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PROBATE PRACTICE: THE ESSENTIAL BASICS

SPOUSE'S RIGHTS AND FAMILY MAINTENANCE

A. Determining the Existence or Non-Existence of a Will

If you have been contacted by a family member of the decedent, or by a non-family individual who claims to be the Executor of the decedent's Will, it is likely that the individual contacting you has the original Will, or a copy of it, in their hand as they speak to you on the telephone.

In either case, it is important that you see the purported Will first-hand, and refrain from making any determination of its validity or invalidity without seeing the alleged instrument. It is imperative that you instruct the individual not to remove the staples holding the original Will together (in case they wish to photocopy the Will), and not to make any marks or write anything on the face of the original Will. Any alteration of the original Will might lead the Surrogate's Court to question its validity and, in the case of a contested Will proceeding, could well strengthen the contestant's case.

Neither the removal of the staples in a Will (and its re-stapling), nor the making of marks or slight alterations in the face of the Will will necessarily lead to a Will being declared invalid. In many cases, someone has innocently removed the staples on the Will in order to photocopy it. If this is the case, the recommended procedure is for an affidavit to be submitted to the Court by such individual, stating that the staples were removed solely for copying, and that no changes were made to the Will. This affidavit will generally put the matter to rest.

Alterations and markings on the pages of the Will are a more serious matter. If the available evidence indicates that the Will was defaced, torn or marked up by the testator (the individual who signed the Will), then the Will may be declared invalid

by the Court, as an indication of the testator's attempt to destroy his or her Will. On the other hand, minor notations in the margins of the Will, either by the testator, or by someone else reviewing the Will, may be considered by the Court to be inconsequential, and not affecting the validity of the Will. Clearly, if the margin notations are by a known individual (for example, a family member noting bequests to family members), an affidavit to the Court identifying the maker of the notations would be of great benefit in assuring the validity of the Will. Ultimately, the Surrogate's Court will review all of the facts surrounding an altered Will, and will make a determination of the validity, or invalidity, of the Will on a case by case basis. (See *Matter of Steffenhagen*, 77 Misc.2d 624, 353 N.Y.S.2d 361 (1974) for a complete discussion of revocation).

It must be remembered that in Surrogate's Court, the *original signed* Will must be produced to the Court for probate to take place, and for the Executor to be appointed. If the original Will cannot be found, there is a presumption that the testator destroyed it intentionally (*Matter of Fox*, 9 N.Y.2d 400, 214 N.Y.S.2d 405 (1961)). The only common exception to this rule occurs when the attorney who prepared the Will kept the original signed copy in his or her possession, and lost it during a relocation of the law office, or other reason having nothing to do with the testator's intentions. An attorney's affirmation to this set of facts will usually suffice to have a photocopy of the Will admitted to probate (*Matter of Graeber*, 53 Misc.2d 640, 279 N.Y.S.2d 429 (1967)). *See also*, *Matter of Tabershaw*, N.Y.L.J., 5-9-89, at 27, col. 2.

In the event that only a photocopy of the Will is presently available, or it is not known whether the decedent, in fact, even executed a Will at all, several steps should be taken in the search for a Will:

1. A thorough search of the decedent's residence, including closets, drawers, lockboxes, file cabinets, and other places where "important" papers like bank statements and copies of income tax returns were kept.

2. Identification of the decedent's banks and inquiry whether the decedent maintained any safe deposit boxes there.

3. Contacting any attorneys, accountants, and/or financial planners whom the decedent knew. They may have further information regarding the existence and location of the Will. For example, an accountant's records may indicate that the

decedent took an itemized deduction for the rental of a safe deposit box at a particular bank.

In the event that it is determined that the decedent maintained a safe deposit box at a particular bank, Section 2003 of the Surrogate's Court Procedure Act permits the Court to grant an Order for the search of such safe deposit box for the decedent's Will, in the presence of a bank officer. Similarly, the Court may grant an Order for the search of the decedent's residence for a Will.

