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MARSHALLING AND MANAGING THE ESTATE ASSETS IN ADMINISTRATION

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I. COLLECTING THE ASSETS

INTRODUCTION

The settlement of a decedent's estate consists of three primary objectives: (1) collecting the estate's assets, (2) paying all valid claims and expenses of the estate, and (3) distributing the net estate assets to the estate's beneficiaries.

As the attorney for the estate, you will be dealing with one of two scenarios: either the decedent died *testate*; that is, with a valid Last Will and Testament, which will be duly admitted to your state's probate, or surrogate's court (hereinafter "Court"), so that the decedent's estate can be distributed to the legatees (beneficiaries) named in the Will, or the decedent died *intestate*; that is, without a valid Will, in which case the Court will oversee the distribution of the decedent's estate among the decedent's legal next-of-kin, also known as distributees.

In either case, the task of "marshalling and managing the estate assets in administration" (this teleconference's subject matter) will be substantially identical. Your first goal as the attorney for the estate will be to have the Court appoint the *Executor* named in the Will (if the decedent died testate), or appoint an *Administrator* from among the decedent's legal next-of-kin (if the decedent died intestate). Please note that in some jurisdictions, the Executor or Administrator is known as the *legal*

representative, or *personal representative* of the estate. For purposes of this discussion, I will refer to the Executor or Administrator of the estate as the "Administrator".

A. Practical Procedures for Collecting Estate Assets and Opening Estate Accounts.

1. Identifying the Estate Assets: The first step for the estate attorney is to identify the estate assets and safeguard their value. The proposed Administrator of the estate should be instructed to come to the attorney's office as soon after the decedent's demise as possible, and to bring copies of all of the decedent's financial statements, as well as any other documents and information identifying the decedent's assets. This should be done at the earliest possible time, even before the attorney has applied to the Court for the appointment of the Administrator. It is essential that the Administrator act immediately to safeguard the value of the estate's assets: in most jurisdictions an Administrator can be held personally liable for the devaluation or "wasting" of estate assets if the Court finds that the assets' value could have been preserved by the Administrator's timely actions.

Practice Tip:

If the estate attorney sees, upon evaluation of the estate's assets, that there are volatile assets (such as stocks or securities accounts), or assets subject to wasting or devaluation (such as farm livestock or a closely-held business), then immediate legal action is necessary in order to protect the estate and your client, the Administrator. Most states have a streamlined probate procedure in cases where the Administrator must be authorized to act before the more time-consuming probate procedures (such as notification of all the beneficiaries or legal next-of-kin) have been completed. For example, in New York State, the Surrogate's Court Procedure Act authorizes the expedited appointment of a Preliminary Executor (if there is a Will), or a Temporary Administrator (if there is no Will) upon a showing of urgent circumstances. This expedited appointment permits the immediate collection of assets, or the taking of appropriate action to safeguard the value of the estate assets. As a counterbalance to this

expedited appointment, there can be no distribution of estate assets to the estate's beneficiaries until the full probate procedure is completed.

2. Valuing the Estate Assets: It is crucial that the estate assets be valued accurately, both for possible estate tax purposes, and for the estate accounting or inventory that will be presented to the estate's beneficiaries and to the Court. Let's look at the challenges posed by valuing two major estate assets:

(a) Real Estate: A date-of-death value must be established for any real estate owned by the decedent. If the estate is not subject to estate tax in your jurisdiction, a letter from an experienced local licensed real estate broker may suffice. If a Federal estate tax return (Form 706) is required, the Internal Revenue Service generally insists on an appraisal from a state-certified real estate appraiser. Even if the decedent's residence will be retained by a family member, a date-of-death valuation is important. This valuation may be used many years later to accurately establish any capital gains incurred between the date-of-death value and subsequent sales price.

If the decedent's residence will be sold by the Administrator, it is essential that the property bring the highest possible sales price to the Estate. This is a duty that the Administrator owes to the estate's beneficiaries. I have very low regard for Administrators and attorneys who "dump" an estate property at an "estate sale" distressed price. Deal only with a licensed real estate broker who is experienced in "staging" and "prepping" an estate residence or apartment for sale. My experience, whether with single-family houses, condominiums, or co-op apartments, is that a fresh coat of paint, sanded and stained wood floors, and minor repairs, will return many times their cost in the resale of an estate's residence.

