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THE PROBATE PROCESS FROM START TO FINISH

TAKING THE FIRST STEP: FILING AN ESTATE IN PROBATE COURT

A. Small Estate — What It Is and How to File

The expedited settlement of "small estates" in New York State without formal court administration is governed by Article 13 of the Surrogate's Court Procedure Act (SCPA). A "small estate" under this Article is defined as the estate of a domiciliary or non-domiciliary of New York State who dies leaving *personal property* (as opposed to real property) having a gross value of $20,000 or less (SCPA Section 1301). In computing this amount of $20,000, certain assets are excluded if the decedent has a surviving spouse, or children under the age of twenty-one years. These exclusions are based on New York's "homestead" allowance, which protects or "sets off" certain family assets from being subject to the claims of creditors, or subject to the terms of decedent's Will, if any. These exclusions from the $20,000 threshold amount for the administration of a small estate are set forth in Section 5-3.1(a) of the Estates, Powers, and Trusts Law (EPTL). These exclusions include:

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, with certain caveats if the decedent owned more than one motor vehicle, or if the family elects to receive cash instead of the value of the motor vehicle.

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, then said money or other personal property must be used to defray any shortfall for such funeral expenses).

Taking into account all of these "homestead" allowances, a surviving spouse, or decedent's children under 21 years of age, could use the expedited procedure of a "small estate" filing under SCPA Article 13 if the decedent, for example, had personal property valued at $18,000 (for example, a bank account), plus household furnishings, computer software, domestic animals and/or farm machinery, a car, and an additional $15,000 in cash or other personal property, all of which came within the guidelines set forth in EPTL Section 5-3.1(a)(1), (2), (3), (4) and (5).

It is important to remember that the use of SCPA Article 13 is not applicable to any interest in real estate that the decedent may have owned. Therefore, if the decedent's sole asset was a $15,000 parcel of real estate located in New York State, Article 13 could not be used to sell or transfer this real property interest. However, the fact that a decedent owned real estate would not prevent the use of SCPA Article 13 for the sale or transfer of the decedent's personal property, if the value of said personal property did not exceed the SCPA Article 13 guidelines set forth above (SCPA Section 1302).

SCPA Section 1303 addresses the idea of priority regarding who may be appointed by the Surrogate's Court as the "voluntary administrator" of a "small estate." If the decedent died intestate (i.e., without a valid Will), then SCPA Section 1303 sets the order of priority as follows: the surviving adult spouse (over 18 years of age), a competent adult child or grandchild, parent, brother or sister, niece or nephew or aunt or uncle of the decedent. If none of these is available, then the voluntary administrator may be the guardian of the property of an infant who is a distributee (legal heir) of the decedent, the committee of the property of any incompetent who is a distributee, or the

conservator of the property of a conservatee who is a distributee. If none of these categories of individuals is available, or if there are no known distributees of the decedent within the above categories, then the chief fiscal officer of the county where the decedent was domiciled, or the public administrator of the county, may be appointed as the voluntary administrator of the "small estate" (SCPA Section 1303(a)).

In the event that the decedent died testate (i.e., with a valid Will), then the executor, or the alternate executor, named in the Will has the first right of priority to serve as voluntary administrator, and must file the Last Will and Testament of the decedent with the Surrogate's Court (SCPA Section 1303(b)). If no executor or alternate executor wishes to serve, so qualifies, as voluntary administrator, then the sole beneficiary under the Will may be appointed as voluntary administrator, or if he or she is dead, then the executor or administrator of that sole beneficiary's estate may be appointed as voluntary administrator. If there is more than one beneficiary under the Will, then any one or more of the residuary beneficiaries under the Will may be appointed as voluntary administrator(s) or, if any of these residuary beneficiaries are deceased, then their executor(s) or administrator(s) may be appointed as voluntary administrator(s). See SCPA Section 1303(b), and SCPA Section 1418 for a more complete list of individuals who may serve as voluntary administrators if the executor, or alternate executor, named in the decedent's Will cannot serve as voluntary administrator.

