I. PREPARING FOR ESTATE ADMINISTRATION

Program Agenda Subtopics for "I. Preparing for Estate Administration"

A. Immediate Actions upon Notification of Death

B. Funeral and Burial Issues

C. Assistance with Immediate Cash Needs

D. Safeguarding Assets before Qualification of Fiduciary

E. Locating and Reviewing the Will

F. Preparing Checklist for Estate

G. Initial Meeting with Prospective Fiduciary

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Outline of Online Coursebook's Chapter on "Preparing for Estate Administration" Submitted by Lori J. Perlman, Esq.

I. PREPARING FOR ESTATE ADMINISTRATION

Circular 230 Advisory

I. Immediate Actions upon Notification of Death

II. Funeral and Burial

III. Assistance with Immediate Cash Needs

IV. Safeguarding Assets before Qualification of Fiduciary

V. Locating and Reviewing the Original Will, Codicil and Trusts

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FORMS

Petition to Open Safe Deposit Box

Order to Open Safe Deposit Box

Petition to Search Apartment

Order to Search

PREPARING FOR ESTATE ADMINISTRATION

by

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PREPARING FOR ESTATE ADMINISTRATION

FORMS

Circular 230 Advisory Regarding Communications to Clients

Circular 230 (31 CFR Subtitle A, Part 10) is a Treasury Department publication that governs the practice standard of attorneys, accountants and other tax advisors before the Internal Revenue Service. New Treasury Regulations have expanded the application of Circular 230 so that it now, in general, applies to persons who give tax advice for the purpose of avoiding or evading federal taxation, including Federal estate taxation. It applies to written advice, including e-mail, of estate planning attorneys that are either "covered opinions" or "other written advice."

A "Covered Opinion" is any written advice, including e-mail, concerning one or more federal tax issues arising from: (1) a transaction listed in Circular 230; (2) any plan or arrangement where avoidance or evasion of tax is the principal purpose; or (3) any plan or arrangement where the avoidance or evasion of tax is a significant purpose if the written advice is (i) a reliance opinion; (ii) a marketed opinion; (iii) subject to the conditions of confidentiality; or (iv) subject to a contractual arrangement. Section 10.37, which covers all other written advice, prohibits a practitioner from giving written advice on any federal tax issues if the attorney bases the advice on unreasonable factual or legal assumptions, unreasonably relies on representations of the taxpayer or any other person, does not consider all of the relevant facts that the practitioner knows or should know, or in evaluating a federal tax issue considers the possibility that a return will not be audited, that an issue will not be raised on audit or that an issue will be resolved through settlement if raised. If you are rendering such a communication, the communication must meet several requirements intended to insure that the advice is not misleading. Willful or reckless violation of Circular 230 could lead to a private reprimand, censure, suspension or disbarment from practice before the IRS.

As a precaution, some attorneys are including a disclaimer on all communications that are not intended to be relied upon as tax planning advice. A sample disclosure might be "Notice: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein." However, this kind of disclosure is not required on communication that does not at all relate to estate tax issues. If you are discussing estate tax issues in communications, however, you should review the requirements of Circular 230 to make sure that your communication does not fall within Circular 230's defined communications, or, if it does, that it is in compliance.

For more on Circular 230, see Tara Ann Pleat "Circular 230, What the Trusts and Estates Practitioner Should Know," NYSBA Trusts and Estate's Law Section Newsletter, Fall 2005, vol. 38, No. 3.

I. IMMEDIATE ACTIONS UPON NOTIFICATION OF DEATH

A. Determine existence and location of wills, codicils, and revocable trust agreements.[*] (See Section V, infra, for additional information on locating and reviewing testamentary documents). Identify who will administer the estate (the nominated executor of a will or the person(s) entitled to act as administrator pursuant to SCPA 1001). Although counsel owes a duty of loyalty to estate beneficiaries, the fiduciary is technically the client, as opposed to the "estate," the surviving spouse or other anticipated beneficiaries.

B. If there is an inter-vivos direction regarding disposition of remains (see Pub. Health law 4201) or a Will, codicil or health care proxy, check it for particular funeral arrangements the decedent may have requested. The family generally must comply with such directions. See Matter of Salomon, N.Y.L.J., Sept 5, 2003, p. 25 (Surr. Ct. Nassau Co.) (the decedent's wishes regarding burial take precedence over right of surviving spouse or next of kin to take possession of a decedent's remains for preservation and burial); Matter of Herskovits, 48 NYS2d 906 (1944); Matter of Eichner's Estate, 18 NYS2d 573 (1940); 7 ALR3d 747, 54 ALR3d 1037. But see NY Pub. Health Law Section 4201, which overrules some prior case law.

C. Ethics concern: Determine whether counsel or any associated attorney has a conflict of interest that would prevent representation of the fiduciary or the estate (i.e., counsel already represents or previously represented someone with a claim against the decedent, or someone who is likely to object to probate or to an estate accounting, or counsel has a financial interest in decedent's estate). If counsel has represented the surviving spouse in estate planning and another individual is the nominated fiduciary, consider whether it is appropriate to continue representing spouse or other family members, whose interests may be adverse to the fiduciary/estate, and if so, whether a waiver could cure the conflict. In some cases where there is no conflict of interest per se but the surviving spouse has a conflicting interest (such as a right of election or a prenuptial agreement), it may be appropriate for counsel to ascertain whether the spouse intends to elect against the estate and, if so, recommend that the spouse seek independent counsel, or to obtain informed consent from other family members. The spouse may also benefit from independent counsel on such issues as whether to contest the will or a revocable trust, and whether to file joint tax returns with the decedent, split gifts for gift tax purposes or exercise tax elections.

D. Determine whether the decedent was an organ donor. Generally, organ donor designations must be complied with unless the family can show that the designation was revoked. McKinney's Pub. Health Law Section 4300 et. seq.

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[*] Although most of the advice in this outline applies equally to testate and intestate administration, certain discussions apply only to probate of a decedent's Will.

If the Decedent was a donor and did not specify for what purposes the donated tissue and ligaments might be used, counsel may want to advise the family that some donations of tissue and other body parts are sold for profit, thus the family may want to enter into an agreement with recipients concerning further use of donated body parts. Although the National Organ Transplant Act prohibits anyone from profiting from human body parts, the Act allows "reasonable" fees for recovery, processing and distribution. As a result, some non-profit agencies that receive tissue and ligament donations are able to sell them at a profit to doctors and research facilities. It is unclear at this time whether the survivors could condition the donation so that the recipient may not profit from the donation, or so any proceeds would go to, or be shared by, the donor's family, but it might be prudent to discuss this option.

E. If necessary, have nominated fiduciary arrange for care of minor children, adult incompetents and pets, as well as any perishable items that require immediate attention. Also, arrange for continued employment of any necessary household or business employees.

F. Determine and assist with family's immediate cash needs (See Section III, infra), including funeral expenses.

G. Warn the decedent's family members of the risk of a break-in during visitation period and funeral. Suggest that someone remain in the home, if possible. It may be advisable to alert the police if there are significant valuables in the home and there is no security system in place.

H. Suggest that an obituary, if one is desired, be published after the funeral, if possible. Recommend that all family members be contacted before information concerning the decedent's death is released to the press. Consider whether there are any charitable organizations, alumni associations or professional associations that should be advised of decedent's death.

I. If decedent's home will be vacant and it is anticipated that access to the home will not be readily available (i.e., residence is not in an accessible location, or family does not wish to travel there on a daily basis), advise nominated fiduciary to have post office hold decedent's mail pending appointment of a fiduciary, and stop any regular deliveries.

J. If you are asked by the decedent's family, assist in funeral arrangements. (See Section II, infra, for some specific considerations).

K. Determine the names and addresses of decedent's close family. Names and addresses of decedent's distributees and legatees will be necessary to commence the probate or administration proceeding.

L. If close family lives out of town, you may wish to remind them that airlines often offer bereavement discounts. Family members should be prepared to provide the name and

telephone number of the funeral director for verification.

M. Determine whether decedent was judicially declared an incapacitated person. If so, the Mental Hygiene Law (Section 81.20[a][6][iii]) directs the guardian to determine the appropriate persons to notify in case of death.

N. Advise family not to worry about legal details until after funeral.

Caveat: If there are out-of-town relatives who will be in town for the funeral who are necessary parties to a probate or administration proceeding, it may be advantageous to meet with them either before or immediately after the funeral to obtain their signatures on petitions and/or waivers and consents. (See Section V (C)(10), infra, for determination of necessary parties). The timing of such a meeting may be awkward since family members may be very upset immediately following the funeral. You should consult with the nominated fiduciary and use your judgment as to whether such a meeting is appropriate. For a probate proceeding, be prepared to provide each necessary party with a copy of the will and explain that the party has the right to object to probate of the will, but that if they do not intend to object to probate, signing a waiver and consent will speed the probate process and reduce the expense of probate. For intestate administration, explain to the persons with priority to serve that they may serve as administrator or may designate another to serve, in which case a renunciation and a designation should be signed. (See the outline on Administration Proceedings in Surrogate's Court in this course book for further details).

Additional Caveat: You should ascertain whether the decedent had any pending financial or legal matters that will require immediate attention, such as litigation (attention should be paid to any deadlines or statutes of limitations), mortgage payments, collection or foreclosure proceedings, ongoing business deals, etc. Such exigent circumstances may warrant the appointment of a preliminary executor or temporary administrator who is authorized to act to protect the decedent's interests. EPTL 11-1.3 provides the nominated executor with limited authority to act when it is necessary to preserve the estate assets, but care should be taken because the nominated fiduciary may be personally liable for any acts he or she takes before appointment (in some cases, actions or agreements can be made conditional upon ratification after appointment of the fiduciary). See Bigaj v. Gehl, 562 NYS2d 249 (4th Dep't 1990); Petrizzo v. Kochersberger, 560 NYS2d 723 (1990).