(b) The Decedent's Business: If the decedent had a going business at the time of death, whether a retail store, or a factory, or a professional practice, this business must be appraised, its assets and liabilities must be evaluated, and the likelihood of its continuing for the benefit of the estate's beneficiaries, must be considered.

The relevant documents that must be evaluated by the Administrator and the estate attorney are as follows: (1) buy-sell agreements between principals or partners in the business, including the terms of any "key-man" insurance policies in the event of the death of any of the principals or partners, (2) employment agreements, including any death benefits payable to the decedent's beneficiaries, (3) contracts with vendors, distributors and customers including the impact, if any, of this decedent's demise, and (4) insurance policies covering the buildings, inventory, and other assets and risks of the business, including professional malpractice insurance if the decedent was engaged in a profession such as physician, lawyer or accountant. The Administrator and attorney must be certain that all insurance premiums are paid up-to-date, and that all policies remain in full force and effect.

3. Collecting the Estate Assets: Once the Administrator has been appointed by the Court, he or she is now empowered to collect the assets of the estate. Different procedures are utilized to collect different assets:

(a) Bank Accounts: If the decedent had one or more bank accounts in his or her name alone (as opposed to accounts jointly held with another individual, or "in trust for" (ITF) another individual, which belong solely to that individual), then the bank will generally require four (4) documents from the Administrator to close out the account(s): (1) a certified death certificate, (2) a certified copy of the Court appointment document (usually known as Letters Testamentary, if the Executor was appointed through a Will, or Letters of Administration, if the Administrator was appointed as a legal next-of-kin), (3) a "signature guarantee" document from the Administrator's own bank, guaranteeing to the decedent's bank that the Administrator's signature on this document is his or her true signature, and (4) a copy of the Administrator's photo-identification card, such as a driver's license.

Since banks and jurisdictions vary, it is always prudent to telephone the particular bank to inquire as to their particular requirements. As a practical matter, the estate attorney usually gathers all of the required documents and mails them to the various banks for processing, rather than have the Administrator personally visit each

of the decedent's banks. Upon the successful processing of the bank paperwork, the bank should issue separate checks closing out each of the decedent's accounts, making each check payable to the Estate (e.g., "Estate of John Doe"). These checks are mailed either to the Administrator or to the estate attorney, and they are deposited into the Estate checking account, as part of the collected estate assets.

The following is a sample letter I send to a bank when requesting the close-out of a decedent's bank account:

XYZ Bank
123 Main Street
Anytown, USA

Re: John Doe, deceased
Social Security No.:
Account No.:

Dear Sir or Madam:

I am the attorney who is settling the Estate of John Doe. On behalf of the Administrator Michael Smith, I am enclosing the following documents in order to close out the above account:

1. Certified copy of Death Certificate;
2. Certified copy of Letters Testamentary;
3. "Signature guaranteed" letter from Michael Smith's bank; and
4. Photocopy of Mr. Smith's driver's license.

Please make the check for the closed-out balance of the above account payable to the "Estate of John Doe", and please forward it to me at your earliest convenience. Thank you for your kind assistance in this matter.

Sincerely yours,

Herman Max Leibowitz

(b) Brokerage Accounts: As with banks, brokerage firms may differ slightly in what they require in order to close out the decedent's account. Therefore, it is always best to speak with the individual broker who handled the decedent's brokerage account. This broker's name can usually be found on the first or second page of the brokerage statement. This broker can also be very helpful in providing you with a date-of-death valuation of the brokerage account, which you may need for estate tax purposes, or for the court inventory for the estate.

The accounting systems at brokerage firms differ from those at banks in that the decedent's brokerage account cannot be closed out directly to the Estate. Instead, all brokerage firms seem to follow the procedure of closing out the decedent's account into an Estate account, and then closing out the Estate account into a check made payable to the Estate. This procedure requires the opening of a new brokerage account in the name of the Estate, which in turn requires the Administrator to sign this new brokerage account agreement, even though the Estate account will exist for only a few days.

