

# An Executor's Guide to Estate Administration

NEW YORK STATE



*Presented by the Bousquet Holstein PLLC  
Estate Planning and Administration Practice Group*



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## INTRODUCTION

When a resident of the State of New York passes away, the Last Will and Testament executed by that individual must be "admitted" to probate, in most cases, to secure the authority to pay final bills, pay final taxes and distribute the remaining assets to the persons and entities named in the individual's Last Will and Testament. The person named in the Will as the Executor has the legal authority to act only after the Will is admitted to probate.

The cost and expense of probate in New York State can be minimized if the beneficiaries and the Executor are prepared for the process. This guide offers an overview of the probate estate administration process in the State of New York from the perspective of the person responsible for handling the estate – the Executor. The guide does not address the specific requirements of handling an estate if a person dies in the State of New York without a Will<sup>1</sup>. However, an Administrator – the person responsible for an estate with no Will - may find the information included in this discussion helpful.

This guide is not intended as a "how to" booklet or a substitute for competent legal or tax advice. Rather, it will offer an Executor a perspective of his or her responsibilities and duties and the beneficiaries information as to what to expect from the Executor of the estate.

### **Probate – Demystifying the Process**

Simply put, "probate" is the legal procedure by which a court in the State of New York, typically, the Surrogate's Court, ensures that the deceased

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<sup>1</sup> If a person dies a resident of the State of New York without a Will, then the "intestate" laws of New York control the process that has to be followed. The person responsible for handling the estate of someone who dies without a Will in New York is called the "Administrator." The intestate laws of the State of New York identify who may act as Administrator and who is entitled to receive the assets of the estate.

person's Last Will and Testament (referred to in this guide as the "Will") is authentic, properly signed and administered consistent with its instructions. The Surrogate's Court in the county in which the deceased person last resided oversees this process.

Many people think that probate is a very complex and expensive process that should be avoided at all costs. While that may be true for some estates and in some counties where the case loads are high, for the most part, the probate process is not complex, time consuming or expensive. There are cases when complications can increase costs and complexity; for example, if the deceased person was the owner of a business or if there is ongoing litigation. The most frequent issues that increase the expense and complexity of probate are disagreements among beneficiaries or with the Executor.

### **When Probate is Not Required**

In the first instance, it is important to know when probate is NOT necessary. Probate is not required for all estates.

- **Family Exemption:** Under New York Law, the surviving spouse and dependent children are entitled to receive certain assets and funds before any estate proceeding is required ("family exemption"). For example, a spouse is entitled to receive cash of \$25,000 before any estate proceeding is required. Under New York law, a spouse is entitled to transfer one motor vehicle with a value of \$25,000 or less without resort to probate. The death certificate and title documents will be required by the Department of Motor Vehicles in order to complete the transfer.
- **Small Estate Administration:** If the assets of the testator are valued below \$30,000 (after the Family Exemption amounts) and if the testator owns no real estate, the estate may be administered using a small estate proceeding. The small estate proceeding is a simplified process and less expensive process which does not require the filing of a petition for probate.

- **Joint and Survivorship:** Probate is not required to transfer funds to a joint owner with rights of survivorship or a beneficiary of an account. Therefore, if the testator did not own any assets in his or her name alone, or the account has a beneficiary designation, e.g. insurance, retirement funds or Transfer on Death designation then no probate proceeding is required. The testator's ownership interest in these assets has to be reported on an estate tax return, if one is required, but no probate proceeding is needed to change the ownership of the funds.
- **Revocable or Other Trusts:** Probate is not required if all of the assets owned by the decedent are titled in the name of a trust rather than in the individual name of the decedent.
- **Insufficient Assets to Pay Debts:**  
If a preliminary review of the testator's debts and obligations exceed the value of the testator's assets, it may not be advisable to proceed with probate. The filing of the petition for probate will require the Executor, if appointed, to complete the estate. Therefore, if there are insufficient assets with which to pay all creditors, a judicial settlement of the estate will likely be required. The judicial settlement is an additional cost and expense to the estate. There are reasons and circumstances under which it might be desirable to proceed with probate, even if the total debt exceeds the total value of the assets, but it is recommended to retain experienced counsel before proceeding with probate under these circumstances.

## **PRELIMINARY MATTERS**

While the Executor is named in the Will, the "nomination" as Executor does not grant the legal authority required to act. Only when a Decree or Probate is entered by the Court is the person able to act as Executor. The Surrogate's Court will issue "Letters Testamentary". Certified copies of these Letters are needed by the Executor to prove to 3rd parties, e.g. banks, that the Executor has authority to act on behalf of the estate.

Although the authority to act cannot be granted until a petition for probate has been filed, it is wise to try to locate some preliminary financial information prior to filing a petition for probate. This information will help the nominated Executor and the estate's attorney decide whether and how to proceed.

There is no time limit to the filing of a petition for probate in New York. However, if there is significant delay in the filing of the petition, other important deadlines such as tax filing deadlines, discussed below, may be missed and the nominated Executor may be held responsible for the delay.

The nominated Executor may hire experts to help with the decision as whether or not to probate the Will, to assist with the probate process and to assist with planning and filing the required tax returns for the estate, if any. In most cases, it will be less expensive to retain a competent attorney to assist in the process at the beginning rather than retaining one only after things have gone wrong. The size and complexity of the estate, as well as the expertise, experience and time constraints of the Executor will help guide the Executor's decision as to what tasks the Executor will handle personally and what tasks should be handled with the assistance of an attorney and/or accountant.

### **Defining Terms**

It may be helpful to understand the meaning of some significant terms that are used in the probate process.

"Testator" - The testator is the deceased individual who signed his or her "Last Will and Testament".

"Distributees" – These are the relatives of the testator who must receive formal "service" of the filing of the petition for probate. These are the people who can "object" to the Will. The New York State statute defines which relatives are distributees for probate purposes. The statute provides that the distributees are the relatives who would have received the assets of the deceased person, had that person died without a Will. For example, if the deceased person died without a Will and was married and had four children, the spouse and the four children would be required by law to divide the

assets owned by the decedent at death. Therefore, the spouse and the children, who are not named as Executor, must be served with process in the probate proceeding because they are the "distributees". This is true even if the Will leaves all of the assets to the spouse.

### **Asking for Help**

If the nominated Executor wishes to retain the services of a lawyer who is knowledgeable about estate administration, the nominated Executor will enter into an engagement agreement with the lawyer who will provide specified services according to the arrangement desired by the nominated Executor. Nevertheless, the nominated Executor will generally assist in securing information and working with the attorney to complete the estate administration process.

While most attorneys who focus their practice on estate administration prepare Estate Tax returns and Estate and Trust fiduciary income tax returns, it is likely that the final personal income tax return of the testator will be prepared by the accountant who was working with the testator prior to his or her death.

### **Locating Information**

Generally, the testator stores a copy of his or her Will with the important tax and other financial information in a desk or cabinet in the testator's home. In some cases, the testator has placed a copy of the Will in a vault, safe deposit box or some other location. If the nominated Executor does not have access to the home or a safe deposit box and the Executor believes the original Will is in the home or the safe deposit box, a motion to access the home may be presented to the Surrogate's Court prior to the petition for probate.

