(4).

246 *In re Smith*, 243 A.D. 348, 276 N.Y.S. 646 (4th Dep't 1935).

which requires revocation by the issuing court or overturn on appeal.[247] Thus, the spouse against whom a separation agreement or decree is obtained will remain disqualified until the judgment or decree is properly set aside, regardless of any intervening reconciliations.[248]

A judgment or decree of separation that is not in effect on the date of death of the surviving spouse will not operate to disqualify the spouse against whom it was rendered.[249]

F. Abandonment of the Deceased Spouse

A person is disqualified as a surviving spouse if such person abandoned the deceased spouse and such abandonment continued until the time of the decedent's death.[250] The party alleging abandonment must prove all the necessary elements thereof.[251] The elements of abandonment are those that would support a judgment of separation.[252] It must be shown that the spouses lived apart and that the departing spouse left without justification, without intent to return and without the consent of the other spouse.[253] Consent of the decedent to the spouse's departure, however reluctantly given, is a defense to a charge of abandonment.[254] Moreover, there is no abandonment where the departing spouse does so involuntarily, at the request of the other spouse.[255]

Open and notorious unfaithfulness does not by itself constitute abandonment.[256] Cruelty and inhumanity alone are not equivalent to abandon-

247 DRL § 202; *In re Granchelli*, 90 Misc. 2d 103, 393 N.Y.S.2d 894 (Sur. Ct., Monroe Co. 1977).

248 DRL § 202; *In re Granchelli*, 90 Misc. 2d 103.

249 *In re Oppenheim*, 178 Misc. 1035, 37 N.Y.S.2d 40 (Sur. Ct., N.Y. Co. 1942), *aff'd*, 266 A.D. 652, 41 N.Y.S.2d 197 (1st Dep't 1943).

250 EPTL 5-1.2(a)(5).

251 *In re Salerno*, N.Y.L.J., Nov. 9, 1977, p. 16, col. 3 (Sur. Ct., Richmond Co.).

252 *In re Lapenna*, 16 A.D.2d 655, 226 N.Y.S.2d 497 (2d Dep't), *appeal dismissed*, 12 N.Y.2d 671, 233 N.Y.S.2d 463, 185 N.E.2d 903 (1962).

253 *Schine v. Schine*, 31 N.Y.2d 113, 335 N.Y.S.2d 58, 286 N.E.2d 449 (1972); *In re Maiden*, 284 N.Y. 429, 31 N.E.2d 889 (1940); *In re Prince*, 36 A.D.2d 946, 321 N.Y.S.2d 798 (1st Dep't 1971), *aff'd*, 30 N.Y.2d 512, 330 N.Y.S.2d 61, 280 N.E.2d 888 (1972); *Lapenna*, 16 A.D.2d 655; *In re Amendola*, N.Y.L.J., Dec. 2, 1981, p. 12, col. 3 (Sur. Ct., Bronx Co.).

254 *In re Williams*, N.Y.L.J., Dec. 13, 1977, p. 11, col. 2 (Sur. Ct., Bronx Co.). *In re Primm*, N.Y.L.J., Feb. 17, 1988, p. 15, col. 2 (Sur. Ct., Bronx Co.); *In re Ruff*, 91 A.D.2d 814, 458 N.Y.S.2d 38 (3d Dep't 1982).

255 *In re Sadowski*, 246 A.D. 490, 284 N.Y.S. 521 (4th Dep't 1935).

256 *In re Holman*, 46 Misc. 2d 809, 260 N.Y.S.2d 885 (Sur. Ct., Erie Co. 1965); *In re Archibald*, 19 Misc. 2d 705, 191 N.Y.S.2d 1021 (Sur. Ct., N.Y. Co. 1959).

ment, nor is conduct endangering the life and health of a spouse *per se* equivalent.[257]

The determination of abandonment is a factual one.[258] Where the decedent's assault of the spouse prompts the spouse to leave, the departure has been held justified and not an abandonment.[259] Similarly, where the spouse becomes mentally disabled and thereafter, with the decedent's knowledge and consent, is confined to an institution, there is no departure without consent, and hence no abandonment.[260]

Where the departing spouse enters a valid or invalid second marriage with a third party and thereafter openly cohabitates with that third party, the New York State courts have generally held the second marriage to be an act of abandonment.[261]

A reconciliation of the parties following abandonment reestablishes the departing party as a qualified surviving spouse and preserves his or her right of election.[262]

G. Failure to Support

A husband or wife of a deceased spouse will not qualify as a surviving spouse if such husband or wife had

> the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means

257 *In re Green*, 155 Misc. 641, 280 N.Y.S.2d 692 (Sur. Ct., N.Y. Co.), *aff'd*, 246 A.D. 583, 284 N.Y.S. 370 (1st Dep't 1935).

