III. PROBATE PROCEEDINGS

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PROBATE PROCEEDINGS

I. General

a. A "will" may be defined as "a written declaration of a person's wishes as to the disposition of his property to take effect after his death". The words "will", "testament" and "last will and testament" are used synonymously (technically however, the term "testament" only applies to a will disposing of personal property; and a will which operates only on real estate is a "devise").

A person who dies leaving a will is said to die "testate" (and such person is called the "testator"); a person who dies without leaving a will is said to die "intestate".

"Probate" is the process pursuant to which a will is "proved" to the satisfaction of, and decreed by, the Surrogate to be the valid last will and testament of the decedent, and the person named in the will as "executor" (the person whom the decedent has named to "execute", or "carry out", the terms of the will) is appointed. If no executor is named in the will, or if the executor named in the will does not qualify, or if for any reason a named executor who has qualified ceases to serve and no successor is named in the will, an administrator c.t.a. (from the latin "cum testamento annexo", or, "with the will annexed") will be appointed.

The State of New York conducts "solemn" form of probate, meaning that the validity of the will must be established pursuant to a proceeding in which jurisdiction is obtained over all interested parties who are given an opportunity to oppose the will prior to its admission to probate. (This is opposed to "common" form of probate in which the will is admitted to probate and notice is then given to interested parties who may then contest the validity of the will and the admission to probate).

b. A will which disposes of personal property, wherever situated (i.e., even outside of New York), or real property situated in New York, made either within or outside of New York, by either a domiciliary or a non-domiciliary of New York, is formally valid and admissible to probate in New York, if:

(i) it is in writing;

(ii) signed by the testator; and

(iii) otherwise executed and attested in accordance with the local law of:

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(A) New York (See, EPTL 3-2.1);

(B) The jurisdiction in which the will was executed, at the time of the execution; or

(C) The jurisdiction in which the testator was domiciled, either at the time of the execution or of his death. (EPTL 3-5.1(c)).

The foregoing "rule of validation" applies only in proceedings for original probate (i.e., not in proceedings for ancillary letters).

c. The Surrogate's Court of any county has jurisdiction over the will of a decedent domiciled in New York at the time of his death (or disappearance or internment). However, the proper venue for a probate proceeding is the actual county of a decedent's domicile at the time of his death, and a probate proceeding initiated in a county of improper venue will be transferred to the Surrogate's Court of proper venue, either on the motion of any party or on the motion of the surrogate. (SCPA 205; SCPA 206).

Domicile is defined as a "fixed, permanent and principal home to which a person wherever temporarily located always intends to return." (SCPA 103(15)); See Matter of Gerard, NYLJ, November 3, 1998, p. 26, col. 4 (Surr. Ct NY Co.) for an illustration of the factors that a court may consider when multiple residences make it difficult to identify the decedent's domicile.

d. The Surrogate's Court of any county also has jurisdiction with respect to the will of any non-domiciliary of New York who: (i) left property in New York; or (ii) left a cause of action for wrongful death against a domiciliary of New York. However, the proper venue for probate proceedings in such cases lies in the county:

(i) where the non-domiciliary decedent left property, or

(ii) where personal property belonging to the non-domiciliary decedent has since his death come into and remains unadministered, or

(iii) of the domicile of the person against whom a non-domiciliary left a cause of action for wrongful death. Where venue lies in more than one county pursuant to the foregoing, the Surrogate's Court of proper venue where a proceeding is first commenced retains jurisdiction and all related matters pending in Surrogate's Courts of other counties shall be transferred to it. (SCPA 206).

See Matter of Gibson, 40 Misc.2d 253, 242 NYS.2d 994 (Surr. Ct NY Co. 1963); Matter of Edwards, 87 Misc.2d 337, 385 NYS.2d 253 (Surr. Ct Nassau Co. 1976); Matter of Brunner, 72 Misc.2d 826, 339 NYS.2d 506 (Surr. Ct NY Co. 1973); Matter of Fignar, 53 NYS.2d 439 (Surr. Ct Kings Co. 1945)

e. There may be original probate in New York of a will of a non-domiciliary where such will, upon probate, may operate upon any property in New York. (SCPA 1605). However:

(i) A will which has been admitted to probate or established in the testator's domicile shall not be admitted to original probate in New York except:

(A) in the case where the Surrogate's Court is satisfied that ancillary probate would be unduly expensive, inconvenient, or impossible under the circumstances;

(B) where the testator has expressly directed in his will that it shall be offered for probate in New York; or

(C) where the laws of the testator's domicile discriminate against domiciliaries of New York, either as a beneficiary or a fiduciary.

(ii) A will which, by a judgment or decree of a competent court in the testator's domicile, has been denied probate or establishment, shall not be admitted to probate in New York except where the denial of probate or establishment is solely for a cause which is not grounds for the rejection of a will of a New York domiciliary.

f. There may be ancillary probate in New York of a foreign written will where property of the decedent disposed of by such will is situated in New York, upon proof that such will has been admitted to probate at the testator's domicile or established in accordance with the laws of the domiciliary jurisdiction. (SCPA 1602).

g. There also may be admitted to probate:

(i) A nuncupative will (i.e., an unwritten will), or a holographic will (i.e., a will written entirely in the testator's handwriting, but not executed and attested in accordance with the formalities of EPTL 3-2.1) pursuant to, and under the limited circumstances described in, EPTL 3-2.2 (i.e., applicable only to persons in specified situations of armed conflict and sea voyage).

(ii) A lost or destroyed will under the conditions specified in SCPA 1407:

(A) It is established that the will has not been revoked;

(B) Execution is proved in the manner required for the probate of an existing will; and

(C) All of the provisions are clearly and distinctly proved by each of 2 credible witnesses, or by a copy or draft of the will proved to be true and complete.

See Matter of Kleefeld, 55 NY.2d 253, 448 NYS.2d 456 (1982); See also EPTL 3-4.1(a)(2) with respect to the physical destruction of a Will, and Matter of Fox, 9 NY.2d 400, 174 NE.2d 499 (1961), Matter of Danziger, 57 Misc.2d 1014, 293 NYS.2d 979 (1968) for the longstanding rule that an instrument last in the possession of the testator which cannot be found is presumed to have been destroyed by the testator with the intent of revoking it. However, no such presumption arises when the Will was not in testator's possession or where the loss or destruction occurred after testator's death. Matter of Bly, 281 A.D. 769 (2d Dep't 1953).

(iii) The will of a person who has disappeared under circumstances sufficient to justify the belief that he is dead. (SCPA 1408(3)).

h. If a will was duly executed, and the testator was in all respects competent to make a will, and not under a restraint, at the time of the execution, the Surrogate's Court must admit it to probate as a will valid to pass real and personal property. (SCPA 1408 (2)).

i. The Surrogate's Court has the duty to determine on its own initiative the genuineness of the will, the validity of its execution, and the testamentary capacity of the testator, even if no objections are raised. (SCPA 1408). (See Matter of Jacobovitz, 58 Misc.2d 330, 295 N.Y.S.2d 527 (1968): Matter of Roe, 65 Misc.2d 143, 316 N.Y.S.2d 785 (1970)).

j. The probate proceeding is an in rem proceeding commenced by the filing of a probate petition and resulting in a decree admitting the propounded instrument to probate and appointing fiduciaries. See Roseman v. Fidelity & Deposit Co. of Maryland, 154 Misc. 482 (New York City Court, Jan. 30, 1936).

II. Due Execution of Wills and Codicils

a. The probate of a will (or a codicil) presumes a finding of validity and due execution. In order for a will to be valid, certain conditions must have existed at the time of execution:

(i) The testator must have had the legal power to execute the will, which means that he must have been 18 years of age or over at the time of execution. (EPTL 3-1.1).

(A) A will executed by someone under 18 years old is ineffective, and his property passes in intestacy, even if death occurs after age 18. Such an ineffective will, however, can be saved by re-execution and re-publication after age 18 is reached.

(B) Convicted felons and aliens can execute wills.

(ii) In addition to "power", a testator must have had "testamentary capacity" at the time of the execution. Eccentricity, habitual intoxication, or old age alone do not constitute testamentary incapacity.

(iii) A blind person has testamentary capacity. (Matter of McCabe, 75 Misc. 35, 134 N.Y.S. 682 (1911)). And EPTL 3-2.1 allows for a method for due execution (e.g., in Matter of McCready, 82 Misc 2d 531, 369 N.Y.S. 2d 325 (1975), valid execution was found where the will was read aloud to the testator in the presence of the witnesses, and the testator then declared that which was read to be his will, and made his cross-mark).

(iv) Testamentary capacity requires strength and clarity of mind and memory sufficient to know generally and without prompting:

(A) The nature of the act about to be performed;

(B) The nature and extent of the assets about to be disposed of; and

(C) The names and identities of the persons who are the "natural objects of one's bounty" and his relationship toward them. (See Delafield v. Parish, 25 N.Y. 9 (1862)).

b. Assuming the requisite testamentary "power" and "capacity" on the part of the testator, the statutory requirements governing the execution and attestation of a will as set forth in EPTL 3-2.1 must be strictly followed:

(i) The will must be signed at its physical end by the testator, or in the name of the testator by another person in his presence and by his direction;

(ii) The testator's signature must be affixed to the will in the presence of each of the attesting witnesses, or acknowledged by the testator to each of the attesting witnesses to have been affixed by the testator or at his direction;

(iii) The testator must, at some time during the ceremony of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will; and

(iv) There must be at least two attesting witnesses who, within one thirty-day period, both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their residence addresses at the end of the will.

