Your Probate Handbook

An Easy-to-Use and Easy-to-Understand Guidebook – 37 Short Chapters Filled With Valuable Information About Wills, Probate, and Administration Proceedings in New York

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About the Author

Your Probate Handbook was written by Michael S. Haber, Esq., an attorney in New York with 30 years experience.

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Legal Stuff and Disclaimers

The purpose of Your Probate Handbook is to educate the public about issues of probate law. Please do not rely on Your Probate Handbook for legal advice -- laws change every day and, beyond that, legal advice can only be given if there is an opportunity for attorney and client to confer with one another. Facts in one case are not necessarily the same as in another case. It is also important to recognize that any handbook (whether about probate matters or anything else) is, by definition, incomplete and cannot be deemed to include every possible consideration.

Your Probate Handbook can, however, be useful in helping you to understand the legal issues with which you are confronted, and thus allows you to do effective planning.

No attorney/client relationship is established by your reading this Handbook, or parts of it. If you do not agree with the statements on this page, your solution is simple: Do not read any portion of this Handbook.

With that out of the way, let's begin.

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Part 1: Reference

CHAPTER 1

Some Terminology

It is the purpose of this chapter to give you just enough terminology to allow you to understand words and phrases used in this book and used also in court notifications and in various publications dealing with estate matters. You may want to skip this chapter at the moment and come back to it to understand certain words and phrases.

Administration: The process of administering an intestate estate.

Administrator: A person appointed by the court to act on behalf of the estate of an intestate decedent.

Citation: A document issued by the Surrogate's Court that is used to establish jurisdiction. It is the equivalent of the better-known "summons" used in most other courts.

Codicil: An amendment to a will. It can

change a particular provision in a will or it can add a new provision. For reasons that will be clear later in this Guide, a codicil is never ever a good idea.

Decedent: A person who has died.

Devisee: A person who receives a bequest of real property under a will.

Distributee: A person who would share in the estate if there were no will.

Elective Share: The one-third share to which a spouse is entitled from his or her deceased spouse's estate. The elective share is the minimum that a spouse can collect from a deceased spouse's estate.

Estate Tax: A tax imposed by the federal government and by the state based on the value of one's estate. It is not an inheritance tax in that it is not paid by the person who inherits money, but, rather, by the estate itself; still, it will reduce the amount available to inheritors.

Executor: A person nominated in a will and approved by the court to act on behalf of

the estate, including by marshaling assets of the estate.

Intestacy: Intestacy means that the decedent died without a will. A person who dies without a will is said to be "intestate."

Joint Tenants With Right of Survivorship: Property that is held (usually by two persons) in such a manner that upon the death of one, the property vests by operation of law in the survivor. The term "Joint Tenants with Right of Survivorship" or the abbreviated form ("JTWROS") is typically used to denote such property.

Intestate: A person who dies without a will.

Legatee: A person who receives a bequest under a will.

Letters of Administration: Like letters testamentary, letters of administration show the authority of a person to act on behalf of an estate. But, unlike letters testamentary, which show a person's right to act as executor of a will, letters testamentary are granted to a

person who is known as the "administrator" of an intestate estate.

Letters Testamentary: A document issued by the Surrogate's Court that shows that the will has been proven to be valid and genuine, and that someone has been appointed to act as executor of that will. The executor, after the will has been admitted to probate, is provided with what is known as letters testamentary. Letters testamentary are not actually letters at all; it is a one-page document showing the authority to handle the estate.

Non-Probate Asset: An asset that is either held jointly with the decedent or that has a designated beneficiary.

Probate: The process of proving the genuineness and validity of a will. When probate is "granted" or a will is "admitted to probate," it is given effect.

Probate Asset: An asset that is owned solely in the name of the decedent or that is payable to the decedent's estate.

Surrogate: A judge of the Surrogate's Court, which handles probate of wills and the administration of intestate estates.

Surrogate's Court: The statewide court in New York that handles various probate, administration, and related issues.

Tenancy in Common: A form of holding property that provides fractional shares to each of two or more persons, in such a manner that each person has an undivided interest. Thus, if persons A and B each hold a 50% percent interest in property as tenants-in-common, then A owns half the property and B owns half, and each is free to sell, assign, or bequeath his or her interests separately. As distinguished from Joint Tenants with Right of Survivorship.

Testator: A person who made out a will.

CHAPTER 2

The "Reading of the Will"

Old black-and-white movies, especially those that date from around the 1940's, always have scenes of a reading of a will. Like so many other supposed "facts" about estate matters, the reading of the will is primarily a myth. I start this Handbook with that old myth so that you will understand from the outset that it would be a good idea to disregard just about everything you *think* you know about probate, because a lot of that knowledge may consist of mythology and false information.

In those old movies, family members, wearing their Sunday best, gather in a dimly-lit attorney's office and listen to the attorney as he reads aloud the will of the decedent. The only thing incorrect about those scenes is that they virtually never occur today and, actually,

only infrequently occurred in the past.

The truth is that will readings are not required in any state. And it is difficult to find more than a handful of examples in the past century of a formal will reading. It seems true that in ancient times, Julius Caesar's will was read aloud, but it appears that this was more of a political maneuver than anything else.

Those movie scenes of a somewhat public reading of a will are dramatic and often help to advance the plot. But there are good reasons why such readings do not actually occur. For one thing, they are potentially very embarrassing to those who may have been disinherited or those who receive far less than might have been expected.

In the movies, what made the formal will-readings particularly dramatic was that, quite often, those who most expected to receive sizable bequests typically received nothing, and those who expected nothing quite often received the bulk of the estate. Another reason that militates against a formal will-

reading is that, in real life, wills are typically filled with language that most laymen will find obtuse, confusing, and unclear.

I don't claim that will-readings NEVER occur. Even in New York, my research of reported probate-type cases has uncovered three times where will-readings have been done. The most recent one appears to have been in 1993 and another in 1991, and before that there were none referred to in any reported case since 1894.

Similarly, other states had similar results – one in Nebraska in 1979, another in California in 1958, and one in Connecticut in 1928. It appears that formal will-readings were, for the most part, the province of the very wealthy. There is some authority to suggest that the probable reason for will-readings is that some very wealthy people, when preparing their wills, envisioned an opportunity, even in death, to show off their wealth.

CHAPTER 3

The Surrogate's Court's Powers

In New York, the court in which probate and related proceedings take place is called the Surrogate's Court. It is a statewide court, and a courthouse can be found in every county. In Manhattan, that courthouse is separate from other courts, but in most other counties, the Surrogate's Court is housed in the same building as NYS Supreme Court.

In most counties, each Surrogate's Court has one judge who is known as the "Surrogate." Some counties, like New York County, traditionally have two Surrogates.

The powers of the Surrogate's Court are quite broad, and, for that matter, broader than they might appear.

The powers of any court are those that are said to be within its "jurisdiction." The Surrogate's Court is a court of very broad jurisdiction. Section 202 of the Surrogate's

Court Procedure Act is a one-sentence provision that starkly broadens the Court's jurisdiction. It says that those proceedings that are specifically listed in Article 2 of the Act "shall not be deemed exclusive" and that the court invoke its jurisdiction even where those powers "may be exercised in or incidental to a different proceeding."

This provision has been construed to mean, in part, that Surrogate's Court can entertain any matter found within the court's subject matter jurisdiction regardless of the procedural form in which the matter may be presented to the court. Thus, the Court's jurisdiction may be rather expansive when an estate matter is closely related to a kind of issue that might seem foreign to the ordinary matters that are brought in Surrogate's Court.

That 50-year-old provision may be seen as clarifying that the Court's powers are not limited to the specific proceedings that are more typically recognized as the type dealt with in the Surrogate's Court Procedure Act.

CHAPTER 4

History of the Surrogate's Court

This chapter deals with some pretty esoteric subject matter. You may find it interesting, but none of this will be on the test. What I mean is that if you are in a hurry to understand substantive matters about probate and administration of estates, you can skip this chapter and you won't be worse off.

The Judge of any county's Surrogate's Court is known as the "Surrogate." That terminology has been used since 1702. The Surrogate is elected and serves for a term of 14 years within New York City and 10 years outside New York City.

In the year 1653, matters that now are handled by the Surrogate's Court were handled by a court known as the Court of Burgomasters and Schepens. Fortunately, this awkward name did not last long, and by 1665, the Court of Orphan Masters took over

some of the tasks of the prior court.

Ultimately, both of those courts were consolidated within what was known as the Mayor's Court. Still later, probate matters were handled by the Prerogative Court. Later, that court was called the Provate Court, and by the time of the American Revolution, probate matters were handled largely by the Supreme Court (New York's trial-level court).

After the formal establishment of the State of New York, in 1776, and two years later, the Probate Court was established, which later changed into mostly an appeals court. The powers of the earlier Probate Court were transferred to Surrogates by 1787.

By the beginning of the 1800's, the powers of the Surrogates were enlarged. In 1823, the Probate Court was abolished, its jurisdiction transferred to the Court of Chancery.

Today's Surrogate's Court today hears various cases involving the affairs of decedents (persons who have died). The

jurisdiction of the Surrogate's Court includes the probate of wills, administration of intestate estates (where a person dies without a will), trust proceedings, and has concurrent jurisdiction over certain guardianships of the person and property of infants, and over adoption proceedings.

The Surrogate's Court often, but not always, can be found within the same building in which a county's Supreme Court is located. In New York City, this is true in every county except Manhattan, which has a beautiful separate building (replete with gargoyles and the kind of architecture that is no longer done) more than a century old. It is down the street from the Supreme Court.

Part 2: Considerations When Making Wills

CHAPTER 5

Do I Even Need a Will?

You've thought about making up a will. And you intend to do it. At some point. The problem with doing it now is that pick one):

*** It's a busy time for you.**

*** You have a lot going on.**

*** Business stuff.**

*** Family stuff.**

*** Holidays coming.**

*** Vacation approaching.**

*** Who wants to make up a will on a nice Spring day? Or in the summer? Or in the dead of winter? Or during autumn?**

Now, you don't need a lawyer to tell you that the only unalterable requirement about when to make a will is that it has to be during your lifetime. Younger people often don't want to bother with a will because they have plenty of time to do it. Senior citizens often don't want to do it because they sometimes get

superstitious about what will happen after they make a will. And middle-aged people occasionally don't want to do it since it's an unwelcome reminder of their own mortality.

