VIII. ACCOUNTING AND SETTLEMENT OF ESTATE

FIDUCIARY ACCOUNTING

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Reprinted with permission from the upcoming supplement to *Probate and Administration of New York Estates*, published by the New York State Bar Association, One Elk Street, Albany, New York 12207

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PREPARING THE ACCOUNT

I. Preliminary Concepts

A. Distinction between Probate and Non-Probate Property

1. Probate property (or testamentary property) is property for which the Executor or Administrator is responsible and which passes under a Will, or by intestacy if there is no Will or to the extent that a Will is ineffective. It includes, for example, both real and personal property held in the decedent's name alone or payable to the decedent or his or her estate.

The assets listed on Schedule A of an Executor's final account represent the probate assets of the estate, including real property, securities, bank accounts, a life insurance policy payable to the estate and certain tangible personal property.

A Will governs the disposition of probate property (in accordance with rules governing dispositions as stated in EPTL Article 2 and also rules governing testamentary dispositions as stated in EPTL Article 3, Part 3). EPTL 3-3.1 states that unless the Will provides otherwise, a disposition by the testator of all his property passes all of the property he was entitled to dispose of at the time of his death.

An Executor or Administrator is required to account to estate beneficiaries for probate property in the estate, because such property is

directly subject to his or her control. Probate property is subject to claims against the estate (SCPA Article 18), and the Executor or Administrator has power to administer (in accordance with EPTL 11-1.1) and to invest (in accordance with EPTL 11-2.2) such property. See EPTL 13-1.1 for an enumeration of "mixed" property, which is treated as personalty in New York.

2. Non-probate property (or non-testamentary property) is property which passes to a beneficiary other than by Will, even if there is a Will purporting to dispose of the testator's entire estate. The disposition of non-probate property may be governed by any of a variety of methods, including, for example:

The form of registration of title before death, as in tenancies by the entirety for real property only and joint tenancies (EPTL Article 6, Part 2), bank accounts in trust form sometimes known as Totten Trust accounts (EPTL Article 7, Part 5) and United States savings bonds payable on death to a named beneficiary;

A beneficiary designation by the decedent before death, as with life insurance, pension and profit sharing benefits or mutual fund shares payable to a named beneficiary other than the estate;

Operation of law, as with exempt property under EPTL 5-3.1 passing to a surviving spouse or children under the age of twenty-one years; and

The terms of a trust or other instrument passing title to property by reason of the decedent's death, for example by exercise or non-exercise of a power of appointment (EPTL Article 6).

3. Non-probate property is generally not subject to claims, or to Executor's commissions (SCPA 2307). However, non-probate property is includible in the decedent's gross estate for federal and New York estate tax purposes as prescribed in IRC 2031 ff.

4. The Executor or Administrator is not required to account to testamentary beneficiaries for non-probate property. However, the existence of non-probate property may affect the Executor's account in a variety of ways, including, for example:

The proper apportionment of estate taxes in accordance with the Will or EPTL 2-1.8;

The proper funding of a marital deduction formula clause bequest to a surviving spouse or to a trust for his or her benefit;

The proper determination of a right of election of a surviving spouse (under EPTL 5-1.1 and 5-1.1-A), against the decedent's "net estate," including "testamentary substitutes" under certain circumstances; and

The set-off of exempt property from the residuary estate (under EPTL 5-3.1).

5. An Executor's account will also be influenced by non-probate property if it comes into his hands. For example, he is not required to account for it, but if contributions from the non-probate beneficiaries for estate taxes are collected, such contributions should be reflected in the account in Schedule I or K.

B. Distinction between Principal and Income

1. The distinction between principal and income for estate and trust accounting purposes is governed by EPTL Article 11-A. The distinction is important for estate accounting purposes particularly where a trust is an estate beneficiary and therefore estate income is ultimately payable to trust income beneficiaries and estate principal is distributable to the Trustee and ultimately to remaindermen.

2. Uniform Principal and Income Act. New York has adopted the Uniform Principal and Income Act. It is found in EPTL Article 11-A and replaces EPTL 11-2.1. The Act changes many well established accounting rules (mostly for trusts, but some for estates) and will alter the practices of fiduciaries in administering trusts and estates, but it will not alter significantly the format of an accounting: principal and income credits and charges change in many respects under the new regime, but the manner of reporting them will remain largely unchanged. Thus, a fiduciary will continue to determine what is a principal asset or an income receipt and whether an expense is to be paid out of income or principal (admittedly using many new rules) and then reporting them in the format prescribed by court rule. It should be noted that the court forms described in Part III.B. below have not been changed as a result of the passage of the new Act.

3. Effective dates. The Act was effective as of January 1, 2002. It applies to any trust or decedent's estate established on or after the effective date unless the governing instrument provides otherwise or unless an election or court decision is made to adopt the new optional unitrust provisions under EPTL 11-2.4.

The Act also applies to any receipt or expense received or incurred after the effective date by any trust or estate then in existence whether or not the asset was acquired by the Trustee before or after the effective date, unless specifically provided in the governing instrument.

4. Definitions and Allocation Rules. EPTL 11-A-1.2 provides 13 new definitions (compared to four under EPTL 11-2.1). Principal is property "held in trust for distribution to a remainder beneficiary when the trust terminates." EPTL 11-A-1.2 (10) Income means receipts "as a current return from a principal asset." It also includes a portion of receipts on the sale, exchange, or liquidation of a principal asset, to the extent provided in Part 4 of the Act, covering allocation of receipts. EPTL 11-A-1.2 (4).

Receipts and transfers from principal to be allocated to income include:

> Money received from an "entity," which is a corporation, other business organization or common trust fund. EPTL 11-A-4.1(b)
>
> Non-cash receipts from an entity where the Trustee elects to receive a distribution in the form of property other than cash. EPTL 11-A-4.1 (c) (1)
>
> Income received as a distribution of income from another trust or estate. EPTL-A-4.2

Eminent domain awards to the extent they represent loss of income. EPTL 11-A-4.4 (4)

Rent and amounts paid to cancel a lease. EPTL 11-A-4.5

All interest, without providing amortization of premium. EPTL 11-A-4.6(a)

For instruments issued at a discount, (e.g. a Treasury Bill), the amount payable at maturity in excess of the original consideration is income. EPTL 11-A-4.6(b)

Insurance payments for loss of income, or loss of profits. EPTL 11-A-4.7

Ten percent of annual required IRA distributions or payments of deferred compensation. EPTL 11-A-4.9(c)

Ten percent of distributions from liquidating assets, such as royalties and copyright payments. EPTL 11-4.10

Royalty and other payments from mineral interests, water and natural resources are not subject to the typical 10/90 percent division. The allocation will depend on the type of payment. EPTL 11-A-4.11

Receipts from timber pursuant to the rules of EPTL 11-A-4.12

Amounts determined by the Trustee to constitute a productive return for a surviving spouse on an asset under EPTL 11-A-4.13. (This is the discretionary version of the former under-productive property adjustment required under EPTL 11-2.1).

Receipts from asset-backed securities allocated pursuant to the rules of EPTL 11-A-4.15

Amounts transferred from principal for the share of income payments to creditors that include a repayment of principal. EPTL 11-A-5.2(b)

Transfers from principal attributable to tax elections. EPTL 11-A-5.6

Amounts disbursed from the trust chargeable to income or transfers to principal include:

Pursuant to EPTL 11-A-5.1:

One-third of investment advisory and custody fees.

Amounts allocated by a court for the costs of a legal proceeding, to the extent it pertains to income, including legal fees.

"All of the other ordinary expenses incurred with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal."

Premiums on a security bond.

Depreciation on a fixed asset in a trust with a useful life of more than one year, but not on real estate used as a residence by a beneficiary or on tangible property used or made available to a beneficiary. No depreciation is to be made during the administration of an estate. EPTL 11-5.3

One-third of a Trustee's annual statutory commissions. SCPA 2309

Amounts advanced from principal for income expenses. EPTL 11-A-5.4

Income taxes on receipts attributable to income. EPTL 11-A-5.5

Adjustments to principal attributable to tax elections. EPTL 11-A-5.6

Receipts to be allocated to principal include:

Property other than money received from an entity, subject to the exception described above. EPTL 11-A-4.1(c)(1)

Money received in a lump sum or payments in exchange for all or part of a trust's interest in an entity. EPTL 11-A-4.1(c)(2)

Money received in a partial or total liquidation. EPTL 11-A-4.1 (c)(3) A partial liquidation is defined in EPTL 11-A-4.1 (d).

Money from a mutual fund or REIT that is treated as a capital gain for Federal income tax purposes. EPTL 11-A-4.1(c)(4)

Principal received as a distribution of principal from a trust or estate where the interest is not a purchased interest. EPTL 11-A-4.2

Amounts received from a transferor during lifetime, an estate or trust with a terminating income interest or a payor under a contract naming the trust as beneficiary (i.e. an insurance contract). EPTL 11-A-4.4 (1)

Money or other property received on the sale, exchange, liquidation of a principal asset, including realized profit. EPTL 11-A-4.4(2)

Reimbursements from third parties. EPTL 11-A-4.4 (3)

Eminent domain awards, but excluding an award for loss

of income. EPTL 11-A-4.4(4)

Refunds of rent deposits or security deposits. EPTL 11-A-4.5

IRA distributions not allocated to income under EPTL 11-A-4.9(c).

Ninety percent of distributions from liquidating assets (such as royalties and copyright payments) not allocated to income under EPTL 11-A-4.10

Royalty and other payments from mineral interests, water and natural resources are not subject to the typical 10/90 percent division. The allocation will depend on the type of payment. EPTL 11-A-4.11

Receipts from timber pursuant to the rules of EPTL 11-A-4.12.

Receipts from sales of underproductive property not allocated to a surviving spouse under EPTL 11-A-4.13.

Amounts received in option transactions. EPTL 11-A-4.14

Amounts received from asset-backed securities not allocated to income under EPTL 11-A-4.15

Depreciation transferred from income under EPTL 11-A-5.3.

Transfers from income for advancements of expenses. EPTL 11-A-5.4

Transfers from income attributable to tax elections. EPTL 11-A-5.6

Amounts disbursed from a trust chargeable to principal include:

Any amounts paid to the extent that the terms of the trust

or Will and Article 11-A do not provide a rule for allocating the disbursement to or between principal and income. EPTL 11-A-1.3(4)

Amounts paid in connection with options trading. EPTL 11-A-4.14

Two thirds of investment advisory fees and custody fees. EPTL 11-A-5.2(a)(1)

Trustee's compensation calculated on principal as a fee for acceptance, distribution or termination. EPTL 11-A-5.2(a)(2)

Two-thirds of a Trustee's annual statutory commission. SCPA 2309

Expenses made to prepare property for sale. EPTL 11-A-5.2(a)(2)

Repayment of principal on a trust debt. EPTL 11-A-5.2(a)(3)

Expenses for accounting, judicial proceedings or other matters that involve both income and remainder interests or that concern primarily principal, including construction proceedings and proceedings to protect the trust or its property, but excluding amounts allocated to income under 11-A-5.1(2). EPTL 11-A-5.2(a)(4)

Premiums on insurance policies not covered by a charge to income. EPTL 11-A-5.2(a)(5)

Estate, inheritance and other transfer taxes, including penalties, apportioned to the trust. EPTL 11-A-5.2(a)(6)

Expenses related to remediation of environmental matters. EPTL 11-A-5.2(a)(7)

Transfers to income in reimbursement for income

payments to creditors that include principal repayments. EPTL 11-A-5.2(b)

Income taxes on receipts attributable to principal. EPTL 11-A-5.5

In administering a decedent's estate, the rules with respect to charges to principal are not hard and fast. Under EPTL 11-A-2.1(2)(B) a fiduciary shall pay from principal or income in his discretion: fees of attorneys, accountants and fiduciaries, court costs and other expenses of administration and interest on death taxes, provided however, that such payments can be paid from income and principal passing to a marital or charitable trust only if the tax deduction is not adversely affected. Principal bears the cost of all other amounts paid in connection with the settlement of a decedent's estate, including debts, funeral expenses, disposition of remains, family allowances and death taxes and related penalties. EPTL 11-A-2.1(2)(C)

Part 3 of Article 11-A sets forth new rules for the determination of when an income interest begins and ends. Most importantly, the Act dispenses with the concept of accrued income: a beneficiary's right to income ends with the day of his or her death.

5. Optional Unitrust. The Act includes new Section EPTL 11-2.4 that allows the optional election of a 4 percent unitrust for a non-

charitable trust to replace the provisions of the trust or Will. It is not available to an estate. Thus, the accounting of an Executor or Administrator will not be affected by the new rule. Where a unitrust is elected, the account of a Trustee need not account for income and principal strictly: all annual receipts and disbursements are dealt with in the annual determination of the principal, and the amount paid to the current beneficiary is payable without reference to the net income of the trust.

The optional unitrust is not subject to the power to adjust under EPTL 11-2.3(a). Thus, the amount payable to the current beneficiary is determined solely by reference to the annual calculation of the value of principal and cannot be subject to increase or decrease by virtue of a Trustee's power to adjust.

6. Trustee's Power to Adjust. Where a trust provides for distributions to a beneficiary by reference to the trust's income, new EPTL 11-2.3 (5) authorizes a Trustee to make adjustments between principal and income to the extent "advisable to enable the trustee to make appropriate present and future distributions… if the trustee determines, in light of its investment decisions, [the considerations in clause (b)(3)(A)] and the accounting income expected to be produced by applying [the new

accounting rules in Article 11-A] that such an adjustment would be fair and reasonable to all of the beneficiaries." EPTL 11-2.3(5)(A) A trustee's actions in making adjustments are subject to court review under EPTL 11-2.3-A, but cannot be altered unless the court finds an abuse of discretion. A Trustee may apply for a declaratory opinion in advance of making an adjustment. EPTL 11-2.3 (A)(d)

The power to adjust may be exercised by fiduciaries other than a Trustee, including an Executor, Administrator, and a Guardian under the SCPA and the Mental Hygiene Law. Thus, the power to adjust will be found in an estate account; during the administration of an estate the income beneficiary of a testamentary trust will not be limited to the accounting income of the estate pending the funding of the trust. But the power is not used where a Trustee has wide discretion to distribute principal. The statute provides guidance for the Trustee in exercising the power and sets forth the circumstance when an adjustment may not be made.

The accounting of a Trustee who has determined to make an adjustment should describe the determination in Schedule J. If an adjustment is made to increase the payments to the income beneficiary, a charge should be shown and described in Schedule E and a credit should be

shown and described in Schedule A-2. If an adjustment is being made to principal, a credit should be shown and described in Schedule A and a charge should be shown and described in Schedule E-1. Because a Trustee may adjust between principal and income, the sale of unproductive property no longer triggers a calculation of delayed income. All such sales proceeds are allocated to principal. EPTL 11-A-4.13(b).