The foregoing statutory requirements and certain practical considerations, given the nature and importance of the act, and the ever present possibility of a will contest at a future time, should govern the conduct of every will execution ceremony:

(i) Reading and Review of Will by the Testator

(A) The Testator should have had the opportunity to read the entire will prior to the execution.

(B) The attorney should make certain that the client understands the terms of the will prior to execution.

(ii) Alterations and Changes Prior to the Execution

(A) Interlineations should be avoided if possible.

(B) Changes required at the time of the execution ceremony should be made by the testator, and initialed by the testator and the witnesses, prior to the execution.

(C) The will should be dated, and the time of the will execution specified if there are interrelated documents such as an inter vivos trust agreement.

(D) Appropriate references to such changes should be made in the attestation clause.

(iii) Subscription by the Testator

The EPTL does not prescribe the form or manner in which the testator must sign his name. The only requirement is that the will bear the testator's signature or mark, symbol or inscription tantamount to the testator's signature. A subscription will be valid if it is:

(A) Made by the testator himself, or made by another person subscribing for the testator, in the testator's presence, and at his direction, but:

(1) Such party must sign his own name and affix his residence address to the will;

(2) Failure of the subscriber to sign his name will void the will;

(3) Failure of the subscriber to affix his address will not void the will;

(4) Such party cannot be counted as a witness. (EPTL 3-2.1(a)(1)(c).)

(B) The testator may make his mark or other symbol which he intends as his signature. (See Jackson v. Jackson, 39 N.Y. 153 (1968)). Even a fingerprint impression at the end of a will has been held sufficient. (See Matter of

Arcowsky, 171 Misc. 41, 11 N.Y.S. 2d 853 (Surr. Ct., Kings County, May 2, 1939)).

(C) In all possible cases, the testator should sign his name in the form appearing on the first line of the will. If a mark or symbol must be used, an appropriate descriptive reference should be put in the attestation clause. (See Matter of Fox, 175 Misc. 955, 25 N.Y.S.2d 854 (1941).)

(D) A physically incapacitated testator may have the assistance of a third party in signing his name as long as it can be established that the testator's hand was guided by the third party at the testator's conscious request and that the testator acquiesced in such assistance. (See Matter of Caffrey, 174 A.D. 398, aff'd 221 N.Y. 486 (1917). See also, Matter of Kron, N.Y.L.J., 10/31/83, p. 17, where a blind, deaf and mute testator validly executed a will utilizing the deaf-blind manual alphabet for communication with one of the witnesses, who translated such communication to the other witness, and the testator signed the will after one of the witnesses guided his hand to the signature space on the will.)

(iv) The Subscription Must be at the End of the Will

(A) No effect is given to any matter (except the attestation clause) following the subscription, or to any matter preceding the signature which was added subsequent to the execution of the will. (EPTL 3-2.1(a)(1)(B).) (See Matter of Bochner, 119 Misc.2d 937 (1983), where the fact that the testatrix' signature appeared below the witnesses' signature was held not to be fatal to probate since all signatures appeared after the dispositive provisions).

(B) If a testator fails to sign the will at its end and instead signs in the text, or adds provisions following his signature before he subscribes the will, the provisions preceding his signature and appearing in the will at the time of its execution may be upheld if the Surrogate, in his discretion, finds that the provisions preceding the signature are readily comprehensible without reference to the provisions following the signature, or if the testator's general dispositive plan and the administration of his estate will not be subverted by giving effect to the provisions preceding the signature. (EPTL 3-2.1(a)(1)(A).) (See Matter of Mergenthaler, 19 N.Y.L.J., 4/11/84, p.15, where all material preceding the testatrix' signature was held valid and all matters following the signature were held to have no effect).

(C) Accordingly, the testator should sign the will on the last page of the will following the testimonium clause. It is good practice to prepare the will in such a manner so that the last page of the will contains part of the text of the will.

(D) The subscription must be affixed in the presence of each attesting witness, or acknowledged by the testator to each witness, together or separately:

(1) Allows subscription in the presence of one witness and acknowledgment to the other.

(2) If the subscription is made in the presence of a witness, such witness must see the testator sign.

(3) If the subscription is acknowledged to a witness, such witness need only see the signature.

(4) The testator may acknowledge by sign, or by a third party if with the consent of the testator.

(v) Publication by the Testator

(A) The Testator must at some time during the ceremony declare, or assent to the question, that the instrument to which his signature has been affixed is his will. (EPTL 3-2.1(a)(3).)

(B) Publication may be made through signs or conduct.

(C) Publication need not be made to both witnesses at same time.

(vi) Witnesses

(A) There must be at least two attesting witnesses. Three witnesses are preferable to avoid foreign state (original and ancillary) probate problems.

(B) Each witness must, at the request of the testator, sign his name and his residence address at the end of the will. (EPTL 3-2.1 (a)(4).) See Matter of Katz, 494 N.Y.S.2d 629 (1985), where printed witness signatures were found to meet the requirement.

(C) Failure of a witness to affix his address does not affect the validity of the will.

(D) Witnesses need not sign in the presence of each other, nor in the testator's presence.

(E) Attestation must take place within one thirty-day period. There is a rebuttable presumption that the time period requirement has been met.

(F) The test of a witness, although not statutory, is his competency and credibility. Persons who are blind or deaf should never be used as witnesses.

(G) Witness should be afforded the opportunity to talk with the testator so as to be satisfied as to the testator's mental competence.

(H) Avoid using witnesses with beneficial dispositions in the will. If an attesting witness has a beneficial disposition under the will, the will is still valid, except that the disposition is void unless there are two other attesting disinterested witnesses at the time of the execution and the will can be proved without testimony of such interested witness:

(1) If a disposition is void, and the interested witness would be a distributee if the will were not established, such witness can receive so much of his intestate share as does not exceed the value of the disposition made to him in the will.

(2) Such intestate share is recovered from the residuary only if the void disposition becomes part of residuary; or if it lapses into intestacy, ratably from distributees who succeed to the interest. Void dispositions are distributed as though the witness were not a distributee. (EPTL 3-3.2).

(3) Designation as executor, testamentary trustee or similar fiduciary office does not constitute a beneficial disposition.

(vii) Order of Events

EPTL 3-2.1(b) provides that the procedure for the execution and attestation of wills need not be followed in precise statutory order so long as all formalities are observed during the period of time the Surrogate determines the ceremony has continued.

(viii) Attestation Clause

This clause is not essential, but it is helpful to prove facts certified in it. (See Matter of Bochner, supra.) If a witness subsequently claims an ineffective or incomplete ceremony, this clause can be used to impeach.

(ix) Date

There is no requirement that a will be dated, nor is the accuracy of a date placed on the will critical to probate. (See Matter of Dujenski, 147 A.D.2d 958 (4th Dep't 1989); Matter of Santarpia, N.Y.L.J., 1/15/80, p. 11.)

III. Locating the Will

a. Will Search

Where the existence of a will (or a later executed will) is in question, an initial step in the estate administration process is the will search. Even if there is a strong doubt as to existence of a will in the first instance, the search is essential to an application for letters of administration and must be alleged in the administration petition. (SCPA 1002(2)). There are a number of targets of a will search:

(i) Decedent's personal papers. These papers should be examined by decedent's family members, or by persons interested in the estate.

(ii) Decedent's former attorneys. They may be holding an original will for safekeeping, or may have a record of a will execution.

(iii) Trust company or department of decedent's bank. It may be holding an original will (or a copy) as a named fiduciary.

(iv) Decedent's safe deposit box. SCPA 2003 provides authority for obtaining an ex parte order allowing for the examination of decedent's safe deposit box for a will (and burial plot, deeds and life insurance policies). If a will is found, the order will provide for delivery of the will to the Surrogate's Court clerk.

(v) Surrogate's Court office. SCPA 2507 provides for filing original wills with the Surrogate's Court for safekeeping.

(vi) Office of the county clerk (in the case of an elderly decedent). Prior provisions of Decedent Estate Law and County Law allowed for deposit of wills with the county clerk (and the register of deeds in the City and County of New York).

b. Proceeding to Compel Production of Will (SCPA 1401)

(i) A 1401 proceeding can be utilized to obtain discovery with respect to:

(A) the existence of a will or codicil (including testamentary instruments superseding one offered for probate); or

(B) whether a testamentary instrument was ever executed and destroyed.

(ii) The proceeding may be commenced by the Surrogate's Court, sua sponte, or by a petition presented by a person who would be authorized to present a probate petition under SCPA 1402.