This explains, of course, why so many people die intestate (a fancy term meaning "without a will").

The problem with dying intestate is that a state formula will dictate who gets what. On occasion, that state formula is just fine. [But even if that formula is just fine, an administrator of an intestate estate will often need to post a bond for the value of the estate, a step that can be waived if you have a will that dispenses with the bond, as most wills do].

Other times, the state formula is just completely different from what you would have designed.

Making a will usually requires two meetings with your lawyer. At the first meeting, the discussion will focus primarily on the value of your assets; what you expect to happen to that value over the short term and

over the long term; to whom you reasonably wish to leave your assets, and whether there is a friend or family member whom you'd prefer not get any lump sums, but, rather, get payments over time; and whether there is someone whom you trust to carry out the provisions of your will.

In most cases, you should budget about an hour for the conversation. You then make an appointment for about a week later. You'll sign your will at the second appointment. This meeting will probably be even quicker than the first. You will review the document and your lawyer will explain what certain legal terms mean and why they are included in your will. You ask any questions that you may have. If any changes have to be made to the will, they can usually be made within minutes.

After you have reviewed the document, you are now ready to sign your will. Your lawyer invites two or three persons into his office or a conference room, and introduces them to you. These persons will serve as

witnesses to your will, in accordance with New York requirements.

The will-signing ceremony usually lasts only a short time. At the conclusion of it, copies of the executed will are made, and you either leave with the will in your hands or you ask your lawyer to hold on to it for safekeeping. Either way, you now know what will happen to your assets if you were to die.

If you do take the original home with you, there are certain steps that you should take to safeguard it. And if you leave the original with your lawyer, there are also certain steps that you should take to make sure that loved ones are aware of the existence of the will. These steps are outlined in Chapter 18.

At any rate, don't let the cost of having a will done deter you. Unless you're very wealthy with a large number of complicated assets, or wish to set up a variety of trusts, the cost will be modest -- probably less than the last time you repaired your car, probably far

less than your monthly health insurance premium, and probably way less than dental surgery (but not nearly as painful).

You wouldn't put off attending to car repairs or health insurance premiums or necessary dental work, so why should you endlessly put off making a will?

Here's some truly good advice: Before you go on to the next page, if you do not already have a will that reflects your preferences as to the distribution of your assets, pick up the phone and make an appointment with an attorney to discuss your will. The call will only take a few minutes at most.

CHAPTER 6

Intestacy (Dying Without A Will)

A person who dies without a will is said to die "intestate." When a person has a will, his or her assets are divided and distributed in accordance with the person's own wishes.

But, when a person dies without a will, since we do not know what the person's wishes would be, there is a formula mandated by the State of New York as to what happens to the person's assets.

You may be under the impression that if it was well known that you did not wish to benefit a particular person who would share in your estate in the absence of a will, that that person will not inherit. That's just not true.

The state formula will apply in almost every circumstance: The only exception to that that I can think of is the simple rule that if a person murders another family member, the murderer does not inherit from the estate of

the person he or she murdered.

If one dies intestate, the process is not called probate. Probate is the process by which a person's will is found to be genuine and valid. Without a will, there is no probate process. Instead, the proceeding is not called probate; it is called "administration."

Procedurally, the paperwork that has to be filed with the court in an administration proceeding is similar (but not identical) to the papers filed in a probate proceeding. In probate, the person nominated in the will as executor is usually the one to invoke the probate process and the one who ultimately distributes the assets and makes decisions on behalf of the estate. In administration, a close family relative starts the court proceeding and later distributes assets.

Who gets what in an administration proceeding will depend on which relatives survived the decedent (the person who died), and whether there are any close relatives who died before the decedent.

If the decedent was married without children, the spouse gets everything. That is true in most cases even if the decedent and the spouse hated each other, and it is usually true even if they are in the middle of a divorce.

If the decedent was married and had at least one child, the first $50,000 plus one half of the remaining assets go to the spouse, and the balance is split among the children, whether there is just one child or whether there are eight children.

If the decedent was not married at the time of death, but had children, the children split the assets. The statute goes into considerably more detail, depending upon who survived the decedent.

Who serves as administrator depends upon the closeness of the surviving relatives. If there is a spouse, he or she could be expected to serve as administrator. If there is no spouse, but there are children, one of the adult children would be the likely administrator.

Contrary to the understanding of many people, the eldest child does not have any special entitlement to serve as administrator. Nor does the child who "everybody knows" was especially close to the decedent. And adopted children are also equal to their brothers and sisters.

There are situations, too, where a sibling, cousin, niece, or grandchild serves as the administrator. It all depends on which family members survive the decedent.

In administration proceedings, unlike most probate proceedings, a bond may be required. Most wills dispense with the requirement of a bond being posted by the executor. But in intestacy, there is, of course, no such provision.

The purpose of a bond, as you may imagine, is to prevent the fiduciary from running away with the proceeds of the estate. Bonds have become increasingly difficult to obtain in the past couple of decades, a result of the insurance-company underwriters of

these bonds having been burned. The problem with obtaining a bond is that many persons are simply "unbondable" (to use bond company lingo), because of, basically, their credit ratings.

Not everything passes through a decedent's estate. Real property that is held as joint tenants with right of survivorship, joint bank accounts, bank accounts that are "in trust for" a named individual, and accounts for which there is a named beneficiary will pass outside of the estate. That will be subject, however, to obligations and debts owed by the decedent.

CHAPTER 7

Why Prince Didn't Have A Will

Every day, people pass away without wills, causing problems for their family members. Talent, fame, and wealth do not inoculate a person from the effects of intestacy, as can be seen in the situation with Prince, who, according to news reports, died without a will.

Intestacy is intestacy. Whether a person has a modest estate or, as in the case of Prince, a very sizeable estate, intestacy creates problems for surviving family members and, even more important, the estate may be distributed in ways that the person would never have intended.

Prince didn't realize, of course, that he would die at age 57. By all accounts, he was intelligent and was meticulously focused on on business issues. Thus, it is very doubtful that he never thought about a will. Rather, he

likely figured that he had plenty of time to make a will.

In Prince's case, as I understand it, he was not married and never had any children. Thus his siblings (and half-siblings) stand to inherit what may be hundreds of millions of dollars. A ruling to that effect was made very recently.

Prince may have loved those half-siblings. Or he may not have loved them. I don't know. But I doubt he intended to enrich them to the extent that now appears to be the case.

Remember that wills are quick and easy. If Prince wanted a will, I imagine it would have been quite expensive. That's because he had very substantial assets and, also, because his estate will not be closed out quickly. But for most of us, wills are cheap, quick, and easy. If you don't have a will, call an attorney today. You can probably have your will fully prepared by next week.

CHAPTER 8

Homemade Wills

An attorney advising you to use an attorney to draft a will may fall under the category of "Don't ask a barber if you need a haircut." But there are many good reasons why an attorney should draft a will and supervise execution of the will. And there are no good reasons to prepare a homemade will.

First, let's define what I mean by homemade wills. A homemade will is any will that was neither prepared by an attorney nor one that was signed without an attorney supervising the process.

If an attorney drafts a Will for a client and then supervises the signing of the Will, there is a legal presumption that the Will was properly executed. This presumption is worth its weight in gold, because it can stave off unwarranted but nonetheless expensive probate challenges later on.

If you think that a Will is simply a matter of filling out a form, you're not completely wrong. But you're not completely right, either. Certain provisions of a Will can sometimes be viewed as mere "boilerplate" (generic terminology that is typically present in one version of another of just about every will). But often there are specific reasons for the particular words that are used in Wills.

If you draft a document that you do not understand, it should not be surprising if there are errors that you did not catch. And it bears noting that the fact that you can copy someone else's words does not make you an attorney and does not transform the words you copy into something that is meaningful and effective in the particular circumstances in which you wish to use them.

Most wills are inexpensive. I say "most" because not *all* Wills are inexpensive. A will may indeed be expensive if a person has several million dollars, thus requiring, ultimately, a federal estate tax return. If one

has a lot of money or an unusually complicated testamentary scheme, one can expect the costs to increase.

But that does not detract from the general rule that wills are most often quite inexpensive.

As noted earlier, when a will is drafted by an attorney who also supervises the signing of the will, the law presumes that everything was done correctly. That will, obviously, help to make the probate process smoother and easier and faster and less expensive.

There are no acceptable alternatives to having an attorney draft your will and then supervise the execution of the will. One can, of course, try drafting a will oneself. But, as the saying goes, "An attorney who represents himself has a fool for a client."

It is that much more foolish for a non-attorney to represent himself or herself. There are plenty of companies that will inexpensively prepare a will for you. Those companies may have attorneys on their staff,

but that does not mean that the will is much better than one that you have prepared yourself.

Such wills eliminate the possibility of supervision of the will by an attorney. That is the first strike against it. But there are other good reasons not to use such a company. It entrusts the disposition of all of your assets to a business that may not be qualified to draft a Will.

Still more important, a will should be drafted only by an attorney who has had the opportunity to talk with you about your assets, your family members and other loved ones, and your plan for distribution of your assets.

CHAPTER 9

How Many Executors To Select

When making a will, people often pick their children to serve together as co-executors. Remember: With regard to a will's selection of an executor, less is more. Multiple executors is almost never a good idea.

When one selects his or her children to serve as co-executors, it is usually motivated by the parent's desire to let his or her children know that they are equally loved and trusted, so that nobody's feelings will be hurt. This can result in two, three, or even more co-executors.

It's customary to believe that more is better, that two persons can make decisions more quickly and efficiently than one. But it's always important to remember what Mark Twain said: "A camel is a horse designed by a

committee."

It is almost always better to have just one executor. Executors must act together. That means that every document that must be signed will require two signatures. And it means that the estate attorney must make two calls instead of one, send two letters instead of one, procure two signatures instead of one. That shouldn't be a problem if, say, both co-executors reside near one another and have a good relationship with one another and always agree with one another. In the real world, however, siblings often reside hundreds or thousands of miles away from one another, and don't always see everything eye-to-eye.

And it just doesn't make sense to make more work for the estate's attorney, because more work translates into a higher fee.

Beyond all that, whenever there are two (or more) co-executors, there is an inefficiency brought to the process. And there is room for disagreement. This can slow

things down and add many additional steps. Since most attorneys' fees are based on time expended, having more than one executor will usually increase the work performed by the attorney and, thus, cost the estate more money.