O. Arrange for a meeting with nominated executors or persons entitled to letters of administration as soon as is practical after the funeral. In many cases, the surviving spouse may also wish to be present, if he or she is not a fiduciary. Be prepared to discuss the terms of the will and to identify your role and the fiduciary's role in the estate's administration. (See Section V, infra, for information on reviewing the will, and Section VI, infra, for preparation for the initial meeting with the fiduciary). Use discretion before discussing the details of administration if fiduciary is spouse or close relative. The number of things to do

may be overwhelming to some, and if the fiduciary is distraught, it may be wise to wait a week or two before meeting. In such a case it may be advisable to have a preliminary meeting or telephone call to go over some basics and find out if there are any items that require immediate attention.

P. Advise surviving spouse and family members against destroying any of decedents records, tax returns, checks or other documents, as such acts, or concealment of such documents, may be considered by the IRS to be indications of tax fraud. Bradford v. Commissioner, 796 F.2d 303 (CA9 1986).

Q. Review the estate administration checklist for items and tasks that will have to be completed over the next several months. (See Sections VII and VIII, infra).

II. FUNERAL AND BURIAL:

A. In general, unless you have a long-standing relationship with the decedent or the decedent's family, it is wise to avoid interference in family decisions concerning the funeral (i.e., the type of service, place of funeral, place of burial, method of interment, etc.), unless you are asked to provide legal or practical advice. Many families, or their religious institutions, have ongoing relationships with funeral service providers and cemeteries and may resent unsolicited offers of assistance in such a personal matter. You may wish to offer to notify decedent's clergyman of the death, to be sure that he or she can participate in the funeral arrangements with the family.

B. If you are asked for assistance, suggest that the family obtain more than one estimate from funeral homes, as charges can vary widely. You may also offer to review the funeral directors contract to be sure that services are properly itemized. See McKinney's Pub. Health Law Section 3440-a. In general, for rules governing practices of funeral directors, see McKinney's Pub. Health Law Section 3400 et. seq. and consult regulations of Federal Trade Commission and any applicable local regulatory agencies. For information on the web, go to: http://www.ftc.gov (Federal Trade Commission search for products and services guide - Funerals).

C. Clergy or a member of the family should contact the funeral director or cemetery to determine whether a copy of the burial plot deed will be required in order to bury the decedent. If the family is not aware of where the Decedent is to be buried, advise survivors to search for evidence of ownership of cemetery plots. If the deeds are believed to be in a safe deposit box, or are in a residence that has been sealed by the police, you can commence a proceeding, in the Surrogate's Court for the County in which the decedent was domiciled, to search the home or safe deposit box for the cemetery deed. (SCPA 2003; see forms annexed to this outline).

D. Death Certificates: Determine who is going to provide information for the death certificate and check that required information (i.e., legal name, Social Security number, date of birth, marital status, domicile and cause of death) is correct. The same goes for funeral notices. Sometimes the stress of situation causes survivors to give inaccurate information. Corrections to the death certificate later on might be difficult, time consuming and expense. Advise as to number of death certificates to order (the funeral director usually does it, and generally orders enough to at least begin probate or administration). Ordering later on can be delayed, particularly in New York City or if death occurred out-of-state or abroad.

For information on ordering death certificates of New York City residents, go to http://home2.nyc.gov/html/records/html/vitalrecords/home.shtml. Death certificates for NYC residents cost $15 each.

For information on death certificates of residents outside New York City, go to http://www.health.state.ny.us/vital_records/. Death certificates for residents outside New York City cost $30.00 each if ordered by mail, and $45 each if ordered online plus a transaction fee of $11.95 for the online order.
For information on death certificates for non-New York residents, try www.vitalrec.com.

If additional death certificates are needed, submission of application in person will generally speed up processing in New York and some other counties.

Death Certificates are required for:

(i) life insurance (one per company.)
(ii) Joint bank accounts and investment accounts.
(iii) Totten trust bank accounts ("in trust for" accounts).
(iv) Employee death benefits.
(v) IRAs and annuities that are payable to a named beneficiary.
(vi) Application for letters testamentary or letters of administration in all Surrogate's Courts in the State. Sec. 207.15(b), Uniform Rules for Surrogate's Court.
(vii) Ancillary probate - required if real property located outside New York passes under the will.
(viii) Transfer On Death (TOD) securities (see EPTL 13-4). As of January 1, 2006, an individual can designate a beneficiary for individual securities, and the security will pass to the beneficiary outside probate. Although EPTL 13-4 does not require a beneficiary of a TOD security to provide the financial institution with a copy of a death certificate, many institutions may require it.

E. Payment for Funeral and Burial: Funeral and burial expenses generally include the cost of the funeral, church, synagogue or other services that are an integral part of the funeral,

expense of interment or other disposition of the body, a burial lot and suitable monument or headstone (including a mausoleum, provided it is a reasonable expense), the cost of a post-funeral meal, and reasonable expenditure for perpetual care of the burial lot. SCPA 103(22); Matter of Borden's Will, 288 NYS 957 (1936); Matter of Le Bovici 522 NYS2d 214 (2d Dep't 1987); Matter of Nolen's Will, 99 NYS2d 622 (1950); Matter of Morawetz' Will, 231 NYS2d 1000 (1962). Funeral and burial expenses are generally deductible on the estate tax return, but are reduced by, inter alia, any death benefits received from the Social Security or Veterans Administrations (see IRC 2053(a)(1) and 6501; Rev Rule 66-234, 1966-2 CB 436) or amounts received in a wrongful death settlement (see Rev Rule 77-274, 1977-2 CB 326.

1. The Estate: The decedent's estate is primarily liable for payment of funeral and burial expenses. In order to insure that the decedent is properly buried, these debts are preferred over any of decedent's debts (SCPA 1811[*]; Jaudon v. White, 302 NYS2d 281 (1969)) and also take priority over the payment of exempt property to the immediate family (EPTL 5-3.1(a)(5). Thus, a family member who pays for the funeral, burial or related expenses will in the ordinary case be reimbursed by the estate, provided the expense is reasonable. Matter of Kircher, 123 Misc. 2d 397 (1984). EPTL 11-1.3 expressly provides that the nominated fiduciary may utilize estate assets to pay reasonable funeral expenses before he or she receives letters testamentary.

   Query: is $15,000 a reasonable funeral expense for a $100,000 gross estate? The answer will depend on the size of estate and other special considerations such as a need to ship the body home. It may be appropriate if the decedent had significant non-testamentary assets, or if the decedent had special burial requests that the family is honoring. See SCPA 1811(l) and Matter of Kircher, 123 Misc. 2d 397 (1984); Beaver v. Mulholland, 403 NYS2d 994 (1978); Matter of DeNezzo's Estate, 267 NYS2d 67 (1966).

   Caution should be used when persons contract or pay for funeral expenses because the Court may find them liable for payment, or may in an estate accounting find that a funeral expense was unreasonable, in which case the family member who signed the contract for the expense is personally liable to the service provider. See Joseph Farenga & Sons, Inc. v. Maniatis, 623 NYS2d 1023 (Civ. Ct. Queens Co. 1995); Matter of Cammarinese, 199 Misc. 836.
   Advise family members to keep careful records of all funeral related expenses they have paid, and advise the fiduciary to reimburse family members or others for reasonable funeral expenses from the estate after letters have been issued.

[*] The statutory preference for payment of funeral expenses also applies to the trustee of a revocable lifetime trust (See definition of "fiduciary" in SCPA 103[21]).

Note that funds paid by distributees for funeral expenses may constitute damages that are recoverable in a wrongful death action.

2. Other sources: Social Security (if surviving spouse or dependent children), Veterans Administration, insurance company (if death occurred in accident), and employee benefit program.

3. Prepayment: Inquire whether the Decedent made any pre-need arrangements for his or her own funeral. If so and other arrangements are being made, consider whether a refund of pre-paid funeral costs (with interest) is appropriate. See General Business Law Section 453(2).

F. You may be called on to provide legal opinions concerning a variety of items, including:

1. Who has right to make funeral and burial arrangements?
McKinney's public health law section 4201 provides in relevant part that the following persons in descending priority shall have the right to control the disposition of the remains of such decedent:

(i) the person designated in a written instrument executed pursuant to the provisions of this section;

(ii) the decedent's surviving spouse;

(ii-a) the decedent's surviving domestic partner;

(iii) any of the decedent's surviving children eighteen years of age or older;

(iv) either of the decedent's surviving parents;

(v) any of the decedent's surviving siblings eighteen years of age or older;

(vi) a guardian appointed pursuant to article seventeen or seventeen-A of the surrogate's court procedure act or article eighty-one of the mental hygiene law;

(vii) any person eighteen years of age or older who would be entitled to share in the estate of the decedent as specified in section 4-1.1 of the estates, powers and trusts law, with the person closest in relationship having the highest priority;

(viii) a duly appointed fiduciary of the estate of the decedent;

(ix) a close friend or relative who is reasonably familiar with the decedent's wishes, including the decedent's religious or moral beliefs, when no one higher on this list is reasonably available, willing, or competent to act, provided that such person has executed a written statement pursuant to subdivision seven of this section; or

(x) a chief fiscal officer of a county or a public administrator appointed pursuant to article twelve or thirteen of the surrogate's court procedure act, or any other person acting on behalf of the decedent, provided that such person has executed a written statement pursuant to subdivision seven of this section.

The recent amendments to the public health law, as indicated above, make the prior case law of questionable relevance.

If the body is cremated and decedent's ashes are not claimed by a friend or relative within 120 days, the fiduciary has the authority to dispose of the remains. McKinney's Pub. Health Law Section 4202(4).