(iii) The proceeding is not a fishing expedition, and is concerned only with the question of the existence (or destruction) of a purported testamentary instrument; determines no rights or collateral matters such as due execution, revocation, etc.; and can only result in the production and filing of a purported testamentary instrument. (See Matter of Vieillard, 17 Misc. 2d 703 (Surr. Ct., Kings County Feb. 11, 1959); Matter of Lupton, 26 Misc.2d 827 (Surr. Ct., Suffolk County, Dec. 9, 1960)).

(iv) If the Surrogate finds that the allegations in the petition sufficiently show a "reasonable ground" for a belief that the named respondent has knowledge of the whereabouts (or destruction) of a will of the testator, an order to show cause will be issued requiring the respondent to attend and be examined.

(v) A certified copy of the show cause order must be personally served on the respondent, together with the appropriate witness fee required under CPLR 8001.

(vi) A petitioner unsuccessful in locating a will pursuant to SCPA 1401 can proceed under SCPA 1407 to probate a lost will. (See Matter of Herzog, N.Y.L.J., 3/19/84, p.l6).

(vii) A will cannot be held under an attorney's lien for fees. The proper recourse is to file a claim against the decedent's estate. An order can be obtained under 1401 directing an attorney in possession to file a will with the Court. (See Matter of Anzel, N.Y.L.J., 4/25/74, p. 19).

(viii) It is a felony to conceal, mutilate or destroy a will with intent to defraud. (Penal Law Section 190.30).

IV. Preliminary Steps with Respect to Will

a. Review the will for physical irregularities such as interlineations, erasures, re-fixed staples, etc.

b. Review the will provisions with respect to the identity of fiduciaries, beneficiaries and witnesses; possible problems such as misdescription of property or beneficiaries; and questions of construction, tax apportionment, etc., raised by the language of the will.

c. Make copies of the will for the file and for distribution. Fiduciaries should be provided with a copy immediately, and it is good practice to provide beneficiaries with a copy as early as possible. However, caution should be taken in advising beneficiaries as to the effect of the will if construction questions exist, or if denial of probate is a possibility.

d. If witnesses are unfamiliar, attempts at contact should be made as soon as possible.

e. Steps should be taken at this stage to determine the general magnitude of the value of decedent's assets and form of asset ownership. Such a determination is important, for

example, in cases where the decedent's personal property, exclusive of jointly owned property and property payable on death to a named beneficiary, has a gross value of $10,000 or less, and there is no real property not subject to survivorship rights. In such case, it could be appropriate to have the nominated executor merely file the will with Surrogate's Court pursuant to SCPA Article 13 and act as voluntary administrator.

V. Persons Who May Propound Will (SCPA 1402)

a. In most cases, the executor nominated in the will offers the will for probate; however, a nominated executor is under no legal duty to do so.

b. In addition to the executor nominated in the will, SCPA 1402 allows a probate petition to be filed by:

(i) any person designated in the will as a legatee, devisee, fiduciary or guardian;

(ii) the guardian of an infant legatee or devisee;

(iii) the committee of an incompetent legatee or devisee, or the conservator of a legatee or devisee;

(iv) a creditor of the testator;

(v) a person entitled to letters of administration c.t.a. under SCPA 1418;

(vi) any person interested in the testator's estate (defined in SCPA 103(39) as any person entitled either absolutely or contingently to share as a beneficiary in the estate);

(vii) any party to an action brought or about to be brought in which the testator, if living, would be a party; or

(viii) the Public Administrator or County Treasurer (but only when so ordered by the Surrogate's Court where a will has been filed in Surrogate's Court and proceedings for its probate have not been instituted or diligently prosecuted).

c. There is no priority given to any potential proponent, not even to the named executor. However, letters testamentary will be issued only to the named executor, or letters of administration c.t.a. will be issued only to a person entitled to them according to the priorities set forth in SCPA 1418, notwithstanding who petitions.

d. A petition filed first in time has priority.

e. The Surrogate's Court may direct or authorize any party to take such action as may be necessary to bring a probate proceeding to decree. (SCPA 1402 (3)(a)).

f. When an original proponent abandons efforts to have a will admitted to probate, any other party to the probate proceeding may take the initiative to prove the will. (See Matter of Keegan, N.Y.L.J., 9/1/70, p.2.)

g. For cases on person considered "interested" and having standing to seek probate see: Coccellato v. Coccellato, 168 A.D.2d 872 (3d Dep't 1990) (residuary beneficiary); Matter of Griffith, 167 Misc. 366 (Surr. Ct. Monroe County, Jan. 20 1938) (the separated wife of decedent); Matter of Seppala, 149 Misc. 479 (Surr. Ct. King County 1933) (a distributee not named as a legatee); Matter of Bell, 4 Misc.2d 286, 157 NYS.2d 99 (Surr. Ct. Broome County, Nov. 26, 1956).

VI. Person to Whom Letters Testamentary May be Granted

a. Eligibility (SCPA 707)

(i) Letters testamentary may be issued to a natural person or to a person authorized by law to be a fiduciary, except persons ineligible under SCPA 707:

(A) infants (person under 18 years of age). If a nominated infant attains age 18 before the administration of the estate is completed, however, he becomes eligible for supplementary letters testamentary pursuant to SCPA 1415;

(B) incompetents (defined in SCPA 103(26) as a "person judicially declared incompetent to manage his affairs");

(C) persons who are neither U.S. citizens nor New York domiciliaries, except if any such person (i) serves with one or more fiduciaries at least one of whom is a New York State resident, or (ii) is a foreign guardian as provided in SCPA 1716(4);

(D) convicted felons (or those convicted of crimes that would be felonies in New York); and

(E) one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office. (See Matter of Cherkis, N.Y.L.J., 6/10/82, p.15, where letters testamentary were denied to a disbarred attorney although no objections had been raised against him where disbarment was pursuant to his resignation in the face of an investigation of his professional conduct involving allegations of conversion, forgery, fraud and failure to account for client's funds).

Further, the Surrogate's Court can declare a person unable to read and write the English language ineligible to act as a fiduciary.

(ii) The ineligibility standards under SCPA 707 are exclusive and limit the Court's power to refuse letters. Accordingly, a person cannot be denied letters solely on the grounds of other infirmities such as old age, lack of business experience, or physical infirmities.

(iii) The term "natural person" means an individual human being, and, accordingly, does not include, by way of example, a law partnership.

(iv) A person, other than a natural person, "authorized by law to be a fiduciary", would usually be a trust company qualified under the Banking Law, although other types of corporations may apply. (See Matter of Reeves, 60 Misc.2d 235 (Surr. Ct., Erie County, Aug. 1, 1969) where an incorporated historical society, not a trust company, named in a will as executor and residuary legatee, was found eligible to receive letters.)

b. Revocatory Effect of Divorce, Annulment, Declaration of Nullity or Dissolution of Marriage (EPTL 5-1.4)

(i) Section 5-1.4 of the EPTL was Amended to repeal the former section and add a new section, effective July 7, 2008. The new EPTL 5-1.4 is stated below.

(ii) Any dissolution or termination of a marriage by divorce (including a judicial separation, defined as a final decree or judgment of separation) or annulment, revokes any revocable (1) Disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse, including, but not limited to, a disposition or appointment by will, by security registration in beneficiary form (TOD), by beneficiary designation in a life insurance policy or (to the extent permitted by law) in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form, (2) provision conferring a power of appointment or power of disposition on the former spouse, and (3) nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian, agent, or attorney-in-fact unless the will expressly provides otherwise.

(A) Applies to wills of testators dying on or after September 1, 1967, notwithstanding when the will was executed or when the dissolution or termination of the marriage occurred.

(B) Provides presumption that such former spouse predeceased the testator; accordingly, alternate dispositions in the will take effect.

(C) Compare EPTL 5-1.4 with EPTL 5-1.2 which lists grounds for disqualification of a person as a "surviving spouse" thereby eliminating such person's statutory rights granted to a "surviving spouse" (e.g., right of

election under EPTL 5-1.1, and entitlement to exempt property under EPTL 5-3.1).

(D) Effective September 1, 1979, if a divorce is followed by a remarriage to the same spouse, the will provisions with respect to such spouse are revived. (EPTL 5-1.4).

(E) See Matter of Cullen, 74 Misc.2d 236, 663 NYS.2d 508 (Surr. Ct. Cattaragus Co. 1997)(Surrogate held that while EPTL 5-1.4(a) provides that divorce by the testator prior to the execution of a Will revokes any bequest or fiduciary appointment of a former spouse it does not have the same result with respect to the fiduciary appointment of the former spouse's mother); Matter of Khabbaza, 174 Misc.2d 82, 662 NYS.2d 996 (Surr. Ct. Richmond Co. 1997)(Court denied letters to an alleged surviving spouse when the court concluded that the alleged spouse abandoned the decedent, and in effect, ended the marital relationship).

