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EDUCATING AND WORKING WITH PERSONAL REPRESENTATIVES IN ESTATE ADMINISTRATION

INTRODUCTION

The administration of a decedent's estate is in many ways similar to a rugged journey over unknown terrain. Every decedent's estate is different: the beneficiaries of the estate and their personalities; the nature of the estate's assets and liabilities; and perhaps, most importantly, the relationship that you as the estate's attorney forge with the personal representative of the estate during the course of this journey.

Before we continue this discussion, we need to clarify several terms that will be used during this presentation. The term "personal representative" is used in many jurisdictions to describe both the "executor" named in the last will and testament of a decedent who executed a will, as well as the "administrator" of an estate who, as a legal next-of-kin of the decedent, was appointed by the relevant probate, or surrogate's court, to administer, or settle the estate of a blood relative who died without executing a will. Generally speaking, the powers of an executor or an administrator of an estate are identical once that individual is appointed by the probate, or surrogate's, court.

For convenience during this discussion, I will use the term "personal representative" to describe both an executor and an administrator. I will also use the term "personal representative" to describe the trustee named in the decedent's trust, where the decedent chose to distribute his or her assets through an *inter vivos* (lifetime) trust, or a testamentary trust (created by his or her will). I will use the term "probate court" to describe the court of competent jurisdiction for the settlement of decedent's estates. I will also use the term "estate administration" to describe the settlement of a decedent's

estate, whether such settlement involves the probate of the decedent's will, or the administration of an estate where the decedent died without a will.

FAMILY MEMBER VS. PROFESSIONAL TRUSTEE

In most instances, the choice of a personal representative will have been made before you are retained as the estate's attorney. If the decedent executed a will, then that will names an executor to oversee the settlement of that decedent's estate.

In the event that the decedent did not execute a will, then the state laws governing "intestacy" will determine which close blood relative(s) have the first right to apply to be administrator of that decedent's estate. For example, in New York State, the order of preference for an intestate decedent is (1) surviving spouse, (2) children, (3) grandchildren, (4) the father or mother, or (5) brothers or sisters. (See Section 1001 of the NYS Surrogate's Court Procedure Act.)

A professional personal representative, such as a bank or trust company, is a choice that an individual may make during their estate planning with their attorney. However, there are a few limitations to be aware of. Firstly, most banks or trust companies will not be interested in handling an estate where the gross estate assets are less than $500,000, or $1,000,000, depending on the jurisdiction. This is simply because the bank's statutory commissions, which are usually fixed by state law, will not be deemed sufficient for the work and responsibility involved.

Secondly, professional personal representatives take a very careful look at the assets and liabilities involved in the estate before accepting their nomination as personal representative. For example, if the decedent's assets included a gas station or land that may have been contaminated with industrial waste, many if not most, banks and trust companies would decline to be appointed as the estate's personal representative. This is due to the fact that the bank or trust company might be held liable for any environmental damage caused by the polluting assets.

Practice Tip: The choice of the personal representative for an estate is a major decision, to be considered very carefully by the client and their attorney as part of the

client's estate planning deliberations. The choice of the wrong personal representative can lead to undue and unnecessary delay, hardship, and heartache in the settlement of an estate. A proposed personal representative may have many shortcomings in terms of the multiple roles that a personal representative can and must play in the settlement of a decedent's estate. Among these many roles are the following:

1. Business decision-making: The personal representative must collect and safeguard the assets of the estate. This can involve dealing with bankers, stockbrokers, insurance companies and, in more complicated estates with varied assets, also dealing with real estate brokers, art dealers, auction houses, and valuation experts. There is also the need to deal with creditors of the estate, and to determine whether estate debts are valid, and whether they can be negotiated, settled or disputed. It is very important to note that even though much of the correspondence with these various individuals and entities is facilitated by the estate's attorney, the actual decision-making rests squarely on the shoulders of the personal representative who, as a matter of law, is responsible for completing these tasks in a timely and diligent manner.

The estate's attorney should always be cognizant of the fact that poor decision-making by the personal representative could reflect poorly on, and be blamed on the estate's attorney by the beneficiaries of the Will, or the distributes of the estate. Therefore, if the attorney has serious reservations about business decisions being made by the personal representative, such as the timely sale of estate assets, or the maintenance and repair of estate property, he or she would be well advised to send the personal representative a written statement of such reservations and disagreement, with the recommendation of a different course of action. If these reservations and disagreements are of a continuous and substantial nature, the estate attorney might be well advised to resign as the estate's attorney, lest the personal representative's improvidence and/or incompetence, casts its long shadow over the attorney's professional status.