In addition, two co-executors who must act together can drive things to a halt when there is disagreement about how to proceed, or about which assets to sell and for how much.

We now must deal with the real-world problem of choosing one executor from among two or more adult children, it's helpful to have language in the will that indicates why a particular child is chosen and why the other isn't. The reasons can be varied: One child resides in New York while the other lives far away; one child is an accountant, while the other owns a retail store; one child is familiar with the assets, while the other isn't; one child is retired and therefore has more free time, while the other works full time. There are

various ways to avoid hurt feelings.

Another way is to insert precatory language (a non-binding recommendation) that the chosen executor consult with the other child or children.

Always keep in mind that the goal of the estate is to get everything done as quickly, efficiently, and thoroughly as possible. A parent can show one's love for his or her children in a million different ways; the choice of an executor should not be about love, but, rather, about efficiency. Make a decision; explain that decision in the will; insert language that shows that all the children are equally loved and valued; and then don't worry about it.

Beyond that, there is one very good approach to avoid hurt feelings among the testator's children: Pick someone else. That person can be a friend, a brother or sister of the decedent, or (yes) even your lawyer.

CHAPTER 10

Verbal Promises Are Not A Will

Quite often, a person makes a verbal promise to another person that after the person's death, the other will be given a particular asset. That promise is only worth the paper that it is printed on. And, let's be clear, it is not written on paper.

A friend of mine said to me a very long time ago, "I've realized the meaninglessness of words without action." That goes doubly true with wills. A verbal promise, or even a verbal instruction, does not magically transform into a will.

There are only a few ways to transfer assets after one's lifetime, and those few ways are dependent upon steps taken during the person's lifetime -- creation of a will or trust, creation of a joint tenancy with right of survivorship, and making someone a designated beneficiary.

Verbal promises are mere words and are essentially without legal effect.

The fact that "Everyone Knows" about the testator's verbal promise yields the same result: Nothing.

If a person had a will, then the will controls. If the person did not have a will, the state's laws of intestacy control.

But verbal promises, even if confirmed by a dozen members of the clergy with their hands on the Bible, still mean nothing.

Isn't that unfair? Maybe. Fairness is not really the point here. The point is reliability. It is not my job to pass judgment on what is fair and what is unfair; rather, my job is to help you to make decisions that will help you to avoid problems.

Keep in mind that it is easy enough and inexpensive enough to make out a will. The process of passing assets from one person to another or from one generation to the next should not be filled with chaos, uncertainty, and the spotty and sometimes self-serving

recollection of family members.

What if there's absolute proof of the person's intention? Stop it already. I've already told you that the only proof that will count is a will or other lawful designation. A will is defined by state law as a written document witnessed by at least two persons. That rule applies except in very rare instances, such as when one is a soldier at war.

Making certain that one's intentions are honored can be a delicate issue. When a family member makes a promise as to what will happen to a house or a car or jewelry or artwork or a coin collection or antique furniture or anything else, remind that person that the only ways to make sure that that intention is honored is for him or her to either (a) make a will that specifies the bequest, or (b) retitle the asset, or (c) make the gift now.

You may be uncomfortable saying this to a loved one, and that is understandable. But, don't count on getting the asset if one of the above steps is not taken.

CHAPTER 11

Wills Can Make Recommendations

The commonplace belief is that a will dictates exactly what must be done with a deceased person's assets. But it can be more complicated than that. Because a will can include mere recommendations.

Recommendations are matters that the executor is not required to carry out. Sometimes, it can be very difficult to distinguish between a command and a suggestion.

Unless you practice law for a living, you are unlikely to have ever come across the word "precatory." It refers to words that express a desire, without imposing an affirmative duty. Thus, precatory language in a will is language that comprises a mere recommendation to the executor.

Here is an example of precatory language that is pulled from an old case here

in New York: "It is my wish and desire that my said wife shall pay the sum of three hundred dollars a year to my sister-in-law Miss Nellie Post."

Another example would be: "It is my hope that my executor will make sure that my cousin Bob is allowed to reside in my home for at least 10 years after my death."

It's obviously best to have an attorney review the will (and handle the probate), but if you want to distinguish between the executor's duties and mere recommendations, look for such words as hope, wish, desire, expect, anticipate, recommend, suggest, propose, advise, request, and urge, or forms of those words. This is not a complete list, and context will be crucial.

The governing principle in interpreting a will is determining the intent of the person who made the will (the "testator"). New York's top court, the Court of Appeals, emphasizes that in determining the testator's intent, words "are to be given their ordinary

and natural meaning."

As was stated by a New York court more than half a century ago, a will that sought to "request" that the executor should distribute estate assets in accordance with instructions given to him during the testator's lifetime "has no words of command, obligation or condition." It was thus determined to be "purely precatory."

If you are appointed executor of a will that says what the testator would "like" the executor to do, or that indicates a preference or a suggestion, rather than a command, it is especially important that you have an attorney interpret the will, so that you will clear as to what you *must* do, as opposed to what the testator things that you *ought* to do.

CHAPTER 12

Power of Attorney

A power of attorney is a document by which a person designates someone else to act on his or her behalf. It is a powerful document and must be treated as such. The person who signs the power of attorney appoints another person as his or her agent.

A power of attorney can be fashioned in such a way as to give certain powers but not others. Still, the most common form of power of attorney is one that gives the agent appointed therein a tremendous amount of power. Before signing a power of attorney, make sure that it is not any broader than you want it to be.

Sometimes, you might wish to appoint two or even three agents. If you do so, you can authorize the multiple agents to act separately or together. It is almost never a good idea, in my view, to authorize them to act separately.

A "durable" power of attorney is a power of attorney that remains effective even if the person who signed it becomes disabled or incompetent.

A power of attorney does not authorize medical or health care decisions. There are other documents that can be used for those purposes, including a health care proxy.

A power of attorney ends at the time time specified in the power of attorney, or when it is revoked, or on the death of the person who assigned the powers.

You may delegate only very limited powers or you can delegate a wide array of powers, ranging from real estate transactions to banking matters, litigation, and even gifts, and many other kinds of transactions.

You are free to revoke a power of attorney at any time (provided you are competent to do so).

But be aware that if your agent gives a copy of the power of attorney to a third party, revoking the power of attorney will not be

effective as to that person until he or she receives actual notice that the power of attorney has been revoked.

There are many advantages of a power of attorney. It is a cheap, easy, and effective method to delegate powers.

But there are disadvantages too. Chief among these disadvantages is that if you delegate powers, you will not have say as to precisely how the power of attorney is used. Make sure that you have absolute trust in the person you are appointing.

One last point: If you wish to delegate powers over bank accounts, check with your bank. Most banks, strangely, will not recognize a general power of attorney and, instead, will insist the document be the bank's own form. You may find it odd that a bank gets to decide legal issues, but, hey, they have the money. It's much easier to comply with the bank's requirements than to argue against it.

CHAPTER 13

Death Kills A Power of Attorney

Most chapters in this book are short. This one is especially so. Not because the subject matter is unimportant, but because the rule I will tell you about has *no exceptions*.

It is a common misconception that a power of attorney survives the principal's death. Here's the very simple rule: A power of attorney dies with the decedent.

If someone gave you a power of attorney to act on her behalf, the power of attorney can be used only during her lifetime. That is true of any type of power of attorney, even a "durable" power of attorney. "Durable" refers to disability, not to death.

There are NO exceptions to this rule. A power of attorney is NOT operative after the principal's death, even if the principal states otherwise. A will is effective *after* death; a power of attorney is effective *before* death.

CHAPTER 14

A Way To Avoid Probate Contests

Including a short paragraph in a will, known as an "*in terrorem* clause," can often be a highly effective way to make sure the terms of your will are honored and that the estate will not be challenged.

Not surprisingly, the root of the term *"in terrorem*" is the word "terror." It is a clause, sometimes used in wills, to not-so-gently discourage a person from challenging the will. The provision says that if any person named in the will challenges the will that that person will forfeit any bequest in the will.

Here's an example of an *in terrorem* clause. Let's say that Mary has three children. She decides to make those three children the beneficiaries of her will, but she also knows that each of her children (whose names are, rather creatively, A, B, and C) is in a very different financial position from one another,

and, for that reason, she gives the least to C, who has a steady income and a nice lifestyle. Thus, Mary's $1 million estate is divided in such a manner that A gets $500,000, B gets $300,000, and C gets $200,000. Mary expects that C may be a bit troubled by getting the least. So she puts a clause in her will that says, in effect, that anyone who challenges the will forfeits the bequest. That means that C has to feel very lucky if he wants to challenge the will, because she would be gambling that $200,000 bequest.

If C is successful in her challenge, she might get $333,000 ($133,000 more than she would have gotten under the terms of the will), but if she is unsuccessful, she gets zero. After C performs a quick risk vs. benefit analysis, she recogtnizes that her downside is a lot lower than her upside is high, and she thus becomes much less likely to challenge the will.

If C nonetheless challenges the will and the will is declared invalid due to, say, Mary's

lack of capacity to make a will, then the assets flow in intestacy. Forfeiture of a bequest under the will is no longer an issue because the will itself was knocked out.

Courts, not surprisingly, reserve some discretion as to whether to enforce an *in terrorem* clause. It would nonetheless be unwise and presumptuous to suppose that the court will *not* enforce the clause. This is especially so in light of the fact that the very reason for the clause is to prevent challenges to an estate.

Like many other decisions in life, whether to challenge a will that has an *in terrorem* clause is a balancing act in which one must weigh both the potential risk and the potential benefit. In the example above, C's upside is an additional $133,000 and her downside is the loss of $200,000. But imagine an estate of the same value in which C was to receive only $10,000. In such an example, the *in terrorem* clause might not be worthy of its

name, because it wouldn't scare C away from challenging the estate; that's because C's potential upside easily outweighs the risk.

An *in terrorem* clause is almost never a bad idea, and there are many circumstances in which it is a very good idea. Sometimes an in terrorem clause can be a very effective way to substantially disinherit a family member while sharply reducing the chances of a probate contest.

In the example above, let's imagine that C has argued incessantly with Mary and has been a difficult and unsupportive child. Mary might, because of that, wish to disinherit C completely, but she might also understand that doing so would almost guarantee a probate contest. Thus, she chooses to leave C $50,000. By including an interrorem clause, she reduces the chances of a probate contest that might cost the estate far more than the $50,000 she is leaving to C.