(F) Effective July 7, 2008, and except as expressly provided in the instrument, a registration in beneficiary form of any security, or beneficiary designation in a life insurance policy, or in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form, by an owner on behalf of his or her spouse pursuant to EPTL Article 13 is revoked at the dissolution of the marriage, its annulment or upon any declaration of its nullity. After revocation, the security belongs to the estate of the owner upon his or her death unless there is a contingent beneficiary or the owner establishes another subsequent and valid disposition of the security at death. If a registration is revoked solely by this section, it shall be revived by the owner's remarriage to the former spouse. (EPTL 5-1.4(a)).

c. Potential Conflicts of Interest

(i) Under SCPA 707, a conflict of interest is not a ground for ineligibility to receive letters in the first instance, presumably because a potential for conflict usually exists to some degree in most estate administrations. The only available statutory basis for denial of letters in a conflict of interest case is the improvidence ground under SCPA 707(1) (e). (See Matter of Badore, 73 Misc.2d 471 (Surr. Ct., Franklin County, Mar. 22, 1973) where improvidence served as the basis for denial of letters where the nominated executor claimed that a $40,000 demand note which he had given to the testatrix was invalid. If appointed, there would be a fiduciary duty to take all steps necessary, including legal action, to collect on the note from himself. The conflict was held to be not speculative and intolerable, and letters were denied.)

(ii) An actual conflict of interest in connection with an application for the removal of a fiduciary after appointment, however, is a different matter. (See Matter of Amaro, N.Y.L.J., 8/21/78, p. 14, where an administrator was removed from office pursuant

to SCPA 719(10) and SCPA 711(2) where he failed to act to resolve a conflict in favor of the estate and thereby personally benefited).

(iii) An actual conflict of interest will serve as the basis for resignation by an executor after appointment. (See, Matter of Kubasek, N.Y.L.J., 4/13/83, p. 15).

VII. Qualification or Renunciation of Nominated Executor

a. Qualification

Before letters testamentary can be granted to a nominated executor, he must file with the Surrogate's office:

(i) Designation. An acknowledged written instrument setting forth his domiciliary address and designating the Surrogate's Court clerk to receive service of process issuing from the Surrogate's Court (service may not be made on the Surrogate's Court Clerk of process in an action in another court) in like manner and with the same effect as if personally served on the executor, whenever the executor cannot be found and served within the state after due diligence (an "affidavit of due diligence" must be served with a citation so served). The designation is irrevocable and continues so long as the executor remains in office and until there is full compliance by the executor with the terms of the decree providing for his final discharge. If the executor changes his address, he agrees to promptly notify the court of his new address. (SCPA 708(1)). If he fails to notify the Court of his change of address within 30 days without sufficient reason, his letters may be suspended, modified, or revoked. (SCPA 711(6)).

(ii) Oath. Every individual executor must take an oath, before an officer authorized to administer oaths, that he will well, faithfully and honestly discharge the duties of his office and the trust reposed in him and duly account for all moneys or other property which may come into his hands. The oath must also describe the office of the executor and state that he is not ineligible to receive letters. (SCPA 708(2)).

(iii) Consent. In lieu of the oath, a trust company or other fiduciary exempted by law from taking an oath of office and filing a bond must execute an acknowledged consent to accept its appointment. (SCPA 708(4)).

(iv) Bond. Such bond as may be required by law or by order of the Surrogate's Court. (SCPA 708(3)). Pursuant to SCPA 710(1), no bond is required of an executor unless required by:

(A) The will;

(B) SCPA 806 (which requires a bond from a testamentary trustee or an executor acting as a trustee, unless the will provides otherwise); or

(C) The provisions of SCPA 710 requiring the filing of a bond:

(1) to allow the issuance of letters testamentary to a person who is a non domiciliary of New York, or who does not possess the degree of financial responsibility required of a fiduciary;

(2) where a U.S. citizen and domiciliary of New York, not required to file a bond in the first instance, becomes a non domiciliary of New York (but only upon order of the Surrogate's Court upon a valid and proven objection); or

(3) when required by the Surrogate's Court in connection with the Court approved removal of estate property from New York.

b. Renunciation of Letters Testamentary by Nominated Executor (SCPA 1417)

(i) There is no legal obligation for a nominated executor to apply for, or accept, his appointment. Accordingly, a person may renounce his right to letters testamentary without cause.

(ii) Renunciation is effected by the nominated executor executing and filing an acknowledged written instrument clearly and unconditionally renouncing the appointment and releasing all rights to letters testamentary. (SCPA 1417(1)).

(iii) A waiver of issuance and service of citation should be included in the written renunciation instrument since a nominated executor must be cited in a probate proceeding under SCPA 1402 if he is not the petitioner.

(iv) A renunciation can be retracted before letters testamentary are issued to another party (or after issuance to another party when such letters are no longer in effect), but the Court has discretion to refuse issuance of letters and can require a hearing on notice to all interested parties. (SCPA 1417(2) and (3)). (See Matter of Mitchell, N.Y.L.J., 3/29/79, p. 16, where a nominated co-executor was allowed to retract her renunciation where a nominated co-executor had been granted preliminary letters testamentary, but then resigned, and a corporate fiduciary had been appointed, and was acting as, temporary administrator).

VIII. Probate Petition

a. The probate petition is a pleading under SCPA 302(1)(a) which must be in writing and verified in the manner provided in CPLR 3020.

b. All probate petitions must contain the information required by SCPA 304, and shall include a statement whether or not there are any children born out of wedlock. (22 NYCRR Section 207.16(a)).

c. Whenever in a petition for probate or administration a party to be cited is a distributee whose relationship to the decedent is derived through another person who is deceased, petitioner must state the relationship of the distributee to decedent and also state the name and relationship to decedent of each person through whom such distributee claims to be related to decedent or alternatively submit with the petition a family tree showing the names, relationships and deaths of the persons through whom the distributee claims relationship to decedent. (22 NYCRR Section 207.16(b)).

d. A death certificate must be filed upon an application for letters testamentary. Alternate evidence of death may be accepted in the discretion of the court. (22 NYCRR Section 207.15 (b)).

e. Every petition for probate must contain an estimate of the gross estate of the decedent. (22 NYCRR Section 207.20(a)).

(i) Within six months of the date of issuance of preliminary letters, limited letters, full letters of administration or letters testamentary, the fiduciary or the attorney of record shall furnish the court with a list of assets constituting the gross taxable estate, but separately listing those assets that were owned by the decedent individually or in which the decedent had a partial interest, those assets owned jointly with right of survivorship, those assets held in trust, and those assets over which the decedent had the power to designate a beneficiary. The requirements of this subdivision may be satisfied by the filing within the six month period of a copy of either the entire Form 706 (Federal Estate Tax Return) or certain specified New York estate tax filings. (22 NYCRR Section 207.20(b)).

(ii) In the event such list of assets is not so filed, the court may revoke the letters and may refuse to issue new ones until such list has been provided. Failure to file such list of assets may constitute grounds for disallowance of commissions or legal fees. (22 NYCRR Section 207.20(c)).

(iii) If any additional filing fees are due, they shall be paid to the court at the time of the submission of the list of assets required by subdivision (b). No certificates shall be issued until such fees are paid as provided in SCPA 2402. (22 NYCRR Section 207.20(d)).

f. In addition to the general requirements applicable to all petitions, SCPA 1402 lists other required contents of a probate petition:

(i) the citizenship of the petitioner and the testator;

(ii) a description of the will propounded and any other will of the testator on file in the Surrogate's Court; and

(iii) the names and post office addresses of all persons required to be cited and all of the legatees, devisees and fiduciaries named in the propounded will and £all other wills on file, so far as they can be ascertained with due diligence.

g. With every petition for probate of a will there must be filed the original will and a copy thereof, except in the case of lost or destroyed wills or where the Surrogate dispenses therewith or fixes a later time within which such will or copy must be filed. With such copy there must also be filed an affidavit showing that it is a true copy of the original. If the copy be a reproduction by photographic or similar process, the affidavit shall be by one person; otherwise it shall be by the two persons who have compared the copy with the original. In a proceeding for probate of a will alleged to be lost or destroyed the Surrogate may make such order in respect of the filing of the text thereof as he or she may deem proper. (22 NYCRR Section 207.19(a)).

h. Whenever the petitioner alleges that decedent left surviving only one statutory distributee or where distributees are of a more remote relationship to decedent than issue of brothers and sisters of decedent, proof must be submitted:

(i) to establish how any such distributee is related to decedent;

(ii) that there are no other persons of the same or a nearer degree of relationship who survived the decedent; and

(iii) unless otherwise allowed by the court, the proof submitted pursuant to this subdivision must be by affidavit or testimony of a disinterested person, and shall include as an exhibit a chart or diagram constituting a family tree. (22 NYCRR Section 207.16(c)).

i. If the petitioner alleges that the distributees of testator or others required to be cited are unknown or that the names or addresses of some persons who are or may be distributees are unknown, petitioner must submit an affidavit showing that he or she has used due diligence in endeavoring to ascertain the identity, names and addresses of all such persons. (22 NYCRR Section 207.16(d)).

j. In a probate proceeding where the will purports to exercise a power of appointment, a copy of the instrument creating the power of appointment must be furnished, and the petition for probate shall list those named in said instrument who are adversely affected by the probate of such will. Jurisdiction shall be acquired over such persons in the same manner as over distributees. (22 NYCRR Section 207.19(d)).

k. Neither SCPA 304 and 1402(2), nor the Official Form, cover all information that must be provided in all probate cases. In certain cases, the Court will require additional information