The purpose of SCPA Article 13 is to permit the simplified and expedited settlement of "small estates" by family members. There are a number of specific advantages to utilizing Article 13 if circumstances permit. Among these advantages are as follows:

1. The voluntary administrator is not required to file a bond with the Surrogate's Court to guarantee the faithful performance of his or her duties as voluntary administrator. (SCPA Section 1304(2)). This can save the estate the delay and expense of securing a surety bond through a specialty insurance broker, who is often reluctant to guarantee the performance of an individual whom they have never done business with before.

2. Voluntary administration is set in motion by the filing of an easy-to-understand Affidavit with the Surrogate's Court, (SCPA Section 1304(3)), together with a small filing fee. Most individuals do not require the service of an attorney to file this form, which is provided by the Surrogate's Court. In fact, the Court personnel are usually happy to assist a family member in filling out the Affidavit, which must then be notarized.

3. Collection of the "small estate" assets, and payment of valid estate claims and debts, may be accomplished in an expedited manner. SCPA Sections 1305 and 1306 give the voluntary administrator the powers necessary to collect the estate assets, and to maintain an action or proceeding to enforce any contractual claim owned by the decedent, as long as the amount in contention is within the monetary limit defined as a "small estate" in SCPA Section 1301. It is important to note that the voluntary administrator must maintain a separate estate bank account for all estate assets collected and estate debts and distributions paid out (SCPA Section 1307). In addition, the voluntary administrator must file an account with the Surrogate's Court of all personal property of the decedent received and disbursed, together with receipts and cancelled checks evidencing such transactions (SCPA Section 1307(2)). The voluntary administrator is not permitted to receive any compensation for his or her services as voluntary administrator (SCPA Section 1307(1)). However, the voluntary administrator is entitled to reimbursement for any necessary expenses incurred in the administration of the small estate.

B. Regular Estate — Probate of Larger Estates

Most estates do not meet the restricted $20,000 limitations of an SCPA Article 13 "small estate." For these larger estates, a regular probate procedure is necessary. The probate proceeding is commenced in the Surrogate's Court in the county where the decedent was a domiciliary at the time of death. This county is usually, but not always, the county where the decedent died. For instance, the decedent may have been on vacation, or in a rehabilitation center, at the time that he or she died. If the death certificate indicates a place of death other than the decedent's domicile, then the

practitioner would be well-advised to file an affidavit with the Surrogate's Court explaining the discrepancy.

The probate proceeding is commenced with the filing of a Probate Petition executed by the proposed executor named in the Will, together with the supporting documents, in the Surrogate's Court in the appropriate county. Every county in New York State has its own printed probate forms, often with minor variations between counties. However, all of the Surrogate's Courts will accept the official "Petition for Probate" form (Official Form P-1) which can be downloaded by computer from the official New York State court website: www.courts.state.ny.us/forms/surrogates.

The Probate Petition is fact-based ("name of petitioner", etc.) and self-explanatory, but several sections of the Petition bear further discussion:

Paragraph 1(b) of the Petition: If the proposed Executor is also an attorney, then the client disclosure requirements of SCPA Section 2307-a must have been complied with at the time of the Will execution, or the executor/attorney will be limited to only one-half (1/2) of the applicable statutory executor's commissions. Apparently, the Legislature believed that many attorneys were not fully advising their estate planning clients that an attorney who serves as an executor or co-executor is entitled to receive compensation for legal services performed in the settlement of an estate, in addition to the statutory executor's commissions. Thus, effective as of August 2, 1995, any Will appointing an attorney as executor or co-executor must have a separate statement signed by the testator, and witnessed by one individual, acknowledging that the testator was informed of the following facts, and I quote directly from SCPA Section 2307-a:

"Prior to signing my will, I was informed that:

(i) subject to limited statutory exceptions, any person, including an attorney, is eligible to serve as my executor;

(ii) absent an agreement to the contrary, any person, including an attorney, who serves as an executor for me is entitled to receive statutory commissions for executorial services rendered to my estate;

(iii) absent execution of this disclosure acknowledgement, an attorney who serves as an executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive; and

(iv) if such attorney serves as my executor, and he or she or another attorney affiliated with such attorney renders legal services in connection with the executor's official duties, he or she is entitled to receive just and reasonable compensation for those legal services, in addition to the commissions to which an executor is entitled.