CHAPTER 15

Dementia and Capacity to Sign a Will

It's commonly believed that a person who is diagnosed as suffering from dementia cannot make out a will. That is not always true. This chapter explains just how much mental capacity is needed to sign a will.

To sign a will, a person must have "testamentary capacity." That term alone will not help you to understand just how much capacity is needed, but it does mean that the person is mentally capable of making out a will. If one has testamentary capacity, that means that he or she can make out a will. If one lacks testamentary capacity, that means the person is not capable of making out a will. Whether a person has testamentary capacity is a fact-intensive investigation, and rarely depends on a diagnosis alone.

In order to sign a will, a person must have sufficient mental capacity to do so.

People are usually surprised at how minimum that capacity level must be. I often say that a person who lacks capacity to subscribe to a magazine may have sufficient capacity to make out a will.

Not a whole lot of capacity is needed. The testator (the person who signs the will must know the "nature and object of his bounty." In other words, the testator must know the approximate value of his assets and must desire to leave those assets to persons whom he or she would naturally be thought to want to benefit. Thus, if one wants to leave one's assets to an uncle who died in 1964, that would not qualify as knowing the "natural objects of his bounty." If, on the other hand, he wants to benefit his wife and children, that would qualify.

Knowing the natural objects of one's bounty is not, by itself, enough capacity. But it bears noting that most wills that are challenged are challenged precisely because family members whom one would expect to be

included in the will were excluded. Obviously, if one wants to leave all of one's assets to the corner pretzel vendor (in recognition of the especially salty pretzels that the vendor has sold over the course of many years), rather than one's children, that will encourage family members to challenge the will.

If a person suffers from dementia, he or she may possibly still be able to make out a will. Dementia, like many maladies, is not a one-size-fits-all diagnosis.

For one thing, it is a progressive disease. That means that it gets worse over time.

Many persons have "mild" dementia for a period of time before things start to decline more markedly.

For another thing, many persons who have Alzheimer's Disease, or dementia, or organic brain disease (or whatever you want to call it) have good days and bad days; and sometimes, they are more coherent during the daytime but more confused in the evening.

Just because a person suffers from dementia may not necessarily mean that he or she does not have the capacity to make a will.

If a person fades in and fades out, it may be more difficult to determine that he or she had testamentary capacity on the particular day and at the particular time that the will was executed.

Capacity is, essentially, a legal determination, but is informed by medical factors.

Here are the kinds of questions that will help determine one's capacity: Does the person remember key dates in his or her life, such as birthdays, wedding anniversaries, college graduation?; Does the person know his or her home address and prior home address? Does the person know the name of the President of the United States? Does he or she know the approximate date? The correct season? The proper time of day? The names of his close family members and his friends? Does he or she remember the names of old

employers and his or her job duties? Clearly, one's memory does not have to be perfect or unimpeachable, but it's a safe bet that inability to answer all of these questions will suggest that there is a real impediment to the person's cogency and lucidity.

Certainly, no single answer to these questions will prove the presence of capacity, but if the person can answer all of these questions correctly, there is a 99% chance that he or she has testamentary capacity.

Medical records may also be very important. Bear in mind, however, that the medical records must be close in time to the date on which a will was executed.

Medical records, particularly hospital records, will show whether the person is "Alert and Oriented" (often abbreviated in medical charts as "A&O") to time, place, and person. If one's chart says "A&O X3," that means the person is oriented to time, place, and person, and you can be confident that the person is sufficiently lucid to make out a will.

CHAPTER 16

The Will Signing Process

New York law requires that a will be witnessed by two persons. Quite often, lawyers will have three persons act as witnesses. None of the witnesses should be a person who has an interest in the estate.

The execution of a will is a very simple ceremony. You can expect to first meet with your lawyer and review your plan for what you wish to happen to your assets after death.

One of the issues to be discussed at that first meeting is whom you wish to serve as executor. It should be a person whom you trust. You can (but of course need not) ask your attorney to serve as executor. While two (or even more) persons can serve as executor, in the absence of very compelling reasons, I do not recommend multiple executors.

A second meeting is scheduled for about a week later, at which you review the proposed

will. If changes are needed, they often can be made immediately. The lawyer will invite into the office two or three persons who are going to witness the signing.

The lawyer will introduce you to the witnesses. Usually, there will some small talk while the attorney looks over the final version of the will. Actually, the purpose of the small talk is to embed in the witnesses' memories their interaction with the testator (the person who signs the will) and to allow them to form an impression as to whether the testator is competent to make a will.

The lawyer will then ask you if this is your will. You will look it over briefly and say that it is. The lawyer will reintroduce you to the witnesses and ask if you have requested that these persons serve as witnesses to your execution. The attestation clause is often read aloud.

The testator, and then the witnesses, sign the will.

And the process is complete.

Part 3: After The Will Is Signed

CHAPTER 17

After the Will Is Signed

Now that you have a will, keep in mind that a will that is lost or forgotten or that simply can't be found is no better than not having a will. In fact, it's even worse, because you are lulled into a false sense of security in which you believe that the will will be given effect, but it will not be.

Thus, your first concern should be choosing a safe place to keep your will.

The will, after having been signed, is then photocopied in its entirety.

A will should be kept in a safe place. Some people prefer for their lawyers to have their original will, as the lawyer will often have a fireproof safe and can be entrusted to securely maintain the will.

In my office, I have a five-foot-high fireproof safe that dates back to the late 1800's or early 1900's. It weighs hundreds of

pounds, and is about as safe a place to keep anything. Actually, the safe was purchased when I moved into my current office building 25 years ago. A retiring lawyer, in his late 80's, was moving out and he offered to sell the safe to me. After I paid him the price he asked, I asked him how old the safe was. "I don't know," he honestly replied. "When I moved into the building in 1929, the lawyer who was moving out told me that he was going to throw it out." So, what was junk in 1929 has been used now for nearly a century thereafter.

Anyway, if the lawyer keeps the original will, make sure that you take a signed photocopy home. Then, you should then attach a note to the photocopy indicating the location of the original will. Usually, the will will have a back cover that lists the attorney's name, address, and phone number. If that is the case, make sure to attach a sheet that reads, "*Original retained by attorney*." You should make sure that the copy of the will (or, better yet, two copies of the will) should be

kept in places where they will be found.

There is, of course, no requirement that the lawyer keep the original will, and where precisely to keep the document is the decision of the testator.

One place that is usually not a good place to keep a will is a safety deposit box because after the testator's death, there may be some complications with getting prompt access to the box.

Remember that while the will should be kept in a safe place, it should also be in a place where it can be found.

After the will is executed and kept in a secure place, the testator cannot casually make changes to it. Do not attempt to make any handwritten changes or to make typographical changes. These will not be effective and may invalidate the will.

If changes are needed, they can be done in either of two ways. Either a codicil (an amendment or supplement to the will), which keeps in place the original will (except as to

the specific areas addressed by the amendment) is drafted or an entirely new will is executed. As I point out in Chapter 20, a codicil is usually not a very good idea.

Anyway, the same formalities apply to a codicil as to execution of a will, including the need to have at least two witnesses.

Another bad idea is a homemade will, as noted in more detail in Chapter 8 of this book. Some people try to save money by purchasing will-making kits. I do not recommend these. It is important, in my view, not only that an attorney draft the will, but, of equal if not more importance, that an attorney preside over the actual execution of the will.

Wills are almost always inexpensive (unless the testator is either very wealthy or has a very complicated plan for his or her assets).

CHAPTER 18

Where to Keep Your Will

There's always a lot of discussion about whether to make a will, and what to include in the will. But not enough attention is devoted to where to actually keep that will. It is thoroughly obvious that a will is effective only if it is kept in a place where it can be readily found.

If there was a will, but it can't be found, there is a presumption that it was revoked. Revoking a will is no more complicated than throwing it out. It is because of the presumption of revocation that there are various roadblocks to probating a mere photocopy of a will.

One can always ask the attorney who drafted the will to hold on to it for safekeeping. If you do that, make sure that the attorney has a fireproof safe in which he

or she stores wills. If you do leave the original with an attorney, be sure to take a copy home and to make sure there is a notation attached to the copy indicating that the original will is in the hands of the attorney.

Whether to leave the original will with the attorney/draftsman is a personal choice. There's no right or wrong.

If you prefer not to leave the original will with your attorney, it should be kept in a place that others will not have access to, preferably in a place where it can be protected by a lock.

If you are in possession of your original will, it's best to keep it with your other important papers.

But don't keep it in that drawer in the kitchen where sundry papers and mystery keys are deposited. And don't keep it in the attic.

If you choose to keep it in place that's a bit off the beaten track, be sure to put a note where your other important papers are kept

as to the location of the will.

There are plenty of bad places to keep a will. One very bad place to keep a will is a safe deposit box, because it may take a while for the executor to be able to gain access to the safe deposit box.

Before the executor is formally appointed, if he or she wants access to search a safe deposit box, an application must be made to the court in which the probate proceeding is pending.

Another bad place to keep a will is anywhere that is hidden.

In summary, you want your will to be findable, and you want your will to be secure.

Once your recognize the importance of the will, you will also recognize the importance of finding a safe (but not obscure) place for it.

CHAPTER 19

Filing A Will While Still Alive

It is no secret that quite often a will that is properly drafted and signed simply cannot be found. There is, however, a quick, cheap (free), and easy way to prevent that from happening.

You can file your will with the Court. Yes, you can file your original will with the Surrogate's Court in the county in which you reside while you are still alive. It is absolutely the safest place in the world to keep an original will. There has never been a report that I've heard of in New York State of a Surrogate's Court losing a will that was filed by a living testator.

If you choose to do that, you should leave among your personal effects a copy of the receipt showing that the will was filed with the Court. It will never be overlooked by the court, but if family members don't know that

the will has been filed with the court, they may spend many hours searching for a document that they won't find.

Ironically, filing a will with the safest place to do so is usually the last place that anyone will think of. So, make sure to provide evidence that you have done so.

You should also be sure to alert a family member or your attorney that you are filing the will with the court, and you should also place a note among your personal papers confirming that you filed the will with the court and indicating the date of the will and the date of the filing.

When somebody goes to file any will with the court, or to start an administration proceeding, the court will check to see if a will has ever been filed.

Filing a will by a living testator actually is rarely done. That doesn't, however, make it a bad idea. Many people do lose or misplace wills, often without ever knowing. And it is particularly useful to file a will with the court

in the event that you believe that family members may bear ill will toward one another to the extent that one might possibly secrete the will.