2. Does the family have to honor organ donation authorized by decedent? Such directions are generally binding unless revoked by the decedent. Public Health Law, Section 4300 et seq.

3. For issues concerning cemetery laws, or rights of interment, consult McKinney's Religious Corporations Law and McKinney's Not-for-Profit Corporation Law Section 1500 et seq.

4. For issues concerning obligation to permit autopsy, and right to object to autopsy under certain circumstances, see McKinney's Public Health Law Sections 4209-4215; Bambrick v. Booth Memorial Med. Center, 561 NYS2d 387 (1990), rev'd, partial summary judgment granted and remanded, 593 NYS2d 252 (2d Dep't 1993); Weberman v. Zugibe, 394 NYS2d 371 (1977), Wilensky v. Greco, 344 NYS2d 77 (1973). If an unauthorized autopsy was performed, determine whether a cause of action exists. See Liberman v. Riverside Mem. Chapel, 650 NYS2d 194 (1st Dep't 1996); Darcy v. First Presbyterian Hosp. Of New York, 202 NY 259, rehearing denied, 203 NY 547 (1911); cf. Cremonese v. New York, 17 NY2d 22 (1966); Rotholz v, New York, 582 NYS2d 366 (1992).

5. For causes of action relating to the manner in which the funeral was conducted, or the decedent's remains were treated, or interference with the right to possession of the decedent's body, see 52 ALR5th 155, 63 ALR3d 1252, 14 ALR3d 629, Johnson v. State, 37 NY2d 378, 372 NYS2d 638 (1975); Clayton v. Elliot, NYLJ, March 3, 1998, at 28, col. 5 (Sup. Ct. NY Co.); Duffy v. New York, 577 NYS2d 820, app dismissed, 589 NYS2d 311, and app denied, 594 NYS2d 716 (1st Dep't 1991); Quiroz v. Latulip, 536 NYS2d 350 (4th Dep't 1988).

III. ASSISTANCE WITH IMMEDIATE CASH NEEDS

Recourse to assets passing by operation of law, such as joint bank accounts and life insurance, may solve some immediate cash needs.

It is important to ascertain that a joint account is a "true" joint account, as opposed to a convenience account, before using the funds. See, e.g., Matter of Vairo, 616 NYS2d 611 (1st Dep't) (convenience account). If there is doubt, avoid using the assets in the account unless absolutely necessary, and keep clear records of the assets removed and for what

they were used. If funeral expenses are paid from joint account, the account should be reimbursed from probate estate funds.

Tax Waivers No Longer Required: Previously, a financial institution could only release $30,000 (and an insurance company $50,000) without a waiver from the New York State Tax Commission. New York no longer requires estate tax waivers for persons who die after February 1, 2000 (L. 1997, ch. 389, Part A, § 20). The text of the prior section, and a reference to the repeal, can be found in the Surrogate's Court Greenbook under N.Y. State Tax Law § 975, 1997 Amendments.

Immediate cash needs may also be met by resort to SCPA 1310, which authorizes a debtor (defined very broadly to include banks, investment companies, certain insurance companies and retirement plans) to pay up to $30,000 to a surviving spouse and up to $15,000 to certain designated relatives. SCPA 1310(2) and (3). The relative receiving the funds is accountable to the fiduciary of decedent's estate or, if none is appointed, to the Public Administrator (provided that a surviving spouse need not account for amounts within the set-off allowed pursuant to EPTL 5-3.1). SCPA 1310 (6). In essence, this section allows the immediate family to access decedent's cash and securities accounts before the appointment of a fiduciary. Matter of Peideman, 476 NYS2d 754 (1984). See NY State Tax Form AU-281.17 "Survivor's Affidavit: Request for Refund under SCPA 1310" (form is available online at www.tax.state.ny.us).

Nominated corporate fiduciaries may also be willing to advance cash needs for necessities.

If the decedent's bank knows of his or her death and you are certain decedent had the requisite mental capacity and was not subject of undue influence or fraud prior to death, request decedent's bank to honor checks issued by decedent which have not yet cleared. See UCC 4-405(b). If you have reason to suspect foul play, consider advising the bank not to honor checks.

Advise family members against paying debts and expenses of decedent without consulting you, since they may be treated as volunteers without right of reimbursement. See 60 ALR2d 963.

IV. SAFEGUARDING ASSETS BEFORE QUALIFICATION OF FIDUCIARY

A. One of the fiduciary's main roles is to secure and preserve the decedent's assets for distribution to the appropriate individuals or entities. Matter of Donner, 82 NY2d 574 (1993). For this reason, a nominated executor* is given implicit power to take reasonable

* A prospective administrator is not given the same rights, and must apply for letters of temporary administration, or limited letters of temporary administration, if immediate action is

steps to safeguard estate assets where danger to them is reasonable perceived. See EPTL 11-1.3 (which also allows the nominated executor to pay for reasonable funeral expenses). No person other than the nominated executor is authorized to act before he or she is granted fiduciary status by the Court, even if the person believes that he or she will ultimately receive the property and thus perceives a personal interest in the property. The fiduciary should recall that he or she may be held personally liable for expenses that are ultimately deemed to be unreasonable and should act accordingly. Advise the nominated executor to attempt to make contracts dealing with estate assets or assuming liabilities for the estate conditional upon ratification by the fiduciary after he or she is appointed.

B. The line between actions necessary to preserve estate assets and actions taken because the fiduciary deems the property to belong to him or her, or to a specific beneficiary, can often become blurred, especially if the fiduciary is the surviving spouse or a close family member. You may be tempted to simply let your client deal with estate assets on the assumption that he or she will be the primary legatee or the ultimate recipient of the property, or will be the executor of the estate. However, it is always possible that a later Will could be located, or a surviving spouse could exercise his or her right of election, or an objection to probate could be made, all of which could displace the expected distribution scheme and subject the fiduciary's actions to closer scrutiny. Although it is difficult to explain to the client that an expected bequest remains speculative until probate is completed, try to convey to your client that, as a fiduciary, his or her expenditures should be objectively reasonable and that, until the will is probated or the distributees are determined by the Court, he or she should treat the estate's assets in an impartial manner.

C. Temporary Administration. If there is a real need for immediate action and the nominated executor is unable to act or is unavailable, or the will can not be located, or the decedent dies intestate, temporary letters of administration may be sought. See SCPA 901 et. seq. In necessary cases, letters of temporary administration may be issued absent a probate or administration petition (SCPA 901[2]) and service of process may be excused if sufficient cause is shown (SPCA 902 [5]). See Administration Proceedings in Surrogate's Court, later in this course book, for more on Temporary Administration.

D. As soon as is practical, advise the prospective fiduciary to begin searching decedent's personal effects for information as to potential estate assets and liabilities and to make a list of them. All important documents and all prior bank and tax records should be preserved. The decedent's Will and prior tax returns may provide leads to estate assets.

E. Obtaining Information from Reluctant Individuals: If it appears that an individual has knowledge of the whereabouts of estate assets, or possession of estate assets, and the individual will not provide such information or turn over the property to the fiduciary, the fiduciary may commence a discovery proceeding after he or she is appointed. (SCPA 2103).

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necessary and the administration proceeding cannot be completed in time. See Paragraph (C).

It may help to advise the recalcitrant individual that such a proceeding will have to be commenced if he or she does not voluntarily provide the information necessary to administer the estate.

F. To safeguard the estate, the fiduciary should consider whether it is necessary to:

- Change locks on decedent's residence (several people may have keys).
- Cancel credit cards
- Arrange for security at decedent's place of business.
- Install alarm system or change existing alarm system codes, or hire security service if warranted by value of assets.
- Consider securing valuable items in a vault or safe deposit box.
- Notify police if house is vacant.
- Take photographs of house, rooms, jewelry, etc., to document contents.
- Notify insurance carriers (home, auto and life) of decedent's death. Make sure policies have appropriate coverage (additional coverage may be necessary if home will be vacant), adequate limits to fully cover estate property and estate fiduciaries and that premiums are paid on time. Make sure the auto insurer knows who is driving car if he or she is not listed on the policy (technically, use of the car should be limited to necessary travel).
- Advise anyone to whom the decedent has given a power of attorney that the power has terminated and the attorney-in-fact is no longer authorized to act. Etterle v. Excelsior Ins. Co., 428 NYS2d 95 (4th Dep't 1980).

G. As a precautionary measure, it is wise to advise family members and beneficiaries not to take tangible personal property from the decedent's residence and not to gain access to any safe deposit box. Even if a person technically has access to the safe deposit box, the box must be opened in the presence of a bank representative and an inventory of the contents must be made.

H. It is also a good precautionary measure for the fiduciary and the practitioner to have a witness to any handling of estate property, particularly cash and jewelry.

V. LOCATING AND REVIEWING THE ORIGINAL WILL, CODICIL AND TRUSTS

A. Locating Original Documents

1. Original documents are often maintained by the attorney who drafted the document. If a will cannot be found, check decedent's personal papers and contact former lawyers, bank trust departments and Surrogate's Courts in present and former counties of residence (although it is rare that a will is filed in Court before decedent's death, it sometimes occurs - i.e., if a testator is concerned that his or her wishes will not be followed after death, or that another will unduly influence a change in his or her testamentary plan, filing the will in Court it is one way of making certain that persons named in the will are given notice of probate of any other will that adversely affects their interest). In addition, check corporation's safe and safe deposit box, if decedent was a shareholder in a closely held corporation.

2. If you are advised that a Will exists but the original is believed to be in decedent's safe deposit box, you can commence a proceeding, in the Surrogate's Court for the County in which the decedent was domiciled, to open the safe deposit box to search for the Will. (SCPA 2003; See forms annexed to this outline). The search will be conducted in the presence of an employee of the depositary institution, and an inventory of the safe deposit box will be made. The nominated fiduciary may be required to complete and file a New York State report of safe deposit box opening.[*] The financial institution will file the Will with the Surrogate's Court. A safe deposit box may also be searched for insurance policies or a deed to the burial plot. If the box is jointly owned, the joint owner may make copies of the documents, in the presence of an employee of the institution, but may not remove the documents. SCPA 2003(2).