_____ _____

(Witness) (Testator)

Dated: _____ Dated: _____"

In addition to SCPA Section 2307-a, an attorney who is requesting court letters as *sole* executor or administrator of an estate must comply with Surrogate's Court Rule 207.16(e), which states as follows:

"(e) If a person requesting letters to administer an estate as sole executor or administrator is also an attorney admitted in this state, he or she shall file with the petition requesting letters a statement disclosing: (1) that the fiduciary is an attorney; (2) whether the fiduciary or the law firm with which he or she is affiliated will act as counsel; and (3) if applicable, that the fiduciary was the draftsperson of a will offered for probate with respect to that estate."

Paragraph 4 of the Petition: In this paragraph of the Probate Petition, the proposed executor (known as the "petitioner") states that there is no other will or codicil on file in the Surrogate's Court and, after a diligent search (including any safe deposit box), no other will or codicil exists that is later in date than the Will now being offered for probate. It is incumbent upon the proposed executor and the executor's attorney to be sure that these statements are true. As a practitioner, I am not that concerned about another Will being on file with the Surrogate's Court, because at the time of filing this Will and this Probate Petition, the Court personnel will routinely search the Court records

for any earlier Will filed for safekeeping. However, before I file a Will with the Court, I want to be certain that there is no later Will in the decedent's safe deposit box(es), or in his or her residence, or with anyone else whom I can reasonably identify (a close relative or another known attorney). As a practitioner, you do not want to be in the position of having your client appointed as Executor, of collecting and distributing estate assets under this Will, and then belatedly discovering (or having presented to you) a later Will that has a different executor and different beneficiaries. Take your precautions now so that if the unexpected were to happen, you (and the executor) could at least show the Court that you proceeded with due diligence and in good faith.

Paragraphs 5 and 6 of the Petition: These paragraphs of the Probate Petition require the identification (names, addresses and relationships) of all of the "distributees" (legal next of kin) of the decedent. In most close-knit families, the gathering of this distributee information does not present a problem. There are many instances, however, where the decedent did not have close relatives, or any known relatives at all.

A peculiarity of New York probate practice is that even though the decedent left a valid Will clearly identifying the legatees (beneficiaries) who are to receive the net assets of his estate, that Will cannot be fully probated and the assets distributed to the intended beneficiaries until and unless the Surrogate's Court is fully satisfied that all of the distributees of the decedent (who would have inherited under the laws of intestacy if there were no Will), have been fully identified to the Court, or due diligence shown (in the Court's opinion) that all reasonable efforts have been made to find them. In other words, in New York State, the proposed executor (and the executor's attorney) must use every available avenue to ferret out long-lost relatives, and give them an opportunity to see the Will and to contest it, if they wish!

This being the case, there will be many instances when the experienced practitioner should advise an estate planning client with only distantly-related relatives (distributees), or unknown distributees, that a Will is not advised. Instead the client's estate plan should remove the client's estate from the New York probate process through the use of a revocable living trust, and/or joint accounts, "in trust for" accounts, and

named beneficiaries on insurance policies and retirement accounts such as IRAs, Keoghs, 401(K)s, etc. In this way, the estate plan for a client with distantly-related or unknown distributees would be identical to the estate plan for someone who expected his or her will to be contested if subjected to the New York probate process.

C. The Estate Timetable — What You Need to Do

Settling an estate is a complex task, and it must be approached on a step-by-step basis or the process will quickly become overwhelming. A roughly chronological order of the "timetable" for settling an estate follows:

1. Locate the Will and Determine Whether It Is a Valid 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:

(a) 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.