During the lifetime of the testator (the person who made the will), the will remains confidential. Others will not be able to read it.

CHAPTER 20

Codicils: Amendments to a Will

You've drafted a will. And some time has passed. And now there are either some new circumstances (a beneficiary of the estate may have died, for instance) or you have simply changed your mind about one provision of your will. You want to now change the will.

There are only two ways to change a will: Write a new will or make a codicil. It is a common misconception that one can change one's will by simply writing a note that you attach to a will. Such a note will be worthless at best; at worst, it may invalidate the will altogether.

A codicil is an amendment to a will. It does not replace the will, but, essentially, supplements the will. Usually, it will deal with only one or two bequests in the will. Sometimes it will deal with who is to serve as

executor. It otherwise leaves the will otherwise intact.

A codicil is valid only if it is signed with the same formalities as the will itself. That means, in New York, that it must be signed at the end by the testator and witnessed by at least two disinterested persons. If it isn't properly executed, it's not a valid codicil; and if it's not a valid codicil, it is meaningless.

My real point, however, is not to tell you how to make a proper codicil, but, rather, to advice you to avoid codicils altogether. A codicil is almost never a good idea.

For one thing, if it is ever separated from the will, chances are that it will be forgotten and the will will get probated without the codicil.

Any time there is a codicil, it requires keeping track of two documents, rather than just one. And keeping track of two documents creates a much greater chance that something will go wrong. The will can be probated without the codicil; the codicil possibly may

not be probatable without the will. Unless one has an extremely complicated will (and very substantial assets to go along with that complicated will), a codicil should be considered a bad idea.

CHAPTER 21

How To Revoke A Will

Just as there are specific requirements for how to execute a Will, there also are highly specific requirements for how to revoke a Will.

Everyone is entitled to change their minds. And so, sometimes one has second thoughts about a Will that one has signed. Sometimes that is because of a change in one's relationship with a friend or family member, or because a beneficiary of the will has died, or because one's financial circumstances have changed significantly and the Will no longer suits those changed circumstances.

There are specific requirements for what constitutes a Will, so it should not be surprising that there are also very specific requirements for what will amount to properly revoking a Will.

There are only a few methods to revoke

a will.

- **<u>Method #1</u>: A new will.**

Virtually every will states, usually at the very start of the document, that any prior Wills are revoked by the subsequent Will. This is the best method of revoking a Will.

- **<u>Method #2</u>: A formal writing that**

expressly revokes a previous will. The writing must clearly show the testator's intention to revoke or alter the Will. It must be signed with the same formalities for executing a Will. While it would be simple enough to do this, almost nobody does. There is a good reason for that: If the document revoking the will is lost or mislaid, or simply not found by the decedent's family or friends after the decedent dies, the document will be irrelevant. If the will that was revoked is found, but the revocation document is not found, you can easily guess what will happen: The revoked will gets probated, contrary to the preferences of the testator.

- **<u>Method #3</u>: Destoying the Will.**

There is no particular way that the Will must be destroyed. The statute specifically mentions "burning, tearing, cutting, cancellation, obliteration, or other mutilation or destruction." That pretty much includes just about anything one can do to the Will, including ripping it up and putting it in the trash. Not surprisingly, New York law is also very specific on who must perform that act of destruction. It is not enough that the Will has been destroyed -- it must be done by either the testator or by someone acting on the testator's behalf and in the testator's presence.

If it is done by someone other than the testator, there must be at least two additional witnesses to the act. As a practical matter, having the Will destroyed by someone other than the testator is a terrible idea, because there is simply too much that can go wrong.

When a Will is revoked, it also revokes all codicils (amendments to that Will), even if the codicil itself is not destroyed.

If a new Will has been executed, the new

Will takes the place of the revoked Will. If the old Will was, however, destroyed and a new Will was not executed, that leaves the testator without a Will. This means that if the testator dies after revoking the Will, the laws of intestacy will apply. In other words, one's assets are divided in accordance with the formula prescribed by the State of New York.

Part 4: Probate

CHAPTER 22

The Basics of Probate

The term "probate" comes from a Latin word meaning "to prove." In other words, probate is the process of proving that a person's last will and testament is both genuine and valid.

The probate process takes the form of a court proceeding. How long probate takes, and how complicated it is, depends upon a variety of factors. If no complex issues are involved and nobody challenges anything, probate can be very fast - finishing in a month or so.

The length from initial filing to probate being granted will also depend in large part on how backed up the particular county's Surrogate's Court is. In some counties, it can take many months for probate to be granted, while other counties proceed expeditiously.

At the start of the probate process, one

submits the will, along with a variety of other documents, including the "probate petition."

These documents identify the deceased person's property and the value of that property. If real estate is involved, or if there is an ongoing business, it will be necessary to have an appraisal.

Probate is usually started by the person (or persons) named as executor of the estate. From a pragmatic point of view, this means it tends to be started by the attorney hired by the executor to represent the estate.

The estate will ultimately be responsible for the costs (including attorney fees) of the probate process. Even if the executor pays an attorney to start the process, the executor may ultimately repay himself or herself from the assets of the estate.

If there is no will, there will not be a probate proceeding. Since probate refers to proving the genuineness and validity of the will, if there is no will, then the person is said to have died "intestate." In those instances,

the distribution of the person's assets will be done in accordance with a formula embodied in state law.

Where a person dies intestate, the process is not probate, but, rather "estate administration." That process is usually initiated by a close family member.

If someone challenges the probate of the will (a procedure known as a "contested" proceeding, it is the job of the executor (and his or her attorney) to defend the will during court proceedings. [Chapter 33 in this book deals with contested proceedings.]

After the will has been probated, the executor is responsible for carrying out the wishes of the deceased person. This includes paying those who are named in the will, liquidating property, and paying debts and taxes.

If there is only a small estate, New York has a simplified process for small estates. It is much less time-intensive and considerably less expensive than probating a will where the

assets are significant. A small estate can usually be handled without an attorney. The problem, though, is that the estate must be very small – much smaller than small estate proceedings in most other states.

Keep in mind that not all property must go through probate. Assets that are held jointly with right of survivorship and those for which there is a named beneficiary are distributed outside of probate.

As one example, if there is a life insurance policy and the policy names a particular beneficiary, then the proceeds of that policy are paid directly to the named beneficiary or beneficiaries. But if the policy is payable to the decedent's "estate," then those proceeds constitute a probate asset.

CHAPTER 23

How Attorneys Ease Probate

There are some simple steps that are taken by the draftsman of a will at the time the will is prepared that help ease the probate process and prevent the court from denying probate. An appreciation of these will help you to properly understand what the courts look to.

You may not want to read this chapter if you are convinced that you are going to do it all yourself and that there is no need for an attorney. I do, however, ask you to give me about one minute to try to convince you otherwise.

My guess is that you use a "professional" for such tasks as cutting your hair, or manicuring your nails, or mowing your lawn, or changing the oil in your car, or baking a birthday cake for your kids. Now, I have complete respect for the people who do

those tasks, because they have experience, whether that experience is from education, apprenticeship, or performing their tasks hundreds or thousands of times. You can always tell if someone is new to their game.

Well, you get one shot at drafting a will or probating a will, and if you mess up, it may cost thousands of dollars (or more) to make things right.

Hiring an attorney is like buying insurance – you protect your downside. Or, you can run to Atlantic City with the rent money. Enough said?

When a will is drafted by an attorney *and* that attorney supervises the signing of the will, there is a legal presumption that the will was properly prepared and executed. This can be an invaluable factor in getting the will probated, and almost completely rules out the possibility that the will was the product of forgery.

For a will to be admitted to probate, it must be clear that the will is genuine. Part of

proving genuineness is proving that no pages were switched. That is why attorneys usually draft wills that have carryover language from one page to another, rather than a page that ends with the end of a paragraph and the next page beginning a new paragraph.

The will should always have numbered pages. Even better, it should ideally include not only the particular page number, but a reference to how many pages in the entire document. Thus, a page would read, say, "Page 2 of 8." That will make it less likely that a page was removed.

Most attorneys, when the will is signed, attach a cover to the will. The cover says that the document is a Last Will and Testament; it notes the testator's name and the attorney's name, address, and phone number.

Many attorneys make sure that the testator, the witnesses, and the notary all use the same pen. This is not *required* for a valid will, but does helps establish that the will was signed and witnessed at the same time.

CHAPTER 24

"Common-Law" Marriage in NY

Many persons believe that they are involved in a common-law marriage if they live together in the same manner as a husband and wife and are in a committed, long-term relationship. But New York law has not recognized common-law marriage in a very long time.

Common law marriage is a rather ancient creation that deems a couple who hold themselves out as husband and wife to actually be married. Common-law marriage is recognized in 10 states in the United States, but New York is not among those states.

Here in New York State, there are only two types of common-law marriages that are recognized: (1) Those that began in 1938 or earlier. That means that as of this writing, a couple would have to be residing together and

holding themselves out as married for the past *78 years*. Not surprisingly, that is not going to include very many situations; and, (2) Those that were created in other states, so long as that other state's laws have been satisfied.

Since New York does not recognize in-state common-law marriages unless they were created 78 or more years ago, persons who consider themselves married but who are not actually married under the laws of New York will be deprived, under certain circumstances, from inheriting property from their so-called spouse.

In New York, a person is free to dispose of property by will to anyone. Thus, if two persons live together without being formally married, each is free to write a will that leaves property to the other. But when a person passes away without a will (that is called dying "intestate"), New York State law controls what will happen to that person's property. It will *not* be inherited by a so-called "common-law" husband or wife, unless either of the two

exceptions noted above will apply.

If you live in New York and you hold yourself out as a married couple but are not actually formally married, you should do one of three things: (1) Actually get married; (2) Write a will that bequeaths assets to your "common-law" spouse; or (3) Make sure all assets are in joint name or in an account with a designated beneficiary. Otherwise, the person you deem to be your husband or wife may be prevented from inheriting from your estate.

CHAPTER 25

Disputes Among Siblings

On TV, families are typically close, supportive, and agreeable. It would be nice if life were always like that, but in real life, maintaining family harmony is often difficult. And it often is doubly difficult during probate, especially when a parent passes away. You and your sibling(s) may have old grievances that may have been dormant for many years and that suddenly reappear.