3. If the decedent's residence is sealed by the police and you are advised that the original will or insurance policies are in the home, you can commence a proceeding, in the Surrogate's Court for the County in which the decedent was domiciled, to search the home for the will or insurance policies. (See forms annexed to outline). You will not be permitted to remove any other items from the home. The search is conducted in the presence of the police. Previously, the presence of a member of the department of taxation was also required unless a tax waiver was obtained. However, since the waiver requirement was repealed (see Section III, supra,), it is unclear whether the tax commission must be served with process and/or be present during the residence search. You should check with the

[*] The New York State application for release of safe deposit box (Form ET-92) is no longer required for estates of individuals who died on or after February 1, 2000).

Miscellaneous Department of the Surrogate's Court to determine the answer to this question.

4. If you learn that an individual is or may be in possession of the original will but he or she refuses to surrender the document, you may be able to convince the individual to turn over the will by informing him or her that it is a felony to conceal, suppress or destroy a Will (Penal Law Sec. 190.30; Matter of Katz, 358 NYS2d 616 (1974)). If the individual still refuses to turn over the will, you may compel production of the will pursuant to SCPA 1401. You may request that the court award the cost of the proceeding, including legal fees, if the individual did not have good cause to withhold the Will. A Will cannot be held by the decedent's former attorney under a lien for fees. Matter of Reiss' Will, 107 NYS2d 168 (1951).

5. Lost Will: If you are unable to locate the original will but you have a copy of the will, determine whether the will can be admitted to probate as a lost or destroyed will. SCPA 1407; Matter of Kleefeld, 55 NY2d 523, 448NYS2d 456 (1982).

6. Make every effort to be sure that the Will you have obtained is decedent's latest Will.

B. Reviewing the Will

1. Is a Disclaimer Needed? If the Will has a disclaimer trust, determine if a disclaimer, in whole or part, is advantageous. The amount of the disclaimer depends on the then applicable state and federal tax exclusion amount and the size of the estate. The disclaimed property passes under the Will to a disclaimer trust which is generally for the benefit of the spouse, or the spouse and issue, of the Decedent. If the Will makes use of a disclaimer trust, determine if a disclaimer is required and file the disclaimer (called a renunciation in the SCPA), together with an affidavit of no consideration, within 9 months of the date of death of the decedent. See EPTL 2-1.11. To be effective for federal tax purposes, the disclaimer must be made within the 9 month period, even though a later disclaimer may be permissible under NY state law.

2. Review the agreements for general validity (are they properly signed, witnessed and, where appropriate, notarized). Determine the overall testamentary scheme, especially the relationship between the testamentary scheme and any inter vivos trusts, if any (See EPTL 3-3.7). Review the entire will, even if you drafted it, to make certain that you are familiar with its contents. If the decedent exercised any powers of appointment, either directly or by implication (see EPTL 10-6.1), locate and review the document that created the power to determine if it was an effective

appointment. If the will transfers any assets to an existing trust, make sure the trust complies with the requirements of EPTL § 3-3.7, and that the trust complies with any applicable provisions of EPTL § 7-1.1 et seq.

3 Each testamentary instrument will have its own considerations. Identify any potential problems, such as unusual distributions or unequal treatment of beneficiaries. It is your job to make the fiduciary aware of such problems, and they should be raised at the first meeting with the fiduciary (see Section VI, infra).

Potential problems areas include:

- Construction - If a clause in the Will is subject to more than one interpretation, or contains an ambiguous description of a bequest or identification of a beneficiary, a proceeding for construction of the Will may be commenced to ascertain decedent's intent. See SCPA 1420; See Matter of Carmer, 71 NY2d 781; Matter of Walker, 64 NY2d 354; Matter of Fabbri, 2 NY2d 236.

- Reformation - Is there a disposition that should qualify for a marital or charitable deduction but for a mistake or ambiguity leading to a missing technical provision? Consider a reformation proceeding. See Pamela R. Champine, "Tax-Motivated Reformations of Wills and Trusts: A Proposed Analytical Framework." NYSBA Trusts & Estate Law Section Newsletter, vol 31, no. 1 (Spring 1998).

- Conflicts of Interest: The potential for conflicts between the fiduciary and beneficiaries, and between multiple fiduciaries, exists in many estates, and the topic is too broad to adequately cover in this outline. In general, you should advise the fiduciary when it appears that the conflict is becoming more than just a potential. It is permissible for the attorney to continue to represent conflicted parties provided they provide ***informed*** consent (and a written document evidencing informed consent is advisable). Gadman v. Catalfo, 674 NYS2d 391 (2d Dep't 1998). As between the fiduciary and beneficiaries, the fiduciary is obliged to be impartial, even if he or she is also a beneficiary. In addition, although the fiduciary is your client, the attorney also owes a duty of undivided loyalty to the beneficiaries of the estate. Matter of Clarke's Estate, 12 NY2d 183, 237 NYS2d 694 (1962). This can become a problem when one possible resolution to a dispute, or one construction of an ambiguous clause, favors the fiduciary. If conflicts arise, you may wish to advise the beneficiaries to retain independent counsel, as you cannot represent the fiduciary and the beneficiaries at the same time in conflict situations. If there are multiple fiduciaries and substantial conflicts or disputes arise among them, the attorney should

attempt to reach an understanding with the fiduciaries concerning continued representation, as the attorney cannot continue to represent all of the fiduciaries without consent. Matter of Hof, 478 NYS2d 39 (2d Dep't 1984). In no case should you commence a proceeding against a fiduciary that you once represented, as that is a violation of the conflict of interest (former client or multiple representation) rule of the Rules of Professional Responsibility.

Attorney-Client Privilege: Note that although previously, any communications that an attorney had with the fiduciary was not necessarily protected from the beneficiaries by the attorney-client privilege (see Hoopes v. Carota, 531 NYS2d 407 (3d Dep't 1988), aff'd mem., 544 NYS2d 808 (1989), the privilege now extends to the relationship between an attorney and a personal representative unless there is an agreement to the contrary. See CPLR § 4503. The beneficiary is not considered to be a client of the attorney, and the existence of a fiduciary relationship between the attorney and beneficiary does not waive confidentiality between the attorney and the personal representative.

- Unequal distributions to similarly situated persons, or excluded family members: Depending on the family structure and relationships, an individual who receives a lesser bequest, or none at all, may object to probate. On the other hand, that individual may have been well provided for during his or her lifetime. You may discover that a child was born after the will was executed, in which case the child may be entitled to a statutory share of the estate. (See EPTL 5-3.2(b), amended as of August 1, 2007). It is always a good idea to know the facts as soon as possible to be prepared for all eventualities.

- Ineffective bequests - where a bequest was made to a person who predeceased the testator, was the bequest conditioned upon surviving the decedent? Does the bequest lapse (in which case it generally falls into the residuary estate), or is there an alternate bequest elsewhere in the Will? Or is there an anti-lapse provision that applies? Bequests to brothers, sisters and children who predecease the testator do not generally lapse, but pass to issue, per stirpes. See EPTL 3-3.3.

- In rare circumstances, a bequest may also be invalid if it violates the public policy of the State of New York, such as a bequest to a terrorist organization (See Matter of Walker, 64 NY2d 354, 486 NYS2d 899 (1985); Matter of Sparks, NYLJ April 15, 1981, p.11, Col. 5.), or a bequest to a child on condition that he or she divorce his or her spouse.

- Determine whether any bequest is void as a result of the rule against perpetuities (EPTL 9-1.1).

- A bequest to an attesting witness may be void if it exceeds the witness' intestate share (if any) and there are insufficient independent witnesses to prove the will. (EPTL 3-3.2). In such a case, determine whether the ineffective legacy passes to the witnesses' own issue pursuant to EPTL 3-3.3. If the will would not be valid without the witness' testimony, determine whether it is possible for the witness to disclaim his or her bequest and thereby serve as a witness, thus upholding the validity of the will.

- Determine whether a bequest to a former spouse is voided by divorce or annulment after the execution of the will. EPTL 5-1.4; Jossel v. Meyers, 629 NYS2d 9 (1st Dep't 1995).

- Afterborn Children: Are there children who were born after the Will was drafted who are not provided for in the Will? Such children may have a right to a statutory share of the estate. See EPTL 5-3.2

- Stored genetic material – Be aware that in some cases, a decedent may have preserved genetic material that may be used by the surviving spouse to conceive a posthumous child. The surviving spouse must advise the fiduciary of the existence of the genetic material within 9 months of the issuance of letters. See EPTL 4-1.3

4. Consider whether the spouse has a valid right of election, taking into account all testamentary substitutes (joint accounts, inter vivos trusts, transfer on death securities, IRA and retirement benefits, etc.). Determine if a valid prenuptial agreement waiving the spouse's right of election exists. See EPTL 5-1.1-A(e). If decedent was a non-domiciliary, determine whether EPTL 5-1.1-A(c)(6) denies surviving spouse the right of election.

5. Determine if there is exempt property that vests directly in surviving spouse and minor children and does not form part of decedent's estate. See EPTL 5-3.1

6. Check to determine that names of charitable organizations are correctly identified and reflect the testator's intention e.g., New York Heart Association and New York Chapter of the American Heart Association are different entities; a gift to the American Legion could be to the local chapter or to the national organization. If the provision is uncertain but the Decedent's charitable intent is clear, a proceeding may be commenced to clarify the intended beneficiary (along the lines of a construction proceeding) or, if the organization no longer exists, a cy pres

proceeding may be commenced to amend the provision to effect the decedent's charitable intent. (SCPA 8-1.1[c][1]; Matter of Nurse, 35 NY2d 381; Matter of Potter, 307 NY 504). In such a proceeding, the Attorney General is generally a necessary party. EPTL 8-1.4(e).