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

(c) 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.

2. File the Will for Probate.

File the Will for probate, together with the Probate Petition and supporting documents, and the certified death certificate, in the county where the decedent was a domiciliary. In New York State, there is no deadline for the probate of a Will. However, the Surrogate's Courts in most counties require an "Affidavit of Delay" if the will is not filed for probate within either six months or one year after the testator's death, depending on the county. The purpose of this Affidavit is to explain to the Court why there was a delay in filing, and to apprise the Court whether the identities of the distributees have changed during the delay (i.e., did any of the distributees die or become incompetent during this time period). In addition, the Court wants to know whether any creditors of the estate have been adversely affected by the delay in probate (i.e., did they go out of business, or turn the decedent's debts over to a collection agency).

3. Have All of the Decedent's Mail Forwarded to the Nominated Executor.

This is a very important step, and can be accomplished at the decedent's post office branch by showing the post office personnel a copy of the death certificate and, if necessary, a copy of the will indicating the name of the Executor. It is vital that all first class mail be forwarded to the Executor so that all of the decedent's assets may be accounted for. Every financial institution sends monthly or quarterly statements. Life, property, and professional liability insurance policies are evidenced by

insurance premium payment notices. Even safe deposit boxes send an annual lease renewal statement. Federal and state tax deficiency notices also arrive in the mail, as do real estate tax bills.

4. Be Aware of All Applicable Tax Return Deadlines.

(a) Calculate when Federal (Form 706) and New York State (Form ET-706) estate tax returns and payments are due, in the event that you are settling a taxable estate. Both of these returns are due nine (9) months after the date of the decedent's death. For the year 2008, the Federal estate tax threshold is $2,000,000, rising to $3,500,000 in 2009. The New York State estate tax threshold remains at $1,000,000 for taxable estates (i.e., estate monies not bequeathed to surviving spouses or to charities). To request an extension of time to file and/or pay Federal estate tax, use Form 4768. The applicable extension form for New York State estate tax is Form ET-133.

(b) Be sure that all Federal (Form 1040) and New York State (Form IT-201) tax returns and personal income taxes have been filed up to the date of death. Any questions relating to these tax returns will come from government authorities as notices received in the forwarded mail (paragraph number 3 above).

(c) Calculate when the Federal (Form 1041) and New York State (Form IT-205) fiduciary (estate) income tax returns are due. These returns cover income received after the decedent died, and before the net estate is distributed to the beneficiaries. It is based on a fiscal year (not calendar year). Therefore, if the decedent died on March 16, 2008, the Form 1041 fiscal year would run from March 17, 2008 to February 28, 2009 (the end of the full month preceding the date of death). The Federal and NYS fiduciary income tax returns would be due three and one-half (3½) months after the end of the fiscal year, which would be June 15, 2009.

5. Pay Valid Claims against the Estate.

The Executor is responsible for paying all valid claims against the Estate, to the extent that estate assets are available to pay such claims. Any claim against

the Estate must be presented to the Executor within seven (7) months from the date that court letters are issued appointing the Executor (SCPA Section 1802). If Preliminary Letters Testamentary are issued to the Executor prior to the issuance of full Letters Testamentary, then the seven month period starts to run from the issuance of the Preliminary Letter Testamentary. (For a more complete discussion of Preliminary Letters Testamentary, see my seminar notes under the heading "Understanding the Role of the Personal Representative in Probate" later in this session manual.) The seven month notice requirement for claims pertains only to claims which may not be known to the Executor. The more generic type of claims against the Estate, such as rent, utilities, and credit card bills are evidenced each month by statements that the Executor should be receiving through the forwarded mail, and the Executor has a good faith duty to pay these bills, whether or not he or she receives a formal Notice of Claim against the Estate. *Practice Tip*: Do not be in a hurry to pay bills submitted by doctors and hospitals. Let doctors and hospitals submit and resubmit these bills to Medicare and/or the supplemental Medicare coverage that the decedent may have (i.e., Blue Cross/Blue Shield, or AARP). In most cases, these insurances will eventually pay all or most of these medical bills, leaving little or nothing for the Executor to pay out of estate funds.