(See: SCPA 1408(3) with respect to the will of person "alleged to be deceased", SCPA 1407 with respect to lost or destroyed wills; and SCPA 1404(3) with respect to nuncupative or holographic wills.)

l. The probate petition must contain a request for issuance of letters testamentary and may contain a request for letters of trusteeship, where appropriate. If letters of trusteeship are not requested, and are later required, a separate proceeding will be required.

m. The various Surrogate's Courts provide printed forms of probate petitions. The Official Form, however, must be accepted in all Surrogate's Courts.

n. If a person requesting letters to administer an estate as sole executor or administrator is also an attorney admitted in New York, he or she shall file with the petition requesting letters a statement disclosing:

   (i) that the fiduciary is an attorney;

   (ii) whether the fiduciary or the law firm with which he or she is affiliated will act as counsel; and

   (iii) if applicable, that the fiduciary was the draftsperson of a will offered for probate with respect to that estate. (22 NYCRR 207.16(e)).

o. Also, see SCPA 2307-a, which was <u>amended effective Aug. 31, 2007</u> and applies to wills executed on or after January 1, 1996, and irrespective of the date of any will, to estates of persons dying on or after December 31, 1996, which imposes a disclosure requirement on the attorney who prepared the will offered for probate which nominates the attorney, an affiliated attorney, *or an employee of such attorney to serve as executor*. (Emphasis added to additional language of Aug. 31, 2007 Amendment). Absent execution of a disclosure acknowledgement, the commissions of the attorney/executor will be limited to one-half the statutory amount otherwise payable under SCPA 2307 or 2313.

   (i) See <u>Matter of McDonnell</u>, 682 NYS.2d 569 (Surr. Ct. Nassau County 1998); <u>Matter of Mullen</u>, NYLJ, March 8, 1999, p.32, col.1 (Surr. Ct. Suffolk County); <u>Matter of DeMontagut</u>, 178 Misc.2d 521, 679 NYS.2d 273 (Surr. Ct. Bronx County); <u>Matter of Newman</u>, LYLJ, March 30, 1999, p.28, co.2 (Surr. Ct. Bronx County); <u>Matter of Roth</u>, NYLJ, December 4, 1998, p.38, col.6 (Surr. Ct. Suffolk County); <u>Matter of Castelnuovo</u>, NYLJ, June 23, 1999, p.33, col.3 (Surr. Ct. Nassau County); <u>Matter of Kent</u>, NYLJ, February 5, 1999, p.28, col.1 (Surr. Ct. Bronx County); <u>Matter of Marcus</u>, NYLJ, June 23, 1999, p.33, col.3 (Surr. Ct. Nassau County).

p. Once a probate petition is filed, thereby commencing the <u>in</u> <u>rem</u> proceeding, the petition cannot be withdrawn by the petitioner, except in the discretion of the Surrogate's Court. (See <u>Matter of King</u>, 74 Misc.2d 61, 62 (Surr. Ct., Orange County, Mar. 14, 1973)).

IX. Process

a. Citation

Legal process, called a "citation", is issued by the Surrogate's Court clerk in the name of the Court. (SCPA 306). SCPA 1403(1) lists the persons who must be joined as parties in the probate proceeding:

(i) The distributees of the testator (determined under EPTL Article 4);

(ii) The person or persons designated in the will as executor, except that a person designated in the will as a substitute or successor executor in the event the designated executor cannot act or fails to qualify need not be served where the designated executor is under no disability. However, they are required to be given notice of probate under SCPA 1409.

(iii) Any person designated in the will as beneficiary, executor, trustee, or guardian, whose rights or interests are adversely affected by any other instrument offered for probate that is later in date of execution or which amends or modifies an instrument offered for probate;

(iv) Any person designated as a beneficiary, executor, trustee, or guardian in any other will of the same testator filed in the Surrogate's Court of the county in which the propounded will is filed whose rights or interests are adversely affected by the instrument offered for probate;

(v) If the propounded will expressly refers to an instrument which created a power of appointment and purports to exercise such power of appointment, any persons designated in the instrument that created such power of appointment whose rights or interests are adversely affected by the instrument offered for probate;

(vi) The testator, in any case where the petition alleges that the testator is believed to be dead;

(vii) The State Tax Commission in the case of a non-domiciliary testator; and

(viii) Where any person to whom process is required to be issued has died, process shall issue to his fiduciary, and if none has been appointed, to all persons interested in the estate of such person as distributees or nominated fiduciaries, or named as legatees or devisees under any will of the deceased filed in court.

In addition to the persons required to be cited under SCPA 1403, there are situations where other persons must be served:

(i) The New York Attorney General must be cited in every case where it appears that there are no known distributees or that it is not known whether or not there are distributees. (SCPA 316);

(ii) Some local court rules require service on the Public Administrator when the sole distributees are of a certain degree of remoteness; and

(iii) In any case where the interest of any person in the estate, either absolutely or contingently, is adversely affected, consideration should be given to citing such person, and the issue should be conferenced with the Surrogate's Court clerk. (See Matter of Emmons, 93 Misc.2d 615 (Surr. Ct., N.Y. County, Feb. 16, 1978), where it was held that parties adversely affected by an exercise of a power of appointment must be cited.) Trustees and guardians, and their substitutes and successors, and persons designated as alternate, substitute and successor executors in the case where the person designated as primary executor intends to act, do not have to be cited in probate proceedings since they have no right to contest the proceedings. They are required, however, to be given notice of probate under SCPA 1409.

b. Contents of Citation

(i) The citation must satisfy the requirements with respect to contents set forth in SCPA 306 (citation in general) and 1403 (citation in probate proceedings.)

All citations issued by Surrogate's Court must substantially set forth:

(A) Name and domicile of the person to whose estate or person the proceeding relates.

(B) Name and domicile of the petitioner.

(C) Names of persons to be served.

(D) Place and time when the citation is returnable (must be returnable within 4 months of issuance).

(E) Object of the proceeding and relief sought in the petition.

(F) Date when issued.

(G) Name, address, and telephone number of petitioner's attorney. (SCPA 306(1)).

(ii) In probate proceedings, the citation must also set forth:

(A) Name of proponent.

(B) That the will is nuncupative, if such is the case. (SCPA 1403 (2)).

(iii) The citation must be attested in the name of the Surrogate, and by the seal of the Surrogate's Court. It need not be signed by the Surrogate like an order to show cause; the clerk or his deputy may sign it. The original citation must be filed by the clerk, and a copy furnished to the petitioner. (SCPA 306(4)).

c. Designation of Persons to be Served

(i) The names of all persons to be served must be set forth in the citation unless they have waived the issuance and service of the citation, or unless they have already appeared. (SCPA 306(1)(b)).

(ii) Where the number of persons of any class to be served exceeds 50, the citation need not specify the name of each person of the class, but may be directed to the class by such appropriate designation as the court deems adequate. (SCPA 306(1)(b)).

(iii) Where the names of some of the persons to be served comprising a class are unknown, the citation may set forth the names of those persons of the class who are known, and a general description of all other persons belonging to the class and their interests in the proceedings. (SCPA 306 (2)(a)).

(iv) Where the names of the persons to be served are unknown, the citation must set forth a general description of such persons and their interest in the proceedings.

(v) In any case where the names of some or of all of the persons to be served are unknown, the petitioner may designate the unknown person in the citation by a fictitious name or by as much of his name and identity as is known. (SCPA 306(2)(b)).

(vi) The Attorney General must also be cited where it appears that there is no distributee, or that it is not known whether or not there are any distributees. (SCPA 316).

d. When Service Complete

(i) Service by personal delivery. The service of process is complete immediately upon the personal delivery to the respondent when service is so made, either within or without the state.

(ii) Service by other means. Unless the court directs otherwise, the service of the process shall be complete when served by:

(A) mailing or by registered or certified mail, with or without return receipt requested, upon the mailing thereof;

(B) special mail service, upon receipt of the envelope containing the process by the United States Postal Service in the case of express mail or upon receipt of the envelope containing the process by the designated delivery service in the case of any other special mail service;

(C) substituted service, upon the delivery or affixing and the mailing thereof, whichever is done last;

(D) personal delivery to a person duly designated by the respondent, or to a person or consular official designated by the court by order to be served in respondent's behalf, upon such personal delivery;

(E) publication, on the 28th day after the first publication; or

(F) any other means, as the court directs.

(iii) Service upon an infant. Where service of process upon an infant pursuant to SCPA 307(4) does not require service upon the infant because the infant is under the age of 14 years and does not require service upon one of the other persons listed therein because such other person is the petitioner, service of process upon such infant shall be deemed complete upon the filing of the petition.

e. Return Date

(i) The matter referred to in the citation will be heard in the Surrogate's Court which issued it. (SCPA 306).

(ii) The citation must be served at least the following number of days prior to the return day:

1. 10 days if the person is served within New York;

2. 20 days if the person is served without New York but within the United States, the District of Columbia, Puerto Rico, or the possessions or territories of the United States.

3. 30 days in all other cases. (SCPA 308(1)(a)).