7. Charitable bequests are often conditioned on the organization maintaining tax exempt status at testator's death. Tax exempt status of the charitable institution is also critical for purposes of obtaining a charitable tax deduction. Check IRS publication of exempt organizations or get copy of IRS qualifying letter directly from organization. You can obtain tax status and other information on charitable organizations from the following web sites:

   http://www.irs.gov/charities/article/0,,id=96136,00.html (IRS Pub. 78 tax exempt org. finder)
   http://www.guidestar.com
   http://www.idealist.com

8. Check for a no-contest or "in terrorem" clause which could void a bequest if the will is contested. If such a clause exists, review the actions that are permitted without triggering the forfeiture. See EPTL 3-3.5; Matter of Stiehler, 506 NYS2d 845 (1986); Matter of Kraetzer, 462 NYS2d 1009 (1983).

9. Where a beneficiary does not need the funds, consider the possibility of disclaiming all or part of an interest in the estate, e.g., a parent renouncing a legacy which then passes to a needy child, or to take advantage of generation skipping transfer tax exemption, if applicable. See EPTL 2-1.11 and IRC Sec. 2518. See also David E. Stutzman, Just Saying "NO": Contemporary and Post-Mortem Planning Opportunities with Disclaimers, NYSBA Trusts & Estate Law Section, vol 32, no. 1 (Spring 1999).

10. Consider letters or other instructions from the testator regarding his or her wishes regarding tangible personal property. Such directions are not binding upon the fiduciary or beneficiary, but the family may wish to honor the decedent's wishes. Matter of Voice, 238 NYS2d 736, aff'd 245 NYS2d 310 (1st Dep't 1963).

11. Determine if there are gifts to persons in a confidential relationship with the testator, such as physicians, lawyers, accountants, clergy and nurses. Bequests to them may be void absent satisfactory explanation that the disposition did not result from undue influence exercised in the professional relationship, i.e., a bequest to an unrelated attorney-draftsman may trigger inquiry by the Court. See Matter of Putnam, 257 N.Y. 140 (1931); Matter of Satterlee, 281 AD 251. In New York county, a gift to an attorney may trigger a Putnam hearing, even if no other party objects, unless the attorney is a natural object of decedent's bounty.

12. Review the clauses directing apportionment of taxes and administration expenses. If the will does not provide for apportionment of taxes, parties pay pro rata share in relation to the benefit received. EPTL 2-1.8.

13. Determine whether the will has a self-proving affidavit (SCPA 1406). If not, check to see if witnesses are available to execute a post-death affidavit. Live testimony may be required by any party entitled to process or by the Court if it determines that any unusual circumstances require an explanation beyond that provided in affidavits submitted with the probate petition (i.e., interlineations, shaky signature, executed very close to date of death). If witnesses are not available, check to see if testimony of witnesses can be dispensed with (SCPA 1405) or if Will qualifies for admission to probate as an ancient document. (Matter of Barney, 185 App. Div. 782; Matter of Goldfarb, NYLJ, Aug 16, 1995, at 23, col. 1; Matter of Zippkin, 3 Misc 2d 396. If so, make the appropriate application when you submit your probate petition.

14. Determine whether the will authorizes or directs the fiduciary to retain certain assets, and consider whether retention is appropriate under Prudent Investor Act (EPTL 11-2.3).

15. Determine if the powers of the fiduciary (EPTL 11-1.1) are increased or limited by the will.

16. Determine if provision for compensation of a fiduciary constitutes compensation or is in fact a legacy. Butler v. Mander, 552 NYS2d 946 (1st Dep't 1990); United States v. Merriam, 263 US 179, 68 L. Ed 240, 44 S. Ct 69, 29 ALR 1547 (1923).

17. Determine whether payment of legal fees may be paid on account in advance of a court approval otherwise required by SCPA 2112(2) if counsel is acting as sole fiduciary or co-fiduciary with another attorney. Note that if counsel obtains the written consent of the beneficiaries, they will likely be precluded from a later object that legal fees were paid without a court order (Matter of Weinman, NYLJ, Nov. 19, 1998, at 34 (NY County); Matter of Nickelsburg, 34 Misc 2d 82), although the amount of the legal fees is always subject to review by the Surrogate (Matter of Wiggins, 606 NYS2d 423 (3d Dep't 1994), aff'd sub nom Stortecki v. Mazone, 85 NY2d 578, 626 NYS2d 733). Any un-approved legal fees may have to be repaid to the estate, with interest, absent a court order.

C. Preparing for Probate

1. Obtain and review necessary forms for probate or administration. Some forms can be obtained online at http://www.courts.state.ny.us, and the complete set of official forms can be purchased and downloaded from the Trusts and Estates Section page of the NYSBA web site at http://www.nysba.org

   Be sure to sign each document or submit a one page certification stating something along the lines of "the attorney signature on this page is intended to apply to each document contained in this application, in compliance with the requirements of 22 NYCRR Part 130." Include the attorney's name, address and signature on the page.

2. Determine whether electronic filing (E-filing) is permitted or mandatory in the County in which you are filing for probate. For more on E-filing, see www.courts.state.ny.us and search for the NY State Courts Electronic Filing page.

3. Preserve any duplicate signed wills, as well as any prior wills that are found. All duplicate originals must be submitted for probate.

   Make photocopies of latest original wills and codicils and then put the originals in a secure place. When making copies, do not remove staples or fastening or else you will have to provide the probate clerk with an affidavit of explanation. You will need one copy to submit with your probate petition (with an affidavit of comparison) and will need several copies to provide to beneficiaries, distributees and fiduciaries. (It is generally advisable to make one copy (or one set of copies) from the original and make any subsequent copies from the copied document, to avoid the risk of damage to the original).

4. Make note of any unusual conditions of will, e.g., erasures, prior removal of staples, interlineations, different type-faces, different paper, etc. The Court will usually require an explanation, which can generally be done by affidavit, preferably from a person who has knowledge of how the condition came to be (i.e., from the drafting attorney or an attesting witness as opposed to an attorney affidavit from the fiduciary's attorney). Matter of Conrad, 440 NYS2d 991 (1981); Matter of Lavigne, 428 NYS2d 762 (3d Dep't), aff'd, 52 NY2d 1008, 438 NYS2d 294 (1980); Matter of Fodera, 465 NYS2d 65 (2d Dep't 1983).

5. Determine decedent's domicile, as the probate or administration proceeding should be commenced in the county in which decedent was domiciled. SCPA 103(15), 205. Generally, change of residence to a nursing home or health care facility does not constitute a change of domicile, as the decedent often expresses

an intention to return to his or her home, or is not competent to express a change of intention to remain at the transferred location. Matter of Urdang, 599 NYS2d 60 (2d Dep't 1994); Estate of Rottenberg, 192 NYS2d 303 (1959). Evidence of domicile may be found from: the location where decedent spent the preponderance of his or her time in the year before death; statements of domicile in wills, trusts, powers of attorney, insurance policies and other legal documents; location where gift and income taxes were filed; location where decedent was registered for voting and driving a motor vehicle; location of decedent's church or synagogue or social clubs; location where decedent maintained a bank account or safe deposit box. If decedent was not domiciled in New York, his or her Will may nevertheless be offered for probate in New York in any county in which the decedent left property. SCPA 206. If domicile is uncertain, determine which domicile is more favorable in terms of income, gift, estate and inheritance taxes, method of completing probate or administration, fiduciary powers and duties, validation of claims against the estate and debts of the decedent, validation of the rights of the surviving spouse and children, etc.

6. Determine whether probate or administration will be delayed, and, if so, whether it is advisable to apply for preliminary letters testamentary (SCPA 1412) or letters of temporary administration (SCPA 901) (i.e., if a Will contest is likely, or if decedent had a cause of action as to which the statute of limitations will run before letters can be issued).

7. Determine that the nominated fiduciary meets the requirements of SCPA 707.

8. Determine whether decedent's estate, exclusive of EPTL 5-3.1 exempt property and real property, is less than $30,000, in which case it may qualify for administration as a small estate pursuant to SCPA 1301 et. seq. If so, the attorney may be ethically obligated to inform the fiduciary that there is a method of administering the estate that will not incur the costs and legal expense of a full probate or administration proceeding. See New York State Bar Association, Committee on Professional Ethics, Opinion 569-2/7/85. See also discussion on Voluntary Administration in the outline "Administration Proceedings in Surrogate's Court" later in this course book. Note that an estate will not qualify if the decedent died testate and there is any real property to be disposed of by the Will.

9. Review Uniform Surrogate's Court Rule 207.16 for additional requirements for completing the probate petition and application where: a distributee's status is derived from a deceased distributee; decedent was survived by one or no distributees; decedent was survived by only grandparents, aunts, uncles or cousins; decedent was survived by distributees whose whereabouts are unknown.

10. Determine parties necessary to the probate or administration proceeding (SCPA 1003 and 1403):

- In a probate proceeding, generally the Distributees (the persons who would inherit in absence of will [EPTL § 1-2.5 and 4-1.1]) and executors are entitled to service of a citation unless they sign a waiver of service and consent to probate. Also persons named as fiduciary or beneficiary in prior wills on file in Court who are adversely affected by the later will; beneficiaries and fiduciaries named in the will offered for probate whose rights are affected by a will later in date that has also been offered for probate; persons whose rights may be affected by the exercise in the will of a power of appointment; and the New York State Tax Commission where the decedent is a non-domiciliary. Takers in default of exercise of power of appointment (Matter of Emmons, 403 N.Y.S. 2d 410 (Sur. Ct. N.Y. Co. 1978)) and persons adversely affected by codicil or codicils are also necessary parties.