6. Payment of Legacies to the Will Beneficiaries.

By the time the seven month statutory period (under SCPA Section 1802) for the notice of claims has passed, the Executor should have made some progress in collecting the Estate assets and paying the valid Estate claims. In addition, if the Estate is taxable on the Federal and/or New York State levels (see paragraph 4(a) above), the Estate will have allocated estimated estate tax payments to the Federal and state governments. With a clearer understanding of the approximate amount of the net estate, the Executor may choose to make an initial distribution, on account, to the beneficiaries under the Will. Bear in mind that a substantial reserve against any foreseeable future claims, and possible disputed amounts due on personal, estate, and fiduciary taxes, should always be maintained until the estate settlement is concluded.

Before any distributions to legatees are made, each beneficiary should be supplied with an informal accounting of how that distribution is being

computed. In addition, before any distribution is made, the beneficiary should be given a "Release and Receipt and Refunding Agreement" to sign and have acknowledged before a notary public. The effect of this signed legal document is to: (1) *Release* the Executor(s) from any further liability with respect to the amount being distributed to the beneficiary; (2) Serve as an acknowledgement of *receipt* of the amount of the distribution (even though in actuality the Executor will have this Agreement in hand before sending the distribution check); and (3) Provide for a *refund* of the distributed money in the event that the Executor later needs a full or partial return of the monies from the beneficiaries in the event of unforeseen expenses, liabilities, or claims against the Estate.

For illustration purposes only, I have set forth below a "Release and Receipt and Refunding Agreement" that I use regularly in my probate practice:

RELEASE AND RECEIPT AND REFUNDING AGREEMENT

KNOW ALL PERSONS BY THESE PRESENTS, that

_____, residing at _____,

hereby acknowledges receipt of the sum of $_____, from

_____ and _____, as co-Executors of the Last Will and Testament of _____, deceased, being in full payment and satisfaction for said beneficiary's interest in the estate of _____ (except for the reserve as set forth below), and in consideration of such payment, said beneficiary, on behalf of said beneficiary and beneficiary's assigns and successors in interest, hereby releases and forever discharges the said Executors and said Executors' heirs, executors and administrators, of and from all claims and demands which said beneficiary or said beneficiary's assigns or successors in interest now have or hereafter may have against said Executors by reason of any acts or matters done or omitted to be done by said Executors in connection with said Estate.

Said beneficiary hereby acknowledges that said beneficiary has received from said Executors a copy of the "Statement of Assets, Expenses and Proposed Distributions" for this Estate which sets forth the aforementioned sum payable to said beneficiary, and said beneficiary hereby waives the filing of a formal accounting in this matter. Said beneficiary hereby consents to and ratifies the aforementioned Statement in

all of its particulars, and hereby releases and forever discharges the said Executors from all claims and demands as more fully set forth in the preceding paragraph.

Said beneficiary agrees that if any taxes, expenses, liabilities, adjustments, or charges of any nature whatsoever that would have been properly chargeable against any monies distributed to said beneficiary shall at any time become payable by the Executors, individually or as Executors, said beneficiary will promptly pay over to the Executors on demand a sum or sums sufficient to meet all such taxes, expenses, liabilities, adjustments, or other charges, not to exceed, however, the amount of monies so distributed to said beneficiary. In the event that said beneficiary does not promptly pay over to the Executors such sum(s), then said beneficiary agrees that said beneficiary shall be liable to the Executors for all costs and expenses, including but not limited to attorney's fees, court costs, and interest and penalties, incurred due to said beneficiary's failure to refund such sum(s), even if such costs and expenses exceed the monies distributed to said beneficiary.

Said beneficiary understands that a $_____ reserve fund for taxes and possible estate liabilities shall be held by the Executors for approximately eight (8) months. At that time, said beneficiary shall receive said beneficiary's proportionate share of said reserve fund, after deduction for any additional taxes, liabilities or expenses.