7. For tax purposes, the distinction between principal and income is governed by the Internal Revenue Code rather than the EPTL. The distinction for tax purposes is not necessarily the same as for accounting purposes.

For example, certain items such as capital gains and income in respect of a decedent (IRD) owed the decedent before death but not received until after death are considered principal for estate accounting purposes. Income taxes on capital gains and IRD are chargeable to principal. EPTL 11-A-5.5.

II. Record Keeping

A. Duty to Maintain Records

1. Since every fiduciary is required to account, every fiduciary must maintain records from which an account can be prepared. Failure to maintain records may result in the denial of commissions,

surcharge, imposition of costs or removal. Any questions which arise because of insufficient records will be resolved against the fiduciary. Vinlis Construction Co., Inc. v. Roreck, 30 A.D.2d 668, 291 N.Y.S.2d 924 (2d Dept. 1968) mod. 27 N.Y.2d 687, 314 N.Y.S. 2d 8, 262 N.E. 2D 215 (1970); Matter of Shulsky, 34 A.D.2d 545, 309 N.Y.S.2d 84 (2d Dept. 1968).

2. The expense of maintaining records and preparing an account may not be charged to an estate but is to be defrayed by the commissions payable to the fiduciary. Only in rare circumstances will this rule be ignored. This subject is discussed later.

B. Forms of Records

1. The actual forms of records required to be kept will vary from estate to estate and will depend upon the size and nature of the estate's assets and the need to provide information quickly.

2. However sophisticated or simple the bookkeeping system used, one rule must be followed without variation: all assets of an estate must be registered in the name of or held by an Executor in his fiduciary capacity (unless he deposits them in a bank custodial account where they may be held in nominee registration). Failure to do so is a misdemeanor. EPTL 11-1.6(d).

3. An estate checking account can be a basic record keeping vehicle for estate administration for both principal and income receipts and disbursements. It can provide a clear chronological record of transactions, show at any time a current picture of the estate administration and also serve as a primary basis for the Executor's final account.

4. Where testamentary trusts are involved, every transaction should be classified upon its entry in the checkbook or ledger as either principal or income for estate accounting purposes.

5. Another record keeping vehicle is a monthly income record, showing all estate income received from each asset for each month of administration. Such a record is useful in summarizing income received, in projecting future income and in choosing a fiscal year or making other decisions for estate income tax purposes. It also makes easier the task of determining whether the estate has in fact received all the income that should have been received by a certain time. Moody's Dividend Record is helpful in this regard. It shows each dividend paid by listed companies, as well as the declaration, record, ex-dividend and payment dates.

6. For most estates, in which the residue (principal) is payable outright, and not in trust, separate records for principal and income are unnecessary.

7. The federal estate tax return (Form 706) provides a format for the basic inventory of the estate's principal assets and liabilities, both for probate and non-probate assets, even if the estate is not required to file a Form 706.

8. A trustee is authorized under EPTL 11-A-4.3 to maintain separate accounting records for a business operated by the trust under certain circumstances. That section also describes the types of activities for which separate records may be maintained.

III. Preparing the Account

A. Form of Accounting

1. Official forms for accounting by Executors and Administrators, and also by Trustees, are appended to the SCPA. These forms contain detailed instructions for disclosing the various estate transactions in prescribed schedules. Attached are Forms JA-4, Trust Accounting with Instructions, and JA-7, Non-Trust Accounting with Instructions.

These forms must be accepted in any county in the state. However, Surrogate's Courts in certain counties have also adopted their own forms which should be obtained and used. Uniform Court Rule §207.40.

Form JA-4 differs from Form no. JA-7 in requiring the disclosure of principal and income transactions on separate schedules, with respect to administration expenses, distributions, and property on hand. JA-4 is used for accountings by Trustees or an Executor of an estate passing in trust. JA-7 is used for the accounting of an Administrator of an intestate's estate, or an Executor where the estate passes outright.

Although simplified forms of accounting may also be accepted for filing, at least in some counties, the use of official forms is recommended, particularly for estates subject to federal estate tax, or involving trusts as beneficiaries. Uniform Court Rule § 207.40. The official accounting forms are merely a table of contents for the account and contain simplified instructions for each of the schedules to be attached.

2. Style:

The account should be readable. Unlike other states, such as New Jersey, New York does not base its court filing fees on the number of

pages in the account. Accordingly, the preparer need not be concerned with the size of the account and should not cram each page with information.

The preparer should keep in mind that the account is prepared not for his use, but for others; it is a working document to be reviewed by other lawyers, beneficiaries and court personnel. Thus, sufficient blank space should be provided for marginal notes and calculations.

Although the schedules cover different subjects, they are related to each other. Items should be cross-referenced to other schedules wherever helpful to the reader.

Each separate schedule should contain an itemized statement in detail of all the transactions of the category reportable in the schedule. The schedule letter and page number of the schedule should be shown at the bottom of each page of the account.

The preparer should follow the forms in lettering the schedules. However, additional schedules or exhibits should be added if necessary for clarity, in which case the preparer can label the new schedule at his discretion.

B. Contents of Schedules

1. Schedule A, Principal Received, is an itemized statement of each asset for which the Executor or Administrator is charged, together with the date of receipt or acquisition.

Assets should be valued as of the date of death value as shown on the federal estate tax return, even if the Executor or Administrator has elected the alternate valuation on the estate tax return. Otherwise, the account does not reflect changes in value between death and the alternate valuation date even though the Executor or Administrator is accountable for such changes in value.

Real property is not reportable on Schedule A unless sold, in which case the proceeds of sales should be listed on Schedule A and the closing statement for the sale should be recited. Unsold real property which vests in residuary beneficiaries should be reported on Schedule J (Statement of Other Pertinent Facts).

Assets of the decedent which are worthless should be segregated at the end of Schedule A from the assets having a value. The petition in the accounting proceeding should include a statement as to the worthless assets and request that the Executor be authorized to abandon the

property. The reasons why the property is worthless should be set forth in Schedule J.

As mentioned above, assets should be reported in the order in which they are received or acquired. Generally, the assets will all be treated as having been received as of the date of death even though the Executor has not at that point literally collected savings accounts or reregistered securities or, in fact been appointed. And, as of that date, assets should be reported by type (stocks, bonds, cash, etc.). However, after-discovered assets should be reported on the date they are acquired, including the proceeds of any litigation, in order to make explicit the period between the date of death and the receipt of the property.

Schedule A should also show an adjustment to principal from income where the Trustee exercises his power to adjust under EPTL 11-2.3(5).

2. Schedule A-1, a statement of increases on sales, liquidation or distribution, must set forth all realized increases derived from principal assets due to sales, liquidation or distribution. It should also show realized increases on new investments or exchanges made by the fiduciary.

The transactions should be segregated by subject, i.e., sales, liquidation, distribution. They should then be set forth in chronological order and the description should include the date of the realization of the increase and the property from which the increase was derived. Both the net proceeds of the transaction and the inventory value of the particular item should be set forth in order to determine what the precise increase was.

Because the Executor is credited for commission purposes with the increase in the value of the assets held, the last section in the schedule should show the revaluation to market value of all estate assets distributed during administration and those on hand at the conclusion of the accounting period resulting in a gain. This will make it possible to determine the value of principal for paying out commissions, although no such gain is actually "realized" in making a distribution.

3. Schedule B, a statement of decreases due to sales, liquidation, collection, distribution or uncollectability, should show all decreases realized during the administration of the decedent's estate.

The format should follow Schedule A-1. In addition, Schedule B should contain a statement of all transactions which occurred during administration which did not result in a gain or a loss. Thus, for

example, all investments in Treasury Bills or commercial paper which result in no gain or loss would be shown on Schedule B.

The schedule should also repeat the description in Schedule A of any asset which the fiduciary intends to abandon as worthless together with a full statement of the reasons for abandoning it. Finally, the schedule should show the assets distributed during administration and those remaining on hand at the conclusion of the administration revalued to market for distribution purposes in order to compute commissions.

4. Schedule C is the statement of funeral and administration expenses chargeable to principal. Only obligations created by the Executor should be reported here; obligations incurred by the decedent during life will be set forth in Schedule D.

The accountant should first determine which of the amounts paid during administration are chargeable to principal, following the directions of the decedent's Will and EPTL 11-A-2.1 et seq. Funeral expenses and administration expenses should be enumerated separately in full detail and in chronological order showing the date paid. If the decedent's Will directs that estate taxes are to be paid from the residuary estate, the payment should be shown on this schedule.

Administration expenses can also be divided by subject matter if such a division will assist the reader. For example, expenses incurred in connection with the administration of the decedent's real property can be segregated, as well as taxes, professional fees, commissions etc.

5. Schedule C-1 contains a statement of unpaid administration expenses as of the close of the account. Each item should be set forth in detail with a statement of the basis for each claim. If for any reason lawyers' fees have not been paid prior to the filing of the account, the amount of the fees should be set forth on this schedule. In this situation, most courts require the Executor in his petition to request the court to fix the fees, including both paid and unpaid fees, and in the citation, to make a similar request.

6. Schedule D contains a statement of all creditors' claims. This is the schedule on which is shown the payment of the decedent's debts. It should be divided into five parts:

(a) Claims presented, allowed, paid and credited and appearing in the summary statement, together with the date of payment;

(b) Claims presented and allowed but not paid as of the close of the account;

(c) Claims presented but rejected, the date of and the reason for such rejection;

(d) Contingent and possible claims; and

(e) Personal claims requiring approved by the court pursuant to SCPA 1805.

Part (a), the debts which have been paid, requires no additional statement by the accountant. However, parts (b) through (e) will require a decision by the Surrogate and the accounting petition should set forth all of these items and request a determination of their validity. Likewise, the accounting decree should show an allowance for the payment of claims presented but not paid at the date of the account, the resolution of rejected claims, possible reserves for contingent claims, and the resolution of any personal claim of the fiduciary. In the last four parts reference should be made to Schedule K where a full and complete description should be given.

If the estate is insolvent, the preference allowed to various claims should be set forth and in the order of their priority. Priority of claims is determined pursuant to SCPA 1811.

It should be noted that in the event any of the sub-parts is irrelevant, an affirmative statement should be made that, for example, there are no rejected claims.

7. Schedule E sets forth all of the distributions made from principal during the administration of the decedent's estate. It can be used to show distributions of the unitrust payments to the current beneficiary to the extent Schedule E-1 is not used. Schedule E should also be used to show the transfer to income pursuant to the power to adjust under EPTL 11-2.3(5).

The format of this schedule should follow the organization of the decedent's Will and should set forth the date of the payment or delivery of property and the name of the person to whom payment or delivery was actually made. If the distributions made in kind, the property is valued to market on the date of distribution.

The instructions to this schedule also require that where estate taxes are to be apportioned and payments have been made on account of the taxes, the amounts apportioned in Schedule K against beneficiaries of the testamentary estate shall be charged in this schedule against the respective individual's share.

8. Schedule F is provided for informational purposes only and does not affect the summary statement.

The instructions require that this schedule show:

(a) All new investments made by the Executor with the date of acquisition and the cost of all property purchased;

(b) All exchanges made by the Executor with the date of exchange and items received and items surrendered; and

(c) All stock dividends, stock splits, rights and warrants received by the Executor showing the securities to which each relates and their allocation as between principal and income.

The format of this schedule should be divided by subject matter. All new investments are listed chronologically in the order in which they are made in the first section. Exchanges and stock distributions should be combined in a second section; each security which has been exchanged or on which a stock dividend or split has been received should be listed alphabetically. In addition, all other securities held at any time during the administration should be set forth. For each of the estate's securities set forth information concerning the inventory value of the security. The receipt is shown with a cross reference to Schedule A; then any stock split or

dividend which is allocable to principal is added. The security is revalued to market as of the close of the administration. Reference at that point is made to either Schedule A-1 or B to show the gain or loss realized. Finally, the balance on hand is shown and reference is made to Schedule G. This investment history for each security enables the reader to determine exactly what happened to each security held by the Executor during the administration of the estate.

9. Schedule G contains a statement of the principal remaining on hand at the close of the account. It should also set forth uncollected receivables and property rights due the estate.

A full description of each item of property should be given with the market value at the close of the account. In addition, the schedule should show all uncollected receivables and property rights due the estate.

If the preparer has correctly entered all transactions, the account should "balance", i.e., receipts less disbursements will equal the assets shown in Schedule G. However, to insure that nothing has been omitted, the preparer must "prove" his account to what is actually on hand. Accordingly, each asset must be examined to insure that the balance shown in the Schedule is accurate.

10. Schedule A-2, a statement of all income collected, should set forth a full and complete description of all interest, dividends, rents and other income received and the date of each receipt.

The format of the schedule should show receipts by asset.

The instructions state that each receipt must be separately accounted for and identified except that where a security has been held for an entire year, the interest or ordinary dividends may be reported on a calendar year basis. However, better practice would require that each receipt be enumerated. An estate is a tax-paying entity and often has a fiscal year which does not correspond to the end of the calendar year. A determination can only be made of the income earned during any fiscal year by setting forth the receipt of each item.

Schedule A-2 should also show the receipt from principal pursuant to the Trustee's power to adjust under EPTL 11-2.3(5).

11. Schedule C-2 contains a statement of the administration expenses chargeable to income in accordance with EPTL 11-A-5.1 et seq. The format of this schedule should be organized by subject matter if that will assist the reader.

12. Schedule E-1 is a statement of all distributions of income made during the administration of the estate. The monies paid or the property delivered out of income to the beneficiaries should be set forth chronologically along with the date of payment and the name of the person to whom payment or delivery was actually made. The instructions for this schedule permit, if more convenient, a statement of distributions of income by calendar year to any one beneficiary. Again, however, better practice would require that each distribution be shown in order to determine the tax effects of such distributions.

Where the Trustee has elected an optional unitrust under EPTL 11-2.4. Schedule E-1 is not required: either E-1 or Schedule E (Distributions of Principal) should be used to show payments to the "current beneficiary." Transfers to principal made pursuant to the Trustee's power to adjust under EPTL 11-2.3(5) should also be shown on Schedule E-1.

13. Schedule G-1, a statement of income on hand, should contain a statement showing all undistributed income on hand at the close of the account. If any of the income has been invested, the market value of the investment should be shown.

14. Schedule H contains a statement of all interested parties. It should be divided into three parts.

The first should show the name and address of all persons entitled to share in the estate, their relationship to the decedent, and the nature of their interest. The description should include the approximate value of the interest. This part includes all individuals to whom a citation would be issued in an accounting proceeding. Any legatees who have executed waivers of citation need not be listed.

The second part of Schedule H should include the same information as part one for those individuals who are being virtually represented by the individuals in part one pursuant to SCPA 315.