The following is a sample letter I send to a brokerage firm when requesting the close-out of a decedent's brokerage account:

XYZ Investments, Inc.
123 Main Street
Anytown, USA

Re: John Doe, deceased
Social Security No.:
Account No.:

Dear Sir or Madam:

I am the attorney who is settling the Estate of John Doe. On behalf of the Administrator Michael Smith, I am enclosing the following documents in order to close out the above account:

1. Certified copy of Death Certificate;
2. Certified copy of Letters Testamentary;

3. "Signature guaranteed" letter from Michael Smith's bank;
4. Photocopy of Mr. Smith's driver's license; and
5. XYZ Investments, Inc. Brokerage Agreement as signed by Michael Smith, Administrator.

After you have transferred the decedent's brokerage account into the Estate account, please close out the Estate account, making the check payable to the "Estate of John Doe", and please forward it to me at your earliest convenience. Thank you for your kind assistance in this matter.

Sincerely yours,

Herman Max Leibowitz

Practice Tip:

In your estate planning practice, be careful when a client advises you that they are planning to open a brokerage account titled "transfer on death" (TOD) to two (2) or more beneficiaries. In many cases, the rules governing these "TOD" accounts dictate that if one of the beneficiaries predeceases your client, and your client makes no change in the beneficiary designation, then when your client dies, the entire account will be distributed to the one remaining beneficiary, omitting any distribution to the children of the predeceased beneficiary. This is often not the intention of your client; have the client carefully check the "TOD" account rules at their brokerage firm.

(c) Real Estate: If the decedent's real estate was owned in the decedent's name alone, then the Administrator, i.e., not the estate heirs or beneficiaries, will be the seller of the real estate. Please note that in some jurisdictions, including New York State, the Administrator of an intestate estate requires specific authorization from the Court to act as the seller of real estate, while the Executor of a Will (i.e., if the decedent died testate) does not. In any case, the Administrator transfers the real estate to the purchaser by executing an Executor's Deed, or an Administrator's Deed. The purchaser's title insurance company will generally require more documentation when the seller is an estate than in a transfer between living individuals. These documents may

include a family tree affidavit, and formal releases of possible estate tax liens from the state and Federal estate tax authorities. In the event that estate tax returns were filed and estates taxes were paid, then the purchaser's title insurance company may require copies of the estate tax "closing" letters, indicating that all estate tax liabilities have been satisfied.

4. Opening the Estate Account: Once the Administrator has been appointed by the Court, he or she should open the Estate account, where all checks for closed-out bank and brokerage accounts, and all checks for liquidated assets of the Estate (such as real estate, jewelry, and artwork) will be deposited. The ledger for the Estate account, indicating all deposits of assets, and all payments of estate expenses and claims, will be the most valuable tool in the later preparation of the estate accounting and the court inventory, and should therefore be maintained in great detail (indicating the account numbers of closed-out assets, etc.) and with great care.

Whether the estate account is maintained at a bank or at a brokerage firm, the account should be interest-bearing, in keeping with the Administrator's responsibility to invest the Estate's funds prudently. Needless to say, the Estate account should be entirely safe and stable, invested only in non-fluctuating certificates of deposit or similarly stable investments. Generally the Estate account is opened at the Administrator's own bank, where he or she is already known. Only the Administrator is permitted to be the signatory on the Estate account. If co-Administrators have been appointed for the Estate, then generally both of them must sign all Estate checks.

B. Obtaining the Tax Identification Number and Title to the Assets.

1. Obtaining the Tax Identification Number for the Estate:

Every estate administration requires a tax identification number. This number is not the Social Security number of the decedent, and it is not the Social Security number of the Administrator. It is a number unique to the Estate. This number is used by the bank or brokerage firm as the identification number for the Estate account to identify income earned on monies once they are deposited into the Estate account.

This tax identification number is also used by banks and brokerage firms in reporting Estate income to the Federal government on Form 1099. This identification number is also used on the estate income tax returns (Federal Form 1041, and the corresponding state forms) that the Administrator files each year during the estate administration to report the estate's income and permitted deductions (such as legal, accounting, and administrator's fees).