_____
[Name of Beneficiary]

_____
Social Security Number

STATE OF)
) SS.:
COUNTY OF)

On _____, 2008, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, and acknowledged to me that she executed the same in her capacity(ies), and

that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____ (Notary Seal and Expiration Date)

Notary Public

D. Proving the Will.

In New York probate practice, the Will offered for probate is "proved" by the testimony of the attesting witnesses, who witnessed the testator's execution of his or her Will. No notarization of the testator's signature is necessary or even accepted in New York; an individual who happens to be a notary public may witness a Will as one of the two witnesses necessary for a valid Will, but his or her status as a notary public has no bearing on the execution and witnessing of the Will.

The preferred practice in New York State is for the attesting witnesses to the Will to sign a "self-proving" will affidavit as part of the witnessing ceremony. This is an affidavit attached directly to the Will in which the attesting witnesses swear under oath (in the presence of a notary public) that the testator in fact executed the Will in their presence, was in all ways competent to execute a Will, that the witnesses then signed the Will as witnesses, etc. The very useful purpose of a self-proving witness affidavit attached to the executed Will is that at the future time when the Will is to be probated, the Executor and/or the Executor's attorney need not attempt to locate the witnesses and have them sign similar affidavits at that later date. Needless to say, the witnesses may have died, become incompetent, or simply disappeared many years later.

In the event that the Will does not have a self-proving affidavit attached (which is often the case), then each of the two attesting witnesses to the Will must sign and have notarized an affidavit prepared in accordance with SCPA Section 1406. In practice, this affidavit is a pre-printed Court form, which is part of the "probate package" available at each county's Surrogate's Court. Prior to signing the affidavit, however, the attesting witnesses must see the actual signed Will, or a court-certified copy thereof, to be able to verify the signatures on the Will. In many cases, one or even both of the attesting witnesses to the Will cannot, even with due diligence, be located. This will rarely

prevent the Will from being admitted to probate because, as a matter of public policy, the Surrogate's Courts want to honor and enforce a testator's right to bequeath their property through a Will. If a witness has died or become incompetent, the Court will often accept an affidavit from a relative or third party who knew the witness's signature, attesting to the fact that the signature on the original Will or a court-certified copy, looks like the usual signature of the witness.

If a Will is more than twenty years old and, after due diligence, neither of the witnesses can be located, the Court may dispense completely with the testimony of the attesting witnesses and proof of their handwriting, and admit the Will to probate as an "ancient document" if the Will is of an unsuspicious nature, appears to be duly executed, and has a dispositive scheme that seems fair and reasonable for that particular testator (e.g., bequeathing his or her property to close family members). *See e.g.*, *Matter of Tier*, 3 Misc.3d 587, 591, 772 N.Y.S.2d 500, 504 (2004); *Matter of Borome*, 6 Misc.3d 1005A, 800 N.Y.S.2d 343 (2003).

E. Challenging the Will.

There are two possible grounds upon which a Will may be challenged or "contested" in Surrogate's Court: that the testator who executed the Will was mentally incompetent to sign the Will, and/or that the execution of the Will was the result of undue influence by the beneficiaries named in the Will.

An individual must have "standing' to challenge the Will. In other words, a distributee (legal next of kin) of the decedent would have standing to object to the Will because in the event that the Will is declared invalid, then he will receive a portion of the decedent's estate. Similarly, the beneficiary of an earlier Will has standing to object to a later Will if he or she would receive a greater portion of the estate under the earlier Will.

A challenge or "contest" to the Will is brought before the Court in the form of objections filed with the Court and served upon the petitioner (the Executor) who has filed the Probate Petition with the Court (SCPA 302). The Court will then permit the objectant to examine (depose) the draftsperson of the Will, the attesting witnesses to the Will, and the nominated Executor of the Will pursuant to the deposition provisions of

SCPA Section 1404, so that the objectant may determine whether he or she has sufficient evidence to mount a credible challenge to the Will.