The third section of Schedule H should contain a statement that the records of the court have been searched for powers of attorney, assignments, and encumbrances made and executed by any of the persons interested in or entitled to a share of the estate. There should be listed in detail each power of attorney, assignment, or encumbrance disclosed by the search showing the date of its recording and the name and address of each attorney-in-fact, assignee, and person beneficially interested under the encumbrance referred to in the respective interests. There should also be a

statement by the accounting party as to any knowledge he has of the execution of any power of attorney or assignment not filed and recorded.

15. Schedule I contains the computation of commissions due upon the account and is discussed in detail in Section III, G below.

16. Schedule J consists of a statement of other pertinent facts and a cash reconciliation. In general, it is this schedule which the preparer should use to provide information either by text or calculation which is necessary for a complete understanding of the previous schedules. The schedule should contain the following, if relevant:

A description of all non-testamentary property and the persons receiving it.

A description of the fiduciary income taxes paid.

A description of any real estate owned by the decedent which it is not necessary to include as an accountable item, among with the gross value thereof and the amounts of any mortgages or liens thereon.

A description of any closely held business controlled by the estate. It has been held that the fiduciary's acts in the conduct of the business must be accounted for in addition to a mere disclosure of the stock holding. Matter of Witkind, 167 Misc. 885, 4 N.Y.S.2d 933 (Surr. Ct. N.Y.

Co. 1938). And now, pursuant to EPTL 11-A-4.3, if a Trustee who conducts a business determines it is in the best interest of all of the beneficiaries to account separately for the business he may do so and keep separate records.

A description of any litigation involving the estate. See SCPA 2204 for the accounting treatment of the recovery in a negligence action.

A fuller description of disputed claims than is set forth in Schedule D.

A fuller description of worthless securities than is set forth in Schedule B.

A description of advancements received by any legatee. EPTL 2-1.5.

A description of any specific legacy or devise that adeemed or was disposed of prior to death.

A computation of the Warms adjustment, discussed infra, as permitted by EPTL 11-A-5.6.

A computation of the Holloway adjustment, discussed infra, as permitted by EPTL 11-A-5.6.

A description of all intermediate orders entered during the administration, such as those for the advance payments of commissions or payments on account of attorneys' fees, or resolving claims by the estate against a fiduciary under EPTL 13-1.2

A statement of claims against the estate resolved judicially during the administration or to be resolved during the accounting proceeding. Included here are any claims of the fiduciary under SCPA 1805.

A statement concerning any relief requested as a part of the accounting proceeding, such as the construction of the decedent's Will.

A calculation of a surviving spouse's right of election and the amounts payable to after-born children omitted from the decedent's Will. EPTL 5-3.2.

A description of the Trustee's election of an optional unitrust pursuant to 11-2.4. It should include the unitrust date of valuation and the valuation for each year.

A description of the Trustee's decision to make an adjustment pursuant to EPTL 11-2.3(b)(5).

An allocation of principal and income resulting from the disproportionate distributions of income, discussed infra.

A proposed distribution of estate assets, discussed infra. A dispute concerning the distribution should be resolved by the Surrogate. See SCPA 2106 if the dispute is compromised.

A cash reconciliation to permit verification of the cash shown on hand in the account. The cash reconciliation is a summary statement showing receipts and disbursements of cash items. If the account segregates principal and income, a reconciliation should be prepared for each separately. First, all receipts of cash are listed by schedule. For principal that would include cash items shown on Schedule A, and the proceeds received in Schedules A-1 and B. No itemization is necessary. From the total of receipts is deducted amounts paid out, including Schedule C and the new investments purchased in Schedule F. Cash distributions on Schedule E and the claims paid in cash on Schedule D are also deducted. The resulting total should equal the cash items shown on Schedule G. The same procedure is followed for income. Where income and principal are not segregated, the reconciliation may combine both.

17. Schedule K, a statement of estate taxes paid and the allocation thereof, should contain a discussion of all estate taxes assessed and paid in respect of any property required to be included in the gross estate of the decedent under the provisions of the New York State Tax Law or under the laws of the United States.

The schedule must also show the allocation of taxes. In this section of Schedule K should be set forth a discussion of any statement in the decedent's Will concerning the allocation of taxes and the principles by which the allocation will be made. The computation is discussed below in Section III, C, 1.

18. Accounting Affidavit. The account must be verified by an affidavit appended at the end thereof. SCPA 2209. The official forms contain the language to be used.

C. Apportionment of Estate Taxes

1. Estate Tax Apportionment is governed by EPTL 2-1.8, unless the Will or non-testamentary instrument directs otherwise. In general, the statute apportions federal and New York estate taxes among the persons benefitted in the same proportion that the value of the property or interest received by each such person bears to the total value of the property

and interest received by all persons benefitted. Estate tax values are used for this purpose. EPTL 2-1.8(c)(1).

It should be noted that the New York estate tax was repealed effective for estates of decedents dying on or after February 1, 2000. New York State now collects the amount allowed a decedent's estate for the federal credit for state death taxes. The repeal of the New York estate tax has not obviated the need to allocate the amount collected; it has merely changed the calculation of the amount payable.

In the absence of a tax apportionment clause in the Will, which most frequently directs that all estate taxes be paid from the residuary probate estate, preresiduary bequests and non-probate property would bear a pro-rata share of the total estate taxes paid.

In such a case, any estate tax, marital or charitable deduction inures to the benefit of the surviving spouse or charitable beneficiary. EPTL 2-1.8(c)(2).

Any direction in a Will or non-testamentary instrument as to apportionment of taxes relates only to property passing thereunder unless the Will or instrument provides otherwise. EPTL 2-1.8(d).

If any portion of estate tax is allocated under the statute to a split interest, such as a trust or life estate and remainder, the tax is entirely payable from principal. EPTL 2-1.8(b). Thus, for example, none of the estate tax allocable to a residuary trust would be chargeable to the income beneficiary of the trust.

In most cases, the tax is allocated on a pro rata basis among the estate beneficiaries. However, in certain cases, the difference in the amount of tax caused by the inclusion of an asset over what would have been due without including such asset is allocated to that asset. This "excess tax" method of allocation is required where a Q-TIP trust is includible under § 2044 of the Code. EPTL 11-1.8 (d-1) and I.R.C. § 2207A. The excess method is also required for property included under I.R.C. § 2036 where the decedent had a retained interest. I.R.C. § 2207B. In both cases, the Code permits a testator to direct otherwise by specific reference in his Will or revocable trust.

A direction to pay taxes from the residue of an estate does not include the generation-skipping transfer tax, which must be expressly referred to under I.R.C. section 2603(b). In re Katherine Bleeker Jobson, N.Y.L.J., Oct. 29, 1998, p. 34, col. 3 (Sur. Ct., Suffolk Co.).

The computation of the allocation of taxes is a simple arithmetical process. However, the format in the account must give more information than a conclusory statement, because the reader in all likelihood will not have available the Federal estate tax return.

The calculation of a pro rata allocation should first set forth the totals from each of the schedules on the estate tax return and the amounts of each that are testamentary and non-testamentary. Expenses taken on the estate tax return must be reviewed to determine which party is to be charged. Most expenses will be charged to testamentary property (thus giving that property the benefit of the deduction) because testamentary funds paid those expenses. But expenses which are directly attributable to the collection of non-testamentary property must be charged that side of the account.

The second part of the calculation should set forth the amount of taxes paid. Penalties and interest, which are also chargeable to principal, must also be shown. The allocation is then calculated, charging to each party his or her pro rata share of the tax. A party's share is based on a fraction, the numerator of which is his share of the taxable estate and the denominator of which is the taxable estate. The same steps are followed for the New York estate tax and for any other state to which an estate tax is

paid, in order to determine exactly what assets are includible or expenses allowable in computing the local tax.

The calculation of an "excess" allocation is just as simple. First, a statement should be given describing the property against which the allocation is made. Then, a statement is given setting forth Federal taxes, penalties and interest actually paid (and not merely as shown on the return as filed). The estate tax calculation is then made without including in the gross estate the "excess" property. The difference between the two is the amount of the allocation chargeable to the "excess" property. The same process is repeated in the New York estate tax and for any other state to which an estate tax is paid.

The Executor often handles the distribution of non-testamentary assets and should collect from each beneficiary at the time of distribution a contribution for estate taxes even if the exact amount of tax cannot be determined. This avoids the problem of later having to locate the beneficiaries and collect the contribution when the taxes are finally determined.

If the amount collected from non-testamentary beneficiaries is substantial, it should be deposited in a segregated interest-bearing account in

the name of the Executor. At the time taxes are paid, a transfer is made to the estate checking account in the amount of the non-testamentary property's pro rata portion of the tax. The balance can be left as a reserve for possible additional tax payments. The income earned in the account is distributed to the contributors when taxes are finally determined. The Executor should account privately to the contributors and not include such transactions in the estate account.

However, because the Executor is required by statute to collect the apportioned taxes from the beneficiaries, the estate account should contain a statement that the taxes have been collected. When, as is frequently the case, the non-testamentary beneficiary also has an interest under the decedent's Will, his or her interest under the Will is simply charged with the contribution and his or her testamentary interest reduced by the amount of the tax.

Where preresiduary legacies are charged with a portion of the taxes, the same procedure should be followed, unless the legatees have an interest in the residue which can be used as a reserve with which to pay the tax. Cash legacies should be paid but a reserve withheld. Specific legacies

should not be distributed until the legatee has contributed his share of the taxes.

D. Accounting Adjustments

1. The Warms Adjustment. The so-called Warms Adjustment, based on the decision in Matter of Warms, 140 N.Y.S. 2d 169 (Sur. Ct. N.Y. Co. 1955), is codified in EPTL 11-1.2(a). It is also now permitted under EPTL 11-A-5.6.

If estate administration expenses chargeable to principal have been or will be taken as estate income tax deductions rather than as estate tax deductions, with the result that income taxes are reduced and estate taxes are increased, then, unless the Will provides otherwise, an adjustment must be made to reimburse principal for the increase in estate taxes caused by the Executor's election.

The adjustment from income to principal is determined as follows: The increase in estate taxes must first be calculated by computing estate taxes both with and without the deductions and then subtracting the smaller from the larger tax. Then each person, including the estate or any trust, who has benefitted from the use of the deduction must reimburse principal with a portion of the increase in estate taxes in the same proportion

as the portion of the income tax deduction made available to him bears to the total income tax deduction resulting from the Executor's election.

The computation and allocation of the Warms adjustment should be set forth in Schedule J of the account ("Other pertinent facts…"). More than a conclusory statement should be made. The preparer must first set forth a statement of the principal expenses used as income tax deductions. The figures used should be taken from the account; i.e., start with the total amounts of Schedules C and C-1 and reduce them by the principal items shown, such as estate and income taxes, funeral expenses and administration expenses taken as deductions on the estate tax return. In accordance with Matter of Backus, 106 Misc. 2d 463, 434 N.Y.S.2d 106 (Sur. Ct. Nassau Co. 1980) income in respect of a decedent may also be deducted at the fiduciary's discretion. The balance obtained, when added to principal commissions to be awarded and to be taken as an income tax deduction, will represent all expenses taken or to be taken as income tax deductions. The calculation then shows the Federal and New York estate taxes using the additional deductions. The sum obtained is then offset against the tax actually paid, and the difference is the amount income owes principal.

2. Underproductive Property. The underproductive property adjustment that mandated a transfer of a portion of proceeds of sales from principal to income is no longer required under the new Uniform Principal and Income Act. If the administration of the property has not provided a fair distribution to the current beneficiary, the Trustee may exercise his power to adjust under EPTL 11-2.3 (b)(5). If the property qualified for the marital deduction, and the payments from it are insufficient to provide the surviving spouse with required beneficial enjoyment, the spouse may demand the property be made productive. EPTL 11-A-4.13. Accordingly, given the power to adjust, no calculation of delayed income is made and all sales receipts are allocated to principal.

3. Funding of Marital Shares. Proper funding of marital deduction formula clause bequests is governed by the terms of the Will and EPTL 2-1.9.

Such bequests may be pecuniary (e.g. “an amount equal to one-half of my adjusted gross estate as finally determined in the federal estate tax proceeding relating to my estate...”) or fractional (e.g. “that fraction of my residuary estate the numerator of which is an amount equal to one-half of my adjusted gross estate as finally determined in the federal estate tax

proceeding relating to my estate... and the denominator of which is the value of my residuary estate"). See Covey, The Marital Deduction and Credit Shelter Dispositions and The Use of Formula Provisions. (United States Trust Company of New York 1997).

Whether a bequest is pecuniary or fractional depends upon the testator's intention. EPTL 2-1.9(a)(2).

If an Executor is authorized by the Will or other instrument to satisfy a pecuniary disposition wholly or partly in kind, assets selected for that purpose shall be valued at their respective values on the dates of their distribution. EPTL 2-1.9(b)(1).

However, where the instrument authorizes the fiduciary to satisfy a pecuniary disposition wholly or partly in kind and the instrument requires the fiduciary to value the assets distributed in kind as of a date other than the distribution date, then unless the instrument provides otherwise, the distribution value of such assets plus cash distributed in satisfaction of the disposition shall have an aggregated value of no less, and to the extent practicable no more, than the amount of the disposition as stated in or determined by the formula stated in the instrument. EPTL 2-1.9(b)(2).

If an Executor elects to claim administration expenses as estate income tax deductions rather than as estate tax deductions, with the result that a disposition for a surviving spouse is increased under a formula clause phrased in terms of the maximum marital deduction, no adjustment is required as between the disposition and other interests in the estate. EPTL 11-1.2(b)(1).

4. Income Tax Adjustments.

The so-called "Holloway adjustment" is based on the decision in Matter of Holloway, 68 Misc. 2d 361 and is now permitted under EPTL 11-A-5.6.

A "trapping distribution" occurs when an estate distributes principal to a trust, and the distribution is deemed under IRC 661 to carry out estate DNI to the trust, with the result that the trust principal is required to pay an income tax on estate income which ultimately passes to the trust income beneficiary tax-free.

The Holloway adjustment requires that an equitable reimbursement for such taxes be made by income to trust principal in such a case, unless the Will provides otherwise.

Such an adjustment can be made either in the estate accounting or in a trust accounting. It requires nothing more than a statement explaining the need for the adjustment and a dollar transfer from income to principal in the proposed distribution. The adjustment should be shown in Schedule J, as an adjustment from income to principal in the proposed final distribution.

In general, the courts have been reluctant to require equitable adjustments as between income and principal in situations where the operation of the Internal Revenue Code benefits one at the expense of the other, particularly if the tax consequences are not the result of any conscious election by the fiduciary. See "Income Tax Opportunities and Pitfalls in Estate Distributions," 13/4 Real Property, Probate and Trust Journal 854, at 885 (Winter 1978).

For example, if a stock dividend is allocated to income for accounting purposes, and if a capital gains tax is subsequently paid by principal on the sale of the underlying stock, no adjustment from income to principal is required from the tax on the gain resulting from the reduction in basis by reason of the dividend. Matter of Simmons, 30 Misc. 2d 1022, 220 N.Y.S.2d 515 (Sur. Ct. N.Y. Co. 1961).