258 *In re Riefberg*, 58 N.Y.2d 134, 138, 459 N.Y.S.2d 739, 446 N.E.2d 424 (1983).

259 *In re Salerno*, N.Y.L.J., Nov. 9, 1977, p. 16, col. 3 (Sur. Ct., Richmond Co.).

260 *Riefberg*, 58 N.Y.2d 134; *In re Ruff*, 91 A.D.2d 814, 458 N.Y.S.2d 38 (3d Dep't 1982).

261 *In re Loeb*, 77 Misc. 2d 814, 354 N.Y.S.2d 864 (Sur. Ct., N.Y. Co. 1974); *In re Oswald*, 43 Misc. 2d 774, 252 N.Y.S.2d 203 (Sur. Ct., Nassau Co. 1964), *aff'd*, 24 A.D.2d 465, 260 N.Y.S.2d 615 (2d Dep't), *aff'd*, 17 N.Y.2d 447, 266 N.Y.S.2d 807, 213 N.E.2d 888 (1965); *In re Goethie*, 9 Misc. 2d 906, 161 N.Y.S.2d 785 (Sur. Ct., Westchester Co. 1957); *In re Bingham*, 178 Misc. 801, 36 N.Y.S.2d 584 (Sur. Ct., Kings Co. 1942), *aff'd*, 256 A.D. 463, 39 N.Y.S.2d 756, *motion for leave to appeal denied*, 266 A.D. 669, 41 N.Y.S.2d 180 (2d Dep't 1943). Although a voluntary separation does not permit a finding of abandonment, it does not preclude such a finding if additional facts support it. *In re Estate of Khabbaza*, 174 Misc. 2d 82, 662 N.Y.S.2d 996 (Sur. Ct., Richmond Co. 1997). The court held that even if the initial separation from the decedent had been consensual, the subsequent ceremonial marriage by the husband to another wife in his homeland constituted abandonment.

262 *In re Smith*, 190 Misc. 285, 72 N.Y.S.2d 609 (Sur. Ct., Monroe Co. 1947); *In re Sidman*, 153 Misc. 735, 276 N.Y.S. 56 (1934); Rohan, ¶ 5-1.2(14), p. 5-252.307.

> or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of the support.[263]

The party alleging failure to support must prove that the spouse failed to support the decedent, that the spouse possessed the means from which to furnish support, that the decedent was not guilty of misconduct exonerating the duty to support and that the decedent desired and looked to the spouse for support.[264]

263 EPTL 5-1.2(a)(6).

264 *In re Fitzgerald*, N.Y.L.J., June 9, 1981, p. 15, col. 1 (Sur. Ct., Suffolk Co.); *In re Lamos*, 63 Misc. 2d 840, 313 N.Y.S.2d 781 (Sur. Ct., Kings Co. 1970).

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SURROGATE'S COURT: COUNTY OF _____

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In the Matter of the Application of	:	
_____, as Surviving Spouse of	:	
_____,	:	File No.
Deceased,	:	PETITION ON
	:	APPLICATION TO
To obtain a Determination as to the	:	DETERMINE VALIDITY
Validity or Effect of an Election to	:	AND EFFECT OF
Take Her Elective Share Against the	:	ELECTION
Provisions in the Will of Said Decedent.	:	

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TO THE SURROGATE'S COURT, NEW YORK COUNTY:

The Petition of _____, domiciled and residing at _____, in the City, County and State of New York, respectfully shows:

1.That your Petitioner is the surviving spouse of _____, the decedent above-named.

2.That your Petitioner and the said _____, deceased, were married in New York on the ___ day of _____, ____, and thereafter and until the death of the said _____, deceased, lived together as husband and wife at _____, New York, New York.

3.That said _____, at the time of his death, was domiciled and resided at _____, in the City, County and State of New York and died at _____, New York, in the State of New York on the ___ day of _____, ____, leaving a Last Will and Testament, dated the ___ day of _____, ____, which was thereafter on the ___ day of _____, ____, duly admitted to probate by the Surrogate's Court of the City, County and State of New York.