(iii) The above time limitations begin to run from the time that service is completed. Service is deemed to be complete (unless the Court directs otherwise, except in the case of personal delivery) when process is served by:

(A) Personal delivery, within or without New York, immediately upon delivery. (SCPA 309(1));

(B) Mailing, upon the mailing of the citation. (SCPA 309(2)(a));

(C) Substituted service, upon the delivery or affixing and the mailing of the process, whichever occurs last. (SCPA 309(2)(b)). If the two requirements of substituted service are modified by the court so that one is dispensed with, service will be complete when the single step ordered pursuant to SCPA 307(2)(d) is taken;

(D) Personal delivery to a person duly designated by the respondent to receive process, or to a person or consular official designated by the court by order to be served in respondent's behalf, upon the delivery to such person. (SCPA 309(2)(c));

(E) Delivery to a person designated by the court to protect the interests of a person under a disability, upon personal delivery to the person designated. (SCPA 309(2)(c); or

(F) Publication, on the 28th day after the first publication. (SCPA 309(2)(d)).

(iv) For the purpose of fixing the time within which process must be served, service upon a court clerk, pursuant to a designation, is deemed to be personal service upon the fiduciary in the county where the letters of the fiduciary were issued. (SCPA 308(4)).

(v) Although under SCPA 309(2)(a) service by mailing is technically complete on mailing for the purpose of establishing time requirements of SCPA 308(1)(a), if the respondent refuses to accept delivery, and the mail is returned to the sender with the return receipt unsigned, service in fact is not complete, regardless of the statute, and the court will not file the proofs of service and mark service complete without the signed return receipt. (See Matter of Mackey, 91 Misc.2d 736, 398 N.Y.S.2d 605 (1977))

(vi) If served by publication, the return date must not be earlier than the day service is completed. (SCPA 308(2)).

(vii) In no event may a citation be returnable more than four months after the date of issuance (SCPA 306(1)(c)).

(viii) In computing the return day, the date of service of the citation is excluded. The return day, however, is included. (General Construction Law, Section 20).

(ix) See also Matter of Worms, NYLJ, Dec. 9, 1997, p.26, col.4 (Surr. Ct. NY County); Estate of Jacquet, 252 A.D.2d 780, 676 NYS.2d 265 (3d Dep't 1998)

f. Waiver of Citation

(i) Any person upon whom the service of the citation is required who is an adult (18 years of age and older) and otherwise competent may waive service. The waiver is then filed with the Court on or before the return date. Also, each party executing a waiver and consent must be given a copy of the Will (and codicils, if any). See NYCRR 207.19(b)(2)

(ii) There are appropriate cases in which the party from whom a waiver is requested should be advised to seek independent legal counsel. The party who executes a waiver of citation is chargeable with the knowledge of its contents and its legal effect, whether or not the person availed him/herself of the advice of counsel. The proponent is not obligated to advise the party of the nature and effect of such waiver. Matter of Bissell, 57 Misc.2d 200, 291 NYS.d 663 (Surr. Ct. Erie County 1968); Matter of McMahon, NYLJ, June 11, 1998, p.21, col.3 (Surr. Ct. NY County).

g. Copy of Will.

(i) Unless service is by publication, a copy of the will shall be attached to all citations served and the affidavits of service of citation shall recite the service of a copy of the will. (22 NYCRR 207.19(b)(1)).

(ii) All waivers and consents filed with the court shall recite in the body of the waiver that a copy of the will was received. (22 NYCRR 207.19(b)(2)).

h. Virtual Representation

(i) SCPA 315 ("Joinder and representation of persons interested in estates") provides rules, among other, governing service of process in cases where class or contingent interests in an estate (defined in subdivision (1) to include interests in income and interests in principal) exist:

(A) Class interests:

(1) Where an interest in an estate has been limited in any contingency to the persons who shall compose a certain class upon the happening of a future event, it is not necessary to serve process on any person other than the persons in being who would constitute the class if such event had happened immediately before the commencement of the proceeding. (SCPA 315(2)(a)(i)).

(2) Where an interest in an estate has been limited to a person who is a party to the proceeding and the "same interest" has been further limited upon the happening of a future event to a class of person

described in terms of their relationship to such party, it is not necessary to serve process on any person other than the party to the proceeding. (SCPA 315(2)(a)(ii)); Matter of Ulsh, NYLJ, June 10, 1985, p.15, co.4 (Surr. Ct. Nassau County); Matter of Wenzel, NYLJ, March 26, 1980, p.15, col.2 (Surr. Ct. Nassau County).

(3) Where an interest in an estate has been limited to unborn or unascertained persons, it is not necessary to serve process on any of such persons. However, if it appears that there is no person in being or ascertained having the same interest, the court will appoint a guardian ad litem to represent or protect the persons who eventually may become entitled to the interest. (SCPA 315(2)(a)(iii)).

(4) Where a party to the proceeding has a power of appointment, it is not necessary to serve the potential appointees, and if it is a general power of appointment, it shall not be necessary to serve the takers in default of the exercise of the power. (SCPA 315(2)(b)).

(B) Contingent interests:

Where an interest in an estate has been limited to a person who is a party to the proceeding and the "same interests has been further limited upon the happening of a future event to any other person, it is not necessary to serve such other person. (SCPA 315(3)).

(ii) Subdivision (4) of SCPA 315 ("Representation in probate proceedings), provides that in a proceeding for the probate of a testamentary instrument, the interests of the respective persons specified in SCPA 315(2)(a)(ii) and (3) will deemed to be the "same interest", and thereby allow the application of virtual representation pursuant to those sections as outlined above, where:

(A) The respective parties (i.e., the party representative and the representee(s) are beneficiaries of the same trust or fund (either income or principal interest, a combination of income and principal interests, or one party having an interest solely in income and the other party having an interest solely in principal);

(B) The respective parties all have a common interest in proving, or disproving, the testamentary instrument; and

(C) The person who is a party under subdivision (2)(a)(ii), or the person to whom the interest has been limited under subdivision (3), would not receive a greater financial benefit if such testamentary instrument were denied probate (where the parties common interest is in proving the instrument) or admitted to probate (where the parties common interest is in disproving the instrument).

(iii) If a testamentary instrument so provides, and if a party to a proceeding has the same interest as a person under a disability, it is not necessary to serve the person under the disability. (SCPA 315(5)). (But see Matter of Ginsberg, 115 Misc. 2d 122, 453 N.Y.S. 2d 587 (Surr. Ct. Nassau County 1982), where the court held that this subdivision may not be implemented in a probate preceeding since the will is still subject to contest).

(iv) Any decree or order in a proceeding is binding and conclusive on all persons upon whom service of process is not required by virtue of SCPA 315. (SCPA 315(6)). The provisions of SCPA 315 are made expressly applicable to probate proceedings. (SCPA 1403(1)(h)).

(v) If service of process is not required pursuant to SCPA 315, the probate petition must show all the information required by SCPA 304 (3) concerning the persons not required to be served, the nature of: their interests, and the basis upon which service may be dispensed with. The petition must also show whether the fiduciary or any other person has discretion to affect the present or future beneficial enjoyment of the estate; and if so, what discretion; and if it has been exercised, the manner.

(vi) Notwithstanding the foregoing provisions of SCPA 315, and any provision of the testamentary instrument to the contrary, the Surrogate's Court is empowered to order service on any party whom the Court determines not be adequately represented, notwithstanding that service on such person is technically not required pursuant to SCPA 315.(SCPA 315(7)).

(vii) Pursuant to 22 NYCRR Section 207.18(b), the court, in a probate proceeding, may direct the filing of affidavits by the petitioner, petitioner's attorney and the representor setting forth the information called for in 22 NYCRR Section 207.18(a)(1)and(2).

X. Notice of Probate

a. Before letters will be issued, a notice of probate must be mailed (and proof by affidavit of such mailing filed with the Court) to each person named by affidavit in the petition as a legatee, devisee, trustee, guardian, or substitute or successor executor, trustee or guardian named in the will who has not been required to be served with citation, and who has not appeared or waived service of process. SCPA 1409.

(i) The Office of the Attorney General is also entitled to notice if the testator made a disposition to an unnamed charity or a named charity in an unspecified amount.