However, in Matter of Pross, 90 Misc. 2d 895, 396 N.Y.S.2d 309 (Sur. Ct. Westchester Co. 1977), an income beneficiary was required to reimburse principal for capital gains taxes paid out of principal on a sale of real property, to the extent that the capital gain was attributable to the use of depreciation deductions which had benefitted the income beneficiary while at the same time reducing the basis of the property sold.

Avoiding Adjustments. Provisions of a Will can eliminate the adjustments previously discussed. However, a Will cannot wholly dispense with the preparation of an account. Such a provision is against the public policy of New York. Matter of Brush, 46 Misc. 2d 277, 259 N.Y.S.2d 390 (Sur. Ct., N.Y. Co. 1965); Matter of Lang, 60 Misc. 2d 232, 302 N.Y.S.2d 954 (Sur. Ct., Erie Co. 1969).

Even if the Executor is given authorization in a Will not to make accounting adjustments otherwise required, the Executor still has a fiduciary duty of impartiality as among conflicting interests and he may wish to make the adjustment in any event.

To illustrate, EPTL 11-1.2(b)(1)(B) provides that no adjustment is required as between a marital deduction formula clause bequest and other interests in an estate by reason of the Executor's selection of the alternate

valuation on the federal estate tax return, even though a higher alternate valuation, for example, would increase the adjusted gross estate and therefore increase the marital deduction bequest for the spouse at the expense of the residuary estate. In Matter of Colp, N.Y.L.J. 1/20/76, p. 8, Col. 2B. 2. (not otherwise reported), the Court cautioned a widow Co-executor who sought a higher alternate valuation to thereby increase her marital deduction bequest that the Executors' "highest duty" was owing to the life beneficiaries of the residuary trusts, and that "it is incumbent upon the Executors to resolve this issue in such manner as not to benefit one or the other of them at the expense of these life beneficiaries for they do so at their peril." (This illustration is admittedly obsolete because alternative valuation may not now be elected unless it reduces the gross estate and resulting tax. The principle of Colp still holds, however).

E. Allocation of Income

1. Income earned during administration is to be allocated to beneficiaries in accordance with statutory provisions set forth in EPTL 11-A-2.1 and EPTL 11-A-2.2, unless the Will provides otherwise.

2. Specific beneficiaries are entitled to receive the net income from property bequeathed or devised to them, for the period after the

decedent's death and before distribution of the property. EPTL 11-A-2.1(1). For example, the beneficiary of a specific preresiduary bequest of stock is entitled to the dividend income on the stock from date of death.

3. Beneficiaries of pecuniary distributions not in trust are not entitled to receive income on their bequests until seven months after probate, and then only in an action to compel payment and at the rate fixed in the Will or if none is so fixed then at 6%, or at the legal rate if delay in payment is unreasonable. EPTL 11-1.5(d). Other income earned with respect to such bequests before distribution inures to the benefit of the residuary beneficiaries. However, in fairness to such preresiduary beneficiaries, the Executor, seven months after probate, may wish to pay the legacies or segregate principal funds ultimately payable to them in separate interest bearing accounts for their benefit, assuming there is reason for further delay in distribution such as concern over unresolved claims against the estate which could cause an abatement. (See EPTL 13-1.3 as to order of abatement in cases of insufficiency of estate assets to meet all estate obligations and all dispositions.)

4. Beneficiaries of pecuniary distributions in trust (such as a pecuniary marital deduction formula clause trust for a surviving spouse) are

entitled to income on assets subject to the trust from the date of death. EPTL 11-A-2.1(1).

5. Other beneficiaries are entitled to receive estate income in proportion to their respective interests in the undistributed assets of the estate computed at times of distribution. Under the new Uniform Principal and Income Act, the amount of income earned during the administration of the estate from and after the date of payment of any estate tax or distribution of principal shall be distributed to such beneficiaries in proportion to their respective interests in the undistributed assets of the estate after the making of a payment or distribution on the basis of the fair market value of such assets immediately after the making of such payment. EPTL 11-A-2.2. (This is a major change from prior law which mandated the use of market values after payments of estate taxes and inventory values for distributions of principal.) The determination of market value shall be made as of the actual date of distributions or the "date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed" EPTL 11-A-2.2(b)(4). Thus, month end values generated automatically by a bank can be used if "reasonably near" the date of distribution.

6. Non-pro rata distributions of principal to beneficiaries require that estate income subsequently earned be allocated accordingly. For example, if one of two equal residuary beneficiaries receives a non-pro rata distribution of one-half of his share and the other beneficiary receives nothing, then estate income subsequently earned should be allocated one-third to the first beneficiary and two-thirds to the other residuary beneficiary.

The income allocation is to be set forth in Schedule J and should be prepared whenever disproportionate distributions are made to legatees or when the residue is divided and part of the residue is tax-free (a charitable or marital bequest) and the other part (or parts) is payable to a party different from the tax-free portion. To state the reverse, no allocation need be made when (1) all of the income is paid to one person even though the residue is divided, or (2) where income is payable to two or more individuals, but proportionate distributions of principal have been made, or (3) when the residue is taxable in part and tax-free in part and a distribution is made to the tax-free portion every time a tax payment is made.

The allocation should be prepared in two parts: first, the shares of principal are computed for each of the relevant periods of the account;

second, net income is then computed for each period and divided between the parties according to the percentages determined in part one.

In part one, the preparer must start by determining the relevant dates for calculations of the percentages. A fraction is determined as of the date of death in accordance with the decedent's Will. (See Kurtz, "Increases and Decreases to Fractional Share Marital Deduction Bequest," 8 Real Property Probate and Trust Journal, 450 (Fall 1973).)

The first fraction determines each beneficiary's share of income from the date of death until the first estate tax payment or principal distribution. For this discussion we will assume a tax payment precedes a distribution of principal. All expenses, debts, and gains and losses for the period are also allocated to each beneficiary using this first fraction. At the close of the period, the estate tax payment is deducted from the interest of the beneficiary who bears the tax. Then the assets left on hand are revalued to market values and the net increase or decrease is allocated to each party using the first percentages.

At this point, a new percentage is determined and used for the succeeding period. All gains and losses for the new period are allocated to the parties using the new fraction but administration expenses are allocated

using the original fraction because the payment date is not relevant to the parties' liability. Gains and losses are calculated using the prior period market values and not the date of death values. The period ends with the next tax payment or the next principal distribution (and in each case a revaluation is made). This process continues until the end of the accounting period. The final percentage reached is the percentage used in distributing the principal remaining on hand at the end of the account and the first part of the allocation is completed.

After determining the percentage for each of the periods of the account, the preparer must then compute the net income for each of the periods and allocate the income using the percentages for the period. The total will show the income on hand distributable to each party.

F. Rights of the family unit as against the probate estate are governed by EPTL Article 5.

1. The right of election of a surviving spouse is governed by the detailed provisions of EPTL 5-1.1 and 5-1.1-A. Basically, if a Will does not make provision for a surviving spouse at least to the extent of his or her "elective share", the spouse has a right of election as a claim against the estate. In accounting for the proper satisfaction of the right of election, if

exercised by the surviving spouse, the preparer should show a calculation in Schedule J. The calculation should set forth with specificity all items used to arrive at the net estate as defined in the statute and enumerate all testamentary substitutes included in the calculation.

2. Exempt property for a surviving spouse or, if none, for children under age 21, under EPTL 5-3.1, should be set off from the probate estate and not accounted for as principal received by the Executor on Schedule A.

3. Rights of after-born children to share in the probate estate are governed by EPTL 5-3.2 and should be reflected in a proposed distribution as set forth on a Schedule J.

EPTL 5-3.2 provides that if the testator has one or more children living when he executes his Will to whom he makes a bequest in his Will and a child is born thereafter, the after-born child is entitled to such share as if the testator had included all children and given equal shares to each such child. Matter of Newman, 451 N.Y.S.2d 637 (Surr. Ct. Broome Co. 1982).

As an example of the computation: assume that a decedent leaves an estate of $2 million. He is survived by a spouse and four children,

one of them after-born. To the first three children he leaves his unified credit shelter amount of $1 million, with the remainder to his spouse, whose share is also $1 million. A spouse retains the full amount since only the children must contribute. The after-born child is entitled to one-fourth of the unified credit amount, or $250,000.

G. Computing Commissions

1. The compensation of an executor or administrator is solely statutory and, with few exceptions, cannot exceed the rates set forth in SCPA 2307. The fiduciary is entitled to a commission on "receiving and paying out all sums of money" as follows:

5 percent on all sums not exceeding $100,000;

4 percent on the next $200,000;

3 percent on the next $700,000;

2-1/2 percent on the next $4,000,000; and

2 percent on all sums in excess of $5,000,000.

Where the fiduciary is required to manage real property and collect rents, he is entitled to a commission in addition to those set forth above equal to 5 percent of the gross rents collected.

2. In estates administered by more than one fiduciary, a question arises as to who shall receive commissions. The statute resolves the question as follows:

For decedent's dying before September 1, 1993:

Number of Commissions payable	Size of Estate
1	up to $100,000
2	$100,000 to $300,000
3	more than $300,000

For decedent's dying after August 31, 1993, a maximum of two commissions will be payable, unless the decedent has specifically provided otherwise in a writing. Thus, for estates exceeding $100,000, each of two Executors will receive a full commission. If there are more than two Executors, each will receive a quantum meruit proportion or such proportion as they shall agree upon. SCPA § 2313

Where an attorney is preparing a Will in which he or she (or an affiliated attorney) is an executor-designate, the testator must be given certain information concerning fees and commissions. Failure to do so will result in the attorney-executor's commissions (under SCPA 2307 and 2313) being reduced by one-half. SCPA 2307-a.

3. To calculate commissions, one must first determine what "money" was received and paid out. Any property, not merely cash, is considered "money" in computing commissions. The value of such property shall be determined as directed by the court. Where income must be withheld for income tax purposes, the amount withheld is deemed to have been received and paid out. Property specifically bequeathed or devised is not included in the commission base.

4. Commission rates are applied one-half to amounts received (the "base for receiving commissions") and one-half to amounts paid out (the "base for paying commissions"). Thus, receiving and paying commissions can be in different amounts, depending on changes in values during administration. The computation can be made by computing the commission on property received (and separately on property disbursed) either on the basis of the rate schedule and then dividing the result by two, or on the basis of one-half the percentages on the rate schedule. For example, the receiving commission on an estate of $100,000 could be computed either as 5% of $100,000 = $5,000 / 2 = $2,500; or as 2-1/2% of $100,000 = $2,500.

5. Realized increases in the value of commissionable assets are subject to both receiving and paying commissions. Increases reflected in the market value of assets on hand at the closing of an account, which assets will be distributed at the conclusion of an accounting proceeding, are deemed "realized" for the purpose of the computation of commissions.

Only the value at the time of distribution of the assets distributed is subject to a paying commission. Therefore, decreases in value listed on Schedule B are not considered as having been paid out and thus do not entitle a fiduciary to a commission on the amount thereof.

Losses are not offset against gains for purposes of computing commissions. For example, if a stock with a date of death value of $1,000 increases to $2,000 by the time of distribution and if a second stock with a date of death value of $3,000 decreases to $500 by the time of distribution, the receiving commission is computed on $5,000 ($2,000 + $3,000) and the paying commission is computed upon $2,500 ($2,000 + $500).

6. Receipts and payments of income are also subject to commissions. Irrespective of the time of receipt, the base for the receiving commission is the sum of principal and income received during the

accounting period. Time of payment is also irrelevant in computing the paying commission, which is based on all sums paid or to be paid.

7. Commissions are allocated between principal and income in the same proportions that principal or income received (or paid) bear to total assets received (or paid). If the alternative method is adopted, in which commissions are computed first on principal at the higher rates and then on income at lower rates, income is, arguably, unfairly benefitted at the expense of principal.

8. The computation of commissions should be presented in three parts: the calculation of the commission base, the calculation of the amount of commissions, and the allocation of commissions to principal and income.

The first part should show the amounts of principal and income received. From Schedule A are deducted non-commissionable items. All of Schedule A-1 and A-2 are added. Subtotals are determined for both principal and income for use when commissions are allocated.

The commission base for paying is computed in a similar fashion, by adding Schedules C, D, C-2 and D-1 and by deducting from the base the distribution of non-commissionable items and determining subtotals

for principal and income. Note that Schedule B, losses realized, is not included in the computation.

The second part should show a separate calculation of commissions for receiving and paying, using one-half of the statutory rates.

The third part would set forth a pro rata allocation to principal and income of the receiving and paying commissions.

The following ratios are used:

principal received / total received	x	total receiving commission	=	receiving commission payable from principal
principal paid / total paid	x	total paying commission	=	paying commission payable from principal
income received / total received	x	total receiving commission	=	receiving commission payable from principal
income paid / total paid	x	total paying commission	=	paying commission payable from principal

9. Uniform Court Rule § 207.40 requires that the schedule state explicitly whether any of the decedent's assets were pledged as

collateral for any of the decedent's debts and, if so, the schedule must describe the property and its value, the amount of the debt, the equity in the property and the value of the property subject to commissions.

H. Computing Distributive Shares:

1. After having balanced the account to the assets actually on hand and computed all of the necessary adjustments, the preparer must calculate the exact amount distributable to the estate beneficiaries. The various adjustments from principal to income and vice versa may appear confusing at first glance, but if they are made one step at a time, the net effect will become apparent.

The principal distribution is calculated first and necessarily starts with the balance on hand in Schedule G. To that is added the Warms adjustment from income, and estate taxes contributed by non-testamentary beneficiaries. If a legatee has received an advancement, that is added to the amount distributable. Where relevant, the Holloway adjustment due from income is added. Principal commissions are deducted. Any other account receivable or claim payable is added or deducted. The balance is the amount distributable against which the relevant fraction or percentage is applied.

The next step is to determine what is to be distributed to each party. Because each party is not necessarily responsible for or entitled to all or any part of a particular adjustment, the distribution calculation is repeated, showing the party's exact share of each item. For example, the non-marital share of the residue, because it pays estate taxes, is entitled to all of the Warms adjustment and all of the estate taxes contributed by non-testamentary legatees. Similarly, that party who has received an advancement has the amount of the advancement deducted from his share. Any trust that has paid income taxes and is entitled to a Holloway adjustment is credited with the proper amount. After an exact dollar amount is calculated, an itemized pro rata division of each item of the property on hand is set forth.

The calculation of the distribution of income follows a similar pattern. Income commissions, and the Holloway and Warms adjustments owed to principal are deducted. If, an income beneficiary of a residuary trust owes the estate his share of estate taxes for his non-testamentary property, the contribution is deducted from total income and the beneficiary's share of income, and the Executor's duty to collect the tax is satisfied. Again, after the amount to be distributed is calculated, the process

is repeated for each beneficiary to determine his or her proper share of the income and adjustments.