Often, a parent's passing serves not to bring the family together, and does not bring out the best in each of that parent's children. Rather, the loss often winds up encouraging family members to nurse old grudges and grievances. Sometimes the parent's death reopens old wounds that one would have thought faded from memory decades before.

The probate of a will, or a proceeding to administer an intestate estate, can exacerbate

old grudges and transform them into new fights. After all, it's easier to argue about how one's sibling is handling the estate matter than it is to reinvigorate fights that date back to grammar school decades ago. But those old wounds often inform the new fights.

My best piece of advice is to take the high road. I know that that is difficult, but it is best from two perspectives – emotionally and strategically. It is one of the few times that emotions and strategy can converge. You should take this advice even if you perceive your sibling as remaining firmly on the low road.

Resist the temptation to think that you TRIED to take the high road but that your sibling's actions made this impossible.

Remember that this, too, shall pass. And when it does, you will be far better off if you can look back on your actions and know that you behaved in an upstanding and dignified manner. So, avoid the tit-for-tat type of war-waging that may leave you feeling

embarrassed later on. Your job is to avoid tensions, regardless of how difficult you believe your sibling is being.

There may be no way to completely avoid hurt feelings, anger, and recrimination. But there are ways to lessen the impact. First, remember that nobody, while grieving, is at his or her best. Cut your sibling some slack.

Second, remember that your sibling, even if he or she is being difficult, is also grieving.

Third, when your sibling says or does something particularly unseemly, let it pass -- people don't usually recognize that they're being unreasonable or foolish just because it's pointed out to them; and that is especially true when it's pointed out to them in anger.

Don't ask others to choose sides. By analogy, the Viet Nam war raged for over a decade precisely because others got involved. If you must fight, don't enlist other memers of the family or spouses to take sides. That could turn a spat into a civil war.

If you must communicate with your sibling, don't appoint proxies to have those discussions on your behalf. If you must fight, do your own fighting. Don't hire mercenaries to fight your battle.

And remember: No texting or tweeting or any use of social media to wage your battle. Those short written communications will be remembered *forever*, and, for that matter, saved *forever*. So, just don't do it.

If your meetings and phone discussions with your sibling just ends up in hostility, try a different tack: Communicate in writing, whether it is by old-fashioned letter or by email. Make sure that each communication involves no more than 100 words. When you go beyond 100 words, there no doubt that extraneous statements will be made. And you can bet your bottom dollar that those extraneous statements will be accusations, suspicions, hostility, name-calling, sarcasm, argument, invective, and the like.

Thus, stick to the facts. When you do

communicate in writing, make it all business. Discuss in your writing what *needs* to be discussed and nothing more. Your written communication with your sibling should avoid any and all adjectives. Even the word "very." The only exception to this is that you are permitted to use positive adjectives, like "helpful," "caring," "meaningful." For that matter, don't merely avoid adjectives, but also avoid all negative words. And do try, regardless of the topic or the tenor of your words, to insert into each written communication at least one positive word.

This may sound counterintuitive, but let time pass. Don't be in a rush. Often, hostility will abate over time. And if it doesn't, it's still best to move things at a slow and deliberative pace. When you have a late-night thought, don't rush to send an argumentative email -- wait till morning; you will be glad you waited.

Recognize hostility for what it is. Chances are that the fight you are having is based on something that happened a very long

time ago. Remember that the fights you are having with your sibling tend to dishonor the memory of your recently-deceased parent. Resolve to honor that parent's memory in every way you can; and one of those ways is to take the extra step to get along with your sibling, regardless of whether he or she is right or wrong. Your deceased parent loved your sibling too, and squabbles with your sibling would not have pleased your parent. Every time you are nice to your difficult sibling, visualize your lost parent smiling down at you from heaven.

Following these rules may not be a magic wand for resolving difficulties, but it will avoid exacerbating the tensions. Words have meaning, and human relationships are often far more fragile than one would expect; a wrong or hostile word can forever transform your relationship with your sibling. So, remember to count to ten before speaking or writing.

CHAPTER 26

Joint Ownership of Real Estate

This brief guide provides you valuable information about the legal effects of jointly owning real property.

When a parcel of real estate is held jointly with with right of survivorship by two persons, the property will pass to the surviving owner when one of the owners passes away. (If the two persons are married to one another, the joint ownership will be referred to as a "tenancy by the entirety," but it is essentially the same as a "joint tenancy").

Upon the death of one of the two joint owners, the property will pass to the surviving owner by operation of law. This means that the moment one of the two joint owners passes away, the property is owned by the survivor, even if a new deed is not yet recorded.

When a property is jointly owned (or

held by the "entirety"), the real estate is considered a "non-probate" asset. Thus, no probate or administration proceeding will ordinarily be necessary in order to transfer the property.

When a property is owned with right of survivorship, the transfer of ownership is quick, easy, and cheap. By way of example, let's imagine that persons "A" and "B" (granted, they are not imaginatively named) own real property together, but *not* as joint tenants. If "A" dies, his interest in the property passes to his estate, so that "B" now owns the property with the estate of "A," and ultimately "A"'s heirs. If B wants to sell the property, he can't do so unless and until a probate or administration proceeding is done as to A's estate, and afterward B will be able to sell the property only if A's heirs agree.

But if A and B are joint tenants with right of survivorship, the death of either of them will immediately vest ownership of the entire property in the other.

While joint ownership works well for married couples or others who are in a committed relationship, and sometimes for close family members, it can be disadvantageous in situations in which the two owners have others whom they wish to benefit. As an example, A may have a wife or children whom he wants to benefit in the event of his own death, rather than B, who may be a friend or business partner.

Before deciding how to hold real property, be sure to speak with an attorney. The attorney will be able to evaluate your priorities and help you to make a decision that makes sense for you.

There are different ways to hold real estate. One way is called a "tenancy in common"; another is a "joint tenancy"; and yet another is a "tenancy by the entirety." Let's look at each one:

- **<u>Tenancy in Common</u>: A tenancy in common means that each person owns a particular percentage interest in the real**

estate. For example, if John Smith and his girlfriend, Mary Jones, hold a deed as tenants in common, it means that each of the two owners owns a 50% undivided interest. John or Mary are each free to give, sell, or bequeath his or her respective rights in the real estate. If John transfers his ownership, Mary still owns her share.

- **<u>Joint Tenancy</u>: A joint tenancy means that the real estate is held "jointly with right of survivorship." [Also be alert for the common abbreviation "JTWROS."] This language is typically the language that is found in a deed that reflects joint ownership. It means that neither John nor Mary can sell the property. If, say, John passes away, then Mary becomes the owner of the property. John's estate will not have an interest in the property.**
- **<u>Tenancy by the Entirety</u>: A tenancy by the entirety is, essentially, joint ownership, except that it is between two persons who are married to one another. Thus, if John and Mary get married to one another, they may**

wish to change the deed to reflect their marriage. If the deed now says that the property is owned by "John Smith and Mary Jones, his wife," the addition of those words ("his wife") will reflect that it is a tenancy by the entirety, even without referring to "entirety" or "joint."

If a deed is silent about joint ownership or the status of the marriage, and is similarly silent as to the parties' marriage to one another, then the property is held as a tenancy in common. Courts often refer to the "strong presumption" of a tenancy in common, although in certain ways that strong presumption has become weaker and probably will continue to do so.

The best way to hold a deed depends entirely on what you wish to ultimately happen to the property. In most cases, it makes sense for a married couple to have a right of survivorship, so that if anything happens to either person, the property will pass to the survivor.

CHAPTER 27

Compelling Production of a Will

If a person is believed to be withholding a will from probate, there is a remedy under New York law to compel that person to file the will with the Court.

There is a section of the Surrogate's Court Procedure Act that allows a person interested in the estate to take steps to compel a person who is in possession of the will to produce it to the Court.

A person interested in the estate can petition for an Order requiring someone who may have the will to be examined before a court stenographer about his or her knowledge of the whereabouts of a will. There will then be a transcript of the examination, and the transcript can be used in further court proceedings.

The examination can focus not just on just on the whereabouts of the will, but also as

to the person's knowledge of the destruction of a will.

The court is empowered to impose reasonable attorneys fees against the person who has withheld the will, if that person did not have good cause to withhold it. And there are really not a whole lot of good reasons to withhold a will.

The court's ability to impose attorneys fees means that it is possible for one to bring a proceeding to compel production of a will without it costing that person a penny.

If it appears to the court that a person has has knowledge of the whereabouts or destruction of a will, the Court may, even without a petition, order that the person who is believed to have the will, or to have knowledge of its destruction, be examined and/or to promptly file the will with the Court.

The more typical proceeding, however, is for a family member to petition the court for permission to conduct an examination of the person who is believed to be withholding the

will. When a person is served with an order requiring that he or she be examined to ascertain the existence or destruction of a will, that person, if he or she is actually in possession of the will, usually *immediately* produces the will, rather than submit to a court-ordered examination.

CHAPTER 28

Probate: What *Not* To Sign

Sometimes, a step as simple as signing a one-page document can forfeit your right to challenge a will. Make sure to consult with an attorney before signing anything.

A document commonly known as a "Waiver and Consent" is often sent to close family members of a person who passed away. This document, formally called a "Waiver of Process; Consent to Probate," can have powerful consequences if signed.

A Waiver and Consent form, which usually is one page or, at most, two pages, waives the requirement for one to be served with formal process and, more importantly, consents that the will be admitted to probate.

If you refuse to sign a Waiver and Consent, the only effect is that you will have to be formally served with court process. In Surrogate's Court (the court in New York that

handles probate), the document by which the court will acquire jurisdiction over you is called a "Citation." It is similar in effect to a "summons" that is used in many other courts. The Citation must be personally served on you if you live within New York, but can be served by certified or registered mail if you live in a different state or in a different country.

If you receive a Waiver and Consent form, you should contact an attorney right way. If you ignore the document, the next thing that will happen is that a Citation will be served on you, directing you to show cause why the will should not be probated.

There are times when a Waiver and Consent form can be revoked or rescinded. But don't count on it. It will depend on the particular circumstances. But do bear in mind that courts are typically reluctant to disregard a signed Waiver and Consent.

CHAPTER 29

Preparing A Will For Probate

If a loved one has passed away, there are some simple steps to take to help make sure that person's will can be readily probated.

First, quite obviously, locate the will. If you know, or think you know, where the will is, make certain you can locate it. Just because you knew where the will was last year or last month, ascertain that it is still in the same location. Look through your family member's papers and find that will, if you can.