(ii) Since this notice is advisory, it is not necessary to serve those persons whose whereabouts are unknown or who are members of a class of contingent beneficiaries. (SCPA 1409(1)(a),(b) and (2).

b. The function of the notice is to make such parties aware of the probate proceeding, and of the existence of their interests as beneficiaries, or status as alternate fiduciaries, under the will. The notice of probate is not jurisdictional.

c. Persons entitled to notice only are not parties to the probate proceeding (unless and until they intervene to object to the appointment of the person designated as executor).

d. The notice of probate can be mailed at any time prior to the entry of the decree.

e. Where by the terms of the will an interest in a trust or other fund or property has been limited in any contingency to the persons who shall compose a certain class upon the happening of a future event, it is sufficient to name only the persons in being at the death of the decedent who would constitute the class if such event had happened immediately before the date of such notice, and who have been served or appeared or waived service of process. (SCPA 1409(1)(a)).

f. Where by the terms of the will an interest in a trust or other fund or property has been limited to a person who is named in such notice, or who has been served or has appeared or waived notice of process, and has been further limited upon the happening of a future event to a class of persons described in terms of their relationship to such person, it shall not be necessary to name such class of person. (SCPA 1409(1)(b)).

g. Notice of probate need not be mailed to those persons whose names or addresses are unknown to the petitioner when such lack of knowledge is shown on the petition. (SCPA 1409(2)).

h. On January 1, 2008 SCPA 1409 was amended to include a clause related to the discovery of assets subsequent to the probate of an estate and distribution of its assets. If an undistributed asset is found subsequent to the probate of an estate and distribution, the surrogate's court that granted such probate petition shall maintain jurisdiction and shall not require any additional service of the notice required by this section to be served against by the estate, unless such previously undiscovered asset has an estimated value of more tan five thousand dollars or it has been more than seven years since the distribution of the assets pursuant to the original probate.

XI. Proof of Attesting Witnesses

a. In-Court Proof

(i) The general rule is that at least 2 of the attesting witnesses to the will execution must appear before the court and be examined before a written will is admitted to probate if they are within the state, competent and able to testify. (SCPA 1404(1)).

(ii) In the usual uncontested probate proceeding, the attesting witnesses appear in Surrogate's Court on or after the return date set forth in the citation and give testimony with respect to the testator's testamentary capacity and the will execution ceremony to the clerk designated by the Surrogate which is reduced to deposition form. Such testimony forms the basis for the Court's decision to admit the will to probate.

(iii) The clerk may require at least two days' notice before taking a deposition or testimony of any attesting witness. When any party is to be represented by a guardian ad litem, proponents should give notice to the time and place of taking a deposition of an attesting witness to such guardian ad litem. (22 NYCRR Section 207.19(c)).

(iv) If the will offered for probate is on file in a jurisdiction from which it cannot be removed by law, the Court may issue a commission to take testimony to a person authorized under CPLR 3113, or to an attorney of such other jurisdiction. (SCPA 1404(2)).

(v) The death, absence from New York, incompetency or forgetfulness of one or more of the attesting witnesses can result in:

(A) An order (in writing or on the minutes) dispensing with the testimony of one such witness and allowing probate on due and usual proof by one attesting witness. (SCPA 1405(1));

(B) A commission to take the testimony of an out of state witness in the Court's discretion, or when demanded by an interested party where it is shown that such testimony can be obtained with reasonable diligence. (SCPA 1405(2));

(C) Probate upon testimony of at least 1 of the attesting witnesses and such other facts as would be sufficient to prove a will when 1 of the attesting witnesses has forgotten the will execution ceremony. (SCPA 1405(3)); or

(D) Probate upon proof of the handwriting of the testator and at least 1 of the attesting witnesses and such other facts as would be sufficient to prove the will where all of the attesting witnesses are dead, incompetent, otherwise unable to testify by reason of physical or mental condition or absent from New York and such absentee's testimony has been dispensed with. (SCPA 1405(4)).

(vi) When, in an uncontested probate proceeding, a witness to a will is outside the jurisdiction of the court, and SCPA section 1406 is not utilized, the court may order that the witness be examined in the Surrogate's Court of another county or in an appropriate court of another state or county or before a commissioner designated by the court pursuant to SCPA 508, specifying the nature and manner of the examination, and shall send such other court or commissioner a copy of such order together

with the original will or court certified reproduction thereof. If the original will is sent, a court certified copy thereof shall be retained in the office of the court wherein the proceeding is pending. When the testimony of the witness is obtained, it shall be annexed to the will or to the copy to which it relates, and together they shall be returned to and filed in the court wherein the proceeding is pending, as provided in SCPA 507. (22 NYCRR Section 207.22).

(vii) The party conducting the SCPA 1404 examination is entitled to document discovery to the extent allowed by CPLR Article 31. (SCPA 1404(4)).

(viii) Any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses, the person who prepared the will, and if the will contains a provision designed to prevent a disposition or distribution from taking effect in case the will, or any part thereof, is contested, the nominated executors in the will and the proponents. (SCPA 1404(4)).

b. Out-of-Court Proof

SCPA 1406 also allows for "out-of-court" affidavits which may be made at any time between the execution of the Will and entry of a decree admitting the Will to probate. See Matter of Lipin, NYLJ, March 30, 1982, p.7, col.4; Matter of Westover, 145 Misc.2d, 546 NYS.2d (1989).

(i) Any or all of the attesting witnesses to a will may at the request of the testator, or after his death, at the request of:

(A) the executor designated in the will, or

(B) the proponent of the will, or

(C) the attorney for the proponent of the will, or

(D) any person interested, make an affidavit, duly notarized, stating such facts as would establish the genuineness of the will, the validity of its execution and that the testator was competent and not under any restraint at the time he executed the will.

Such a sworn statement may be accepted by the court as though it had been taken in court unless:

(A) a party to the proceeding objects to the use of the affidavit, or

(B) the court requires that the witness or witnesses be produced for any other reason. (SCPA 1406(1)).

(ii) For purposes of showing the will to the witnesses making such an affidavit, a court-certified photographic reproduction of the will can be used instead of the original will. (SCPA 1406(2)).

(iii) Before a SCPA 1406 affidavit is used, the local court rules must be examined because many courts have adopted a form of affidavit which must be used and rules concerning the use of affidavits of attesting witnesses taken out of court. (See Matter of Lipin, N.Y.L.J., 3/29/82, p. 13, where the Court adopted on its own certain rules not previously published and noted the rules adopted by the Surrogate's Court of New York County concerning the use and acceptance of 1406 affidavits, including the litany of situations of apparent irregularity requiring the appearance of witnesses, even in uncontested probate proceedings.)

(A) However, in observance of guidelines according to a Surrogates' Press Release which appeared in the New York Law Journal on November 15, 1973, p.1, col.5, the courts may not accept SCPA 1406 self-proving affidavits in the following circumstances:

(1) where the will contains changes, interlineations, deletions or mutilations in its dispositive provisions, or the appearance of the Will requires an explanation which the affidavit fails to provide;

(2) where the testator was illiterate or could not read English;

(3) where more than one will was executed and not all counterparts are produced, or where a reproduced copy is offered and the original is not;

(4) where the will was executed within ninety days of the decedent's death;

(5) where the attorney-draftsman or a member of his family is a beneficiary under the will, or where the decedent and an unrelated beneficiary had a confidential relationship;

(6) where the testator was blind or otherwise unable to execute a will in the usual way;

(7) where the execution was not supervised by an attorney;

(8) where the testator signed by a mark.

XII. Return Date; Decree and Letters

a. Any person whose interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections to the probate of the will or of any portion thereof except that one whose only financial interest would be in the commissions to which he/she would have been entitled if their appointment as fiduciary were not revoked by a later instrument shall not be entitled to file objections to the probate of such instrument unless authorized by the court for good cause shown. (SCPA 1410).

(i) Typically, the objectant's interest must be pecuniary, with the limited exception of a fiduciary nominated by an earlier will who may object under certain circumstances. See Matter of Eisenfeld, 52 Misc.2d 209, 275 NYS.2d 434 (Surr. Ct. Kings Co. 1966)(court on its own motion struck objections of persons whose financial interest were same under Will as in intestacy); Matter of Haddock, 22 Misc.2d 694, 200 NYS.2d 800 (Surr. Ct. Nassau Co. 1960) (though children had possible right to letters of administration if will was denied probate, they had no standing to object because they would received more under the will than in intestacy)

(ii) An objectant has standing even if damaged by the admission of only a part of the will if admitted to probate. See Matter of Nickerson, NYLJ, July 24, 1989, p.29, col.2 (Surr. Ct. Nassau Co.); Matter of Atlas, 101 Misc.2d 677, 421 NYS.2d 815 (Surr. Ct. Nassau Co. 1979), but also Matter of Okin, 100 Misc.2d 1020, 420 NYS.2d 464 (Surr. Ct. Westchester Co. 1979)

b. The objections must be filed on or before the return day of the process or on such subsequent day as directed by the court; provided, however, that if an examination of the attesting witnesses be required pursuant to SCPA 1404, objections must be filed within 10 days after the completion of such examinations or within such other time as is fixed by stipulation of the parties or by the court. (SCPA 1410).