B. Duties of the Personal Representative

In New York State, the "personal representative" of the decedent, as nominated in the decedent's Will, is called the Executor (male individual) or Executrix (female individual). If more than one individual is named to serve together, they are called co-Executors. The power of the Executor(s) is necessarily very broad, in order to permit the Executor(s) to settle the decedent's estate in a timely and comprehensive manner. These powers are enumerated in Section 11-1.1 of the Estates, Powers and Trusts Law of New York State. These powers include, among many others:

1. The power to accept additions to the estate from outside sources, such as inheritances from other estates;

2. The power to invest and reinvest the estate assets;

3. The power to keep the estate property insured;

4. The power to sell, lease, collect rents from, manage, and mortgage property contained in the estate;

5. The power to make repairs to the estate property;

6. The power to contest claims against the estate and to settle those claims; and

7. The power to pay administrative expenses, such as executor's commissions, and legal and accounting fees.

As broad as these executor's powers are, they do not include certain powers which were intentionally not included in the statute. Among the most significant powers not added in the statute are:

1. The power to abandon or demolish real property (real estate) owned by the estate;

2. The power to borrow money (except through a mortgage of estate property);

3. The power to keep estate funds uninvested;

4. The power to advance income to a beneficiary of the estate;

5. The power to continue the decedent's business without authorization from the Will or from the Court. (Section 2108 of the SCPA permits the Surrogate's Court to authorize continuation of the decedent's business by the Executor); and

6. The power to delegate the executor's authority to third parties (for example, through a power of attorney).

The testator may give any or all of these powers to the Executor(s) simply by specifically including them among the powers granted to the Executor(s) in his or her Will.

The aforementioned *powers* of the Executor(s) clearly frame the *duties* of the Executor(s), but the duties of the Executor(s) will necessarily vary regarding the circumstances and assets of each estate. For example, if an estate contains valuable artwork, the issues of storing, safeguarding, insuring, and selling these estate assets will take top priority.

The principal duties of the Executor in roughly chronological order from the time he or she is notified of the testator's death until the estate probate is closed are as follows:

1. Locate and safeguard the Will of the decedent.

2. Secure the decedent's residence. Possible steps include changing the locks on the doors, relocating the decedent's pets, and arranging for mail to be forwarded to the Executor. One small but important tip: Empty the decedent's refrigerator! *Practice Tip*: The landlord of a rental apartment cannot force the Executor to surrender the decedent's apartment prematurely. The Executor is entitled to the time necessary to inventory the apartment's contents and arrange for the sale or other removal of the decedent's tangible personal property, even if this will take several months. The Executor's only obligation is to pay the rent due up to the date that the apartment is vacated.

3. Locate evidence of the decedent's assets (bank accounts, brokerage accounts, retirement accounts, deeds, and safe deposit boxes). A copy of the decedent's income tax returns will indicate essential information regarding payees of interest and dividends (Schedule B of Form 1040).

4. Be sure that premiums on fire insurance, property insurance and business insurance have been paid up to date and have future premium bills sent to the Executor. The insured should now be "the Estate" of the individual, not the individual personally. If the present insurance carrier will not cover the Estate (especially if the residence is now unoccupied), then find a new insurance carrier, even if the premium is higher. Artwork and jewelry riders to the homeowner's (or renter's) insurance policy may provide valuable information about the existence of these assets and their value.

5. Evaluate the decedent's business or professional practice. If the decedent owned a business, the assets and liabilities of the business must be reviewed, the viability of continuing the business must be evaluated (i.e., partners or key employees who can continue the business), and incoming revenues and ongoing liabilities must be controlled. The business also must be appraised for estate tax purposes.

6. If the decedent had a professional practice (doctor, dentist, lawyer, etc.), it must be established whether there is a colleague or other professional who will be handling the clients' or patients' continuing needs. The decedent's staff, vendors, and family members may provide valuable information. Be sure that ongoing expenses are paid up to date, including rent, utilities, and professional malpractice insurance.

7. Determine whether Preliminary Letters Testamentary are necessary. The Surrogate's Court Procedure Act provides a very valuable tool (SCPA Section 1412) for the issuance of Preliminary Letters Testamentary when there is an immediate need to safeguard assets, pay estate bills, or both. For instance, in the cases listed in paragraphs 5 and 6 above, the issuance of Preliminary Letters Testamentary to the Executor will quickly empower the Preliminary Executor to take control of the decedent's business or professional practice, collect bank accounts, etc. to pay bills, and stabilize the estate's situation. As previously mentioned, a court order pursuant to SCPA Section 2108 is necessary if it is determined that the Executor will continue to run the decedent's business (and such power was not granted to the Executor in the Will).

Clearly, a professional practice may only be continued by professionals licensed to practice in New York State.