The tax identification number, also known generally as an "employer identification number" because it is also used by corporations, partnerships and others, is obtained from the Internal Revenue Service by filing Form SS-4 "Application for Employee Identification Number" with the IRS. This form can be obtained online at the IRS website www.irs.gov. Click on "Forms & Publications", then "Form & Instruction Number", and at "Find", type in "SS-4". The SS-4 form is self-explanatory, and is signed by the Administrator. The form is mailed or faxed to the IRS, and the tax identification number is received back, by mail or fax, within several weeks.

2. Obtaining Title to the Estate Assets.

The procedures for obtaining title to various estate assets, such as the decedent's real estate, business interests, bank accounts, and brokerage accounts, have already been dealt with extensively in the earlier parts of these seminar materials.

C. Canceling Utilities and Credit Cards.

As an experienced estate practitioner, I would say that the general rule is to take one's time canceling utilities, but to cancel credit cards quickly. Certainly, you do not want anyone using the decedent's credit cards, which would add liabilities to the estate, and could easily fall into the wrong hands. Utilities servicing the decedent's residence, however, are another matter. If the contents of the residence must be sorted through, or repairs must be made, or the house will be shown to prospective purchasers, it is very helpful to have electric light, and heat (or air conditioning), and maybe even cable television while the Administrator is waiting for the painter to arrive.

II. PREPARING THE INVENTORY

A. Introduction.

In a sense, the Administrator (or the estate attorney or the accountant) is "preparing the inventory" from the first deposit into the estate account, and the first check written on the estate account. The inventory is simply the running account of the progress of the estate administration, step by step, until the last asset is collected, the last bill is paid, and the last estate distribution is made. No less than a ship's log on a transatlantic voyage, the estate inventory will be the final, lasting evidence of all that transpired on a great journey, from start to finish.

B. Purposes.

The estate inventory has three (3) primary and overlapping purposes, and as such must be maintained, completed, and preserved with great care: (1) most jurisdictions require an Administrator to file the inventory with the Court prior to his or her discharge as Administrator by the Court; (2) the inventory contains all of the details of assets collected, expenses paid, and distributions made that will be used to prepare and support the filing of any estate tax returns that are due for the Estate; and (3) the inventory will be sent to the estate beneficiaries to support and confirm the amount of any portions of the residuary estate which they are to receive (e.g., "15% of any residuary estate left after all specific bequests are paid").

C. Format.

Some jurisdictions have a preferred format for the estate inventory, in which case the estate attorney or estate accountant will use that format. If no format is prescribed, or for preparation of an inventory to present to estate beneficiaries, I suggest the following format, which I have used many times:

HERMAN MAX LEIBOWITZ

ESTATE OF JOHN DOE

STATEMENT OF ASSETS, EXPENSES AND PROPOSED DISTRIBUTIONS

Assets Collected:

A.	Merrill Lynch A/C #	$100,000.00	
B.	Bank of America A/C #	$ 50,000.00	
C.	Sale of Condominium	$175,000.00	
D.	Coin Collection	$ 90,000.00	
	TOTAL ASSETS COLLECTED:		$415,000.00

Expenses Paid:

A.	Funeral	$10,000.00	
B.	Uninsured Medical Bills	$13,000.00	
C.	Credit Cards	$27,000.00	
D.	Executor's Commission	$15,000.00	
	TOTAL EXPENSES PAID:		-$65,000.00
	NET ASSETS AVAILABLE FOR DISTRIBUTION:		$350,000.00

Specific Bequests Under Will:

A.	Mark Twain	$20,000.00	
B.	James Joyce	$10,000.00	
C.	Charles Dickens	$15,000.00	
D.	Scott Fitzgerald	$ 5,000.00	
	TOTAL SPECIFIC BEQUESTS:		-$50,000.00
	NET RESIDUARY ESTATE:		$300,000.00

Residuary Legatees Under Will:

A.	Aunt Dorothy (25%)	$75,000.00	
B.	Uncle Bert (15%)	$45,000.00	
C.	Sister Suzy (30%)	$90,000.00	
D.	Brother Tim (30%)	$90,000.00	
	TOTAL RESIDUARY BEQUESTS:		$300,000.00

D. Use of "Release and Receipt and Refunding Agreement" in Conjunction with Inventory Presented to Estate Beneficiaries.

As discussed above, one of the primary purposes of the Inventory is to illustrate to the residuary legatees under a Will or to the legal next-of-kin of a decedent who died without a Will, how their share of the net estate was calculated.