Because the analysis as to whether to proceed and how to proceed must often be made before complete financial information is available, it will be important to begin to gather and locate as much information about the estate as possible. If the attorney for the testator has the original Will, it may be that the attorney also has information helpful to locating and valuing estate assets.

Typically, the testator will keep this information together with copies of income tax returns, and other financial records in his or her name.

It is possible that the family and the nominated Executor will not be able to locate significant information prior to appointment of Executor. However, the following is a list of some of the information that will be helpful, if not required, in order to complete the duties as Executor:

- Birth and/or adoption certificate
- Marriage certificate
- Divorce decree or separation agreement
- Prenuptial Agreement
- All Trusts created by the testator
- All Trusts for which the testator was acting as Trustee
- Safe deposit box and keys
- Bank passbooks
- Financial statements
- Income tax returns
- Gift tax returns
- Military service records
- Social Security number and cards
- Diplomas, educational records
- Medical and health records
- Cemetery site deed or cremation instructions
- Passport
- Citizenship papers

## **FIRST STEPS**

### **Funeral Arrangements**

Generally, the deceased person will have advised family members if he or she made funeral arrangements in advance. It is often the case that payment for those arrangements has also been completed.

If not, funeral arrangements are generally made by the surviving spouse, children, or other family members rather than by the Executor. The deceased person may have specifically designated an individual as the authorized agent of the deceased person to dispose of his or her remains. The deceased person's (also known as the "decedent") wishes should be respected if they are known, but do not have to be carried out if they are unreasonable or financially burdensome.

In the event that the deceased individual has made an anatomical gift it will be necessary to notify the funeral director as soon as this information is known. New York State permits individuals to register such gifts with the New York State Department of Health.

The Executor is responsible for keeping a record of the funeral expenses and bills paid from the estate's assets. In most cases, the probate of the Will has not been completed at the time the funeral director requires payment. It is common to arrange for an advance of funds by a family member with the understanding that as soon as funds are available from the estate, the family member will be reimbursed upon tender of the invoice and proof of payment.

Reasonable funeral expenses and burial expenses incurred as a result of the decedent's death are payable from the estate.

Funeral expenses paid by the estate or reimbursed by the estate are deductible on the estate's Estate Tax return, if any. However, the costs of a celebration for family and friends; and costs of travel, meals, and lodging for the persons attending the funeral are generally not deductible.

The funeral director will generally order the initial death certificates. It is important to confer with the Executor and the estate attorney to determine the number of certificates that are likely to be required. If additional certificates are required, they can be ordered from the Bureau of Vital Statistics or the County Health Department (as applicable to the particular county).

A separate certified copy of the death certificate will be required to be submitted to each account holder, life insurance company, and bank. The Surrogate's Court requires the filing of a certified copy of the death certificate with the petition for probate.

### **The Will**

The original Will is required to be submitted to the Surrogate's Court with the probate petition and other supporting documents. If the original Will cannot be located, it will be necessary to contact the court to determine if the Will was filed with the court.

If not, then it will be necessary to communicate with the professionals who most recently worked with the testator to inquire as to the location of the original.

If the original was in the possession of the lawyer who drafted the Will and the lawyer cannot locate the original, it may be possible to probate the copy provided the Surrogate's Court is satisfied with the applicable and required affidavits explaining the loss of the original.

The Executor may, but is not required to, hire the attorney who drafted the will to assist with estate administration matters. It is generally recommended that the Executor hire an attorney whose practice is focused on estate planning and estate administration.

### **Reading the Will**

There is no requirement under New York Law to gather the family together to "Read the Will". The family may wish to gather or more typically, the Executor will provide photocopies of the Will to family members who are entitled to receive assets under the Will. This informal sharing is not part of the formal probate requirements.

## **PETITION FOR PROBATE OR APPOINTMENT**

### **Formal Probate**

After a decision has been made to probate the Will, the nominated Executor (or the person who wishes to act as Executor) will meet with the attorney for the estate and provide the information needed to prepare the petition and the supporting documents

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required to be filed with the Surrogate's Court. The Petitioner is usually the nominated Executor. If the nominated Executor does not wish to act or cannot act, then the nominated successor Executor may be the Petitioner.

If no named individual wishes to act, a descendant of the testator may act. New York Law specifies who is entitled to act if the nominated Executors cannot or choose not to act.

It will be necessary to secure the names and addresses of the beneficiaries named in the Will and of the "distributees" (see definition above) of the testator. In addition if any beneficiary is a minor, that beneficiary's birthdate has to be provided to the Court.

An affidavit and Family Tree may be required if there is only one distributee or if there are no immediate relatives alive.

### **Preliminary Letters**

Under some circumstances, it may be necessary to seek preliminary letters of appointment from the court to allow the Executor to address certain estate administration issues while the probate proceeding is pending. Generally, the probate process takes 30-60 days; however, in some counties and under some circumstances, the proceeding may be much longer. For example, if there are distributees who cannot be found or if the Court's docket is very crowded, it could take months to secure the appointment of the Executor. In issuing preliminary letter, the court may require the nominated Executor to post a bond or limit the actions that the Executor may take.

### **Probate Petition and Supporting Documents**

In New York State, probate begins with the filing of a Petition for Probate. The details of the documentation and procedures that accompany the Petition vary slightly from county to county. However, there are basic requirements that are uniformly followed.

These requirements include:

- (1) Submission of the original Will with the self proving Affidavit of Witness to the Will filed with the Surrogate's Court;
- (2) Service of process (via Citation) on all distributees and other parties as directed by the court. In lieu of formal service of process, the parties may execute a Waiver and Consent.
- (3) Notice of the Probate Proceeding must be mailed to all beneficiaries named in the Will.
- (4) In the event that the Petitioner is not the initial nominated Executor the court will require either a signed "renunciation" by the nominated Executor or proof of service of process of the petition on the nominated Executor.

The court will generally set a "return date". If all parties have consented to probate of the Will, no hearing will be required. If the parties do not consent, then the probate process may become more litigious with depositions, discovery and hearing requirements. It is beyond the scope of this guide to address that circumstance. If the Will is not admitted to probate with all of the parties in agreement, the nominated Executor and beneficiaries will need to retain separate counsel.

If there is no disagreement among the parties, the court will issue an Order and provide Letters Testamentary to the Petitioner. The Executor is now authorized to act on behalf of the estate. The court will provide as many "certificates of appointment" as requested by the Petitioner/ Executor. The Certificates of Appointment together with the certified copy of the Death Certificate will permit the Executor to administer the assets of the estate.

### **Minor Children**

Guardianship of minor children in New York is divided between guardian of the "person" and guardian of the "property". The parent of the child has the right to be the guardian of the person of his

or her minor child without Court approval. However, Court approval is required even if a parent is to be appointed guardian of the "property" of a minor child.

If the deceased individual left minor children who have no surviving parent, a guardian of the "person" must be appointed for the minor children by the Surrogate's Court as soon as possible. The nomination of the guardian included in the testator's will is given great weight. In addition, if the testator left funds directly to the minor children, a guardian of the property of the minor children will be needed. The court will complete a background check on the nominated guardian before making an appointment.