2. Proposed distributions in kind to residuary beneficiaries should generally be pro rata, unless the Will provides otherwise. EPTL 11-1.1(20) authorizes a fiduciary to make non pro rata distributions.

In the rare instance where a Will directs pro rata distributions, violations of the direction may have adverse tax consequences. If, for example, the Executor distributes 100 shares of stock in A Company with a distribution value of $10,000 to one of two equal residuary beneficiaries, and if the Executor distributes 200 shares of stock in B Company with a distribution value of $10,000 to the other residuary beneficiary, then in the absence of authorization in the instrument the distribution will be regarded by the Internal Revenue Service as a pro rata distribution of one-half the shares in each company to each beneficiary followed by a taxable exchange as between the beneficiaries of one-half of one stock for one-half the other, giving rise to capital gain or loss to each beneficiary. Rev. Rul. 69-486, 1969-2 C.B. 159. This undesirable result is avoided by either a pro rata distribution of one-half of each stock to each beneficiary, or language in the Will authorizing such a distribution.

Another advantage of pro rata distributions in kind to residuary beneficiaries is the equitable sharing of tax basis of assets distributed. If, for example, the stock in A Company had doubled in value and the stock in B Company had declined in value by 50% since the date of death and if the two stocks had equal distribution value, it would be unfair to distribute all of the stock in A Company to one beneficiary with built-in capital gain, and all of the stock in B Company to the other beneficiary, with built-in capital loss. Again, this inequitable result could be avoided by distribution of one-half of each stock to each of the two equal residuary beneficiaries.

INFORMAL SETTLEMENT OF ESTATES

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INFORMAL SETTLEMENT OF ESTATES

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INTRODUCTION

The informal or non-judicial settlement of an estate permits the executor or administrator to wind-up the administration of the estate, make final distribution, and be released from liability for his actions by agreement with the parties, with no or only limited involvement by the court. Informal settlements of accounts, which come in several forms, are a popular choice among executors, administrators and trustees, who may thereby avoid the expense and delay of a formal or judicial settlement. (Inasmuch as informal settlements of accounts are equally valid and widely used in the context of estate as well as both inter vivos and testamentary trust administration, the term "executor" as used in this section of the materials includes administrators and trustees, unless otherwise specified.)

While the majority of accounts are settled informally, this option may not be appropriate or advisable in every situation, and the executor and his attorney should always consider a variety of factors in deciding whether to use this procedure. Some of the factors to be considered are: the value of the estate and nature of the assets; the duration and complexity of the administration of the estate; whether the parties to be accounted to include infants, incompetents, unknown persons or charitable organizations; the relationship of the executor to the parties and to the attorney for the estate; the relationship and quality of the relations between and among the parties; and the willingness of the parties and the executor to forego a formal settlement of account, including judicial review of the account, approval of attorney's fees and executor's commissions, and discharge of the executor.

The term "informal" is generally taken to refer to the manner in which the account is settled. It may also refer to the account itself. Because an informal settlement does not contemplate judicial review or approval of the account, there is no requirement that the account

be in any particular form. Indeed, the account need not even be filed with the court. Thus, the account may consist of typed or handwritten summary schedules of assets and income received and distributions made, or copies of transaction statements produced by a corporate executor or custodian. Although there appears to be no restriction against an oral account, it is strongly recommended that the account be memorialized in some tangible form. What is most important is that the account fully and accurately convey to the parties the actions taken by the executor, so that an informed release of liability may be given.

Of course, the account exhibited to the parties may be in the form prescribed for the judicial settlement of an account (as described elsewhere in these materials). As it becomes more and more common for estate administration records to be kept on computer, and with the availability of software designed to produce account schedules conforming to local court requirements, it may require little additional effort or expense on the part of an executor (or his attorney or accountant) to produce a "formal" account, even when an informal settlement of the account is contemplated. Such an account might also provide greater protection for the executor seeking to be released from liability, as it would leave little opportunity for a beneficiary to claim at a later date that a release given should be voided due to a lack of full disclosure.

The informal settlement of an estate account is usually accomplished by means of an instrument known as a "Receipt and Release Agreement," also known as a "Receipt, Release and Refunding Agreement" or simply "Agreement Settling Account." There is no requirement that the account or any agreement settling the account be filed with the court, and the executor or his attorney may choose simply to retain such documents in his files. However, if for any reason the executor or his attorney chooses to file the agreement or account with the court, certain rules of procedure, as described below, should be observed.

RECEIPT AND RELEASE AGREEMENTS

A Receipt and Release Agreement is the means by which a beneficiary of an estate may acknowledge receipt of the property to which he is entitled, and agree to release the executor from any further liability with respect thereto. The form of the instrument should be tailored to the nature of the distribution for which the executor is seeking a release. Thus, a receipt and release, also known as a legacy receipt, for a cash bequest or a bequest of a specific item of personal property is frequently a brief instrument or printed form which reveals little about the nature and extent of the assets and liabilities of the estate. The same may be true of a receipt and release obtained in connection with a partial distribution on account of a beneficiary's interest in a share of the residue of an estate, especially if the executor intends to present a final account to the beneficiary for his approval.

A Receipt and Release Agreement can be thought of as telling a story - the story of the administration of the estate - by summarizing the significant events which occurred between the date of death and the closing date of the account. This serves two important functions. First, while the various steps taken from the time the decedent died until the final distribution of the estate assets may be well known to the executor and his attorney, the beneficiaries of the estate often don't know or don't remember what happened. The agreement helps the beneficiaries to understand the actions that were taken and the results that were obtained, so that the release they give the executor is meaningful. Second, the agreement serves to memorialize the administration of the estate, thereby creating a record for future reference. If an issue regarding an estate, such as an after-discovered asset or claim, comes to light some time after the estate has been closed, the agreement can be a resource for the executor and his attorney, as it is a document which contains an accurate summary of the estate administration that was reviewed and signed by the interested parties at the time the estate was closed.

A Receipt and Release Agreement in connection with a final account should contain (at a minimum) the following information: (i) a list of the names and addresses of the parties to the agreement; (ii) the date of death and domicile of the decedent; (iii) the name of the court which issued letters testamentary (and letters of trusteeship, if relevant) and the date thereof; (iv) a statement that funeral and administration expenses, the decedent's debts and all estate taxes have been paid (and that all required estate tax returns have been filed and closing letters or discharges received), that all specific devises and bequests of cash and other property have been satisfied, and that the executor is prepared to make final distribution of the remaining assets comprised in the estate; (v) a summary or quotation from the Will or trust instrument of the provisions governing the disposition of the residuary estate or remainder of the trust; (vi) an identification of the account which has been exhibited to the parties; (vii) a summary of the account or a recitation as to the parties' knowledge and approval of such matters as the amount of legal fees and disbursements and executor's commissions proposed to be charged and paid to date; (viii) an acknowledgment of receipt of all property to which each such party is entitled; (ix) an agreement to release the executor from all liability with respect to the administration of the estate, to indemnify the executor against any expenses or claims which may at any time be asserted against the executor, and to refund to the executor any amount of such party's total distribution which is either needed to so indemnify the executor or later discovered to be an overpayment to such party; and (x) the duly acknowledged signature of each party.

After the specific information for the estate which is the subject of the account has been set out, many of the provisions, such as releases and acknowledgments and agreements to refund and indemnify the executor, are relatively consistent from one Receipt and Release Agreement to the next. However, an agreement can be customized by the addition of provisions which

describe the handling of an issue unique to that estate administration. The goal is always to make full disclosure to the interested parties and to create a complete record of the executor's actions.

One original agreement may be circulated for signature by all parties or, if numerous signatures must be gathered or the parties are widely dispersed geographically, multiple counterparts of the agreement may be used. In either case, it is strongly recommended that a copy of the account be attached to the Receipt and Release Agreement so that each party will have ample opportunity to review it and raise questions. A sample Receipt, Release and Refunding Agreement is appended to this section of the materials. An official form of Receipt and Release (in a much more abbreviated form) has been approved for use in the Surrogate's Courts (Official Form JA-2).

FILING RECEIPT AND RELEASE AGREEMENTS WITHOUT INCURRING A FILING FEE

Section 2402(4) of the Surrogate's Court Procedure Act ("SCPA") provides that no fee shall be charged for filing an instrument (i.e., a Receipt and Release Agreement) which releases and discharges a fiduciary but does not contain any statement of account. (An instrument which contains even a brief summary of the account exhibited to the parties will not be accepted by the court without payment of the full filing fee.) The fee for recording any such instrument is currently $6 per page. An executor or his attorney may choose to file such an instrument with the court for safekeeping upon the termination of an estate. No presumption arises as a result of such filing as to the accuracy of the account or the adequacy of the disclosure made to the persons who signed the instrument.

If local court rules require that the court be provided with proof of the completion of the administration of the estate, the filing of such an instrument may serve this purpose. In this context, reference should also be made to Uniform Rules for Surrogate's Court ("Uniform Rules") §207.42, "Report of estates not fully distributed," perhaps more honored in the breach than in the observance.

RECORDING OR FILING INSTRUMENTS
PURSUANT TO SCPA §2202

SCPA §2202 provides that there may be recorded or filed in the court any instrument settling an account in whole or in part executed by one or more fiduciaries and one or more beneficiaries including, in the case of a beneficiary under a legal disability who has been paid, such beneficiary's legal representative or the person who actually received payment on such beneficiary's behalf. If the instrument is to be recorded and not merely filed, the parties' signatures must be acknowledged in the presence of a notary public. It is important to note that if the instrument is recorded, such record or a certified copy of the record or the instrument "shall be presumptive evidence of the contents of such instrument and its due execution." By its terms, SCPA §2202 is applicable to both an intermediate account (more common in the case of a trust than an estate) or a partial distribution, and a final account. No special proceeding is required and no notice need be given of an executor's choice to act under SCPA §2202.

SCPA §2402(4) directs that upon the filing or recording of an instrument pursuant to SCPA §2202, a fee shall be charged based on the gross value of the assets accounted for, including principal and income, computed in accordance with the schedule found at SCPA §2402(7). The fee charged includes the cost of filing or recording the instrument, and if multiple counterparts of the same instrument executed by different beneficiaries are filed, only a single fee shall be charged for filing or recording all such instruments. Thus, SCPA §2202 seems to contemplate that the instrument settling an account which is filed with the court will contain a summary of the account or have a copy of the account attached to it (local court procedure may permit the executor to submit his account to the court for review and request that it be returned to him rather than filed). The clerk of the court is directed under SCPA §2502(4) to maintain a record book listing the name and file number of the estate and the date of filing of any informal

account or any release pursuant to SCPA §2202. However, neither the filing nor recording of the instrument settling an account secures or implies any judicial approval of the account.

The statutory presumption of due execution and of the contents of the instrument afforded by recording a Receipt and Release Agreement under SCPA §2202 provides a limited measure of protection to the executor which is not available if the instrument is merely filed. As is the case with all methods of informal settlement of an account however, if fraud or duress is used in obtaining the signed instrument settling the account, then the instrument may be voided by the signatory thereto. While it is true that "[o]rdinarily the burden of pleading and proving fraud in obtaining a release is placed upon the party seeking to establish that fact," it has been held that "the burden of proof on the whole issue remains with the fiduciary as to whether at the time of the execution of the release the beneficiary was fairly dealt with." In re Amuso's Estate, 13 Misc. 2d 686, 176 N.Y.S.2d 175 (Nassau Co. 1958). Even in the absence of a challenge by a beneficiary, every executor has an obligation to maintain the viability of the informal settlement procedure by making full disclosure to every beneficiary from whom a release is sought of all material facts and circumstances of and surrounding such executor's account.

DECREE ON FILING INSTRUMENTS PURSUANT TO SCPA §2203

A slightly more "formal" means of informally settling an account may be had under the provisions of SCPA §2203. Under this section, the executor may file with the court a petition praying for a decree releasing and discharging him as executor. Unlike SCPA §2202, only final accounts may be settled under this section.

The petition must show the names and addresses of all interested parties, that all taxes have been paid (or that none were due), and that the petitioner has fully accounted and made full

disclosure in writing of his administration of the estate to all persons who would be required to be served with process in a proceeding under SCPA §2210 (although, of course, this is not such a proceeding). SCPA §2203(1). The petition shall also show: (a) in the case of a fiduciary other than a trustee or guardian, either that the fiduciary's letters have been revoked or that he has been removed or that the time for creditors to present claims has expired and that all known debts and administration expenses have been paid; (b) in the case of a trustee, whether or not the trust has been fully executed; and (c) in the case of a guardian, either that the infant has reached majority or has died. SCPA §2203(2).

In addition to filing his petition, the petitioner must also file with the court duly acknowledged instruments executed by all interested parties, as defined in SCPA §2210, or, in the case of a person under a legal disability who has been paid, executed by such person's legal representative or the person who actually received payment, which approve the account of the petitioner and release and discharge him. It is suggested that the instruments filed under this section be recorded as provided under SCPA §2202, to invoke the statutory presumption of due execution and of the contents of the instrument described above.

While there is no requirement that a copy of the account exhibited to all parties who have executed such instruments be filed with the court, SCPA §2402(5) provides that a filing fee shall be charged based on the gross value of the assets accounted for, including principal and income, computed in accordance with the schedule found at SCPA §2402(7). Unlike the filing fee provisions relating to SCPA §2202, the statute provides an alternative means of fixing the filing fee if no values are shown in the petition and Receipt and Release Agreements, by looking to "the estate of the decedent as shown in the estate tax return [Form ET-706] filed under article 26 of the tax law or a proceeding under such article." Obviously, such an alternative would not

apply in the case of a trust or guardianship account, unless for some reason the filing of a New York State estate tax return is also required. More importantly, at least one court has held that "estate" means gross taxable estate, including such items as insurance payable to the surviving widow individually and jointly held property, and not just the comparatively small amount of the decedent's property passing under his Will and accounted for by his executor. In re Estate of Carriero, 107 Misc. 2d 968, 436 N.Y.S.2d 175 (Saratoga Co. 1981). Thus, since the statute requires that some form of written account be prepared and exhibited to the interested parties in order to obtain their informed releases, it would seem prudent to file a copy of the account with the court, so as to avoid any question with respect to the proper amount of the filing fee.

Upon filing the petition and duly executed instruments of all interested parties and payment of the filing fee, and the court being satisfied upon its review of these documents, the court may "make a decree releasing and discharging the petitioner and the sureties on his bond, if any, from any further liability to all persons interested." SCPA §2203(4). It is questionable whether such a decree is of any greater significance than the recording of Receipt and Release Agreements under SCPA §2202, and it has been held that an account settled by means of properly obtained and recorded instruments of release and discharge "is as effectual for all purposes as a settlement pursuant to a judicial decree." In re Kahn's Will, 144 N.Y.S.2d 253 (West. Co. 1955), aff'd, 156 N.Y.S.2d 1016 (2d Dep't 1956).