If you have located the will, or know where it is, put it in a safe and secure place. Do not leave it among the decedent's belongings -- you never know who might have access.

Treat the will gently. It is a very important document that will help give effect to your loved one's intentions. Thus, be sure

to treat the document carefully -- don't even fold it. Put it in a large envelope. Do make a photocopy of the document, but be particularly careful in how you bend or fold pages and do not, under any circumstances, remove any staples. A stray staple hole can make the probate of the will a lot more difficult, can add costs to the fee your attorney is charging, and can even potentially result in the will being denied probate.

Next, hire an attorney. Unless the estate is exceedingly modest (small enough to permit a simplified "Small Estate" proceeding), you will be best advised to hire an attorney to represent the estate. Bring the will, a certified copy of the death certificate, a list of known assets, and a list of the names and addresses of family members to your first appointment with an attorney. It is a very unwise to mail the will to an attorney.

Although it's always a good idea to have a photocopy of an executed will, make sure to bring the original will to your appointment

with an attorney. A photocopy of the will cannot be readily probated, except in the most unusual or extraordinary circumstances (dealt with in Chapter 30 of this book). The attorney almost certainly has a fireproof office safe in which to keep the will until he or she files it with the court. Ask the attorney to show you where the will is going to be kept until it is filed with the court.

CHAPTER 30

When An Original Will Is Lost

These days, "electronic signatures" are often just as good as original signatures, and a pdf version frequently suffices for the original. Yet, there are only limited circumstances in which a photocopy of a will can be probated. This chapter capsulizes New York law on the issue.

The main reason an original will is typically required is the presumption of revocation. That means that when the original will cannot be found, there is a legal presumption that the reason it can't be found is because it was revoked. In that regard, bear in mind that the "ceremony" for revoking a will is nothing more complicated than tearing it up and throwing it in the trash.

The reason an original will is required is simple: If a copy were easily capable of being probated, then it would be almost impossible

to revoke a will that had been copied many times. If, for some reason, 20 copies of a will were made, and the testator had destroyed the original and 19 of those copies, the remaining copy (perhaps long forgotten about) could be probated. That would undercut the presumption of revocation. [The presumption of revocation is a legal principle that states that when an original will cannot be found, it is presumed to have been revoked by the testator.]

There are, nonetheless, certain circumstances in which a lost or destroyed will may be probated. Section 1407 of the Surrogate's Court Procedure Act provides three circumstances in which such a will may be probated: a) It must be established that the will was not revoked; b) Execution of the will is proved in the same manner as required for probate of an actual existing will; c) The provisions of the will are proven by at least two witnesses or by a "true and complete" copy or draft of the will.

This three-pronged approach is a rather difficult burden. It was *designed* to be difficult. The first requirement (that it be established that the will was not revoked) is particularly difficult to prove, because the mere absence of the original will leads to a supposition that it was revoked. Thus, there must be proof that the fact that the original is missing was not due to it being revoked.

Circumstances in which that first requirement can be proven can best be illustrated as a situation in which a testator, shortly before death, refers in a signed writing to the will. One circumstance in which I offered a copy for probate was when the original was held in the office of the attorney draftsman and a fire later destroyed the attorney's office.

CHAPTER 31

Powers & Duties of Fiduciaries

This chapter provides a simple overview of the job of the executor or administrator of an estate.

As a general rule, an executor is the person nominated in a will to carry out the provisions of the will. An administrator is the person who, when a person passes away without a will, becomes the personal representative of the estate; the administrator is usually a close relative of the decedent.

The executor or administrator owes the estate a "fiduciary duty." A fiduciary duty is a special duty of care, and is earmarked not just by carefulness, but also by acting with the highest degree of honesty, integrity, and rectitude. The fiduciary for the estate must avoid any approach that serves his or her self-interest.

Among the typical duties of a fiduciary

for an estate are the hiring of an attorney for the estate; hiring an accountant for the estate; closing bank accounts and securities accounts; marshaling the estate's assets; having real property transferred or sold; authorizing the filing of state and federal estate tax returns, and of a decedent's final return and any estate income tax returns; disposing of a decedent's personal property; resolving claims against the estate; and filing any necessary accounting of his or her actions.

In New York, an executor or administrator is entitled to a commission. That commission is based on a sliding scale: 5% on the first $100,000 in assets; 4% on the next $200,000; 3% on the next $700,000; 2.5% on the next $4 million; and 2% on any further assets.

Thus, as an example, if an estate were valued at $1.5 million, the commission to the executor or administrator would be $46,500. This commission schedule does not, generally, apply to those assets that pass outside of the

estate to a designated beneficiary.

Although an estate fiduciary possesses certain powers, those powers are not unlimited. One of the clear limitations is that a fiduciary is not empowered to interpret the decedent's will or to disregard the testamentary schematic set out in the will.

This question arises very often, despite the fact that it is a hard-and-fast rule. Being appointed executor does not permit one the opportunity to decide whether a testator meant what he or she said in the will – if the will says that the decedent's daughter, Sally, should get all of the assets of the estate, that does not mean that the executor, who knows of certain ways in which Sally was not good to the decedent, gets to decide whether to carry out that provision of the will. The will says what it says, and the executor's duty is to make sure that the distributions called for in the will are properly accomplished.

Similarly, a fiduciary must not act for his or her own self-interest. And investments

made by the fiduciary must be reasonable: A fiduciary cannot, by way of example, invest in some up-and-coming new technology penny stock that might take off like a hot-air balloon or, on the other hand, might come crashing back to earth, because the estate's beneficiaries will not complain about the former, but will take decisive action about the latter.

CHAPTER 32

Who Can Be Executor

The best way to understand who can serve as an executor or administrator of an estate is to recognize that *anyone* can so serve unless he or she falls within one of the exceptions.

Those who are *never* eligible are persons who are below 18 years of age, a person who is a convicted felon, a person who is "incompetent" (and, likely, a person for whom a guardian has been appointed). The Surrogate's Court Procedure Act also declares as unable to serve as an estate fiduciary a person who lacks qualifications due to "substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit."

The word "improvidence" in the preceding sentence can best be understood to mean dishonesty, but it does not mean a

person who merely has been dishonest on one occasion. If it did mean that, probably nobody would be qualified to serve as an estate fiduciary.

Rather, "improvidence" refers to habits of mind and conduct that become part of the person and render him or her unfit for the position. The standard here is whether the estate would be unsafe in the hands of such a person. "Improvidence" has also been defined to mean "lack of prudence, care and foresight."

Determining whether a person fits into this category is quite often a matter of the court's discretion.

There is then a class of persons who are *sometimes* eligible to serve, such as a "non-domiciliary alien," who may, under certain circumstances, serve as a fiduciary. Similarly, a person unable to read and write the English language may be appointed, although this is rather unlikely.

There are other situations in which

appointment as an executor or administrator is within the Court's discretion.

If one seeks to deny letters of administration or letters testamentary to a person because of unfitness to serve in that capacity, there must be some proof available. Conclusory allegations are insufficient. A conclusory allegation is an allegation that *starts out* with a conclusion and is thus devoid of evidentiary value.

CHAPTER 33

Contested Estates 101

In order for a will to be given effect, it must be probated. Probate comes from the Latin word meaning "to prove." And probate is just that -- proving the genuineness and validity of the will. A contested estate is one in which there is a challenge to the will.

Such a challenge is usually brought by those who were included in a previous will or those who are relatives and believe that the will is deficient in some manner. If a person was not named as a beneficiary in a prior will, then the person must usually be a close enough relative that he or she would inherit from the estate if there were no will. [How close a relative that person must be will depend on which family members survived the testator. Spouses and children are at the top of the list, but if there are none, parents, siblings, and even nieces and nephews may be

on that list.

There are several grounds to challenge probate:

- **<u>Invalid Will</u>: There are requirements for a will to be valid, including that it be signed at the end and that there are two or more witnesses. Failure to comply with basic requirements for a will can invalidate the will.**
- **<u>Forgery</u>: The will must be genuine. If an attorney drafted it and presided over its execution, chances of a successful challenge are remote.**
- **<u>Later Will</u>: It is sometimes alleged that the document to be probated was not the testator's final will.**
- **<u>Fraud/Coercion/Influence</u>: Fraud, coercion, and undue influence may be considered separately, but one rarely sees an allegation of one without the others. They all say basically the same thing -- that the testator was unfairly pressured, threatened, or tricked.**
- **<u>Lack of Capacity</u>: This means that**

the testator lacked competence to make a will, due to mental illness, retardation, Alzheimer's Disease, or the like. One need not be in perfect mental condition to make a will, but must know the approximate value of his or her assets and whom he or she reasonably wishes to leave assets to. The fancy legal term for that concept is called "knowing the nature and object of one's bounty."

CHAPTER 34

Can A Spouse Be Disinherited?

Most persons provide in their wills for their spouses to receive much, if not all, of their estates. But not every marriage is made in heaven. And thus there are some people who try to disinherit their spouses.

New York, like most states, tries to prevent one from leaving his or her spouse completely out of the estate. New York's statute says that a spouse must be awarded the greater of $50,000 or one third of the state. That means that if the estate is worth $150,000 or less, the spouse will receive $50,000, and more than that if the estate is greater than $150,000.

This law has traditionally been known as the "widow's right of election," but has been modernized to be gender-neutral. It now refers, instead, to the "surviving spouse's right of election." The current statute was enacted

20 years ago.

To exercise the spouse's right to receive his or her "elective share," a notice of election must be filed and served within six months of the time that the court appoints an executor (or, where there is no will, an administrator), but in any event within two years of the death of the spouse. [Even if there is no will, a decedent may have tried to set up his or her finances in a way in which there were joint accounts with, or beneficiary designations of, persons other than the surviving spouse.]

In my own experience, one situation in which the right of election is often exercised is where the spouses were separated at the time the decedent died, but the divorce had not as yet been finalized or even commenced. A mere separation (in the absence of an agreement stating otherwise) will not by itself amount to a waiver of the right of election.

It is strongly recommended that one hire an attorney to handle this. Missing the deadline can potentially be very costly.

CHAPTER 35

Estate Tax

Estate tax is a tax that is collected on the transfer of one's assets after death. It is determined by adding all of the decedent's date-of-death assets and then applying an various credits and deductions. It is not a tax on the sums received by a beneficiary of the estate.

There are both federal and state estate Taxes. This chapter addresses both.