8. Determine the legal heirs-at-law of the decedent. New York State probate practice requires that the "distributees" of the decedent, i.e., the individuals who would have inherited the decedent's estate if the decedent had had no Will, be identified to the Court in the Probate Petition. In many cases, these distributees will also be the legatees (beneficiaries) named in the decedent's Will because of the natural affection of the decedent for his other family members. But in other cases, some or all of the distributees may be omitted from the Will for reasons best known to the testator when he or she signed the Will. In most cases, the names and addresses of the distributees will be readily available to the Executor of the Will, who may also be a family member. Problems arise, however, when the decedent had no close family members, or no known family at all. The Court may require extensive research into the decedent's family background, including genealogy research. In these cases, the use of Preliminary Letters Testamentary is essential so that assets may be collected and bills paid before the full Letters Testamentary can be granted. *Practice Tip*: An estate planning client with no close family members may be better served with a Revocable Living Trust, rather than a Will, for their estate planning needs. Assets in a Revocable Living Trust can be distributed directly to the trust beneficiaries without the delays and costs of genealogical research that a formal probate procedure in Surrogate's Court may require.

9. Collect the decedent's testamentary assets. All assets in the name of the decedent alone are testamentary assets to be collected by the Executor as soon as he or she has been appointed by the Surrogate's Court as Executor or Preliminary Executor. Assets with a named beneficiary, as well as joint assets, "in trust for" accounts, and "transfer on death" (TOD) accounts are not within the jurisdiction of the Executor, and are generally collected personally by the named beneficiary, who requires only a certified copy of the death certificate from the Executor in order to effect transfer of the asset to the beneficiary. If the decedent owned a residence, the property should be appraised, and a licensed real estate broker should be retained for the sale. Consideration should be given to specific repairs or "prepping" of the property to achieve the maximum sale price for the property.

10. Pay the decedent's valid debts and claims against the estate.

11. Prepare and file the decedent's final income tax return, and the estate's Federal and New York State tax returns (if necessary), and the estate's income tax (fiduciary) returns. Be sure that the decedent filed and paid all income taxes due for the years before death.

12. As the estate settlement progresses, determine and pay initial and final distributions of the net estate to the legatees (beneficiaries) under the Will. Be sure to maintain adequate reserves until all estate claims and income and other tax matters have been finalized.

C. Homestead and Exempt Property — What Is Legally Your Client's, Regardless of Value

Section 5-3.1 of the Estates, Powers and Trusts Law sets forth those items of the decedent's property which are not considered to be assets of the decedent's estate, but are instead "set off" to the decedent's surviving spouse or children under the age of 21 years. In the event that there is no surviving spouse, or if the surviving spouse is disqualified (if, for example, he or she abandoned the decedent), then the items specified in Section 5-3.1 are "set off" to the decedent's children under the age of 21 years. Since the items are "set off", they are not subject to the terms of the decedent's Will or to the claims of decedent's creditors. Those "set off" items are as follows:

1. All housekeeping utensils, musical instruments, sewing machine, household furniture and appliances, including but not limited to computers or electronic devices used in and around the home, fuel, provisions and clothing of the decedent, not exceeding a total of $10,000 in value.

2. The family bible, family pictures, video tapes and computer tapes, discs, and software used by such family, and books, not exceeding $1,000 in value.

3. Domestic animals with their necessary food for 60 days, farm machinery, one tractor and one lawnmower, not exceeding $15,000 in value.

4. One motor vehicle not exceeding $15,000 in value. If the alternative, if the decedent owned one or more motor vehicles, each of which exceeds $15,000 in value, the surviving spouse or the decedent's children may acquire one such motor vehicle from the estate by payment to the estate of the amount by which the value

of the motor vehicle exceeds $15,000. Instead of receiving such motor vehicle, the surviving spouse or children may elect to receive in cash the value of the motor vehicle, up to the sum of $15,000.

5. Money or other personal property of the decedent not exceeding $15,000 in value, except that if the decedent's assets are not sufficient to pay the decedent's reasonable funeral expenses, the Executor must apply said money or other personal property to defray any shortfall for such funeral expenses.

Under the Estates, Powers and Trusts Law, the above items are deemed to be necessary for the support of the decedent's surviving spouse and children under the age of 21 years, during the settlement of the estate. No allowance may be made in money or any other property in the event that any of the items of property specified in subparagraphs 1, 2, 3 or 4 above are not in existence at the time of the decedent's demise (EPTL 5-3.1(b)).