Further, it may be necessary to request an expedited or temporary appointment of a guardian for the reason that minors cannot receive medical treatment or enroll in school without the consent of a parent or guardian.

In the event that the Will does not give the minor child his or her "intestate" share then the Court will appoint a guardian ad litem to examine the Will and supporting document on behalf of the minor child. The guardian ad litem reviews the documents to be sure that they appear to be in order and that no objection to the Will should be made on behalf of the minor child. The guardian ad litem will be appointed even if the natural parent of the child is surviving.

### **Bonding**

If the Will did not waive the requirement of a bond, the Executor may have to post a bond in order to protect interested parties (creditors and beneficiaries under the Will) against possible negligence, fraud, or embezzlement. The bonding premium is based on the total value of the probate assets. The premium is an administration expense chargeable to the estate. The estate lawyer or an insurance agent can help the Executor to arrange this coverage. In some circumstances the Court can waive the requirement of Bond.

## **ADMINISTRATION OF ESTATE AFTER APPOINTMENT**

### **Overview**

Upon receipt of the Letters Testamentary, the Executor has the legal authority and the responsibility to "execute" the terms of the Will and dispose of the testator's assets consistent with the terms of the Will.

The Executor is a "fiduciary" to the estate and has a duty of loyalty and a duty of impartiality to the estate. The Executor is required to use the skill of a "prudent investor" when considering the investment and placement of estate assets. Whether or not the estate assets should be invested in anything other than insured and liquid funds, such as an FDIC insured savings account, must be decided by the Executor. The Executor will consider factors such as the expected length of the administration/probate process, the nature of the inherited assets and the need for cash to pay bills and taxes.

One of the primary and initial duties of the Executor is to identify and gather assets and to decide whether or not to sell the assets and place the proceeds in an interest-bearing account. The Will may include specific instructions to sell or may contain other directions as to investment. The instructions to sell assets, if included in the Will, are binding on the Executor, unless a court proceeding is brought and the court requires a different disposition.

Ultimately, the Executor will distribute the assets and close the estate. The total period of administration from time of death to final closing generally ranges from 7 to 24 months. The variation in time depends on the complexity of the estate and whether or not an estate tax return is required to be filed with the Internal Revenue Service and/or New York State. For estates with hard to sell assets the time period will be longer.

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In New York, specific bequests and general bequests (e.g. I give \$10,000 to my son, John) must be paid within seven months of date of appointment. Unless the estate does not have sufficient funds to make the payment, the beneficiary may be entitled to interest on any unpaid bequest after the expiration of seven months.

If an Executor keeps an asset beyond a reasonable time and the value of the asset declines, the Executor may be held liable for the loss. The primary focus of the Executor's duties is to preserve the value of the assets during the administration period.

Further, the beneficiaries of the estate may not want the Executor to sell some or all of the assets. The Executor should consider the wishes of the beneficiaries in connection with this decision. It will be important to seek the advice of an attorney regarding any limitations on investments set forth in the Will. In addition, the estate attorney can assist in the decision as to whether to sell the assets and distribute the cash to the beneficiaries or keep the assets as is and distribute things directly to the beneficiaries. This is known as a distribution in kind.

All tax elections, decisions to liquidate and all other discretionary decisions required to be considered by the Executor must be made in the best interests of the estate and not in the best interests of the Executor. This is true even if the Executor is a beneficiary. The Executor owes a duty of loyalty to the estate.

### **Identify and Value the Assets**

One of the most important duties of the Executor is to identify the assets owned, in whole or in part, by the testator at the death of the testator. Even if an estate tax return is not required to be filed, the Surrogate's Court requires a report of all assets ("Inventory") to be filed with the court by the Executor within 9 months from date of appointment as Executor. If an estate tax return is required, the court may permit the filing date to extend to the estate tax return extension date.

### **Locate the Assets**

If the decedent left a list of items or a letter of direction, the Executor's task is simplified. Nevertheless, it will be necessary to systematically review all of the testator's financial information to be sure that the Executor identifies all assets. Begin with the most recent income tax return. This will list most income-producing assets and other information about the decedent's finances. Moreover, the supporting financial records may be stored in close proximity to the copy of the return. It is possible that the financial information will be on the testator's computer. Access to the password will be required.

The testator's accountant may also provide the Executor with valuable financial information needed to administer the estate.

In addition, it is necessary to check with New York State Comptroller - Office of Unclaimed Funds to be sure that none of the accounts or income of the deceased individual escheated to the state.

As soon as possible the Executor should request the U. S. Postal Office to forward mail to the Executor.

Records relevant to the following items provide a starting point for securing the necessary information:

- Automobile and boat registrations and insurance information
- Checkbook registers and on-line or paper copies of bank statements and cancelled checks
- Income tax returns for the last three years
- All prior gift tax returns
- Life insurance policies
- Medical insurance and Medicare information
- Business records – Name and address of the business accountant
- Credit cards and statements
- Financial records including bank statements, brokerage statements and other investment information

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- Deeds, mortgages, and real estate tax bills
- Information regarding jewelry, art, and other valuables including insurance riders attached to the Home Owners Policy

Depending upon how well or how poorly the testator's records were organized, the Executor should be prepared to rummage through every room, closet, desk drawer, and "secret hiding place" that may exist, in particular, the testator may have hidden cash or collectibles.

### **Safe Deposit Box**

If the testator owned a safe deposit box, it is likely that the expense for the same will appear as a deduction on the income tax return. To access the box, the Executor will need a certified copy of the Letters Testamentary, a death certificate and the keys to the box. If the keys cannot be located, it will be necessary to pay for the box to be drilled. It is recommended that the Executor inventory the box, remove its contents and close/cancel the box. If the contents require the continued security of a safe deposit box, the Executor may open one in the name of the estate.

If Executor cannot locate any safe deposit box, but it is believed that the decedent had one, the Executor should send a letter of inquiry to all local banks with which the testator did business. If there is still no identification of a box, the American Safe Deposit Association (ASDA) will solicit that information from its member banks and savings institutions. There is a fee for this service.

### **The Estate and Taxes**

The Executor is responsible for filing and paying from estate accounts applicable federal and state taxes on a timely basis. After death, there are three potential taxpayers: (1) the estate, which may have to pay federal and state income tax, and estate tax; (2) the testator, who is subject to income tax for the portion of the year before his or her date of death; and (3) the beneficiaries, who may have to pay income tax upon the receipt of a distribution from the estate.

Upon receipt of Letters Testamentary, the Executor must secure an Employer Identification Number from the Internal Revenue Service ("EIN").

This number is assigned by the Internal Revenue Service ("IRS") upon completion of IRS Form SS-4 and the information on the assignment letter from the IRS should be shared with the professional assisting the Executor with the preparation of estate tax returns. All accounts opened for the estate will require the use of this EIN.

To the extent that the taxation of the estate impacts the beneficiaries, the Executor is expected to take into consideration this impact in making tax elections for the estate during administration. For example, deductions for commissions and attorneys' fees may be taken on either the estate tax return or the fiduciary income tax return for the estate.