4.That Letters Testamentary of the Last Will and Testament were, on the ___ day of _____, ____, duly issued and granted by the said Surrogate's Court to _____, the Executor therein named who thereupon duly qualified and thereafter acted and is still acting as such Executor.

5.That by said Last Will and Testament, the said decedent made no provision for your Petitioner. No other provision was made in said Will for your Petitioner or in any other way under the provisions of EPTL section 5-1.1-A, except that Petitioner is the survivor under certain joint account, the total amount of which is $_____.

6.That on _____, ____, Petitioner and the decedent executed a writing purporting to be an antenuptial agreement with a waiver of all of Petitioner's rights in the estate of the decedent. Said purported agreement was and is invalid, void and ineffective because, among other things, (a) Petitioner was uninformed of the factual impact of the writing that she executed, or the value or consequences of the purported waiver; and (b) decedent concealed and failed to disclose the nature and the extent of his assets at the time that he fraudulently induced the Petitioner to execute the alleged antenuptial agreement; and (c) decedent failed to provide the Petitioner with an opportunity, sufficiently in advance of the execution of the antenuptial agreement, to understand and comprehend the instrument and its consequences and failed to provide her with an opportunity, sufficiently in advance of the execution of the writing, to obtain and consult with an independent counsel for the purpose of review and negotiation of said writing; and (d) the purported antenuptial agreement was not acknowledged in the manner required by the laws of the State of New York for the recording of a conveyance of real property.

7.That _____ is the son of a prior marriage of _____, decedent, and principal beneficiary under the Last Will and Testament of said decedent. There are no other beneficiaries.

8.That your Petitioner, desiring to exercise her right of election, pursuant to EPTL section 5.1-1-A to take her elective share of the estate of the said deceased, on the ___ day of _____, ____, caused a written Notice of Election in proper form to be duly served upon _____, the named Executor of the Estate of _____, by depositing a true copy of said written Notice of Election in a postpaid, properly addressed wrapper in official depository under the exclusive care and custody of the United States Postal Service within the State of New York. Thereafter, the original of said written Notice of Election, with proof of service, was filed in this Court on the ___ day of _____, ____. A copy of said Notice of Election, together with the affidavit of service thereto upon the named Executor is annexed hereto as Exhibit A-1. Petitioner has reason to believe that her election has been rejected by the Executor.

9.That the names and post office addresses of all persons other than your Petitioner interested in obtaining a determination as to the validity and effect of the said election, and all other persons interested in this pro-

ceeding who are required to be cited upon this application or concerning whom the Court is to have information are:

e.g., _____, Sole Beneficiary
Street Address/P.O. Box
City, State, Zip
under the Last Will and Testament
of _____

Upon information and belief, the said _____ is of sound mind and of full age.

10.That, upon information and belief, there are no other persons than those mentioned interested in the application or proceeding.

11.Your Petitioner makes this application, pursuant to Section 1421 of the Surrogate's Court Procedure Act in order that she may have a judicial determination as to the validity of the aforesaid Notice of Election and as to her rights thereunder, so that your Petitioner's rights and remedies thereunder may be speedily determined and fully protected.

WHEREFORE, your Petitioner prays for a decree determining the validity and effect of the election of your Petitioner under EPTL section 5-1.1-A to take an elective share of the estate of the said _____, deceased, against the provisions of his Last Will and Testament, and that a citation be issued to all persons interested in the question to be presented to show cause why such determination should not be made and such relief should not be granted, and that Petitioner have such other and further relief as this Court may deem just and proper.

Dated:New York, New York

_____, ____

s/_____
Attorney for _____
Street Address
City, New York Zip Code

VERIFICATION

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

_____, being duly sworn, deposes and says that the deponent is the Petitioner in the within action; that the deponent has read the foregoing Petition and knows the contents thereof; that the same is true to the deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, deponent believes it to be true.