2. Dealing with the beneficiaries/distributees of the estate: In most cases involving the settlement of an estate (except for insolvent estates), there is the tantalizing prospect among the beneficiaries of the will or the distributees of the intestate (no will)

estate, of receiving money. Once these beneficiaries or distributees are informed of the personal representative's identity, that individual is likely to be incessantly barraged with telephone calls, letters, and (in these modern times) with e-mails advising the personal representative of emergencies, impending disasters, and the dire need for orthodontia and prom dresses, all of which apparently occurred the day after the decedent passed away. The personal representative must have strong moral fiber and a stiff backbone to deal with all of these impatient beneficiaries during the pendency of the estate settlement. Adding to the complexity of the situation is that usually the beneficiaries or distributees are family members, so that all of the dynamics of family relationships come into play. In summary, in many cases the personal representative is not emotionally equipped to deal with impatient beneficiaries of the estate, and it falls upon the estate attorney to deal with these matters.

If the estate is of sufficient size, and does not contain problem assets, such as described above, then a professional personal representative, such as a bank or trust company might be considered, if no family member seems equal to the task. The personal representative to be named in the will might also be a friend or professional advisor who is known and trusted by the family members.

It is essential for an attorney to remember that if he or she is retained as the attorney to settle the estate, then the attorney's client is the *personal representative*, and not the *estate*. In any matters of contention during the estate administration process, such as dealing with estate assets and liabilities, or controversies involving the nature and timing of estate distributions to the beneficiaries, the attorney will be representing the interests of the personal representative in the estate settlement, and not the interests of the individual beneficiaries. This, of course, does not preclude the attorney, acting on behalf of the personal representative, from attempting to address the beneficiaries' concerns toward an amiable settlement of the estate.

It is equally essential for the estate attorney to have a written retainer agreement with the personal representative for the estate, in order to avoid later

misunderstandings regarding attorney compensation. The following document is a sample of a retainer agreement that I use in my own estate practice:

RETAINER AGREEMENT

Date:
Estate of:
Client:

Client hereby retains Herman Max Leibowitz to do the legal work necessary to settle the Estate of the above-named individual. Mr. Leibowitz agrees to perform all such legal work including the appointment of Client as Executor of the decedent's Will, assistance in the collection or transfer of the Estate assets, preparation and filing of the necessary Estate Tax Proceedings, and preparation and filing of the necessary fiduciary (estate) income tax returns.

Mr. Leibowitz will be compensated for his legal work at the rate of $_____ per hour. Mr. Leibowitz will send itemized statements to Client detailing the legal work performed, and Client agrees to pay such statements promptly.

Mr. Leibowitz will be reimbursed for court costs and related expenses upon presentation of cancelled checks or receipts.

Client acknowledges receipt of copies of the "NYS Statement of Client's Rights" and "NYS Statement of Client's Responsibilities".

_____ _____

HERMAN MAX LEIBOWITZ (CLIENT)

BE SURE THE CLIENT QUALIFIES FOR AND RECEIVES THE DEDUCTIONS

As you may know, in this year of 2010, there is no federal estate tax due, regardless of the size of the decedent's estate. Next year, the threshold for paying a federal estate tax will be $1,000,000, pending further legislation. Remember, however, that there may be a state estate tax presently due in your jurisdiction, which tax may also vary from year to year.

There are many opportunities for federal and state estate tax deductions, and the practitioner must be aware of all of them in his or her advice to the estate's personal representative. The following are deductions that will be available to most estates:

1. Funeral expenses, clergy fees, cost of gravesite and monument, and perpetual care of the gravesite.

2. Estate legal fees, disbursements, and court filing fees.

3. Accounting fees for the decedent's final federal (Form 1040) and state personal income tax returns, as well as for the federal (Form 706) and state estate tax returns and the federal (Form 1041) and state estate income tax returns. Although the personal representative will generally retain an accountant to prepare these various tax returns, it is imperative that the estate's attorney have a good working knowledge of the federal and state estate tax laws so that he or she can effectively supervise and oversee the accuracy of these returns in order to maximize the deductions available to the estate.

4. Executor's, administrator's, and trustee's statutory commissions.

5. Appraisal fees for valuation of art work, jewelry, antiques, and real estate that is part of the decedent's estate.

6. Sales commissions for the sale of stocks and other securities that are part of the decedent's estate.

Please note: Real estate brokerage commissions are deductible only if the applicable real estate (a house, farm, vacation home, factory, etc.) must be sold in order to effect the terms of the Will on the property division mandated by the laws governing intestacy (when someone dies without a will). For example, if the will dictates that the decedent's house be sold and the proceeds be split among five siblings, then the

brokerage commission is deductible. However, if the house is bequeathed to one sibling, and that sibling directs the personal representative to sell the house, and give the sibling the net sale proceeds, then the real estate brokerage commission is *not* deductible because, under the terms of the will, the personal representative could simply have transferred the house to the sibling without selling it. (See the instructions for Schedule J of Form 706 (U.S. Estate Tax Return)).