The Executor must decide which return will achieve the best result for the estate and the beneficiaries.

In the event that the Executor is not skilled in the preparation of tax returns, it is advisable to secure the assistance of an attorney, particularly when a federal estate tax return is required, and possibly an accountant.

This guide is not intended to address all of the details required to make the requisite tax decisions for the estate. However, the following is a summary of the issues for consideration.

### **Final Income Tax Returns**

The Executor is required to be sure that the final federal individual income tax return for the testator is filed. Generally, the Executor will contact the prior preparer to secure his or her services for this task. The due date to file the return is April 15 of the year after the year of death, although extensions to file are available.

If the testator was married at the time of death, the Executor and the surviving spouse may consent to the filing of a joint return. This election is not available to the estate if the surviving spouse remarries before the end of the year. The income

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reported on the joint return includes the income received by the testator for the portion of the year that he or she was living, and the surviving spouse's income received for the entire calendar year.

It will be necessary to file a final New York State income tax return if the federal return is required.

**Estate Tax Return**

*New York State Law*

Recent legislation has significantly changed the New York estate and gift tax rules for persons dying on or after April 1, 2014.

Beginning April 1, 2014, the New York State estate tax exemption will increase each year over the next five years, until it is on par with the federal estate tax exemption, as shown in the table below.

<b>For individuals dying:</b>	<b>NY Estate Tax Exemption Amount</b>
April 1, 2014 - March 31, 2015	\$2,062,500
April 1, 2015 – March 31, 2016	\$3,125,000
April 1, 2016 – March 31, 2017	\$4,187,500
April 1, 2017 – December 31, 2018	\$5,250,000
January 1, 2019 and beyond	Equal to federal exemption amount

After April 1, 2014, if an individual dies with a taxable estate that is larger by 5% than the amount referenced above for the appropriate year of death, the credit that his or her estate can claim against estate taxes owed to New York is eliminated. The estate tax will be calculated on the first collar of the estate using the brackets provided by New York State. The brackets gradually increase starting at a rate of 3.06% for estates of \$500,000 and ending at the highest rate of 16% for estates of \$10,100,000 or more.

For example, under the current rules, in 2015 an estate that is valued at \$4,000,000 will pay estate tax of \$280,400 prior to consideration of available deductions. Recall that estates valued below \$3,125,000 pay no estate tax after March 31, 2015. Additional rules apply to gifts made after April 1, 2014 and before January 1, 2019.

*Federal Law*

For federal estate tax purposes, an estate tax return is required to be filed if the estate's combined gross assets and prior taxable gifts exceed \$5,000,000, as indexed for inflation. In 2015, the indexed amount is \$5,430,000. The estate tax, generation skipping tax, and gift tax exemptions are the same. (Note, the generation-skipping tax for New York State has been repealed effective April 1, 2014). This means an individual can give away the exemption amount during his or her lifetime and pay **no** federal estate tax at death if they do not own any additional assets.

Federal law also provides for a planning device, known as "portability," which permits the re-allocation of the estate tax exemption between spouses. The way it works is, upon the death of the first spouse, any unused estate tax exemption is "transferred" to the surviving spouse by the filing of a federal estate tax return by the estate of the first spouse (i.e., even if filing the return is not otherwise required). At the death of the second spouse, the estate of the second spouse can allocate the estate tax exemption available to the second spouse (e.g. \$5,430,000) plus the amount of the exemption received from the estate of the first spouse to die.

Complicated rules regarding remarriage and other variables make reliance on this tool difficult for planning purposes. However, the tool can be very useful for individuals whose taxable estates exceed \$5,000,000 (as indexed) and who have not completed appropriate tax planning. Note that New York State did not adopt portability in the recent tax law changes.

### *Filing Estate Tax Returns*

If a federal estate tax return is required, the Executor must file with the IRS, Form 706. If a New York State estate tax return is required, the Executor will first prepare IRS Form 706 and then attach to it the additional New York State Form ET-706. The return is due within nine months after the date of death. One extension for filing the New York return is available.

With rare exception, however, no extension for payment of the tax is available. Due to the complex nature of these forms, it is recommended that you secure the advice of an attorney who is knowledgeable in this area. Audit of these returns may be costly.

Much of the information needed for this form is secured in the early information gathering process. The Executor should request copies of all gift tax returns filed by the testator from the IRS, unless the Executor is working with the professionals originally engaged by the testator and the professionals have copies of all prior returns. At the federal level, the law operates to add all taxable gifts made after 1976 to the value of the estate before computing estate taxes. Gifts are normally valued at their fair market value at the time the gift was completed, unless the donor retained a life estate or control over the property.

In addition, the Executor must try to determine if the testator made gifts to "skip persons" during his or her lifetime to determine if the testator made use of the Generation Skipping Tax Exclusion. This can be a very complicated matter requiring more than a little detective work. Note, however, the generation skipping transfer tax only applies for federal purposes. New York State generation skipping transfer tax was repealed effective April 1, 2014.

The next step is to determine and claim all available deductions and credits. Only then can the amount of any estate tax due be computed.

The estate is allowed to take deductions for expenses and debts actually paid by the estate against the value of the estate assets. The most significant

deduction is the marital deduction which, under current law, is equal to the value of the assets that pass to the spouse either outright or in trust. If the assets are in trust for the spouse, the deduction will be available only if the trust satisfied the tax rules regarding "quantified terminable interest property" also known as a QTIP trust. The marital deduction typically eliminates estate taxes on the estate of the first spouse to die.

In addition, an unlimited deduction is allowed for the value of the property transferred to a charitable organization that qualifies for tax exempt status under Internal Revenue Code ("IRC") Section 501(c)(3). Note, however, the Will must require the bequest to the charity (or charities), because the executor is not permitted to make the charitable gift on a discretionary basis. It is often the case that the beneficiary of retirement funds is a charity. The Executor will need to know who received these assets and in what amount even though the retirement funds are not paid to the probate estate.

There are a number of other credits, elections and valuation variables that exist to render the preparation of this return very complicated.

### **Step-Up in Basis**

Even if the estate is not large enough to require the filing of an estate tax return, the current tax laws provide for an increase (or "step-up") in basis to the value of certain assets owned by the testate or at death. As a result of this step-up, the capital gain tax incurred on the subsequent sale of such assets is decreased to the extent of the increase in basis. Therefore, even if no estate tax return is required to be filed, the valuation of the assets in the estate upon the testator date of death can be very important to avoid capital gains taxation.

### **Additional Federal Taxes**

After all deductions and adjustments have been taken, the Generation-Skipping Transfer (GST) tax may have to be computed and added to the federal estate tax due. The federal GST tax applies when the testator has made transfers exceeding the federal extension amount to any person who is more than one generation below the person making the gift. The distribution has "skipped" a generation.

### **Estate Fiduciary Income Tax Returns**

If advantageous for income tax purposes, the estate may elect to use a fiscal year that is different than a calendar year. The fiscal year must end no later than the end of the month prior to the month in which the death occurred (no greater than a 12 month period). If the estate earns in excess of \$600 during a fiscal year of administration or if it has any taxable income, it will be necessary to file a New York State and a federal fiduciary income tax return.