Sworn to before me this

___ day of _____, 20__

_____
Notary Public

SURROGATE'S COURT: COUNTY OF _____

----------x

In the Matter of the Application of	:	
_____, as Surviving Spouse of	:	
_____,	:	File No.
Deceased,	:	
	:	ANSWER TO
To obtain a Determination as to the	:	PETITION AND
Validity or Effect of an Election to	:	COUNTERCLAIM
Take Her Elective Share Against the	:	
Provisions in the Will of Said Decedent.	:	

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_____, Executor under the Last Will and Testament of _____, deceased, by way of answer to the petition of _____, alleges as follows:

1.That Respondent admits paragraphs "1," "9" and "10" of the petition.

2.That Respondent denies paragraph "2" of the petition in that the marriage therein recited was invalid by reason of the then existing marriage of _____, as more fully detailed at paragraphs 14 through 17 herein.

3.That Respondent admits paragraph "3" of the petition and admits that _____ died on the ___ day of _____, ____, and that the Last Will and Testament for the said decedent was admitted to probate on the ___ day of _____, ____.

4.That Respondent admits paragraph "4" of the petition and admits that Letters Testamentary of the Last Will and Testament were, on the ___ day of _____, ____, duly issued and granted by the said Surrogate's Court to _____.

5.That Respondent admits paragraph "5" of the petition except denies that no provision was made for petitioner under the provision of EPTL section 5-1.1-A.

6.That Respondent denies paragraph "6" of the petition, except admits that Petitioner and decedent, on _____, ____, executed an antenuptial agreement with a waiver of all of Petitioner's rights in the estate of the decedent.

7.That Respondent admits paragraph "7" of the petition except denies that there are no beneficiaries under the Last Will and Testament of _____, deceased, other than _____.

8.That Respondent is without information sufficient to form a belief as to the allegations set forth in paragraph "8" except that Respondent denies that thereafter on the ___ day of _____, ____, the original of said written Notice of Election was filed in this Court. Respondent admits that portion of paragraph "8" which states that Petitioner's Notice of Election has been rejected.

9.That Respondent is without information sufficient to form a belief as to the allegations set forth in paragraph "11."

FOR A FIRST DEFENSE

10.That the Petitioner verified her petition on the ____ day of _____, ____, wherein said Petitioner swore that she had read the contents of said Petition and that those matters within her knowledge were true, except as to the matters stated to be alleged on information and belief, which Petitioner believed to be true.

11.That in said Petition, sworn to on the ___ day of _____, ____, Petitioner stated that a certain written Notice of Election was served upon Respondent on the ___ day of _____, ____, and thereafter, the original of said Notice of Election was filed with the Surrogate's Court, New York County, on the ___ day of _____, ____.

12.That Petitioner in the instant proceeding is required to serve and file a duly verified petition, and that by virtue of the foregoing, Petitioner's verification is defective, and as such may be regarded as a nullity.

13.By reason of the premises, Respondent, _____, Executor of the Estate of _____, deceased, pray that this Court dismiss the Petition, together with all costs of suit.

FOR A SECOND DEFENSE

14.That on or about _____, ____, _____ did purport to obtain from the Court of Mexico a decree of divorce from _____, Respondent's mother and the wife of _____.

15.That such *ex parte* divorce decree dated _____, ____, was invalid and void.

16.That the purported marriage by Petitioner and _____ on _____, ____, was invalid by reason of the incapacity of _____ to enter into marriage, being at such time the lawful husband of _____, Respondent's mother.

17.That on _____, ____, following such purported marriage, _____, Respondent's mother, died in _____, New York, leaving _____ as her widower.

FOR A COUNTERCLAIM

18.That Letters Testamentary of the Last Will and Testament of _____, the decedent above named, were duly issued to your Respondent by the Surrogate's Court of the County of New York on the ___ day of _____, ____, and the said _____ thereupon duly qualified and thereafter acted and is still acting as such executor.

19.That _____, the decedent above named, at the time of his death was domiciled and resided at _____, in the County, City and State of New York, and died at _____ Hospital, _____, New York on the ___ day of _____, ____.

20.That certain personal property which should be delivered and/or paid to your Respondent, or the value of which should be paid to your Respondent, is in the possession of the Petitioner, who withholds the same from your Respondent.

21.That the property aforesaid consists of miscellaneous items of furniture, furnishings and personal effects, including but not limited to the following:

(a)Kitchen set consisting of a table and chairs;

(b)Persian rug, 6' x 9';

(c)Three small Persian rugs;

(d)Three (3) tables;

(e)One (1) television set;

(f) One (1) tea cart;

(g)One (1) living room couch;

(h)Two (2) upholstered chairs;

(i) One (1) wooden religious candelabra;

(j) One (1) serving buffet;

(k) Various pieces of crystal, china, plateware and jewelry; and

(l) Miscellaneous items of monetary and sentimental value.