A bit of background may be necessary to debrief you on estate tax issues that have played out in the newspapers, on television, and on the internet over the last several years. The estate tax reduced over a period of years until 2010, when there was to be no federal estate tax unless Congress reinstated it. In the last two weeks of 2010, it was reinstated, essentially retroactive to January 1, 2010, and was imposed for the period ending December

31, 2012.

The federal estate tax has never been very popular, and its detractors often refer to it as the "death tax." The key argument made against the estate tax is that it represents double taxation – that is, that income is first taxed when it is earned and is later taxed again at the time the person who earned it dies. This is a political argument, and it is actually a very misleading argument.

The best advice that the top experts offered immediately after the election of Donald Trump can be summed up in two words: Don't die. That's because the estates of some very wealthy people could save quite a bit of money if they survive until repeal of the tax.

But, don't hold your breath for the repeal of the federal estate tax. It's one of those things that help get votes, but never really takes place in the real world.

President Trump's website says (or, at least, used to say) that the estate tax would be

repealed. He, and other opponents of the tax, refer to it as the "death tax," an inaccurate but politically freighted terminology. Thus, there is an expectation that the federal estate tax may be repealed. But don't bet on the likelihood of repeal. The estate tax has weathered quite a few storms, but is still with us. In fact, it can be stated, ironically, that despite fervent opposition over the course of many years, the estate tax just won't die. I strongly believe that all of the talk about repealing the estate tax is just that: Talk. The estate tax isn't going anywhere.

The reason the estate tax is here to stay is that it is an easy source of income for the federal government. And its lack of popularity with citizens in general belies the fact that the threshold for estate tax has been raised so much and so high that today it only applies if an individual has assets of $5.45 million or if a couple has assets of $10.9 million. Even the President's promise has to be viewed from a multi-dimensional approach: While the

Administration pledges to repeal the estate tax, there also has been discussion of perhaps imposing a capital gains tax on estates valued at more than $10 million.

That can be seen as swapping the estate tax for a capital gains tax, which would hardly be worth the effort of a bruising political fight. Indeed, the most likely way for the estate tax to be eliminated is for repeal to be part of a deal that imposes new taxes. Ironically, such a deal would almost certainly impose new taxes on persons who are not likely to die wealthy enough to have to pay estate tax. Taxing persons who are not wealthy in order to compensate for the repeal of the estate tax would be, not surprisingly, unpopular.

Experts estimate that the estate tax applies only to a tiny fraction of one percent of all estates. Only about 5,000 estates a year pay federal estate tax, but that minuscule amount still provides about $30 billion in revenues to the federal treasury. While $30 billion may not sound like a whole lot when

compared to other federal tax sources, it still is real money.

Right now, about 15 states (including New York) have an estate tax. Another six states have an inheritance tax. [An inheritance tax is different from an estate tax because an estate tax imposes a burden on the estate, while an inheritance tax imposes the burden on the persons who inherit.]

State estate taxes are typically far lower than the federal estate tax and take a much smaller bite out of an estate. Interestingly, however, many state estate taxes are pegged, in one way or another, to the federal estate tax, so that any legislative action on the federal estate tax would require changes to (or repeal of) state estate taxes.

There is likely to be great fanfare about the imminent repeal of the federal estate tax. But that is nothing new. The issue has been debated for decades. In my view, the federal estate tax may change in a variety of ways, but it will not disappear.

Although the federal estate tax gets a lot more attention, New York State also has an estate tax. This chapter gives you crucial information about that tax -- everything from when the tax kicks in, to the tax rate, due date, and some uniquely New York features.

For estates in which the decedent died after April 1, 2016, the State estate tax applies only to estates valued at more than $4,187,500. And that figure keeps rising. Until 2019, the threshold for estate tax in New York will rise until it matches the federal estate tax, which currently is at $5.45 million.

The state estate tax generates a lot less attention than its federal counterpart because it is at a much lower rate. New York estate tax rates begin at 5% and work their way up to 16%, depending on estate's value. By contrast, federal estate tax can be a rate of 40%.

New York figures estate tax somewhat differently from other states, in that it taxes the entire value of an estate that exceeds the exempt amount. Most states will tax only the

amount that exceeds the exempt amount.

When the exempt amount is $5.25 million, anyone with an estate valued at less than that amount would pay no New York estate tax. But, even a small amount beyond that $5.25 million makes the entire estate taxable. A common example given by many commentators is that if a person dies with an estate valued just 5% more than that exempt amount would wind up paying far more in estate tax than the value of that 5%; stated differently, in 2017 if a person dies with an estate worth $5.5 million (just $250,000 over the exempt amount), that person's estate taxes would be in the range of $400,000.

The marital deduction provides that any property left to a surviving spouse is exempt from state and federal tax, regardless of amount.

New York's estate tax applies not just to probatable assets (assets solely in the name of the decedent), but to all of decedent's assets. Such assets include real estate, cash, bank

accounts, investment accounts, motor vehicles, life insurance proceeds, retirement accounts, and ownership of a small business.

The New York State estate tax return is due within nine months of death, as is the payment. Certain allowances are granted as to extension of time to file and pay.

Any situation in which a state or federal estate tax return must be filed warrants hiring an attorney. The estate tax rules are complicated and not easy to understand. A decision to try to address this on your own can cost untold thousands of dollars, perhaps even hundreds of thousands of dollars.

CHAPTER 36

When a Witness is a Beneficiary

In New York, a will is typically proven by affidavit or testimony of the attesting witnesses. While it is often said that one who receives a bequest under the will cannot serve as a competent witness to the will, the issue is a bit more complex than that.

An attesting witness is a competent witness to the will execution, subject to certain other standards and exceptions.

The issue that arises is less concerned with probating the will than about validity of a bequest to the witness. A bequest to a witness/legatee is void unless there are at least two other attesting witnesses who do not receive anything under the will. Thus, if there are two persons who are good (and non-interested) witnesses in addition to the witness/legatee, there are no issues.

The bequest is valid unless the will can't

be proved without testimony of the witness/legatee, in which case it is void . . . but the void bequest can be (effectively) revived if it falls within the paragraph below.

Any witness (whose bequest is void) who would share in the estate if decedent died intestate (known as a "distributee") can still receive an intestate share up to the amount set forth in the will. Thus, a distributee witness gets the lesser of his/her intestate share and the amount set forth in the will. If the "void disposition" becomes part of the residuary disposition, he or she can receive funds only from the residuary disposition.

And if the void disposition passes in intestacy, the void disposition is recovered ratably from intestate heirs who succeed to such interest. For this purpose, the void disposition is distributed in accord with New York's intestacy statute as though the attesting witness was not a distributee.

CHAPTER 37

Medicaid Liens

Years ago, Medicaid rarely impressed a lien against property owned by one who, or filed a claim against an estate of a decedent who, received benefits. Today, such liens and claims are commonplace. It is important to have an understanding as to how this works.

In New York, a creditor of a decedent can file a claim against the person's estate at any time up to seven months from the date of the appointment of an executor or administrator. Thus, most estates make only partial distributions to beneficiaries until that period ends. While a decedent's death does not revive a stale claim, Medicaid can make a claim that covers the past 10 years.

When a claim is interposed against an estate, the estate must make allowance for it. The claim is not automatically valid, but the estate cannot make distributions that would

frustrate the claim if it were valid. To ignore a claim invites various repercussions, including personal liability.

When Medicaid makes a claim, two issues arise: (1) Discharging the claim against the estate and, (2) the effect of a Medicaid claim, and, of course, the interplay between those issues.

A quick review of Medicaid is in order. Medicaid began in 1965 with enactment of Title XIX of the Social Security Act. Administered by the Secretary of Health and Human Services, authority is exercised through the Centers of Medicare and Medicaid Services. Each state opts to participate in Medicaid. It is a joint federal/state program that funds medical care for persons unable to pay their own medical costs.

Federal funds pay for between 50-83 percent of costs that the state incurs for medical care for a given patient. In return, the State pays Medicaid part of the costs and complies with requirements regarding

eligibility determinations, information collection, and program administration.

Medicaid is intended to be a "payor of last resort," and thus does not provide payment for medical services if other resources are available. Rather, federal law requires states to ascertain legal liability of third parties to pay for care and services available under the plan and to seek reimbursement from them. As a result, federal directives require that the State plan include assignment, enforcement, and collection mechanisms.

Thus, Medicaid seeks reimbursement of sums it paid; it does this through such methods as placing liens on real estate, estates, and personal injury and wrongful death judgments. Reimbursement claims of medical services payors have in recent years often changed the tenor of personal injury litigation.

There is a statutory right of recovery that runs to the states and administered

through local districts for medical assistance and other services. This right of recovery is asserted by notice of lien under section 104 of New York's Social Services Law.

That provision allows a "public welfare official" to bring an action or proceeding against a person who has real or personal property, or against the estate or a fiduciary of the estate, and even against a decedent's "sucessors in interest" if decedent owned real or personal property, so long as the person received assistance during the prior ten years and can "recover up to the value of such property the cost of such assistance or care," (Social Services Law sec. 104(1)).

This is so because public assistance constitutes an "implied contract." Thus,

> **"No claim of a public welfare official against the estate or the executors, administrators and successors in interest of a person who dies leaving real or personal property, shall be barred or defeated, in whole or in part, by any lack of sufficiency of ability**

on the part of such person during the period assistance and care were received."

The claim is not impaired or defeated by the fact that some other person or persons may also have been liable to contribute. That subsection makes clear that a public welfare official making these claims is "deemed a preferred creditor."

Exceptions are available for funeral expenses, commissions for executors and administrators, and attorney fees. Thus, these expenses fall outside of the scope of a Mediciad lien or claim.

Other more specialized protections are built into SSL sec. 369, such as if the decedent had a child under age 21 or who is disabled, or if a sibling of the decedent has an interest in the home and was residing there before the decedent was admitted to a medical institution. The section also offers protections in the case of "undue hardship," as determined by regulations.

CONCLUSION

I hope that you find this handbook helpful. Please understand, as I pointed out at the beginning of this book, this handbook does not replace an attorney, and does not invite you to try handling legal matters by yourself.

Nor does it cover everything that needs to be known about probate and related matters. But it does provide an overview.

It is my hope that this book will help you to understand legal issues you are facing, hire the right attorney, ask the right questions, and understand the answers you get. If that occurs, my mission has been accomplished.

- **Michael S. Haber**
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