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THE PROBATE PROCESS FROM START TO FINISH

UNDERSTANDING THE ROLE OF THE PERSONAL REPRESENTATIVE IN PROBATE

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.

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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

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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

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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

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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.