As stated above, this form of informal settlement of account specifically requires that all interested parties, as defined in SCPA §2210, execute instruments of receipt and release. As will be covered elsewhere in these materials, such "interested parties" may include not only legatees, devisees and residuary beneficiaries, but also unpaid creditors, the surety on the fiduciary's bond, all co-fiduciaries who do not join in the petition, and the attorney general, among others. While

it is generally good practice, for the protection of the accounting executor, to obtain the signatures of all residuary beneficiaries on any Receipt and Release Agreement, the rather burdensome requirements of SCPA §2203 render this a little used method of informal settlement of accounts. Because this section does stop short of all the procedural requirements of a judicial settlement of account, it may be of use in a case where nothing less than a judicial decree will permit the discharge of the surety on the executor's bond.

While the attorney general is an "interested party" under SCPA §2210 and for purposes of SCPA §2203, it is recommended that the attorney general be advised of any informal settlement of an account for an estate in which a charitable organization has an interest beyond that of a specific devise or bequest which has been satisfied, and that his office be provided with a copy of the account as well as the Receipt and Release Agreement. (In this context, reference should also be made to Estates, Powers and Trusts Law ("EPTL") §8-1.4(e)(1), "Supervision of trustees for charitable purposes.")

Although it is sometimes felt by practitioners that only a judicial settlement of account is appropriate when the residuary beneficiaries include charitable organizations, this is not required by statute. A charity may be quite willing to execute a Receipt and Release Agreement upon receipt and review of an account by the charity's in-house or outside counsel, in order to avoid any diminution of its share by the general estate administration expenses attendant upon a formal proceeding, and to receive the funds to which it is entitled more quickly. Of course, a charity, like any other party, may request a judicial settlement of the account, but there is nothing inappropriate in inquiring as to whether the charity would consider dispensing with such a proceeding. If all charitable organizations interested in the executor's account have been willing to execute Receipt and Release Agreements, a fully executed copy of the Agreement, together

with the account, may be submitted to the attorney general as and for the final periodic report required to be filed by the estate (pursuant to EPTL §8-1.4(f)-(h)), and the executor may request the attorney general to issue a "Notice of No Objection" with respect to the executor's informal settlement of his account.

VIRTUAL REPRESENTATION
PURSUANT TO SCPA §315

This section applies in any proceeding in which all interested parties are required to be served with process and, accordingly, it is expressly applicable to voluntary judicial settlements of accounts under SCPA §2210. With respect to informal settlements of accounts, the rules of this section provide a useful means of determining if the signatories to a Receipt and Release Agreement may adequately represent all parties who may potentially raise a claim against the executor or the estate, thereby rendering the instrument settling the account "binding and conclusive on all persons upon whom service of process would not be required to the same extent as that instrument binds the persons who executed it." SCPA §315(8).

In general terms, the theory underlying this section is that if one looks at the group of persons interested in, for example, an estate account, there may be two or more persons who share an identity of interests in the estate. That is, one of those persons ("X") may be so situated that, in looking after his own interests, he will also be looking after the interests of another person ("Y"). If X is made a party to the proceeding, he may be able to "virtually represent" Y, who shares an identity of interests with him, thereby rendering it unnecessary for Y to be made a party at all. The person who is made a party to the proceeding and who has been found qualified to virtually represent other interested persons is commonly referred to as the "representor." Those persons who are being virtually represented by another are the "representees." Thus, in the example given, X is the representor and Y is the representee. In re Estate of Putignano, 82 Misc. 2d 389, 368 N.Y.S.2d 420 (Kings Co. 1975).

As used in this section, the term "an interest in the estate" includes both income and principal interests. The statute does not define the terms "same interest" or "identity of interest," but these terms have been interpreted to mean "same economic interest" rather than a literal

congruence of property interests. In re Estate of Connable, 102 Misc. 2d 406, 423 N.Y.S.2d 421 (N.Y. Co. 1979); In re Goldstick, 177 A.D.2d 225, 581 N.Y.S.2d 165 (1st Dep't 1992). Thus, the nature of the proceeding in which virtual representation is sought to be used can be important. For example, the life income beneficiary of a testamentary trust and the remainderman of that trust most certainly do not have the same interests with respect to the settlement of a trust account, but they may well have the same interest in a contested probate proceeding, where the very existence of the trust is threatened. Further, even if two persons have the same economic interests as beneficiaries of an estate, if one of those persons is also the fiduciary who is rendering the account, his dual status will likely be considered to put him in conflict with the person who is only a beneficiary.

While the statute provides that the decree or order entered in any proceeding in which all interested parties are required to be served with process shall be binding and conclusive on all persons upon whom service is not required (SCPA §315(6)), it is important to remember that virtual representation does not assure the same finality as when a guardian ad litem is appointed by the court to represent an interested person under a disability, or when a competent adult person is cited. In re Estate of Dickey, 195 Misc. 2d 729, 761 N.Y.S.2d 473 (Nassau Co. 2003). Just as a Receipt and Release Agreement obtained by fraud is not binding on the signatories thereof, an improper application of the virtual representation rules will render a decree entered with respect to a representor not binding on his purported representee. Accordingly, courts are not disposed to apply the statute loosely. In re Estate of Lawrence, 106 Misc. 2d 19, 430 N.Y.S.2d 533 (N.Y. Co. 1980). A distinction must also be drawn between virtual representation and legal or actual representation, such as the representation afforded the beneficiaries of a trust

by the trustee, who stands in a fiduciary relationship to the trust beneficiaries. In re Ziegler, 157 Misc. 2d 423, 596 N.Y.S.2d 963 (N.Y. Co. 1993).

The representor is not a fiduciary and is not liable to a purported representee for failing to adequately represent his interests. However, under Uniform Rules §207.18, "Use of virtual representation," the court shall require in an accounting proceeding where representation is based on SCPA §315(5), and may in any other accounting proceeding direct, both the petitioner or his attorney and the nominated representor to file affidavits with the court setting forth, inter alia, the statutory basis for the use of virtual representation and the steps taken by the representor to represent adequately the interests of the representee. In addition, the petition filed in any proceeding in which service of process upon interested persons may be dispensed with pursuant to SCPA §315 or SCPA §2210 shall set forth certain detailed information regarding such persons. SCPA §315(7). The appropriateness of a representor/representee relationship must be evaluated independently in each proceeding relating to an estate or trust, and the proper use of virtual representation in any prior proceeding is always subject to review in any subsequent proceeding.

The statute is primarily concerned with representation of successive or vertical interests and makes certain specific provisions with respect to the representation of class interests and contingent interests. Thus, the persons who shall compose a class upon the happening of a future event may be virtually represented by the members of that class who are in existence immediately before the commencement of the proceeding (e.g., if income is payable to A for life with remainder to A's issue, the now living issue of A may represent the class of A's issue). SCPA §315(2)(a)(i). Similarly, the persons who shall compose a class upon the happening of a future event who are described in terms of their relationship to a party to the proceeding may be virtually represented by such party (e.g., if income is payable to A for life with remainder to B or,

if B is not then living, to B's issue, B may represent the class of B's issue). SCPA §315(2)(a)(ii). In addition, the persons who shall compose a class of unborn or unascertained persons may be virtually represented by a person in being or ascertained who has the same interest (e.g., if income is payable to A for life with remainder to A's issue or, if none, to B's issue, the now living issue of A may represent both the class of A's issue and the class of B's issue). SCPA §315(2)(a)(iii). Finally, if the holder of a power of appointment is a party to the proceeding, he may virtually represent his potential appointees and, in the case of the holder of a general power of appointment, he may likewise represent the takers in default of his exercise of such power. SCPA §315(2)(b). In re Levy, 130 Misc. 2d 370, 496 N.Y.S.2d 911 (N.Y. Co. 1985). With respect to representation of contingent interests, a party to a proceeding may virtually represent a person who would succeed to such interest upon the happening of a future event (e.g., if income is payable to A for life with remainder to B or, if B is not then living, to C, B may represent C). SCPA §315(3).

In addition to vertical interests, representation of concurrent or horizontal interests is also permitted under the statute (e.g., if income is payable to A for life with remainder to A's children, B, C and D, and at the time of A's death B is an adult but C and D are still minors, B may represent his siblings, C and D). However, virtual representation of horizontal interests does not apply unless the Will or trust instrument expressly so provides. SCPA §315(5). In re Sanders, 123 Misc. 2d 424, 474 N.Y.S.2d 215 (Nassau Co. 1984). An example of such an express Will provision is as follows:

> Service of Process. In any proceeding in which all persons interested in my estate or a trust are required to be served with process, where a person having an interest in my estate or such trust is under a disability and a party to the

> proceeding has the same interest as the person under a disability, it shall not be necessary to serve the person under a disability, unless, notwithstanding this provision, such service is required under local law.

In the absence of such an express provision, a guardian ad litem must be appointed to represent the interests of a person under a disability, despite the fact that he may be a member of a class of beneficiaries all of whom have identical interests and all the rest of whom are parties to the proceeding.

Fall 2014

SAMPLE AGREEMENT

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

In the Matter of the Settlement of the Final Account of Proceedings of PETER BEALE and DEBORAH WILKINS, as Executors of the Will of LOUISE BEALE, Deceased.	:	**RECEIPT, RELEASE AND <u>REFUNDING AGREEMENT</u>** File No. 0000/11

THIS AGREEMENT, made as of the day of , 2014, by and among PETER BEALE, currently residing at 600 East 86th Street, New York, New York 10029, DEBORAH WILKINS, currently residing at 500 West 67th Street, New York, New York 10025, and PAULINE BEALE FOWLER, currently residing at 2000 Sunset Boulevard, Los Angeles, California 90454.

W I T N E S S E T H:

WHEREAS, Louise Beale (the "Decedent") died on July 5, 2011, a resident of 2222 Park Avenue, in the City, County and State of New York, leaving a Will dated March 23, 1998, as amended by a First Codicil thereto dated October 13, 1999 (collectively, the "Will"), a copy of which is attached hereto as Exhibit A, which was duly admitted to probate on August 8, 2011, and Letters Testamentary thereon were issued on the same date to Peter Beale and Deborah Wilkins, the Executors named in the Will (the "Executors"), by the Surrogate's Court of said County; and

WHEREAS, the Executors have duly administered the estate of the Decedent, having (i) taken into their possession or secured all estate assets, (ii) paid the Decedent's debts and funeral expenses, (iii) prepared and timely filed the United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706) required for the Decedent's estate, paid the federal estate tax determined to be due from the Decedent's estate, and received a Federal Estate Tax Closing Document dated March 5, 2014, (iv) prepared and timely filed the New York State Estate Tax Return (Form ET-706) required for the Decedent's estate, paid the New York State estate tax determined to be due from the Decedent's estate, and received a New York State Estate Tax Closing Letter dated December 26, 2013, (v) paid or reserved funds for the payment of all expenses of administering the Decedent's estate, (vi) distributed the tangible personal property owned by the Decedent in accordance with the provisions of Article SECOND of the Will, (vii) sold the Decedent's cooperative apartment as directed under Article THIRD of the Will, (viii) directed Deborah Wilkins, as Trustee of the Albert Beale Trust under an Agreement dated September 22, 1990, to distribute the remaining principal of such trust in accordance with the Decedent's exercise of her power of appointment under Article FOURTH of the Will, (ix) paid the cash bequests as directed under Article FIFTH of the Will and obtained signed Receipts therefor, and (x) made substantial distributions of the Decedent's residuary estate (the "Residuary Estate") on account to the Decedent's surviving children, as directed under Article SIXTH of the Will; and

WHEREAS, the Decedent was survived by her two (2) children, Peter Beale ("Peter") and Pauline Beale Fowler ("Pauline"), both of whom are adults, there being no predeceased child of the Decedent; and

WHEREAS, Article SIXTH of the Will provides that the Residuary Estate is to be distributed in equal shares to the Decedent's children; and

WHEREAS, the Executors now desire to make final distribution of the principal and income comprised in the Residuary Estate to Peter, individually, and Pauline; and

WHEREAS, an account of proceedings of the Executors covering the period from July 5, 2011 (the Decedent's date of death), to and including September 30, 2014, has been prepared (the "Accounting"), a copy of which is annexed hereto as Exhibit B and made a part hereof; and

WHEREAS, Peter, individually, and Pauline have been advised of their right to require that the Accounting be settled judicially, but because they are satisfied with the manner in which the Executors have performed their duties and, in order to avoid the expense and delay incident to the judicial settlement of the Accounting, Peter, individually, and Pauline have requested, and the Executors have agreed, on the basis of the release, discharge and waiver of judicial accounting contained herein, not to require a judicial settlement of the Accounting; and

WHEREAS, Deborah Wilkins, as Executor, is entitled to receiving and paying commissions in the total amount of $36,250.95, as set forth at Schedules C-1 and J of the Accounting, of which $17,600 was paid on account to her by Order of the New York County Surrogate's Court, as set forth at Schedule C of the Accounting (Peter, as Executor, having waived his right to receive commissions); and

WHEREAS, the sum of $50,000, for legal fees, and the sum of $2,872.25, for legal disbursements, have been paid to Mitchell & Watts LLP, as attorneys for the Executors, for legal services rendered and legal disbursements incurred in connection with the administration of the Decedent's estate, as set forth at Schedule C of the Accounting; and

WHEREAS, each of the parties hereto is of full age and of sound mind and is fully advised of his or her rights in the premises;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements of the parties hereto and of the consent of the Executors, and at the request of Peter, individually, and Pauline, to facilitate the settlement of the Accounting without requiring the judicial settlement thereof, and of other good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto do hereby agree as follows:

FIRST: Peter, individually, and Pauline do hereby acknowledge and agree that the Accounting is in all respects just, true, proper and correct, and they do ratify, approve and confirm each and every one of the acts, doings, proceedings, collections and disbursements of the Executors, as set forth in the Accounting, and they and each of them do hereby waive their, his or her right to enforce a judicial settlement of the Accounting, it being the purpose and intent of the parties hereto that the release and discharge hereinafter given and granted to the Executors shall be accepted by the Executors and each of them and shall be binding on Peter, individually, and Pauline and each of them, in all respects as though a final account had been rendered in the course of a judicial proceeding and had thereupon been settled and allowed, as presented and filed, by a judgment, decree or order of a court of competent jurisdiction.

SECOND: Peter, individually, and Pauline do hereby acknowledge that the Accounting constitutes a full and complete disclosure to them of all the acts, doings and proceedings of the Executors during the period from July 5, 2011, to and including September 30, 2014; and also, that the Executors have put at the disposal of Peter, individually, and Pauline all papers, documents, memoranda, records, tax returns and other information in any way related to or connected with the acts, doings and proceedings of the Executors during said period.

THIRD: Peter, individually, and Pauline do hereby approve the payment to be made to Deborah Wilkins, as Executor, of the balance of receiving and paying commissions due her in the amount of $18,650.95, as set forth at Schedules C-1 and J of the Accounting.