7. Decedent's unpaid utility bills (electric, gas, telephone, cable, etc.) up to the date of death.

As noted earlier, the estate will generally have two types of estate taxes to consider: the estate tax return (federal Form 706) enumerating the *assets* of the decedent, and the estate income tax return (federal Form 1041) enumerating the *income* earned by the estate from interest, dividends, royalties, etc. Form 706 is filed only once (unless it is amended), while Form 1041 is filed annually for as long as the estate earns income (i.e., until the income-bearing assets are transferred to the beneficiaries, who will then begin reporting the income from those assets on their personal income tax returns (Form 1040)).

It is important for the estate's attorney to see that the personal representative receives the maximum benefit for the estate from the deductions available to the estate. For example, if the federal and state estate tax computations indicate that little or no estate tax will be payable on those returns, then it would be wasteful to use (and lose) the aforementioned estate tax deductions on those returns. A far more prudent strategy would be to use the permitted deductions (legal, accounting, and executor/administrator/trustee's commissions) on the estate *income tax* returns in order to reduce the net taxable income on those returns. Please note that the deductions discussed in the preceding sentence can be used *either* on the estate tax return *or* on the estate income tax return, but not on both returns.

HERMAN MAX LEIBOWITZ

DETERMINING TRUSTEE FEES

Every state codifies the statutory commissions payable to executors, administrators and trustees for the faithful performance of their duties on the decedent's estate. These statutory commissions are generally based upon a percentage of the estate assets being sold or transferred.

For example, in New York State, the statutory commissions payable to an executor or administrator are as follows:

1. Five percent (5%) of the *estate* assets not exceeding $100,000 (i.e., assets in the decedent's name alone; not in joint accounts, "in trust for" accounts, or having a named beneficiary, and not specifically bequeathed property);

2. Four percent (4%) of the next $200,000 of estate assets;

3. Three percent (3%) of the next $700,000 of estate assets;

4. Two and one-half percent (2.5%) of the next $4,000,000 of estate assets; and

5. Two percent (2%) of all estate assets above $5,000,000.

By way of example, if the decedent's estate in New York State contained $700,000 in estate assets as defined above, then the executor's or administrator's commissions would be $25,000, computed as follows:

5% x $100,000 =	$5,000.00
4% x $200,000 =	8,000.00
3% x $400,000 =	12,000.00
	$25,000.00

(See Section 2307 of the New York State Surrogate's Court Procedure Act).

In New York State the *annual* statutory commissions payable to a trustee of an *inter vivos* (lifetime) trust, or testamentary trust (established in the decedent's will) are as follows:

1. $10.50 per $1,000 or major fraction thereof on the first $400,000 of trust principal;

2. $4.50 per $1,000 or major fraction thereof on the next $600,000 of trust principal; and

3. $3.00 per $1,000 or major fraction thereof on all additional principal.

In addition, in New York State the trustee receives a commission of one percent (1%) on all trust principal that is paid out of the trust.

By way of example, if a New York State trust contained $700,000 of principal, then the annual trustee's commission would be $5,550, i.e., (10.50 x 400 = 4,200 + 4.50 x 300 = 1,350). At such time that the full trust principal was paid out, the trustee would receive an additional trustee's commission of $7,000 (1% x 700,000). (See Section 2309 of the NYS Surrogate's Court Procedure Act).

DETERMINING COMPETING DESIRES OF PRESENT BENEFICIARIES AND REMAINDERMEN

Most often in the probate of a will or the administration of an intestate estate, there is no matter regarding "remaindermen" because the beneficiaries of the decedent's estate receive their inheritance outright and free from the constraints of any trust. The matter of remaindermen arises when a will or a trust gives a lifetime income and/or partial principal interest to one or more individuals, and a remainder interest, usually upon the demise of the initial beneficiaries, to other individuals or entities (such as charities), who are known as "remaindermen".

The conflict between the present beneficiaries and the remaindermen usually arises regarding the *investment* of the estate's assets. The present income beneficiaries wish to maximize the *income* earned on the estate or trust assets (often through passive investments such as government and/or corporate bonds); while the remaindermen usually are interested in the growth of the estate or trust principal, as a long-range hedge against inflation, which would decrease the actual buying power of their eventual legacy.