Before the Administrator sends each of these beneficiaries an estate check for their share of the estate, however, he or she must have a signed and notarized acknowledgement that the beneficiary has received a computation of how his or her estate share was computed, that he or she agrees with the computation, and that he or she releases the Administrator and Estate from any further liability to that beneficiary. This type of agreement is referred to as a "Release and Receipt and Refunding Agreement." Presented below is the form of agreement that I have used for many years:

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 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 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 $10,000.00 reserve fund for taxes and estate expenses shall be held by the Executors for approximately five (5) months. At that time, said beneficiary shall receive their portion of said reserve fund, after deduction for any additional taxes and estate expenses.

_____
(Beneficiary's Name)

_____
(Social Security Number)

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

On _____, 2011 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 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

III. HANDLING CLAIMS AGAINST THE ESTATE

A. Medicare, Insurance Claims, and Public Assistance: Understanding the Paperwork Involved.

Generally speaking, all individuals aged 65 and over are eligible for Medicare, which is a Federal medical reimbursement program, covering both physicians and hospitals. Many individuals also have a "supplemental" Medicare plan, such as AARP or Blue Cross/Blue Shield, to cover the portion of medical bills that Medicare does not cover. Physicians and hospitals are paid directly by Medicare. These bills should not be sent to the patient (here, the decedent). As the estate attorney, you should counsel the Administrator not to pay any medical or hospital bills sent directly to the decedent by physicians or hospitals if the decedent had been receiving Medicare, until it is clear that Medicare has paid its full share of these bills. In addition, if the decedent had a supplemental Medicare policy, the medical providers should be advised of this fact so that they may receive the total compensation for which they are eligible.

In the event that the decedent had no medical insurance, or insufficient medical insurance, then any valid unpaid physician and hospital bills will be claims against the decedent's estate. In such a case, the bills must be scrutinized closely in order to detect duplicate billing, unreasonable billing, and other inaccuracies. Always consider the possibility that physicians and hospitals may be willing to compromise and settle an outstanding bill rather than be unduly delayed in payment, or face protracted litigation over possibly inflated billing.

In the event that the decedent was receiving public assistance, then there was the assumption and determination at the time that he or she qualified for public assistance that he or she had little or no assets. If the decedent did in fact have assets and a net distributable estate, then the state and/or city authorities may have a claim against the estate for public assistance payments. If such is the case, then the Administrator would be well advised to cooperate fully with these authorities so as to avoid possible personal liability for withholding material financial information.

B. Priority of Concern: Following the Chain of Command in Allowances, Claims and Taxes.

In most jurisdictions, the priority of claims against a decedent's estate is as follows:

1. Funeral expenses;

2. The cost of estate administration, such as administrator's commissions and legal fees;

3. Federal and state taxes due;

4. Allowances to family members, which differ from state to state, but may include a certain amount of money, a car, farm equipment, household furnishings, etc.

5. Secured creditors of the estate (such as mortgage holders, or holders of secured chattel liens as filed pursuant to the Uniform Commercial Code (UCC)); and

6. Unsecured creditors of the estate.

C. Effective Creditor Communications.

All creditors of the decedent's estate should be notified as soon as possible of the decedent's demise. This will generally prevent the claim against the decedent from becoming a "default" matter, or a "collection" matter. Some creditors will feel more protected if they file a formal "claim against the estate" in Court. This is their right, and should be encouraged by the Administrator or the estate attorney as an alternative to their

commencing a lawsuit against the estate. As with all creditor situations, regular updates on the progress of the estate administration and, if possible, partial payments of any valid debt due as the estate settlement progresses, should keep the creditors calm and less prone to litigation. Always bear in mind, however, that it is the Administrator's duty to fully investigate and verify all claims and debts against the estate before making payment. As always, the prime responsibility of the Administrator is to safeguard the Estate.