FOURTH: Peter, individually, and Pauline do hereby approve the payments made to Mitchell & Watts LLP in the total amount of $52,872.25, for legal services rendered and legal disbursements incurred in connection with the administration of the Decedent's estate, and consent and agree that the additional sum of $15,000 be paid to said Firm for the balance of its fee for legal services rendered, plus such additional legal disbursements as shall be incurred (in an amount to be determined), in connection with the administration of the Decedent's estate, including the preparation of this Agreement and the Accounting and the settlement thereof, as set forth at Schedule C-1 of the Accounting.

FIFTH: Each of Peter, individually, and Pauline does hereby acknowledge receipt from the Executors of the cash and other property heretofore distributed and remaining on hand (after payment of Executor's commissions and the balance of legal fees and disbursements, as described in paragraphs THIRD and FOURTH of this Agreement), as set forth at Schedules E, G, E-1 and G-1 of the Accounting, and does hereby accept such cash and other property in full satisfaction of his or her respective interests in and to the principal and income of the Residuary Estate through September 30, 2014, the closing date of the Accounting.

SIXTH: Peter, individually, and Pauline do hereby jointly and severally release and discharge the Executors, individually and as Executors, and their, his and her respective heirs, legal representatives, successors and assigns, of and from any and all manner of action or actions, cause or causes of action, suits, debts, dues, sums of money, damages, claims and demands whatsoever which any of Peter, individually, and Pauline now has or hereafter may

have against the Executors or either of them, for or by reason of any act or omission, collection or disbursement, cause, matter or thing whatsoever, recited, contained, appearing or set forth in the Accounting or reasonably to be inferred from anything therein contained, or for or by reason of any payment, distribution or transfer made, or of anything done or omitted to be done by the Executors in connection with their administration of the Decedent's estate during the period from July 5, 2011, to and including September 30, 2014.

SEVENTH: Peter, individually, and Pauline agree to reimburse, promptly upon demand, indemnify and hold harmless the Executors, to the extent of his or her respective share of the property received, for, of and from any and all claims, demands and liabilities which the Executors may at any time sustain, incur or become liable for by reason of the administration of the Decedent's estate by the Executors during the period from July 5, 2011, to and including September 30, 2014.

EIGHTH: Each of Peter, individually, and Pauline does hereby represent, certify and warrant that he or she has not assigned, transferred or encumbered, in any way, either voluntarily or involuntarily, his or her interest in the Residuary Estate or any part thereof.

NINTH: This Agreement shall inure to the benefit of the Executors as to all matters contained in the Accounting for the period from July 5, 2011, to and including September 30, 2014, and to his, her and their respective heirs, legal representatives, successors and assigns, and shall be binding on Peter, individually, and Pauline and his, her and their respective heirs, legal representatives, successors and assigns.

TENTH: This Agreement may be executed in one or more counterparts, but all such counterparts shall together constitute but one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals as of the day and year first above written.

_____[L.S.]
PETER BEALE, as Executor of the Will
of Louise Beale, and Individually

_____[L.S.]
DEBORAH WILKINS, as Executor of
the Will of Louise Beale

_____[L.S.]
PAULINE BEALE FOWLER, Individually

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

On the day of in the year 2014 before me, the undersigned, a Notary Public in and for said State, personally appeared PETER BEALE, 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 executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public
(SEAL)

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

On the day of in the year 2014 before me, the undersigned, a Notary Public in and for said State, personally appeared DEBORAH WILKINS, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public
(SEAL)

STATE OF CALIFORNIA)
:ss.:
COUNTY OF LOS ANGELES)

On the day of in the year 2014 before me, the undersigned, a Notary Public in and for said State, personally appeared PAULINE BEALE FOWLER, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public
(SEAL)

FORMAL SETTLEMENT OF ESTATES

By

ELIZABETH H.W. FRY, Esq.

Pillsbury Winthrop Shaw Pittman LLP
New York City

The author wishes to acknowledge the assistance of Joanne Butler and Anne C. Bederka in the preparation of this outline.

FORMAL SETTLEMENT OF ESTATES

A. DUTY TO ACCOUNT

It is the duty of every fiduciary who has been appointed to administer the estate of a decedent to account to those persons having an interest in the estate, including not only persons beneficially interested but unsatisfied creditors as well. The fiduciary will be relieved from personal liability only upon the final settlement of his account and only with respect to the assets and transactions specifically described in the account.

Accounts may be settled informally by agreement between the fiduciary and the interested parties or formally by judicial proceeding. If the interested parties include infants or other persons incapable of protecting their rights and who cannot be virtually represented in an informal settlement under SCPA § 315(8), a judicial settlement is required.

The preferred practice is for the fiduciary to account voluntarily. However, if he does not, there are statutory provisions authorizing the court on its own motion, or other parties interested in the estate being administered, to compel the fiduciary to account. SCPA § 2205.

If a fiduciary dies before settling his account SCPA § 2207 provides for the settlement of his account by his fiduciary.

B. VOLUNTARY ACCOUNTING PROCEEDINGS

1. Prerequisites to Commencement of Proceeding

Before a voluntary accounting proceeding may be brought, the estate fiduciary

must satisfy at least one of the following requirements under SCPA § 2208:

(a) That the period for the presentation of claims to the estate has expired. This provision precludes a fiduciary from completing the administration of an estate before all creditors have had an opportunity to submit their claims within the time allowed under SCPA § 1802.

(b) That the fiduciary's letters have been revoked.

(c) That although not more than six months have passed from the appointment of the original fiduciary, a disposition of the decedent's real property is necessary pursuant to SCPA § 1902, generally relating to the sale of real property to satisfy debts, expenses, taxes or distributive shares.

(d) That the fiduciary's account has not been judicially settled during the past year. A fiduciary may account for this reason alone, however, only if the Court specifically agrees to entertain the proceeding. This provision contemplates that the fiduciary may wish to have one or more intermediate accounts during the course of the estate's administration. However, at least one year must pass between each such account.

2. **Commencement of Proceeding**

A voluntary accounting proceeding is commenced by formal petition of the fiduciary to the Surrogate's Court from which the fiduciary's letters issued praying that his account be judicially settled, that all necessary and proper parties be required to show cause why such settlement should not be had and for whatever specific relief may be desired. Official forms (including a Petition for Judicial Settlement of Account, a Citation, Decree and other necessary forms) have been enacted by the Chief

Administrative Judge and are set out in 22 NYCRR, Subtitle D, Chapter 7. Official forms may also be obtained from the Surrogate's Court in which the proceeding is being commenced.

Section 207.40 of the Uniform Rules for Surrogate's Courts provides that together with the petition the fiduciary must file the account and a copy of the decedent's will. Following such filing, process in the form of a citation must then issue and be served upon the parties required to be cited.

3. **Necessary Parties**

The necessary parties to a voluntary accounting proceeding are set forth in SCPA § 2210 and include:

(a) All persons purporting to have claims against the estate that remain unpaid. These are the parties whose claims have been listed in the account on Schedule D in paragraph 2 (claims presented and allowed but not paid), paragraph 3 (claims presented but rejected) and paragraph 4 (contingent and possible claims).

(b) The surety on the fiduciary's bond, if any.

(c) Any co-fiduciaries who are not co-petitioners.

(d) A successor fiduciary, if the petitioner is no longer acting and a successor has been appointed. If no successor fiduciary has been appointed the accounting fiduciary must account to all "persons interested" who are required to be served under SCPA § 2210. This provision is based upon the supposition that a successor fiduciary will adequately represent the interests of all persons for whose benefit he acts and to whom he, in turn, will have a duty to account.

(e) The Attorney General of the State of New York (i) if required pursuant to EPTL 8-1.4(e)(1)(D) because one or more charitable organizations has an interest in the estate, or (ii) if the decedent or a beneficiary has died intestate as to part of the estate leaving unknown distributees or known distributees who cannot be located.

(f) The distributees where the decedent or a beneficiary has died intestate except those who have executed acknowledged releases evidencing full payment as described below.

(g) All devisees, all trustees of any trust created by the will or by an inter vivos instrument to whom estate funds are payable and all legatees, except those who have executed acknowledged releases evidencing full payment as described below.

It is generally desirable to reduce the number of beneficiaries who must be cited. For example, process need not issue to any person who has previously executed an acknowledged release which has been filed in the Court. If a legatee has died, such a release may be executed by the fiduciary appointed for his estate.

When a portion of the decedent's estate is payable to trustees of a testamentary or preexisting inter vivos trust, if at least one of the trustees is different from the accounting fiduciaries it is not necessary to account to the persons beneficially interested in such trust. However, when the accounting fiduciaries as executors would account to themselves in their capacities as

trustees, all persons beneficially interested in the trust must receive process. SCPA § 2210(7) and (10) .

Thus, if A and B are the executors and the trustees or if only one of them is a trustee, process must issue to all of the persons beneficially interested in the trust. However, if A and B are the executors of C's estate and A and D are the trustees of the trusts created thereunder, process need issue only to D, and not to the persons beneficially interested in the trust. In applying the foregoing rule, however, it is important to consider whether trustee D could possibly have a conflict of interest in representing the trust beneficiaries. If so, process should issue to all of the trust beneficiaries. See Matter of Estate of Knauf, 145 Misc.2d 749, 547 N.Y.S.2d 803 (1989); Matter of Will of Parkinson, 134 Misc.2d 565, 511 N.Y.S.2d 539 (1987).

SCPA § 2210(14) specifically provides that the provisions of SCPA § 315 relating to virtual representation shall apply to voluntary accounting proceedings. This provision will reduce the number of persons who would otherwise be required to be cited pursuant to SCPA § 2210(7). For example, where the accounting executors would otherwise be accounting to themselves as trustees of testamentary trusts, and pursuant to § 2210(10) must therefore include as necessary parties all persons interested in the trust, the virtual representation provisions of § 315 may apply to permit the presumptive remaindermen to represent the interests of the more remote contingent remaindermen thus reducing the number of parties to whom process must issue.

(h) If a necessary party dies prior to the settlement of the account, process must issue to his fiduciary or if none has been appointed to all of his distributees, named fiduciaries or persons beneficially interested in his estate as set forth in any will of the deceased filed in the Court. SCPA § 2210(11).

4. **Pleadings and Other Necessary Documents**

(a) **Petition**

The petition must satisfy the requirements of SCPA § 304 and should set forth the following:

(i) The title of the proceeding and the name, address and capacity of the petitioner.

(ii) The name, domicile and date of death of the decedent and the date of the appointment of the fiduciary. This information will support the jurisdiction of the court to entertain the proceeding.

(iii) The nature (i.e., final or intermediate) of the account being submitted and a history of prior accounts, if any.

(iv) The reason for the account and justification therefor pursuant to SCPA § 2208. In the case of a final account this reason would most likely be that the estate is fully administered and more than seven months have passed since the issuance of letters thereby satisfying the period for the presentation of claims.

(v) The names and addresses of all persons interested in the estate and the nature of their interests, including those having a current interest as well as

all presumptive and contingent remaindermen of trusts no matter how remote.

The petition should separately identify those who are necessary parties to whom process must issue and those who are virtually represented. As to those who are virtually represented the petition should describe them as such and identify the party receiving the citation who represents them.

If any interested persons are infants, the petition should also reflect their ages, dates of birth, the person with whom they reside and whether or not they have a general or testamentary guardian.

If any interested persons are mentally incompetent, the petition must also reflect the name and address of such person's committee or, if none, an adult relative or friend interested in his welfare, and of the person or institution charged with his care and custody.

Persons who have executed acknowledged releases (SCPA § 2210(7)) need not be included as parties to the proceeding but the petition must reflect that they have executed the releases and that such releases have been filed in the Court.

(vi) The petition should reflect the value of the property being accounted for to enable the court to fix the filing fee. This number should be the total of Schedules A, A-1 and A-2 of the account.

(vii) In the case of a final account a statement that the New York estate tax proceedings have been completed. Section 207.44 of the Uniform Rules

for Surrogate's Courts states that no decree of final settlement may be signed without evidence either that no tax is due or that all such taxes, interest and penalties have been paid, except as provided in SCPA § 1804(3).

(viii) A statement that there is no other proceeding pending for the settlement of the account in this or any other Court. If a proceeding for a compulsory account has been commenced, the petition should so state and request that the proceedings be consolidated.

(ix) A statement of the relief requested, e.g., that the account be approved as filed, that the attorneys' fees requested be allowed pursuant to SCPA § 2110, that the Court approve or direct the distribution of the estate assets as in the case of a construction or cy pres issue, or give direction as to the payment of outstanding claims.

(b) **Citation**

The form of process in an accounting proceeding in the Surrogate's Court is a citation which is issued by the Court. The citation must satisfy the requirements of SCPA § 306 which include a description of the proceeding, the names and domiciles of the decedent and of the petitioner, the names of all persons to be served who have not appeared or waived the issuance of a citation, the return date (which cannot exceed four months after the date of issuance) and the name, address and telephone number of the attorney for the petitioner. The citation must also contain the following statement:

This citation is served upon you as required by law.
You are not required to appear; however, if you fail to

appear it will be assumed you do not object to the relief requested. You have a right to have an attorney appear for you, and you or your attorney may request a copy of the full account from the petitioner or petitioner's attorney.

An official form of citation is prescribed and published as an addendum to the SCPA.

The citation must also accurately describe the relief prayed for in the petition to give the parties adequate notice. If the citation does not reflect the relief requested such relief cannot be granted in the decree.

Section 207.40 (e) of the Uniform Rules states that a copy of the summary statement of account must be attached to all citations served and the affidavit of service must reflect that it was served with the citation. A full copy of the account must be provided to any party cited who requests it.

(c) **Affidavits for Virtual Representation of Lateral Interests**

Section 207.18 of the New York Uniform Rules for Surrogate's Courts provides that in any accounting proceeding where virtual representation is to be used pursuant to subdivision 5 of SCPA § 315 (providing for "lateral" virtual representation of persons under a disability having the same interest as the representor), both the petitioner or his attorney, and the individual representing the party virtually represented must submit affidavits.

The petitioner's affidavit must provide the name, address and interest in the estate of the person proposed to represent the interest of the person alleged to be virtually represented, the name, address and interest in the proceeding of the person virtually represented and the statutory basis under which virtual representation may be used in the particular proceeding.

The representor's affidavit must recite that he has fully reviewed the proceeding, that he has no conflict of interest in representing the interests of the representees and what steps he has taken to represent the interests of the representees in deciding what action, if any, he should take in the proceeding.

(d) **Affidavit of Petitioner with respect to a claim he may have against the estate**

If the fiduciary is also a creditor of the estate and has not previously sought the approval of the Court for payment of his claim pursuant to SCPA § 1805, he must seek the Court's approval for payment as part of the accounting proceeding and must submit a separate affidavit in support of the claim.