Practice Tip: The best way for an estate planning attorney to minimize the likelihood of an eventual conflict between the income beneficiaries and the remaindermen is to anticipate and *directly address* this issue with your client as part of

the estate planning process. Most conflicts of this nature occur because the will or trust is silent as to the nature of investments permitted or mandated by the executor or trustee. After discussion with the client, the experienced estate planning attorney will *specify in detail* in the estate planning documents the nature of the investments permitted to be made by the executor or trustee, in order to prevent conflict and possible litigation after the client's demise. For example, if the client's primary concern is to maximize income for the lifetime income beneficiary, then say so in the will or trust. In this case, sample will or trust languages might read as follows:

"It is my direction that the trust funds be invested in good quality, high-yielding government or corporate bonds so as to maximize the income payable each year to my beloved nephew, even though this will have a negative impact on the possibility of growth of the principal for the remaindermen of said trust."

Alternatively, the estate-planning client may wish to strike a compromise between the income beneficiaries and the remaindermen. In this case, the sample will or trust language might read as follows:

"In order to balance the income needs of my lifetime beneficiaries, and the growth-of-principal needs of my trust's remaindermen, I direct that 50% of the trust principal be invested in good quality, high-yielding government and corporate bonds, and the balance of the trust principal be invested in good quality common stocks."

Please note: In any case where investment counseling and advice will be prudent and necessary, be sure to include in the powers given to the executor or trustee the power to retain investment counsel and to pay their professional fees from the estate or trust assets. Please also note that any suggested legal wording in this article is for illustration purposes only, and should not be used in actual legal documents without consultation with an experienced estate planning attorney after analysis of the specific facts of the situation.

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HANDLING REQUESTS FOR INCREASING/DECREASING DISTRIBUTION AMOUNTS

One of the hallmarks of competent estate administration is the orderly progression of the many tasks involved, from collection of assets, to payment of valid estate debts and claims, to payment of applicable taxes, to the distribution of the estate to the beneficiaries.

Clearly, a beneficiary is never entitled to a larger share of the estate assets than he or she is bequeathed under the will, or entitled to under the state's laws governing intestate distribution. However, there may be a situation where a beneficiary has a documented emergency where he or she is requesting a greater partial distribution at the present time than the personal representative had planned at that stage of the estate administration. Although, in general, unequal distributions are to be avoided, there might be an individual case where such action seems warranted. Be forewarned, however, that the other beneficiaries will quickly hear of that distribution and will request (or demand) that they be treated equally.

On the other hand, there may be very valid reasons why a beneficiary under a will, or the beneficiary of an intestate estate, may want to decrease, or even decline, his or her share of the decedent's estate in an effort to avoid enriching his or her own taxable estate. This process of "renunciation" or "disclaimer" of a property interest in an estate is feasible if, upon the renunciation by the individual, the renounced or disclaimed property will pass to his or her children under the terms of the Will, or pursuant to the state laws governing intestacy, in the same way as if the renouncing party had predeceased the decedent. In this way the renounced property will enrich the renouncing party's children, rather than add to the beneficiary's eventual estate tax burden.

Be sure to check your state's requirements for the effective timing and filing of the renunciation with the probate court (usually required to be in writing, and signed and acknowledged by the renouncing party). For example, in New York State, the signed and acknowledged renunciation, in most cases, must be filed with the Surrogate's Court

within nine (9) months after the decedent's death. (See Section 2-1.11 of the NYS Estates, Powers, and Trusts Law).

MODIFYING TRUSTS

If a grantor has created his or her own revocable *inter vivos* (lifetime) trust, there is no question that he or she may modify this trust during his or her lifetime, as long as this modification power is granted among the trustee's powers in the trust document.

In many jurisdictions, even if the grantor created an *irrevocable* trust, such a trust can be modified or revoked *during the grantor's lifetime* upon the written and acknowledged consents of all of the persons beneficially interested in said trust. (See, for example, Section 7-1.9 of the NYS Estates, Powers, and Trusts Law).

A more specialized situation concerns the modification of an irrevocable trust by the trustee *after the death* of the grantor of the trust. Some jurisdictions permit such a modification even without the approval of any interested persons and without court approval, under specialized circumstances. (See, for example, Section 10-6.6(b) of the NYS Estates, Powers, and Trusts Law).