The Executor will report the income of the estate on Form 1041, "U.S. Income Tax Return for Estates and Trusts". New York State requires the filing of form IT-205.

In determining what income is taxable to the estate and what is taxable to the beneficiaries, the general rule is that if there are no distributions to the beneficiaries during the fiscal year, the estate will pay the tax on the income. If distribution to the beneficiaries is made, in most cases, the beneficiaries will "pick up" the income on their personal returns from the information reported on the K-1 generated by the estate's income tax return. Except in the final tax year of the estate, the estate will report and pay capital gains and losses. Because the estate is likely to be required to pay tax at a rate that is higher than the tax rates of the beneficiaries, it is generally wise to distribute assets to beneficiaries to permit the use of a lower tax rate for the payment of taxes. Due to the other administration constraints applicable to an Executor, this preferable tax position may not be possible. The Executor must consider all factors relevant to the administration of the estate and not just the tax implications.

If the estate has deductible expenses, those deductions are used to offset the income reported on the estate's return or on the K-1 distributed to the beneficiaries. Unless the deductions are "matched" with the income, it is possible that some deductions will be "wasted" because there is no offsetting income. Deductions that are reported on the Estate tax return cannot be reported again on the Estate's income tax return. Careful planning of deductions is needed.

Deductions for the final income tax return filed for the estate will "pass out" to the beneficiaries. Expenses of administration, such as Executor fees, attorney fees, accountant fees and appraiser fees generally will be the most significant type of deductions. Even if these deductions are more than the taxable in case of the estate, these deductions may be useful to beneficiaries who itemize their deductions.

### **VALUATION AND CLASSIFICATION OF ASSETS**

Under the New York State and federal tax law, all of the property owned by the testator anywhere in the world, even property of which he or she owned only a fractional share, must be inventoried and valued. Although New York does not assess a tax on real property assets located outside of New York State, the calculation of the tax on the assets within the state requires the reporting of the value of all assets on the federal estate tax return Form 706. This results in a "gross up" of the assets that are subject to New York State estate tax.

Assets are valued at date of death, and if tax would be saved, the Executor may elect an alternate valuation date which is the date of disposition of the asset or the value of the asset six months after date of death, which ever is sooner.

The value of property is its fair market value. The tax regulations enforced by the Internal Revenue Service ("IRS") define fair market value as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." The IRS regulations define the method for establishing values for publicly traded stock – it is the mean price between the opening and close of the day – not the closing price.

### **Non-Probate Assets**

At the time of death, some of the testator's assets may pass to a joint owner or to a named beneficiary by operation of law. Some assets are not owned by the deceased person, individually.

The ownership and control of these assets are not governed by the Will and the Executor does not have authority over these assets. The Surrogate's Court does not have authority over these assets unless a separate petition regarding the assets is filed with the Surrogate's Court.

These "non-probate" assets are typically not subject to claims against the estate (caveat – in New York there is case law to support that if the assets of the estate are insufficient to pay claims, certain joint and other assets may be subject to the claims of creditors), so they may be immediately available for use by the joint owner or beneficiary.

Accordingly, when the Executor discovers a non-probate asset, the Executor's main responsibility is to determine its value for estate tax purposes and listing in the Estate's inventory which is filed with the Surrogate's Court. The Executor should notify the joint owner or beneficiary of the existence of the asset, but it is not the Executor's responsibility to help the beneficiary transfer the asset to his or her own name. Care must be taken to avoid any costs to the Estate associated with the transfer of non-probate assets, unless the beneficiaries have agreed to incur that cost as part of estate administration.

### **Life Insurance**

Life insurance policy proceeds are often an important source of cash for survivors. Because life insurance proceeds are paid to the beneficiary whose name is on file with the insurance company, life insurance is not a probate asset (unless the estate is the named beneficiary). The terms of the Will do not control the distribution of life insurance.

However, the value of the proceeds is included in the testator's taxable estate. Therefore, it is important that the Executor be aware of and receives documentation of all insurance policies on the life of

the testator. The insurance company that issued the check to the beneficiary is required to provide the Executor with the information needed to report the value of the policy on the estate tax return. Generally, the Executor can coordinate with the beneficiary to request this value which is reported on an IRS Form 712 when the claim for payment of the insurance proceeds is submitted to the insurance company.

The estate tax return requires the Executor to report the existence of all insurance policies which insured the life of the testator, even if not owned by the estate or the testator or included in the taxable estate of the testator. In addition, insurance owned by a testator on the life of another individual is taxable for estate tax purposes to the extent of the replacement value of the policy.

If the ownership of the policy was transferred by the testator to a trust or another person during their lifetime, it will be necessary to carefully review that transaction to determine if the asset is includible in the testator's taxable estate. If the transfer was made within three years of death, the value of the policy proceeds is "brought back into" the taxable estate of the testator as if the transfer of ownership had not been made.

Recovering the proceeds involves filing a claim form, which is secured from the insurance company, together with a certified copy of the death certificate. Sometimes the company will also require the surrender of the policy, or submission of an affidavit stating the policy has been lost.

### **Survivor Benefits**

Additional assistance may be required to file for the Social Security death benefit and survivors' benefits, veterans' burial benefits, or any employee, union, or workers' compensation benefits. Social security payments that are directly deposited to the account of the testator will be automatically withdrawn if the testator died before the close of the month for which the deposit was made. Some pension payments may also have withdrawal and deposit requirements that are automatically executed.

### **Joint Tenancy Property**

Property that was owned jointly by the testator with another person or entity who has a "right of survivorship" must be included in the inventory of assets which is filed with the Surrogate's Court, even though the joint property is not included in the testator's probate estate.

For estate tax purposes, the identity of the joint owner is significant. If the joint owner is the spouse, the testator is presumed to own ½ of the value of the property. If the joint owner is someone other than the spouse, the testator is presumed to have contributed the entire value of the asset and is therefore subject to estate tax on the entire value of the asset, unless the Executor can demonstrate the value of the contribution of the other joint owner.

This joint property, although included in the testator's taxable estate, is not included in the testator's probate estate.

### **Annuities**

Annuities are payable to the beneficiary whose name is on file with the annuity company.

If the annuity is a lifetime annuity and the guaranteed period (often 10-year certain) has expired, there may be no value remaining. If the annuity is not in "pay" status and/or there is still time left on the guaranteed payment period, the beneficiary will receive that value.

The annuity value must be reported on the decedent's estate tax return. Annuities, in addition, are subject to income taxation to the recipient of the annuity. Ordinary income is payable on the difference in value between the amount paid out and the amount initially paid to buy the annuity ("basis"). It may be necessary for the beneficiary to seek the advice of tax counsel regarding the income tax consequences of receipt of the annuity proceeds.