5. **Service of Citation**

(a) **General Provisions**

The time limitations and methods of service of the citation are set forth in SCPA §§ 307-309. If the person to be served is a domiciliary of New York, service by personal delivery is required not less than 10 days prior to the return date of the citation. If the person is not a domiciliary of the State of New York, service is generally obtained by mailing a copy of the citation to the person; no court order is required for non-residents (SCPA § 307(2)). If the party lives outside New York but within the United States, service must be made at least 20 days prior to the return date, usually by certified mail, return receipt requested. If the party lives outside the United States, service must be made at least 30 days prior to the return date, usually by registered mail.

Service by personal delivery is complete upon physical receipt and service by mail is complete upon the mailing of the citation. Proof of service of

any kind is made by an affidavit. Courts vary in their practice of whether or not the return receipts must be submitted with an affidavit of service by mail.

Creditors may be served by mail even if they are domiciliaries (SCPA § 307(6)).

(b) **Service upon an Infant**

If one of the necessary parties to the proceeding is an infant, service is effected in accordance with SCPA § 307(4) by serving a copy of the citation upon the parent or guardian of such infant, any adult person having care and control of the infant or with whom the infant resides or such other person interested in his welfare or education as the court may direct unless such parent, guardian, adult or person is also the petitioner in which case no such service is required. If such infant is over the age of fourteen, a copy of the citation must also be served upon such infant. If the infant is under age fourteen, and service upon an adult is not required because such adult is the petitioner, service upon the infant is complete upon filing of the petition. SCPA § 309(3). The Court may, however, designate a person to be served on the infant's behalf pursuant to SCPA § 311.

(c) **Failure to Serve**

In the event that service is not obtained within the required time periods, the Court will adjourn the return day and issue a supplemental citation to those persons not yet served. SCPA § 312.

6. **Alternatives to Service of Citation**

(a) **Waiver and Consent**

Service of citation is not required upon any person who waives the issuance and service of a citation and consents that the Court grant the relief requested in the petition. The waiver and consent must be acknowledged and filed in the Court. A person under disability, such as an infant, may not execute a waiver and consent. Unless otherwise directed by the Court, the waiver shall recite that the party received a copy of the summary statement of account and understands that he may request a copy of the full account from the petitioner or petitioner's attorney. Uniform Rules § 207.40(f).

(b) **Appearance in the Proceeding**

Service is not required, and failure to obtain service is cured, upon any party who voluntarily appears in the proceeding either on his own or by his attorney.

(c) **Admission of Due and Timely Service**

Any party 16 years of age or older may admit service of the citation, without waiving his right to question the account, by instrument signed and acknowledged by him before a Notary Public. SCPA § 314. It is generally required that this instrument be executed prior to the last day on which service could have been obtained. This procedure is helpful when personal delivery of a citation is otherwise necessary because the party is a domiciliary of New York but lives beyond the area where he may be conveniently served by the petitioner's attorney.

(d) **Dispensation of Service**

SCPA § 2210(12) provides that for good cause shown service upon any person whose interest in the estate is not more than $500 may be dispensed with by the Court; however, unless that person is subsequently served, waives service or appears in the proceeding prior to the entry of the decree, the decree shall not be conclusive against him. This section recognizes that in some instances the cost of service may exceed the beneficiary's interest in the estate and provides the accounting fiduciary with an alternative.

7. **Issues to be Resolved as Part of Accounting Proceeding**

(a) **Approval of Executor's Actions**

In the accounting proceeding, the fiduciary primarily seeks approval of his financial transactions with regard to the administration of the estate, including the sale of assets, investment of funds, payment of claims, expenses and taxes, allocation of receipts, and partial distributions.

(b) **Direction as to Payment of Claims and Expenses**

As part of the accounting proceeding the fiduciary may seek the determination of the Court as to whether a claim presented against the estate is properly payable. This may arise either because the fiduciary has rejected the claim and the claimant having received a citation now attempts to enforce his claim in the accounting proceeding (SCPA § 1808), or because the fiduciary seeks a determination as to whether a claim is properly payable and wants the protection

of a court determination before he pays it. An example of this might be a question as to the enforceability of a charitable pledge.

If the legal fees in connection with the estate administration have not been paid the fiduciary should seek their approval in the account pursuant to SCPA § 2110. An Affidavit of Legal Services must be filed along with the petition settling the account. Section 207.45 of the Uniform Rules.

(c) **Issues Concerning the Distribution of Assets; Construction**

If there is any question as to how the assets of the estate should be distributed pursuant to a decedent's will the fiduciary should specifically raise the question as part of the accounting proceeding and ask for a determination as part of his prayer for relief in the petition and on the citation. For example, issues could exist concerning (a) the proper identification of beneficiaries (such as whether a distribution should be made per capita or per stirpes), (b) the allocation of receipts and disbursements between income and principal, (c) the source of tax payments, or (d) the effect of a renunciation.

8. **Proceedings On and After the Return Date**

(a) **The Return Date**

On the return date the petitioner will appear (usually by his attorney) to move for the relief requested in the petition. If no other parties appear and the Court has no questions of its own, the account will be marked for decree. If an interested party does appear the Court may schedule a time for a hearing or for the filing of objections as it may deem appropriate. The Court may also enquire whether the party who has appeared wishes to examine the fiduciary pursuant to

Section 2211. Such an examination may be held either before or after the filing of objections.

(b) **Appointment of a Guardian ad litem**

If one or more infants are parties to the proceeding, following the return day the Court will appoint a guardian ad litem to represent their interests.

If the interests of the infant beneficiaries differ the Court may appoint a separate guardian to represent each such class of interest. For example, if certain infants have a current interest in income of the estate and others have an interest in the remainder of a trust, a separate guardian may be appointed to represent each separate interest.

The petitioner or his attorney should provide a copy of the account to the guardian ad litem, and must provide a copy to any party who requests one. If the petitioner or his attorney does not provide such copies such failure may constitute grounds for the disallowance of commissions or fees. Uniform Rules § 207.40(e).

The guardian will generally schedule an appointment with the petitioner or his attorney to review the account and the supporting papers on which the account was based such as bank statements and tax returns.

(c) **Filing of Objections**

Pursuant to § 207.41 of the Uniform Rules for Surrogate's Courts, any creditor or any other person interested in an account may file written objections to the account within such time as the Court may allow. A copy of the objections must be served upon the petitioner or his attorney before such objections are filed with the Court.

A guardian ad litem is given 20 days after his appointment to file objections or to file his report unless for cause shown such time is extended by the Surrogate.

(d) **Examinations and Hearings**

Upon the filing of objections, the court will fix such schedule for the conduct of examinations and hearings and the filing of briefs as it may deem appropriate.

(e) **Affidavit Amending or Supplementing Account**

Following the resolution of any objections to the account or changes required thereto that are agreed upon, the petitioner should amend the account by affidavit to make the necessary corrections. Such affidavit must be served on all parties who appeared in the proceeding.

Where, in the Court's opinion, a substantial period of time has passed between the closing date of the account as filed and its settlement, and depending in part upon the amount of property shown as being on hand as of the last day of the account, the Court may require the petitioner to file a supplemental account (reflecting additional transactions for the estate for the period following the closing date of the account as filed) and serve the same upon all parties who appeared in the proceeding. If there have been significant transactions, the Court may require that a supplemental citation issue to all parties.

(f) **Decision and Decree**

If necessary and appropriate the Court will render a decision on any unresolved issues raised in the proceeding. Following that decision or at the

conclusion of the proceeding if no decision is required a proposed decree settling the account should be prepared by the petitioner's counsel and submitted to the Court for signature. The decree should reflect any decisions made in the accounting proceeding and should recite in detail the relief given and provide specific instructions to the petitioner as to the distribution of funds and the payment of claims and expenses. In general the decree should track the language of the prayer for relief in the petition. Notice of its settlement must be served on all parties who appeared in the proceeding. Once the decree has been signed by the Court, notice of its entry must be served on the same parties.

C. COMPULSORY ACCOUNTING PROCEEDINGS

If a fiduciary fails to account voluntarily to the persons entitled to such an account he may be compelled to account. Such direction must come from the Court, however, and will only be made if the Court considers an accounting to be appropriate at that time. Compulsory accounting proceedings are governed by SCPA §§ 2205 and 2206.

1. Who May Seek a Compulsory Account

Pursuant to SCPA § 2205 the Surrogate's Court having jurisdiction over the administration of a decedent's estate may in its discretion direct a fiduciary at any time to render his account if it considers an account to be in the best interests of the estate at that time. The Court's power to compel an account continues notwithstanding that the parties interested in the estate have already released the fiduciary by a Receipt and Release Agreement.

In addition, any of the following persons having an interest in the estate being administered who have not already released the fiduciary may petition the Court seeking an order directing the fiduciary to account and if the Court considers it appropriate the Court will direct the fiduciary to account. The persons who may file such a petition are set forth in § 2205 and include:

(a) A creditor whose claim has not been satisfied.

(b) A person interested in the estate. This term is defined in SCPA § 103(39) to include only those persons who are beneficially interested in the estate or the trustee in bankruptcy or receiver of such person.

(c) The public administrator or county treasurer.

(d) Any person acting on behalf of an infant or a child born after the will was executed if such infant or child is interested in the estate.

(e) The fiduciary of a deceased person interested in the estate.

(f) The surety on the fiduciary's bond.

(g) A successor fiduciary or co-fiduciary where the former fiduciary's or co-fiduciary's letters have been revoked or the predecessor or co-fiduciary has been removed .

(h) A co-fiduciary after he has petitioned for judicial settlement of his account.

(i) The Attorney General if any portion of the estate will escheat to the State of New York because the decedent or a beneficiary died without distributees.

2. **Related Relief**

Pursuant to Sections 2205 and 2206 amended by the legislature in 2002, a petition for a compulsory accounting (or the Court on its own initiative) may now also seek (1) the suspension or removal of a fiduciary who fails to appear on the return day or to file his account within the time directed; (2) the appointment of a fiduciary to replace the one suspended or removed, and (3) the statement of an account on behalf of the suspended or removed fiduciary.

3. **Commencement of Proceeding**

(a) **The Petition**

A request that the Court compel an account or seek related relief pursuant to SCPA § 2206 must be in the form of a petition. The petition should comply with the provisions of SCPA § 304 and specifically should establish the petitioner's standing, the reason he seeks the account and that an accounting at this time would be in the best interests of the estate.

(b) **Process**

If the Court decides to entertain a petition to compel an account, or decides to compel an account on its own motion, the Court will issue process including a summary statement of any proposed stated account to the fiduciary setting a return date for him to appear.

4. **Proceedings On and After Return Date**

(a) **Appearance and Answer by Fiduciary**

The fiduciary may appear on the return day and object to the request for an account. He may either contest the petitioner's standing to make the request

(because, for example, he believes that a creditor's claim is invalid or that a person has no interest in the estate), or he may attack the petitioner's allegation that an account at this time would be in the best interests of the estate.

Following the answer by the fiduciary the court will direct the timing for such hearings and examinations as it may deem appropriate. Any issues concerning the standing of the petitioner must be decided before the Court will decide whether to direct the fiduciary to account.

(b) **Order to Account**

SCPA § 2206 provides that if on the return day the fiduciary fails to (1) appear, (2) file an account (either in response to the petition for a compulsory account or as a voluntary account pursuant to § 2208) or (3) show good cause why he should not be compelled to account, the Court may direct him to account within such time as it shall deem appropriate and to cause process to issue to all necessary parties under SCPA § 2210. The court will further direct the attendance of the fiduciary before the court at such times as it deems necessary to settle the account.

(c) **Default of Fiduciary/Related Relief**

If the fiduciary fails to appear on the return day or fails to file an account within the time directed by the Court, the Court may also (1) suspend his letters, (2) appoint a successor to act during such suspension, (3) schedule a hearing to consider the modification or revocation of such letters and (4) schedule a hearing to take and state an account of the fiduciary. Supplemental process will then be given to such persons as may be entitled to notice on a hearing for such

suspension, modification, revocation, appointment of a successor or settlement of account.

(d) **Commencement of Proceeding for Voluntary Account**

If the fiduciary prefers, on or before the return day of the citation on the compulsory account he may commence a voluntary accounting proceeding. SCPA § 2206(3). The two proceedings must thereafter be consolidated, and the proceeding will then continue as a voluntary accounting proceeding. Process on the voluntary accounting proceeding need not issue to the petitioner for the compulsory account. SCPA § 2206(2).

D. ACCOUNTING BY FIDUCIARY OF DECEASED FIDUCIARY

1. Death of Fiduciary Prior to Commencement of Account

The death of a fiduciary does not relieve him of his duty to account. Accordingly his estate will be relieved of liability with respect to his actions as a fiduciary only upon the rendering of an account on his behalf by his fiduciary.

The fiduciary of a deceased fiduciary may account voluntarily pursuant to SCPA § 2208 with respect to all property that came into the hands of the deceased fiduciary. The form of the account should be the same as would have been rendered by the deceased fiduciary were he still alive, and the proceeding would be conducted in the same manner.

Pursuant to SCPA § 2207(l) the fiduciary of a deceased fiduciary may also be compelled to account upon the petition of any person required to be served in a voluntary accounting proceeding. The fiduciary of the deceased fiduciary, however, has no individual liability to the persons to whom he accounts except to the extent that he has assets of the deceased fiduciary. SCPA § 2207(2).

2. **Death of Fiduciary During Accounting Proceeding**

SCPA § 2207(3) provides that if a fiduciary dies during an accounting proceeding the proceeding may nevertheless continue if the deceased fiduciary's fiduciary is made a party to the proceeding. The proceeding will continue in the same manner as it would have proceeded had the fiduciary of the deceased fiduciary initiated the accounting proceeding.

3. **Compensation to Estate of Deceased Fiduciary and his Fiduciary**

An issue that will arise in an account on behalf of a deceased fiduciary that would not have arisen if the deceased fiduciary were still alive is the amount of compensation payable to the deceased fiduciary. See In re Jadwin's Estate, 58 Misc.2d 809, 296 N.Y.S.2d 901 (1969).

SCPA § 2207(6) provides that upon settlement of the deceased fiduciary's account by the deceased fiduciary's fiduciary, the Court may allow him reasonable compensation for the services he has rendered to the estate. In no event, however, may the aggregate of the compensation directed to be paid to him plus any amounts paid or payable to the deceased fiduciary or his estate exceed the full commission that would have been payable to the deceased fiduciary under SCPA § 2307.

4. **Distribution of Estate Funds Following Account on Behalf of Deceased Fiduciary**

Following the settlement of the account of the deceased fiduciary the Court in its discretion may direct the fiduciary of the deceased fiduciary to make the final payments and to distribute the assets on hand in the estate being accounted for directly without the necessity of appointing a successor fiduciary to the deceased fiduciary. This provision

saves the estate being accounted for the expense of having a successor fiduciary appointed for the sole purpose of distributing the estate assets. SCPA § 2207(5).