MANAGING PERIODICAL AND FINAL DISTRIBUTIONS

No distributions to the estate beneficiaries should be contemplated until the personal representative has a complete understanding of the scope of any and all possible debts, claims, and liabilities of the estate or trust to third parties, including but not limited to business creditors, judgment creditors, litigation claimants, and the taxing authorities. This is simply because the personal representative may be personally liable to these creditors if he or she does not satisfy all valid claims with the estate or trust assets before making distributions to the beneficiaries.

Once the personal representative has a clear understanding of the scope, amount, and nature of claims against the estate or trust, then he or she may contemplate making one or more periodical and then final distributions to the beneficiaries during the estate administration process.

It is crucial that *before* the final distribution is made to each beneficiary that each such beneficiary execute a "Release, Receipt and Refunding Agreement" in order to protect the personal representative from any further liability to the beneficiary, and also to ensure that in the event any unforeseen expenses or claims arise in the future, that the beneficiary will remain responsible to reimburse the personal representative for his or her proportionate share of any such expenses or claims. The following is a "Release, Receipt and Refunding Agreement" that I use in my estates 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 _____, and in consideration of such payment, said beneficiary, on behalf of said beneficiary and said 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 in connection with said Estate.

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 attorneys' 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.

_____
(BENEFICIARY)

_____
Social Security Number

STATE OF _____)
) SS.:
COUNTY OF _____)

On _____, 2010 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 acknowledge to me that she executed the same in her capacities, 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

TIPS FOR STREAMLINING THE ESTATE ADMINISTRATION PROCESS

1. Always collect kinship information from your estate planning clients. Many individuals do not have close family relatives, such as a spouse and children. Draw a family tree of your client's relatives, and collect the names, addresses and telephone numbers of all known blood relatives. Often in a family there is a family "historian" or "genealogist"; get this person's contact information. The probate courts in many jurisdictions require detailed family background, even if those individuals are not beneficiaries of your client's estate plan. Having this kinship information will often help your client's estate planning wishes to be fulfilled more quickly, when the will is presented to the probate court.

2. Consider using an *inter vivos* (lifetime) trust rather than a will for certain "red flag" estate planning clients. When I see any of the following situations in my estate planning discussion with a client, I think about utilizing an *inter vivos* trust rather than a will:

(a) A likely will contest. In most jurisdictions it is more difficult to contest a trust agreement than a will. This is because an *inter vivos* trust, with the decedent's assets already in the trust's name, does not need any court review and approval (the probate process) for the decedent's assets to be transferred to the beneficiaries.

(b) Real property in more than one state. The sale or transfer of real property (including land, houses, and condominiums) in another state (other than the decedent's domicile) will require ancillary probate of the will in that state or those states. This is time-consuming and expensive. If these out-of-state properties are presently titled in the trust's name, then they can be transferred or sold by the trustee without ancillary probate.

3. Close out or transfer all of the decedent's assets as quickly as possible. Once I have identified all of the estate assets, and I know whether these individual assets are to be sold or transferred, I prepare all of these "asset close-out letters" at the same time, and give them to the personal representative for their signature (which must usually be a medallion signature guarantee for securities). In this way, I can complete the collection or transfer of the estate assets as one continuous step, and not a piece-meal process over many months. The following is a sample of my "estate asset close-out letter":

[Name and Address of Bank or Broker]

Re: [Decedent]
[Account No.]
[Social Security No.]

Dear Sir or Madam:

HERMAN MAX LEIBOWITZ

I am the Administrator of the Estate of _____. I wish to close out the above securities account. In this regard, enclosed please find all of the documents that I believe are necessary to close out this account.

Please close out the above-referenced account, making the check payable to the "Estate of _____". Please forward the check to my attorney, Herman Max Leibowitz, 56 West 45th Street, New York, NY 10036, who I hereby authorize to transact this business with you on my behalf.

I also authorize you to release to Mr. Leibowitz any income data, photocopies of account statements, and/or copies of Forms 1099 for this account which Mr. Leibowitz may request at any time for the settlement of this Estate.

Thank you very much for your kind assistance in this matter.

Sincerely,

_____

John Doe, as Administrator of the Estate of _____, deceased.

SIGNATURE MEDALLION GUARANTEED:

TIPS FOR WORKING WITH DYSFUNCTIONAL FAMILIES

The key to working with all clients and with all families, whether dysfunctional or functioning, is *communication.* If you or the personal representative foresee a problem of dealing with the individual family members, the best preemptive strategy may well be to invite all of the family members to a conference in your office, where they can shake your hand, look you in the eye, and ask their questions. By patiently explaining the estate administration process to them, and the approximate time that will elapse before they receive their estate distribution *if they all cooperate with you and the personal representative*, you may hopefully find that, at least in this one family situation, they will once again be a functioning family.