- Determine whether there are any adopted or non-marital children, and whether such children are necessary parties. Domestic Relations Law Sections 24(1), 73, 117; EPTL 4-1.2, 2-1.3, 5-3.1.

- Named beneficiaries, trustees and substitute executors are entitled to Notice of Probate (SCPA 1409).

- Determine whether any parties who are required to receive process are minors or under a disability, and whether a guardian ad litem is required. Determine whether virtual representation obviates the need for a guardian ad litem.

- In an administration proceeding, the persons who have a right to letters of administration prior or equal to the petitioner are entitled to service of process, and all other distributees may be required to receive notice of administration, in the Court's discretion. (See outline for "Administration Proceedings In Surrogate's Courts" in this course book for further details on necessary parties in administration proceedings).

D. Conflict of Interest Review and other considerations after Schneiderman v Finmann

On June 7, 2010, the New York Court of Appeals issued a decision called Estate of Schneidermann v. Finmann, 15 N.Y.3d 306 (2010), which overturned a long-standing line of cases that had held that the doctrine of privity bars the estates of decedents from suing an estate planner for legal malpractice. Schneiderman held that the executor or other personal representative stands in the shoes of the decedent, and may commence any

lawsuit that the decedent could have commenced, including a lawsuit for legal malpractice against the estate planner. Strict privity requirements still bar beneficiaries from making a claim for legal malpractice directly against an attorney drafter.

As a result, an attorney drafter or the law firm at which the attorney draftser was employed is cautioned to make an extra review of the case before accepting employment as counsel to the fiduciary. The New York State Bar Association Committee on Professional Ethics issued an ethics opinion, Opinion 865, outlining the Rules of Professional Conduct that are implicated in this review, and held that an attorney drafter may represent the fiduciary of an estate as long as the attorney does not perceive a colorable claim of legal malpractice arising out of the estate planning. The opinion, which reviews the situations when an attorney perceives a colorable malpractice claim from the outset, when an attorney does not perceive a colorable legal malpractice claim at the outset and when an attorney perceives a colorable legal malpractice claim during the representation, can be found in full on the NYSBA.ORG website.

At this time, it is unclear what standard of review is required, or, indeed, if any review is required at all, when an attorney is retained to represent a fiduciary in cases where the attorney is not the attorney drafter. Therefore, an attorney should use his or her best judgment to determine whether the estate of a decedent has a potential claim against the attorney drafter for legal malpractice, and be mindful of any statute of limitations issues and the need to either enter into a tolling agreement with the attorney drafter if your inquiry is ongoing, or to file a protective lawsuit before the statute of limitations runs if you believe that there may be grounds for legal malpractice.

The NYSBA is currently working on checklists that an estate planner may review to determine the best practices for preventing attorney malpractice. Meanwhile, an excellent article by Anthony J. Enea on preventative measures an attorney may take is available in the Spring 2011 Trusts and Estates Law Section Newsletter (What is an Attorney to do Without the Strict Requirements of Privity?), available online to NYSBA members at the NYSA.ORG website.

VI. INITIAL MEETING WITH NOMINATED OR PROSPECTIVE FIDUCIARY

(1) Consider whether to include the primary beneficiaries, particularly the surviving spouse, unless conflicts of interest are foreseen.

(2) Consider providing the fiduciary and beneficiaries with a short summary and analysis of the Will's major provisions. Be prepared to discuss any problems or potential problems identified in your review of the documents (see Section V, supra).

(3) Ask the nominated fiduciary to bring along as much relevant information as possible, such as: life insurance policies; homeowner's insurance riders covering personal property;

bankbooks and canceled checks; brokerage and bank statements for the last three years; leases or deeds to apartment, cooperative apartment or real property; lists of securities (may be available from brokerage statements); gift tax returns; federal and state income tax returns for the last three years; and any other documents that appear to be important.

(4) If you do not already have them, ask the nominated fiduciary for current addresses of distributees, beneficiaries named in the will and other parties necessary to the probate or administration proceeding. You will also need the beneficiaries' social security numbers for the estate tax return.

(5) Retainer Agreement and Legal Fees.

Effective March 4, 2002, an attorney who enters into an arrangement for, charges or collects any fee from a client MUST provide the client with a written letter of engagement before commencing the representation, or within a reasonable time thereafter if it is otherwise impracticable before the representation commences or if the scope of services to be provided cannot be determined at the time of the commencement of representation. (22 NYCRR § 1215). Rule 1215.1(b) requires the writing to cover: (1) the scope of services; (2) fees, expenses and billing practices; and (3) where applicable, the client's right to arbitrate fee disputes pursuant to Part 137 of the Rules of the Chief Administrator of the Courts (the Fee Dispute Resolution Program).[*] If no letter of engagement is signed, any misunderstandings will be resolved in favor of the client. Grossman v. West 26th Corp., N.Y.L.J., August 3, 2005, at 19 (Civil Ct. Kings County 2005 (attorney received quantum meruit for services rendered, and amount was determined in clients favor); Matter of Feroleto, N.Y.L.J., Dec. 15, 2004, at 26 (Surr. Ct. Bronx Co 2004). Where there was no letter of engagement and it appeared that the failure to provide a letter of engagement was deliberate, an attorney has been denied legal fees entirely. Klein, Calderoni & Santucci, L.L.P. v. Bazerjian, N.Y.L.J., Feb. 18, 2005, at 24 (Sup. Ct. Bronx County 2005). However, absent discharge for cause, the First and Second Departments have held that, despite the lack of a retainer agreement, counsel may still recover in quantum meruit. Nabi v Sells, N.Y.L.J., Dec. 22, 2009 at 25, col. 3 (1st Dep't 2009); Rubenstein v. Ganea, 41 A.D.3d 54, 833 N.Y.S.2d 566 (2007).

In addition, Rule 1.5(b) of the Rules of Professional Conduct, effective April 1, 2009, requires an attorney to either provide a written engagement letter to a client or enter into a signed written retainer agreement with a client before the engagement begins or within a reasonable time thereafter. The ethics rule requires an attorney to create a writing, but

[*] Part 137 establishes a fee dispute resolution program for attorney-client representation that began after January 1, 2002 and allows a client to resolve fee disputes through arbitration. Part 137 does not apply where the fee to be paid to the client has been determined pursuant to a court order, and since an attorney's legal fee may be set by the Court in an accounting proceeding, arbitration may not apply to some disputes over estate legal fees.

only when such a writing is required by statute or court rule. Since Rule 1215 is a court rule, a writing is required under RPC 1.5(b) if it is also required under Rule 1215. Like Rule 1215, ethics Rule 1.5(b) specifies that a writing must include: the scope of representation and the basis or rate of fees and expenses. Thus, the two rules may be satisfied with one writing.

For purposes of estate representation, no letter of engagement is required if the fee to be charged is expected to be less than $3,000. A sample letter of engagement may be obtained from the New York State Bar Association website, under "attorney resources."

The Letter of Engagement requirement may be satisfied by entering into a signed written retainer agreement with the client before or within a reasonable time after commencement of the representation provided it explains the same items as would be explained in a letter of engagement. In the retainer agreement, describe the services that are to be rendered (i.e., will counsel prepare the estate and final income tax returns), and the services that are not included in the amount (i.e., administration of complex estate property such as commercial real estate or a business, an IRS audit, or contested or litigated proceedings and appeals may warrant additional charges if a flat fee for estate administration is being used). If hourly billing is contemplated, specify the current hourly rate of partners, associates, paralegals and others, and indicate whether the rates will remain constant or are subject to increases during the course of administration. If representation is based on a percentage of decedent's estate, make sure to define your terms (is it the gross estate, net estate, probate or non-probate estate, are assets to be valued at the date of death or the alternate valuation date, are assets to be valued subject to liens and encumbrances, or subject to premiums or to discounts for lack of marketability or minority interests) and consider how you wish to be compensated for assets that the attorney successfully excludes from decedent's estate. Indicate what out-of-pocket disbursements will be billed to the estate, and what will be included in the attorney's fee. Generally, legal fees of less than 3% of the estate have been found to be reasonable and are allowed as an estate tax deduction. Matter of Goldstick, 581 NYS2d 165 (1st Dep't 1992); Baird v. Commissioner, TC Memo 1997-55, RIA TC Memo 97055, 73 TCM 1883 (1997). If a retainer is requested, indicate that any unused portion of the retainer will be refunded if counsel is discharged. Also, indicate the frequency of billing and when payment is expected. You may also wish to consider whether to request that the fiduciary agree to pay counsel from his or her commissions, or that beneficiaries of the estate agree to pay the attorney personally, for legal services provided in administering the estate in the event that the Court reduces the amount chargeable to the estate. Matter of Jones, 562 NYS2d 448 (2d Dep't 1990); 13 ALR3d 518; 20 ALR 2d 1226. You may wish to explain to the fiduciary or beneficiaries that legal fees are deductible on the fiduciary income tax return or estate tax return if the estate is subject to estate tax.