22. That your Respondent has made diligent search and inquiry in regard to said property and on the ___ day of _____, ____, made a personal inspection of the decedent's premises and observed the aforesaid items of personal property at such premises.

23. That your Respondent at the date and place aforesaid duly demanded of the said Petitioner the delivery of the said property, but the said Petitioner has refused to deliver the same to your Respondent and/or claims that she is the owner thereof.

WHEREFORE, your Respondent prays for an inquiry respecting the said property and that the Petitioner be ordered to attend the inquiry and be examined accordingly and to deliver the said property to your Respondent.

Yours, etc.

s/_____
Attorneys for Respondent
New York, New York
(212) _____

SURROGATE'S COURT: COUNTY OF _____

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In the Matter of the Application of	:	
_____, as Surviving Spouse of	:	File No.
_____,	:	
Deceased,	:	REPLY AND ANSWER
	:	TO COUNTERCLAIM
To Obtain a Determination as to the	:	
Validity or Effect of An Election	:	
to Take Her Elective Share Against	:	
the Provisions in the Will of said	:	
Decedent.	:	

----------x

The Petitioner, for her Verified Reply and Answer to Counterclaim, alleges as follows:

1.Petitioner denies each and every allegation set forth in paragraphs "18" through "23" of the Counterclaim, except that Petitioner admits that Respondent inspected the premises, _____, New York, New York, on or about _____, ____.

AS AND FOR AN AFFIRMATION DEFENSE
TO THE COUNTERCLAIM

2.That with the exception of the wooden religious candelabra designated as Item (i), all the items of personal property mentioned in paragraph "21" of the Counterclaim are owned by the Petitioner in that they were either given to the Petitioner by the deceased, _____, at the time of the said marriage of _____ to _____, the Petitioner, on _____, ____, as gifts, or were transferred to her in return for property that was transferred to the deceased, or were purchased by _____ and _____ as joint tenants to be used as matrimonial property by _____ and _____.

Yours, etc.,

s/_____
Attorney for Petitioner,
New York, New York
(212) _____

VERIFICATION

STATE OF NEW YORK)

: ss.

COUNTY OF NEW YORK)

_____, being duly sworn, deposes and says that the deponent is the Petitioner in the within action; that the deponent has read the foregoing REPLY AND ANSWER TO COUNTERCLAIM and knows the contents thereof; that the same is true to the deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, deponent believes it to be true.

Sworn to before me this
___ day of _____, 20__

_____
Notary Public

Mutual Waiver Clause in Antenuptial Agreement

Ms. _____ and Mr. _____ each renounces, waives, releases and relinquishes:

(a)Any and all claims and rights which he or she may now possess or may hereafter acquire to share in any capacity, or to any extent, in the estate of the other, whether arising by way of statutory allowance, setoff, distribution in intestacy, dower, curtesy, community property, exempt property, or election to take against any Last Will and Testament of the other of Ms. _____ and Mr. _____; and Ms. _____ and Mr. _____ each covenants and agrees that he or she will refrain from any action or proceeding that might change, impair or abrogate any provision of the Last Will and Testament of the other except to enforce his or her specific rights under this Agreement. Ms. _____ and Mr. _____ intend that the provisions of this subparagraph (a) shall constitute a waiver by each of them of the right of election in accordance with the requirements of any statute (including, but not limited to, EPTL section 5-1.1-A of the Estates, Powers and Trusts Law).

Waiver of Right of Election

Pursuant to New York's Estates, Powers and Trusts Law

I, _____, residing at _____, being the [husband/wife] of _____, do hereby waive and release any and all rights which I may now possess or which I may at any future time possess, pursuant to section 5-1.1-A of the New York Estates, Powers and Trusts Law, or any successor to such section, or pursuant to any other applicable similar law or statute of any other jurisdiction, to elect to take against the Last Will and Testament of my said [wife/husband] executed by my said [wife/husband] on the same date but prior to the execution of this instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 20__.

s/_____

STATE OF NEW YORK)

) ss.:

COUNTY OF _____)

On this _____ day of _____, 20__, before me, the undersigned, personally appeared _____, 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 he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public