D. Effect of Prenuptial and Postnuptial Agreements

New York State makes it clear that any spouse, or prospective spouse, may waive their "right of election" to receive a portion of the estate of the deceased spouse, whether or not the deceased spouse has executed a Will. These rules are codified in EPTL Section 5-1.1-A(e). Such a waiver or release of the spouse's right of election against the Will or the estate of the deceased spouse must be in writing, signed by the individual waiving or releasing his or her right of election, and must be acknowledged or proved before a notary public or a commissioner of deeds in the same manner as required in New York State for the recording of a deed.

Such a waiver or release of the spouse's right of election is effective, according to its terms whether it is

(a) Executed before or after the spouses get married;

(b) Executed before, on, or after September 1, 1966;

(c) Executed by only one, or by both spouses;

(d) Executed with or without consideration (i.e., monetary value); and

(e) Whether the terms of the waiver or release of the spouse's right of election is absolute or conditional. For example, the waiver agreement could specify that the spouse will never have a right of election against the other spouse's estate.

Alternatively, the agreement might specify that if the marriage lasts a certain number of years, then the spouse will receive a certain portion of the other spouse's estate.

A note of caution is in order. Waiver or release agreements are frequently the subject of litigation after the first spouse's death. The individual who signed the waiver or release agreement will often assert a claim for a right of election, alleging that he or she was not properly represented by counsel in the negotiation of the waiver agreement, did not know the extent of the other spouse's assets, etc., etc. Needless to say, each spouse, or prospective spouse, must be adequately represented by experienced counsel in the negotiation of any such waiver or release agreement for the agreement to be enforceable under intense scrutiny.

E. The Surviving Spouse's Elective Share

The Estates, Powers and Trusts Law Section 5-1.1-A covers the surviving spouse's right of election against the decedent's estate, whether or not the decedent had executed a Will. For instance, the right of election would entitle the surviving spouse to a portion of the decedent's estate whether the decedent had executed a Will bequeathing nothing to the spouse, had never executed a Will, or had left all of the decedent's assets to third parties via "testamentary substitutes", such as joint bank accounts, "in trust for" accounts, or life insurance with named beneficiaries. Of course, the spouse's right of election ceases to exist if the surviving spouse had executed an enforceable waiver or release agreement relinquishing this right of election.

In New York State, the surviving spouse's right of election is computed as the greater of $50,000 of the decedent's net estate, or one-third (1/3) of the decedent's net estate, whichever is greater. For purposes of this Section, "net estate" is defined as the gross estate less estate debts, administrative expenses (executor's commissions, legal and accounting fees, etc.), and reasonable funeral expenses. Any and all estate taxes are disregarded, however, in making this computation (EPTL Section 5-1.1-A (a)(2)).

As stated above, the surviving spouse's right of election includes, but is not limited to "testamentary substitutes" such as joint bank accounts and life insurance policies with named beneficiaries. Otherwise, it would be relatively easy for a disgruntled spouse to defeat the surviving spouse's right of election simply by naming third parties as beneficiaries on the decedent's assets. As a practical matter, the surviving

spouse could still have a difficult time collecting his or her elective share if beneficiaries named on the decedent's assets have access to a certified death certificate and quickly contact the financial institutions to collect the assets. The difficulty of collection by the surviving spouse would be compounded if the named beneficiary lives in another state, or foreign country, making litigation to recover the spouse's elective share even more difficult.

The right of election must be exercised by the surviving spouse within six (6) months from the date of issuance of Letters Testamentary (if there is a Will), or of Letters of Administration (if there is no Will). Written notice of this election must be served on the Executor or Administrator of the estate, and the original notice must be filed, with such proof of service, in the Surrogate's Court. This service of the written notice of the right of election, together with the Court filing, must be completed no later than two (2) years after the date of the decedent's death. See EPTL Section 5-1.1-A(d). Please note that the right of election is *personal* to the surviving spouse; if the surviving spouse dies, the executor or administrator of his or her estate cannot exercise the right of election on behalf of the deceased surviving spouse. However, the guardian, committee, or conservator of a surviving spouse under a disability may exercise the right of election on behalf of such surviving spouse when authorized to do so by the Court. See EPTL Section 5-1.1-A(c)(3).

F. What Are the Family Allowances That Can Be Taken?

Section C of this text, as enumerated above, set forth the "homestead and exempt property" permitted pursuant to Section 5-3.1 of the Estates, Powers and Trusts Law. There are no additional "family allowances" permitted under New York State probate law.