Note: Counsel should maintain accurate time records, even if the client is not being billed on an hourly basis, since time spent performing legal services is a significant element of

the Court's determination of whether the overall legal fee charged was appropriate. Matter of Freeman, 34 NY2d 1 (1974); Matter of Potts, 241 NY 593 (1925); Matter of Middagh, 699 NYS2d 506 (3d Dep't 1999) (Surrogate's reduction of legal fees upheld where no time records). Reference to time charges may also be required if counsel institutes a proceeding in Surrogate's Court in which he or she seeks a determination of legal fees. Uniform Surrogate's Court Rule 207.45. In addition, time charges will be requested by the IRS in the event of an estate tax audit. Time records are also valuable in the event counsel is discharged without cause, as such records are evidence of the value of counsels services (Ajar v. Ajar, 616 NYS2d 59 (2d Dep't 1994) and can be used as an account stated for purposes of summary judgement (Ruskin, Moscou, Evans & Faltischek, P.C. v. FGH Realty Credit Corp., 644 NY2d 206 (1st Dep't 1996). Also note that if counsel is acting as the fiduciary or if all fiduciaries are attorneys rendering legal services to the estate, court approval should be obtained before taking advance payment of legal fees (although written consent of the beneficiaries insulates the attorney from a later challenge by them, it is not a wise practice to take legal fees without court approval, as the court is the ultimate arbiter of the appropriateness of legal fees and any excess fees will have to be returned to the estate, with interest. See Section V (B)(16), supra). Generally, payment of advance legal fees without a court order can result in an order to repay the estate with interest. See Matter of Kinzler, 600 NYS2d 126 (2d Dep't 1993).

Note that it depends upon the policy of the Surrogate's Court in which an estate is venued whether the executor is permitted to recover for disbursements that are not considered part of the attorney's office overhead.

(6) Discuss with the fiduciary his or her duty to collect and preserve assets, pay debts, taxes and administration expenses and to distribute assets in the estate in accordance with terms of will, or trust agreement, or the laws of intestate distribution if the decedent died intestate. Also advise the fiduciary not to commingle estate assets with the fiduciary's personal assets.

(7) Advise the fiduciary to sign checks and estate related documents in a manner that clearly indicates that he or she is signing as fiduciary, to obtain the protection of EPTL 11-4.7(a).

(8) Advise the fiduciary to keep complete and accurate records of the estate's assets, income and expenses.

(9) Advise the fiduciary that estate assets should not be removed from the state without Court approval (SCPA 711[7]). It may also be advisable to mention the other actions that are grounds for removal of the fiduciary (SCPA 711).

(10) Discuss the provisions of the Prudent Investor Rule (EPTL 11-2.3) as they will effect investment of assets as executor and as trustee. Keep in mind that the primary duty of an

administrator or executor is to prevent waste during the administration of the estate, and that deposits in interest bearing accounts and short-term investments are the norm.

(11) If there is a trust created under the Will, be prepared to discuss the power to adjust (EPTL 11-2.3 (b)(5)) and discuss the new unitrust provisions (EPTL 11-2.4) with the fiduciary. Together with the revised Principal and Income Act, these two new provisions allow a trustee to invest a trust for total return, rather than focusing independently on the production of income for income beneficiaries and growth of principal for remainder beneficiaries. Explain that if the trustee determines that the income produced from a trust in a given year is not in proportion to the total growth or the trust, the trustee may make a distribution to the income beneficiary to adjust for the difference. Alternatively, the Trustee may wish to elect to have the new Unitrust provisions apply to the trust. The unitrust election provides that instead of receiving net income from a trust, the income beneficiary may receive as a distribution a preset amount, paid from income and from principal if income is not sufficient. Generally speaking, for the first three years of the trust, the "unitrust amount" is defined as 4% of the net fair market value of the assets held in the trust on the first business day of the current valuation year. Commencing the fourth year of the trust, the unitrust amount is equal to 4% multiplied by a fraction, the numerator of which is the sum of (a) the net fair market value of the assets held in the trust on the first day of the current valuation year, plus (b) the net fair market values of the assets held in the trust on the first business day of each prior valuation year, and the denominator of which shall be three. (EPTL 11-2.4[b][1] and [2]). The assets "held in the trust" shall not include assets while held in an estate. (EPTL 11-2.4[b][6]).

EPTL 11-2.4 shall apply to trusts if (a) the governing instrument provides that the section applies; or (b) (i), for trusts in existence before 1/1/01, if the trustee, with consent by or on behalf of all persons interested in the trust, OR in his, her or its discretion, makes an election on or before 12/31/2005 to have the section apply; or (b) (ii), for a trust not in existence on 1/1/02, if the trustee, with consent by or on behalf of all persons interested in the trust, or in his, her or its discretion, makes an election on or before the last day of the second full year of the trust beginning after assets first become subject to the trust, to have the section apply. An election must be made in an acknowledged writing, delivered to the creator of the trust, if living, and to all persons interested in the trust and to the Court having jurisdiction over the trust. (EPTL 11-2.4[e][1]).

For more information about the Principal and Income Act, the Unitrust provisions and the Trustee's power to adjust, see Charles J. Groppe, "Uniform Principal and Income Act Will Work Fundamental Changes in Estate and Trust Administration," NYSBA Journal, Jan. 2002, Vol. 74, No. 1, at p. 8.; David J. Arcella, "New York's Principal and Income Act," NYSBA Trusts and Estates Law Section Newsletter, Winter 2001, Vol. 34, No. 4, at 35 (available online to NYSBA Trusts and Estates section members in the Trust and Estates section of the NYSBA web site at www.NYSBA.org).

(12) Review the general procedure involved in probating the will or seeking letters of administration.

(13) Provide the fiduciary with a general timetable for estate administration, payment of taxes, etc.

(14) Review the tentative estate budget with the fiduciary, including a preliminary estimate of cash needs for taxes, debts and administration expenses (including legal fees) and a preliminary estimate of the amounts payable to residuary beneficiaries or distributees. Be sure to advise the fiduciary that the figures are subject to change depending on a variety of circumstances (i.e., unexpected administration expenses or debts, or a drop in the market or some other event that decreases the value of the decedent's assets), and that the preliminary figures should not be relied upon as a determination of the ultimate distributions to beneficiaries.

(15) Advise fiduciary of the tax options available in estate administration (i.e., QTIP, selection of fiscal year, timing of distributions to beneficiaries, alternate valuation date election, etc.).

(16) Commissions - Advise fiduciary of preliminary estimate of commissions he or she is likely to receive. Unless the Will provides otherwise, consult SCPA 2307(1)(a) for individuals or SCPA 2307(1)(f) and 2312 for corporate fiduciaries. Determine if limitation on multiple fiduciary commissions applies. SCPA 2313. Generally, no commissions for: exempt property as defined in EPTL 5-3.1 (Matter of Rosenblum, 171 NYS2d 619 (1958)); specific legacies (SCPA 2307(2); jointly owned assets, insurance proceeds payable to a named beneficiary or totten trust accounts (Matter of Jakobson, 646 NYS2d 948 (1996); Matter of McEntee, 374 NYS2d 96 (1975)); and real estate that is not sold by the fiduciary (Matter of Taylor's Estate, 200 NYS 321, aff'd, 204 NYS 367, aff'd, 239 NY 582 (1923)). It is likely that commissions will not be permitted for transfer on death securities, which seem quite similar to totten trust accounts. (See EPTL 13-4)

Advance payment of commissions. If commissions will be substantial, it may be advisable to take some commissions in each year of the estate administration to reduce the income tax burden on the fiduciary. Caution fiduciary that a court order is required in order to take advance payment of commissions. SCPA 2310, 2311. For an ex parte proceeding for advance payment, the fiduciary bears the cost of the proceeding, including legal costs, whereas in a proceeding on notice to all interested parties, the cost of the proceeding may be borne by the estate or apportioned between the estate and the fiduciary.

Renunciation of Compensation. If the will provides for specified commissions to the executor, determine if executor wishes to take the specified compensation or renounce the compensation and take statutory commissions. A renunciation of compensation must be

completed within 4 months from the date he or she receives letters testamentary. SCPA 2307(5)(b). (Note that a testamentary trustee may not use the same method to obtain statutory commissions and is required to take the compensation specified in the Will. SCPA 2309[10]).

Note that a proposed bill (AB85107) would provide that the fiduciary must accept the compensation specified in the Will if he or she wants to serve. This bill passed the assembly and as of April 2008 was referred to the senate committee on judiciary for review.

Waiver of Commissions. In some cases, where the fiduciary is also a beneficiary, it may be advantageous to waive commissions in order to increase amounts passing under the will (i.e., increase the amount protected by the credit shelter trust or the amount that can pass as marital deduction property). Also consider that commissions constitute income to the fiduciary and are a tax deduction for the estate. Determine the net after-tax benefit to the fiduciary and the net after-tax cost to the estate or revocable trust of waiving commissions to determine whether a waiver is advantageous. If advantageous, the waiver should to take place within 6 months from the fiduciary's qualification (Rev Rul 66-167, 1966 CB 20), although a later waiver may still be effective (Breidert v. Commissioner, 50 TC 844 (1968)).

Attorney-fiduciary disclosure. SCPA 2307-A requires that if the fiduciary is an attorney, a statement must be signed by the testator acknowledging that he or she was aware that the attorney may collect legal fees as well as commissions in administering an estate. Recent amendments clarify that the disclosure must be made in a separate writing and cannot be contained within the boilerplate language of the Will, but the writing may be annexed to the end of the Will, and that the drafting attorney cannot appoint an employee or affiliated attorney in an attempt to circumvent the disclosure requirement.

If applicable, determine whether SCPA 2307-a disclosure was made and, if not, whether cause exists to apply to the court for a waiver of the disclosure requirement. SCPA 2307-a [9][b][ii]. (The attorney fiduciary should also be sure to comply with Uniform Surrogate's Court Rule 207.52, which requires the attorney fiduciary to file, within 12 months after issuance of letters or 24 months if a Federal estate tax return is to be filed, an affidavit setting forth commissions and legal fees payable to the attorney-fiduciary). See generally Matter of DeMontagut, 679 NYS2d 273 (Surr. Ct. Bronx Co. 1998); Matter of Newman, 177 Misc2d 72, 675 NYS2d 836 (Sur. Ct. Bronx Co. 1998); Matter of Waldman, 172 Misc2d 130, 658 NYS2d 565 (Sur. Ct. Bronx Co. 1997). Note that in some Court's, the consent of all beneficiaries may be accepted in lieu of the 2307-a disclosure. See Matter of Brokken, 13 Misc3d 244, 820 NYS2d 419 (Surr. Ct. N.Y. Co. 2006).