### **Retirement Funds, IRAs, Keogh Plans and others**

The proceeds of these types of assets are payable to the named beneficiary. If there is no named beneficiary, the terms of the plan or contract will

dictate who or what entity receives the assets. Many plans and contracts provide that the estate is the default beneficiary, but the precise terms of the plan or contract must be reviewed. Unless the beneficiary is the estate, these assets are not subject to probate, but their value is subject to estate taxation. Retirement funds and IRAs are valued as of date of death. These assets (other than a Roth IRA) are also subject to income taxation to the named beneficiary. There are significant and complex rules associated with required distributions from these assets. It is very important for the Executor to be familiar with these requirements or seek the assistance of qualified counsel. Significant tax consequences will follow if the distribution requirements for these funds are not satisfied.

### **Assets Controlled by the Will/Probate Assets**

All assets owned by the testator, individually, and which do not make use of joint account ownership, beneficiary designations, transfer on death (TOD) designations or "In Trust for" designations at banks will be required to be distributed in accordance with the terms of the testator's Will. Unless the testator has created a revocable trust and transferred all of his or her assets to that trust prior to death, this means that most "ordinary" assets will pass by the Will as part of the probate process.

The following is a list and discussion of the valuation of those assets for estate tax purposes.

### **Tangible Personal Property**

This property includes furniture, clothing, and memorabilia, major appliances, motor vehicles, household goods, tools and equipment, sporting goods, collections (art and other), jewelry, antiques, and all other personal effects.

The value of personal property is the price that a willing buyer would pay to a willing seller. If an item or group of items is not saleable, such as well-worn clothing, there is no need to list it in the inventory. Please note that the estate may not take a charitable deduction for items "given" away unless the gift is expressly set forth in the Will. However, a beneficiary may "receive" the property "in kind" and

give the property to charity thereby qualifying for a personal deduction on his or her personal income tax return.

It may be necessary to make an inventory of the items in the home. If the items are to be sold, the Executor may retain a service to complete the inventory and sale. Where there is a likelihood that the items in question are valuable, a photograph of each item is recommended.

The Executor should determine if insurance riders owned by the testator list any items of tangible personal property. It may be necessary to secure the services of a qualified auction house in the case of significantly valuable tangible personal property.

Professional appraisals may be required to comply with IRS requirements, buy-sell agreements or to satisfy the need to accurately value hard to value assets.

### **Cash and Bank Accounts**

The cash that is in possession of the testator, money deposited in savings, checking, and money market accounts, certificates of deposit, and other cash equivalents are valued at face value as of date of death. Interest accrued up to the date of death is included in these amounts. Checks outstanding at the time of death may be subtracted from the total if they are later honored and charged against the testator's account. If the cash includes foreign currency or foreign bank accounts, the value should be stated in terms of the official rate of exchange on the date of death.

### **Real Estate**

If the testator owned real estate, such as a personal residence, a commercial building, a summer or winter home, farmland, etc., a professional appraisal is likely to be necessary. However, if the real property is sold within six (6) months of date of death, the sale price to a third party (unrelated) purchaser may be used as the value of the property. There are specialized valuation rules for certain special use properties such as farmland. The estate attorney should be consulted to determine if the rules

are applicable and/or desirable and if the Executor must take special action to make the elections.

In the event that the testator owned real property in a state other than New York, it will be necessary to complete an ancillary probate proceeding in that state in order to be able to transfer or sell the real estate. There may also be a separate state estate tax due for the property owned in that state.

### **Stocks and Bonds**

The value of publicly traded stocks, bonds, and mutual funds on the date of death has to be determined in accordance with IRS regulations. The value of dividends may be included in the date of death value if they were announced prior to death, even if not paid until after death. The value of accrued but unpaid interest on bonds is includible in the taxable estate. Discounts and other special adjustments to the value of stock may be applicable under special circumstances, e.g. a holding of a large block of stock.

If the testator owned privately traded stock, it will be necessary to secure an appraisal of that stock, particularly if an estate tax return is required or to establish the value for the step up in basis.

### **Business Interests and Partnerships**

If the testator owned a business interest in a sole proprietorship, partnership, limited liability company, or corporation, it is likely that an appraisal of the business will be required to establish a basis for this asset and for estate tax purposes. In all cases, the organizing documents and any buy-sell agreements must be reviewed to determine if and what buy-sell arrangements existed at the testator's death. The accountant for the business is usually a good source for this information. The formation documents are on file with the Secretary of State. However, these documents will not include the pertinent buy-sell arrangements, if any.

In connection with partnership interests, if the partnership agreement is silent as to disposition on the death of a partner, the surviving partners are required to account to the Executor as the representative of the deceased partner. Payment of the deceased partner's interest is due within a reasonable time thereafter.

Please note that there are tax elections and other actions that may be required to be taken by the Executor within a short time of the death for certain business interests. Please consult a knowledgeable tax attorney or estate attorney.

### **Loans, Notes, and Mortgages**

Loans, promissory notes, contracts to sell land, and mortgages held by the testator at death are generally valued at the amount of unpaid principal together with the accrued interest, unless the Executor can prove that the obligation or contract has a lower value, is worthless or unenforceable. If the testator expressly forgives a note or obligation in the will, the Executor will not be able to collect the obligation. However, the value of the obligation is still included in the taxable estate of the testator. It may also be necessary to issue a IRS Form 1099 to the person who was obligated to pay prior to death, but whose obligation is reduced or forgiven.

### **Powers of Appointment**

If the testator was granted a general power of appointment over assets, the value of the assets which are subject to the general power of appointment are includable in the testator's taxable estate. Powers of appointment are governed by numerous technical rules. If the testator makes specific reference to a power of appointment in his or her Will, then the Executor will have to secure a copy of the document which grants the power.

### **Miscellaneous Assets**

The testator's estate may contain other types of assets, such as rights to receive royalties on patents or trademarks, judgments in lawsuits, and reversionary or remainder interests or a cause of action that is pending. Professional assistance in identifying and appraising these kinds of assets may be necessary.

## **PRESERVE THE ASSETS**

The Executor is responsible for the preservation and maintenance of the testator's assets. This obligation extends to all probate assets. Unlike the obligation to value all assets for inclusion in the inventory and estate tax return, if any, this obligation extends to only probate assets. For example, if the testator owned a residence with a surviving spouse as tenants with right of survivorship, the Executor need not be concerned with the insurance coverage on the residence. However, if there is no surviving spouse, then the Executor must secure the property and take appropriate precautions to avoid burglary or vandalism. The Executor must arrange for insurance coverage.

If there are motor vehicles, they should also be secured and kept in running condition. No individual should be permitted to drive the vehicles if the insurance on the vehicle will not provide coverage in the event of an accident.

Valuables, such as jewelry or securities, that were not jointly owned, but are part of the estate, should be kept in a safe place, such as a safe deposit box rented in the name of the estate.

If the testator maintained an ongoing business, and the Will does not specifically permit the Executor to continue the business, a court order permitting the Executor to act may be required. Some businesses with professional licenses may not be continued by the Executor who does not maintain such a professional license.

Depending on the size and nature of the business, it may be necessary to retain a professional to continue to manage the business.