(i) See also 22 NYCRR 207.26, 207.27, 207.28; Matter of Giardina, NYLJ, June 15, 1999, p.34, col.6 (Surr. Ct. Nassau County) (the limitations of the three year/two year rule is a rule of thumb for the average case and a longer period has been allowed when a scheme to defraud and a continuing course of conduct is alleged and evidenced by the facts); Matter of DeMarinis, NYLJ, Dec.. 2, 1999, p.37, col.3 (Nassau County) and Matter of Haskins, NYLJ, Nov. 2, 1999, p. 27, col.6 (Surr. Ct. Bronx County) (purpose of Uniform Rule 207.28 that examinations be held at the courthouse is to expedite rulings and to avoid unnecessary motions), but see also Matter of Rosenthal, NYLJ, May 28, 1999, p.30, col.2 (Surr. Ct. Queens County)

(ii) Any party to the proceeding, either before or after filing objections to probate, may examine any or all of the attesting witnesses, the person who prepared the Will, and if the Will contains an "in terrorem" clause, the nominated executors in the Will and the proponents. SCPA 1404(4); Matter of Scheiber, NYLJ, July 24, 1997, p.29, col.4 (Surr. Ct. N.Y. County), Matter of Ceccarini, NYLJ, Sept. 16, p.37, col.5 (Surr. Ct. Nassau County), and Matter of Meyer, NYLJ, Jan. 6, 1995, p.26, col.6 (Surr. Ct. Bronx County) for proponent's obligation to produce the two attesting witnesses; See

Matter of LaPaugh, NYLJ, Sept. 7, 1999, p.34, col. 1 (Surr. Ct. Nassau County) and Matter of Fried, NYLJ, Jan. 27, 2000, p.31, col.4 (Surr. Ct. Queens County) for parties allowed to be examined when Will contains an in terrorem clause, and Matter of DeWitt, NYLJ, February 5, 1999, p. 27, col. (Surr. Ct. N.Y. County) for scope of discovery under 1404.

c. Not all beneficiaries of a will are entitled to be served with process in the probate proceeding because the proponent of the will adequately protects the interests of those who would receive more under the will than otherwise. However, if objections are filed, they are entitled to process to allow them to protect their interests in the challenged will. SCPA 1411 outlines the procedure for notification which requires the proponent to prepare citations for all persons named in the will who have not appeared, which the court then issues and the citation is served by the proponent within thirty days after objections are filed as directed by SCPA 307. (SCPA 1411(1)).

(i) the citation must recite that the objections could be resolved on the return date and could adversely affect his interest in the estate and require him to contribute to the settlement of the objections. (SCPA 1411(1), (6)).

(ii) Service of the citation should be made in accordance with SCPA 307 except that under that section New York residents must be served personally unless the court directs service by mail, while SCPA 1411 allows mailed service even to New York residents without a court order. (SCPA 1411(4)). A person who has waived service need not be served with process and is entitled to appear in the objection proceeding. (SCPA 1411(5)).

(iii) Once objections have been filed, the parties are entitled to full disclosure of evidence on all issues pertaining to the validity of the Will. See Matter of Axelrod, NYLJ, Mar. 5, 1986, p.14, col.5 (Surr. Ct. Westchester County)

(iv) Preliminary hearings are governed by the Uniform Rules for Surrogate's Courts, Section 207.27; they do not rise to the level of a hearing on the merits and are therefore not limited by the Dead Man's Statute. See Matter of Switzer, NYLJ, Mar. 5, 1989, p.14, col.6 (Surr. Ct. Westchester County)(oral examination of the proponent before trial is proper and taking of such testimony is not a waiver of the right to object under CPLR 4519 at a trial on the merits). The Surrogate's Court can conduct a hearing or trial and issues a decree or order.

d. In the vast majority of cases, no objections are filed. However, even in uncontested probate proceedings, SCPA 1408 requires the Surrogate to "inquire particularly into all the facts" relating to the will. The Surrogate has independent duty to determine the validity and genuineness of the will. (See Matter of Jacobovitz, 58 Misc 2d 330, 295 N.Y.S. 2d 527 (1968)).

e. In most cases, the petition, proof of service and other required papers filed will satisfy the Court as to validity and genuineness, and the Surrogate will issue a decree admitting the Will to probate. Pursuant to the decree, letters are issued to the fiduciary. There is only one form of letters issued; however, certificates are obtainable from the Clerk at any time certifying to the issuance and continued effectiveness of the letters.

XIII. Preliminary Letters Testamentary (SCPA 1412)

a. The court may issue preliminary letters testamentary where immediate administration is needed but probate is delayed (e.g., will contest or unknown distributees).

(i) Petition for probate and purported will must be filed with the court.

(ii) The court has discretion to issue the preliminary letters testamentary prior to issuance of process upon adequate showing (e.g,. search for distributees will cause substantial delay). Petitioner must produce whatever proof the Court considers necessary. (SCPA 1412(1)).

(iii) There is no official or required form.

(iv) Notice of request for preliminary letters must be served on all persons who have an equal or prior right to serve under the terms of any will filed with the court and who have not joined the application. Successor executors are not entitled to notice unless their predecessor has died or ceased serving. (SCPA 1412(2)(a)).

(v) A person named as executor in a later will, upon filing of petition for the probate of the later will and a request for preliminary letters, shall have a prior right to preliminary letters unless the court finds cause to deny his or her appointment (e.g., applicant has conflict with the estate). See Matter of Auerbach, NYLJ, Aug. 14, 1968, p.10, col.1 (Surr. Ct. N.Y. County). The court has the discretion to appoint the executor named in the later will, appoint both, or confirm the appointment if already made and deny letters to the executor named in the later will if good cause is shown. See Matter of Ellenberg, NYLJ, June 12, 1978, p.13, col.6 (Surr. Ct. N.Y. County).

(vi) Any person with a right to serve as executor equal to or prior to the application's right may join in the application for preliminary letters or may request that preliminary letters also be issued to him if the court has already granted preliminary letters. (SCPA 1412(2)(a),(b)).

(vii) A preliminary executor must give notice of his or her appointment to all parties who have appeared within 10 days of such appointment.

(viii) Court may instead issue temporary letters. (See Matter of Pullman, 89 App. Div.2d 608. 452 N.Y.S.2d 456, 457 (2d Dept. 1982). However, preliminary letters are preferred since the preliminary executor's powers are much broader. Temporary

administrator is limited to marshalling assets and paying taxes except upon application to the Court.

(ix) Preliminary letters are not available for administration c.t.a. or for lost or destroyed wills. The reasoning is that preliminary letters run to the executor named in the will, and if none is named, or if the contents of the will are uncertain, preliminary letters are not appropriate and temporary administration may be used in those circumstances.

(x) All persons with an interest in the estate, not just those with a prior or equal right to serve as preliminary executor, have the right to object to the issuance of preliminary letters. See Matter of Ragone, 116 Misc.2d 993, 459 NYS.2d 649 (Surr. Ct. NY County 1981), *modified on the grounds*, 87 Ad.2d 457 (1st Dep't 1982), *rev'd and Surrogate's opinion reinstated*, 58 NY.2d 864 (1983) (widow had standing to object to the issuance of preliminary letters to decedent's sisters, who had been named as executors).

b. Court may set conditions:

(i) Signing an oath, and filing a designation of the clerk of the court for service of process. (SCPA 1412(5)).

(ii) Filing of a bond (even though the will exempts the executor from a bond if the court determines that there are extraordinary circumstances warranting a bond).

(iii) May limit authority to receipt of described assets.

(iv) May limit duration and require renewal of application at end of stated periods (renewal normally granted unless need for preliminary executor is caused by undue delay in the probate process).

(v) May make directions as to custody, preservation, and copying of decedent's papers. See Will of Deviner, 511 N.Y.S.2d 231 (1st Dep't 1987).

c. Unless the testator has restricted the fiduciary in any way pursuant to the will, preliminary letters confer upon the person named therein all the powers and authority, and subject him to all the duties and liabilities, of an administrator, except:

(i) No power to pay or satisfy legacy or distributive share.

(ii) No power to sell specifically bequeathed property without the consent of the beneficiary (SCPA 1412(3)).

(iii) Subject to restrictions directed by the court. Note breadth of powers as compared to those of a temporary administrator.

d. A preliminary executor can "take possession of, manage and sell any real property devised by and any personal property specifically bequeathed by...the instrument offered for probate" if the propounded will does not say otherwise. (SCPA 1412(3)); see also, EPTL 11-1.1(b)(5)(a). The preliminary executor may also allocate estate administration costs equitably among the beneficiaries. (SCPA 1412(3)).

e. Preliminary letters are revoked when principal letters are issued on probate.

f. A preliminary executor's commissions are the statutory commissions for an executor if he/she is eventually appointed and administers the estate. (SCPA 1412(7)). If the propounded will is denied probate, or preliminary letters are revoked for another reason, the Court can award the preliminary executor reasonable compensation of not more than the statutory commissions. Real property and personal property specifically disposed of are counted in computing commissions if the preliminary executor took possession of them and distributed them. (SCPA 1412(7)).

g. See generally Matter of Smith, 71 Misc.2d 248, 336 NYS.2d 68 (Surr. Ct. Erie County 1972); Matter of Bayley, 72 Misc.2d 312, 339 NYS.2d 129 (Surr. Ct. Suffolk County 1972), *aff'd* 40 AD2d 843, 337 NYS.2d 500 (2d Dep't 1972), appeal dismissed, 31 NY.2d 1025, 341 NYS.2d 898 (1973); Matter of Lazarus, 84 Misc.2d 957, 347 NYS.2d 979 (Surr. Ct. NY County 1975); Matter of Kramer, NYLJ, Jan. 19, 2003, p.31, col.5 (Surr. Ct. Queens County); Matter of Riodan, NYLJ, Oct. 30, 1998, p.35, col.2 (Surr. Ct. Suffolk County).