VII. PREPARING AN "ESTATE MEMORANDUM"

Although an estate memorandum is optional, it is extremely helpful to have all of the relevant information in one place when filling out forms. A typical memorandum might include:

1. Estate name and taxpayer ID number.

2. Date and place of decedent's death; Decedent's social security number and domicile.

3. Date of Will and Codicil and trust instruments, and summary of dispositive provisions.

4. Surrogate's Court file number.

5. Date preliminary, temporary and permanent letters testamentary and letters of trusteeship were issued.

6. Names, addresses and telephone numbers of fiduciaries, distributees, beneficiaries, their counsel, if any, and other estate professionals (accountants, investment advisors, valuation experts). For fiduciary and persons who will receive a distribution from the estate, obtain his or her social security number as well (for tax returns).

7. Identification and location of assets (banks, brokerage houses, insurance companies, transfer agents, etc.), telephone number and name of contact person at each institution.

8. Tentative estate budget (see checklist, infra, number 18) and list of major estate liabilities.

VIII. PREPARE AN ESTATE ADMINISTRATION CHECK LIST

Since there are so many forms to file, tasks to complete and deadlines to be aware of, a checklist is a good way to insure that no important items are overlooked. A sample checklist might have the items listed on the following page.

[*]ESTATE ADMINISTRATION CHECKLIST - ESTATE OF _____:

A. Important Dates and Deadlines:

1. _____ Deadline for making qualified disclaimers/Renunciation (9 months from death) on behalf of Decedent or by a beneficiary (i.e., to take advantage of a disclaimer trust in Decedent's Will).

2. _____ Due date for registration with Charities Bureau of New York State Attorney General, if applicable (6 months from death). See EPTL 8-1.4.

3. _____ Due date for filing Inventory of Assets with Court (6 months from issuance of letters). (Uniform Rule 207.20(c)).

4. _____ Deadline for waiver of executor commissions (6 months from death).

5. _____ Renunciation of executor's compensation provided in Will (in order to take statutory commissions) (four months from letters testamentary (SCPA 2307(5)(b)).

6. _____ Due date for decedent's final Federal income tax returns (15th of April of year following decedent's death, and of year of death if not yet filed for preceding year).
Note: Prior to due date, Executor may apply for an automatic 4 month extension (form 4868), and thereafter for good cause can apply for an additional 2 month extension (form 2688). Estimated income taxes must be paid at time of request for an extension.

7. _____ Due date for Federal gift tax returns (form 709) (earlier of (i) April 15 of the year following the Decedent's death, or (ii) the due date (with extensions, if applicable) for filing the Federal Estate Tax return)
Note: Deadline will be automatically extended if you apply for an extension of time to file income tax return, or Executor can request by letter an extension of time to file. Estimated gift tax must be paid at time of request for extension.

[*]

8. _____ Due date for Federal estate tax return (form 706) (9 months from death).
Note: Prior to due date, Executor may request an automatic 6 month extension of time to file the Federal estate tax return (form 4768). Estimated estate taxes must be paid at the time of the request for an extension.
NOTE: There is a revised Form 706 for Decedents who died in 2005. The form and instructions are available on the IRS website at www.IRS.Gov.

9. _____ Alternate valuation date for estate taxes (6 months from date of death).

10. _____ Due Date for decedent's final New York State income tax return (Form IT 200 or IT 20) (April 14th of the year following the Decedent's death).
Note: Prior to due date, Executor may request a 4 month extension of time to file (Form IT-370 for New York; estimated tax must be paid. If no NY income tax will be due, Executor can send a copy of Federal form 4868, if used).

11. _____ Due date for New York State estate tax return (Form ET-706 for estates of individuals dying on or after February 1, 2000 and before January 1, 2005 (due 9 months from date of death) (consult instructions to Form ET-90 for filing requirements for individuals dying before February 1, 2000).
Note: Executor may request an extension of time (form ET-133). Estimated tax must be paid, unless undue hardship is established, in which case installment payments may be arranged.

12. _____ Selection of Estate's tax year - in the first, timely filed Fiduciary income tax tax return (form 1041), the Executor may choose either a fiscal year (ending on the last day of any month, other than December) or calendar year (ending on December 31).

13. _____ Due date for simultaneous filing of NY State estate tax return in accordance with N.Y. Tax law Section 972(c), if Surrogate's Court local rule requires filing (automatic filing requirement repealed - NY County no longer requires filing of the tax return).

14. _____ Deadline for spouse to file notice of election against the will (6 months from issuance of letters but no later than 2 years from date of death, unless extension of time is sought).

15. _____ Statement under IRC 642(g) re amounts allowable under section 2053 or 2054 as a deduction in computing the taxable estate of a decedent (39 months from death [180 days before expiration of statute of limitation on estate tax]).

16. _____ Deadline for attorney/fiduciary's account to the Surrogate's Court (Suffolk County only) (12 months from letters, 24 months if 706 return required).

17. _____ Annual report to Attorney General re charitable residuary share (EPTL 8-1.4) (within 6 months of end of each fiscal year).

18. _____ Report to Surrogate's Court (2nd Dep't only) (Rule 1830.25(b)(1) (by end of 37th month following month of issuance of letters, or 25th month if estate is under $60,000)

19. _____ Deadline to commence action for wrongful death (2 years from date of decedent's death)

B. Administration Checklist

Completed:

1. _____ Obtain death certificates.

2. _____ Apply for Employer Identification Number (Form SS-4). This can be done before letters are applied for or issued. Nominated executor can sign application and secure identification number by phone or FAX.

3. _____ File IRS Form 56 (Notice Concerning Fiduciary Relationship) and a notice of qualification of executor (NY Tax Law Section 977[d]).

4. _____ Send death notification and request for benefits to Social Security (deadline 2 years from death) and Veterans Administrations.

5. _____ Arrange for insurance of any valuable assets, or continuation of existing insurance.

6. _____ Send death notification to any of decedent's agents, investment advisors, attorneys and others who may have discretionary power who need to know that their authority has been terminated.

7. _____ Obtain copies of income tax returns for three years prior to death to verify that they were filed. Determine who will file final income tax return. Determine if any gift tax returns will be due.

8. _____ Begin locating decedent's assets. Determine if there are any liabilities that require special attention. Contact institutions that hold assets and request date of death balances.

9. _____ Apply for release of safe deposit box (Form ET-92) to open box without a representative of the tax commission. (For decedents who died before February 1, 2000, otherwise form is not necessary).

10. _____ Determine whether decedent was entitled to any employment death benefits.

11. _____ Obtain copies of any separation agreements, pre or post nuptial agreements and divorce documents.

12. _____ Determine whether there is a need for Preliminary Letters (SCPA 1412) or Letters of Temporary Administration (SCPA 901).

13. _____ Begin preparation for probate or administration proceeding.

14. _____ Begin valuation of assets and arrange for appraisals, if necessary. If alternate valuation date is selected, determine if asserts need to be reappraised.

15. _____ Obtain U. S. Treasury Form 712 from each life insurance company.

16. _____ Open decedent's safe deposit box (if still required after repeal of NY estate tax, secure release of contents of safe deposit box from State Department of Taxation and Finance).

17. _____ Once letter are issued, open estate checking, savings or investment accounts. Consider leasing a safe deposit box if required for safeguarding of assets. Begin collecting assets and transferring them into estate accounts.

18. _____ Prepare inventory of assets (i.e., cash and cash equivalents, insurance proceeds, death benefits payable to the estate, tax refunds, medical insurance payments due to the decedent and assets available for sale such as real estate, cooperative apartment, stocks and bonds, business interests, etc) and estimate of estate's cash needs (i.e., funeral expenses, cash legacies, filing fees, accounting and legal fees, estimated commissions, payment of decedent's debts, costs of safeguarding and maintaining assets [including continuing costs for maintaining decedent's businesses and commercial real property pending wind-up or distribution], cost of selling assets, estimated gift, income and estate taxes, estimated guardian ad litem expense, if applicable, and any other anticipated expenses).

19. _____ Consider fiduciary tax elections (i.e., QTIP and other items on questions 2 through 5 of form 706).

20. _____ Consider whether estate has any GST tax issues that require further analysis and planning.

21. _____ Consider whether a disclaimer by the fiduciary of decedent's interest in assets is advisable; Determine whether disclaimers by

beneficiaries of decedent's estate are necessary to create a bypass trust under the Will.

22. _____ Consider spouse's right of election.

23. _____ Consider early satisfaction of general bequests (within seven months from date of issuance of letters to prevent interest). Prepare receipts & releases for bequests.

24. _____ Consider funding trusts, if applicable.

25. _____ Consider timing of distributions to beneficiaries and coordinating estate's and beneficiaries' income tax plans.

26. _____ Consider applying for fiduciary's commissions on account. (SCPA 2310, 2311).

27. _____ Determine whether to settle fiduciary's accounting formally or informally (judicial accounting required if interested parties are minors, or fiduciary will not be fully free from potential liability).

28. _____ Determine when to terminate the estate for income tax purposes.

29. _____ Prepare judicial or non-judicial fiduciary's accounting and receipts and releases.

FOR ESTATES COMMENCING AFTER 2010:

30. _____ Determine whether executor should allocate step-up in basis under IRC 1022;

31. _____ Determine whether executor must report to IRS the transfer of non-cash assets in excess of $1.3 Million (as adjusted for inflation) and transfer of appreciated property acquired from a decedent that was required to be reported on a gift tax return (failure to make the required report to the IRS can result in significant penalties and fines).

32. _____ Determine whether inquiry is required to determine if cause of action for legal malpractice exists against estate planner.