During the period of administration, the Executor will have to take additional actions to preserve assets. Depending on the nature and extent of the assets, it may be necessary to:

- Pay premiums on property and motor vehicles;
- Pay mortgage and other ongoing debt obligations;

- Pay or cancel utilities, as applicable;
- File claims for Medicare, private medical insurance, or casualty insurance benefits;
- Cancel credit cards and secure final balances and refunds, if any;
- Cancel cable and related unnecessary utility contracts;
- Cash in unused miles and bonuses for airlines;
- Cancel club memberships and magazine subscriptions and secure refunds, if any; and
- Cancel any standing orders to buy or sell stocks or commodities with brokerage houses.

## **PAY CLAIMS, EXPENSES, AND TAXES**

The Executor must retain a record of all claims served on the Executor or filed with the Court and all debts known to the Executor and paid by the estate.

Expenses are separated into two categories: administration expenses and debts of the testator. In New York, funeral and administration expenses must be paid as a priority in advance of paying any debts of the decedent. This priority payment is only important if the testator did not have sufficient funds at death to pay all of the debts against the estate and the expenses of the estate. The estate taxes and income taxes due by the estate are administration expenses.

### **Establish an Estate Checking Account**

The Executor will open an estate checking account using the EIN and a certified copy of the death certificate and a Certificate of Letters Testamentary received from the Court. All of the debts and expenses of the estate should be paid out of the estate checking account. The account can be established at any bank, brokerage or credit union that provides checking account services. The Executor is not permitted to move funds outside of New York State. Accordingly, any bank or brokerage firm used by the Executor must be authorized to do business in the State of New York.

Because the Executor is required to act prudently, the terms and costs of maintaining the account must factor in the selection of the estate's financial arrangements. The estate may open a savings account or a money market fund that is insured or invests solely in government securities to deposit significant funds. The account should be opened under a name such as "Estate of Susan Testator, Deceased; John D. Smith, Executor." Once the account is opened, the Executor can deposit all checks payable solely to the deceased. It should not be necessary to endorse the checks. The checks may be deposited with "for deposit only" indicated.

All proceeds from the sale of estate assets should be deposited to the estate account. It is critical to keep records of all deposits and the source of the deposited funds. The Executor should retain a copy of the deposit check. It is possible that the Executor will have to account to the beneficiaries and/or creditors for all estate transactions. Reimbursement for advances made personally by the Executor or the beneficiaries is possible, but not preferable. If the payment of expenses can wait until the estate account is open with sufficient funds to meet the expenses, that is the preferred method of payment.

### **Decide When and Which Bills to Pay**

The first bills that require consideration for payment are those that were incurred in connection with the administration of the estate. If there are sufficient assets in the estate to meet all expenses and pay all debts, when a bill is received and is not questionable, it should be paid promptly from the estate account. In all events, the Executor should take steps to avoid finance charges or bad check charges. Ideally, the decedent's bills, debts, and expenses should be paid as soon as the estate has sufficient funds and the Executor has had an opportunity to determine that the bill is legitimate. Because some debts, particularly medical, may be covered by insurance, care should be taken to avoid making a premature payment. The Executor should check to determine if the testator maintained insurance to cover outstanding balances or debts.

The Executor and beneficiaries are not personally required to pay the debts of a deceased relative. While the Executor may feel some moral obligation to do so, careful consideration and consultation with an attorney is recommended before any such voluntary payment is made.

In formal probate proceedings, the estate is required to account to all creditors known to the Executor and who have filed a claim against the estate. Generally, only probate assets (or assets of a revocable trust, depending on the language of the trust) are used to pay the estate's expenses and claims. Conversely, if there is a surviving owner of real property, the jointly held mortgage and tax obligations for that property are the responsibility of the surviving joint tenant, not the estate.

New York State law provides that if an estate has insufficient assets to meet all obligations, certain obligations are to be paid before others.

The priority order in New York is as follows: (1) funeral expense; (2) costs of administering the estate (including fees and commissions); (3) taxes and other priority payments as specified by law; (4) wage claims; and (5) all other legitimate and unsecured debt. If the assets are insufficient to pay all claims in a particular class, each creditor in the class will receive a pro-rata percentage of the claim.

If there are insufficient funds to pay all debts in full or insufficient funds to make all of the distributions required under the Will, the Executor must reduce the bequests under the Will to complete the estate. The order in which this is accomplished is, first, in accordance with the instructions under the Will. If there are no such instructions, then New York State law provides as follows: (1) the residue is reduced or eliminated first, (2) the general money bequests (bequests of a specific amount, but not from any particular source) are reduced next, (3) money bequests payable out of specific sources (i.e., from the sale of named assets) are reduced pro-rata next and finally, (4) bequests of specific property are reduced or sold as a last resort.

## **Deciding What to Sell**

Assuming that there are sufficient assets to make all of the distributions required under the Will, but insufficient cash to make the distributions, the Executor must decide which assets to sell in order to generate the necessary cash. The Executor's decision as to which assets to sell and which to distribute to the beneficiaries "as is" will rest on many factors, including the language of the Will, tax considerations and beneficiary preferences. Specific bequests of property may not be sold until all other estate assets are depleted.

Even when it is not necessary to sell assets to pay debts it may be prudent or convenient to sell assets in order to complete the distributions required under the Will.

For example, where the asset is not easily divided among beneficiaries or the value is difficult to determine without a sale.

Records of decisions to sell and not sell assets must be maintained.

If the Estate owns real estate, it will be necessary to secure a Release of Lien from New York State in order to sell or distribute the property from the estate. No Release of Lien is required if the real property is owned in joint title with the surviving spouse. If an Estate tax return is required, the request for a Release of Lien will be filed at the time of the filing of the Estate tax return. A separate request can be filed with the New York State Department of Taxation.

## **DISTRIBUTE THE REMAINING ASSETS**

### **Personal Effects and Motor Vehicles**

Even if the testator's residence is jointly owned, the furniture and personal effects in the residence are not necessarily joint property. If the assets are insured, the owner of the assets may be listed in the policy. In practice, however, they are often treated as belonging to the surviving joint owner of the home, or to the testator's next of kin, except for items specifically bequeathed to others by the Will. Once the personal property has been valued and

inventoried for tax and probate purposes, and once it is apparent that the estate's expenses can be paid without selling off these items, the personal effects can be distributed pursuant to the Will.

### **Probate Assets**

Once all expenses, claims, debts, and taxes are paid or provided for, the Executor may begin the distribution process. In New York, the Executor will be held personally liable for unpaid debts if the Executor distributes assets to the beneficiaries and a claim is filed within seven (7) months of the date of appointment which cannot be paid due to insufficient remaining assets.

Before making distributions, the Executor should determine if an accounting is required or if a simple report to the beneficiaries is all that is necessary. When the estate is large or complex, the process of planning distributions should begin shortly after the Executor is appointed.

Many factors must be taken into account in planning for distributions. Most important are the immediate and legitimate needs of the beneficiaries, the tax implications of making (or not making) distributions and the limitations and directions imposed by the Will and local law. Within these boundaries, careful planning can do much to minimize taxes that would otherwise be paid by the estate and/or beneficiaries.

In certain cases, the distribution scheme provided in the Will may be changed by Court order. State law may permit a surviving spouse to take an "elective share" which is equal to one-third (1/3) of the estate in lieu of whatever he or she received in the Will. State law determines what property is counted in computing the elective share. Some beneficiaries may decide to refuse or "disclaim" part or all of the inheritance left to them. In such a case, no adverse gift tax consequences will occur if the disclaimer is made no later than nine months after the death of the testator. The legal requirements for a "qualified" disclaimer are strict and the advice of counsel will be important to ensure that the negative tax consequences are avoided.

When a beneficiary disclaims he or she is treated under the Will as if he or she predeceased the testator. The property "disclaimed" will pass to the next designated beneficiary under the Will.

During the period of administration, some of the non-cash assets may have increased in value, while others may have declined. It may be necessary to obtain final appraisals before distribution of the assets can be made.

## **CLOSING THE ESTATE**

The close of the estate signals completion of all duties of the Executor and release of the Executor from any future liability concerning the estate assets and administration. The Executor may secure that release from the beneficiaries of the Estate or, in absence of their release, an order of Court.

Before requesting a release, the Executor must be able to demonstrate that all tax returns have been filed and that a closing letter for the estate tax return(s) (if any) has been received from New York State and the IRS, as applicable.

### **Commissions**

Unless the Will states otherwise, the Executor is entitled to reimbursement for reasonable out-of-pocket expenses and a commission which is calculated according to the applicable New York statute and is based on the value of the assets of the probate estate. The Executor may choose to waive some or all of the commission. The commission is usually taken at the end of the administration process, but may be taken sooner upon application and approval of the Court or upon the consent of all beneficiaries.

### **Informal Closing**

If all of the beneficiaries of the estate are adults and have the legal capacity to sign a Receipt and Release, then the Executor should prepare a summary of the transactions of the Estate, make copies of statements, account information and related financial information available to the beneficiaries who wish to review the estate's

transactions and prepare and distribute to the beneficiaries a proposed distribution schedule with Receipts and Releases. Upon receipt of the signed Receipts and Releases, the Executor will file the Receipts and Releases with the Court and distribute the final distribution check.

In addition, the Executor will file with the Court a Fiduciary Affidavit which advises the Court that all matters of the Estate are concluded. An Attorney Affidavit providing the same information to the Court is also required in some counties.

### **Formal Closing**

If one or more of the beneficiaries does not want to sign the Receipt and Release or if the beneficiary is not able to sign the Receipt and Release due to incapacity, the Executor must petition the Surrogate's Court to secure a discharge of the Executor's responsibilities to the Estate. A formal accounting will, in this case, be required using the official court format for an accounting required under New York law. The Petition is filed with the Court and the Court sets a date for the appearance of the Petitioner (Executor) and any beneficiary who wants to object to the accounting. A beneficiary who objects has to state why he or she believes the

Executor failed to act properly. Any beneficiary who does not voluntarily agree with the Petition (by signing a Waiver and Consent) must be served with process by the delivery, usually in person or by mail of the Petition and Citation. The Citation states the date of the Court appearance.

If an objection is filed then the matter turns into a litigated accounting proceeding. The details of that proceeding are beyond the scope of this work.

## **A FINAL WORD**

The role of Executor is an important one. The Executor will be required to communicate, interact with others under often difficult circumstances, remain accessible to beneficiaries, and excel at organization, decision making and delegation skills. While the Executor is required to follow the terms of the Will (the title is derived from the primary duty which is to "execute" the terms of the Will), there are tax and administration decisions to be made along the way. Often, these elections and decisions will have a direct impact on the lives of the beneficiaries of the estate for many years.

## BOUSQUET HOLSTEIN PLLC ESTATE PLANNING AND ADMINISTRATION

The services of our Trusts and Estates Practice Group include estate, tax, business succession, financial and retirement planning; estate and trust administration; estate planning for families with special needs; elder law; Medicaid planning; estate and trust litigation; charitable gift planning; and representation of tax-exempt and charitable organizations.

Our attorneys and paralegals possess diverse talents and interdisciplinary skills. Areas of concentration include tax, employee benefits, will and trust preparation and administration, tax return preparation, business organizations, and elder law.

Members of our Practice Group include attorneys who are admitted to practice in New York, Pennsylvania, Illinois and Florida, allowing us to assist in estate, tax, financial and retirement planning, and in the administration of estates and trusts, for residents of each of these states.

### **Estate Planning**

Our estate planning services include the preparation of wills, health care proxies, living wills, durable powers of attorney and living revocable and irrevocable trusts, including Medicaid trusts, life insurance trusts, generation-skipping trusts, business trusts, asset protection trusts, charitable trusts, grantor-retained annuity trusts and qualified personal residence trusts. Our tax planning services include the use of these planning devices to assist our clients in reducing the tax burdens on their estates.

### **Business Succession Planning**

The depth of our experience in representing business clients in all aspects of commercial dealings makes us especially qualified to assist in planning for business succession.

By using the aforementioned estate and tax planning devices, and by implementing business recapitalizations, business reorganizations, new entity formation and ownership transfers where appropriate, our Practice Group is able to formulate a gifting, inheritance and succession program that meets the unique needs of the family business owner. We also provide counsel regarding asset protection, including the use of asset protection trusts.

### **Elder Law**

Our attorneys frequently represent families with elderly or terminally ill members. We advise these families on asset protection, Medicaid qualification, Social Security, Medicare, hospital discharge planning, nursing home and home care planning, estate and tax planning, and designation of agents under health care proxies and durable powers of attorney. We handle complex guardianship proceedings for incapacitated persons and their families.

### **Special Needs Planning**

Families with members who have special needs present a wide array of planning issues. Our attorneys regularly counsel such families on the establishment of special needs trusts, guardianships and the use of other planning devices to protect governmental benefits and to provide a comfortable life for the special needs client. Frequently, this counsel involves representation in state court proceedings and other appropriate forums.

### **Retirement and Financial Planning**

Our retirement and financial planning services include the review, analysis and implementation of retirement strategies using qualified and non-qualified retirement plans, deferred compensation plans and phantom ownership plans; the determination of the appropriate beneficiaries for these plans; the analysis of and use of insurance in the retirement and estate plan; the determination of appropriate minimum distribution elections from qualified plans; the analysis of asset ownership between spouses and among family members; and the implementation of ownership changes and asset allocation strategies that improve a client's overall investment and tax picture.

### **Charitable Gift Planning**

Our services to clients with charitable intentions include providing counsel on the appropriate form of charitable gift and the selection of the most tax-effective assets to bequeath or donate; assisting in the establishment of charitable remainder trusts, charitable lead trusts, private foundations, supporting organizations and charitable operating organizations; and representation of such tax-exempt organizations in all aspects of their operations.

### **Trust and Estate Administration**

Our attorneys and paralegals handle all aspects of administering wills and trusts, including the probate of wills, the marshaling and inventory of assets, the preparation and filing of estate tax returns and fiduciary income tax returns, the administration of living and testamentary trusts, and the establishment and implementation of investment and distribution policies for trusts and estates. We represent beneficiaries and fiduciaries in contested trust and estate matters in all appropriate forums including state and federal courts. We also provide trust management services to individual trustees, including attorneys of the firm who are acting as trustees.

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