

**Estate Probate and Administration:
The process and pitfalls**

Michael P. Ryan, Esq.
Cullen and Dykman, LLP
44 Wall Street
New York, New York 10005
212.701.4115

I.	Obtain Essential Information	1
	A. Understand Terminology	1
	B. Meet with Potential Clients	2
	C. Locate and Evaluate the Will	2
	D. Secure the Decedent's Property	4
	E. Preliminary Letters Testamentary	5
	F. Small Estate Administration (Voluntary Administration)	6
II.	Probate Petition	8
	A. Venue of Probate	8
	B. Uniform Probate Forms	8
	C. Probate Petition	8
	D. Citation and Waivers	10
	E. Notice of Probate	11
	F. Other Documents Filed by Petition (if applicable)	11
	G. Interested Parties	13
	H. Overview of the Probate Process	14
	I. Appearance	15
	J. Types of Letters Sought	15
	K. Special Situations	16
	L. Ancillary Probate	17
III.	Petition for Intestate Administration	18
	A. Intestacy	18
	B. Uniform Administration Forms	18
	C. Petition for Administration	18
	D. Overview of the Administration Process	19
	E. Letters of Administration	20
IV.	Avoiding Probate Contests	21
	A. Recognize potential of a Will contest	21
	B. Common objections to a Will	21
	C. At the client meeting prior to execution of the Will	21
	D. At the execution of the Will	21
	E. After the execution of the Will	22
	F. Time records: a trap for the unwary	22
	G. Beware of emails	22
	H. Consider a revocable trust.	23
	I. Problems with videotaping a Will execution	23
	J. Other considerations	23

I. Obtain Essential Information

A. Understand Terminology

1. Laws and other rules governing the estates are contained primarily in:
 - a. Estates Powers and Trusts Law ("EPTL")
 - b. Surrogate's Court Procedure Act ("SCPA")
 - c. Uniform Rules of the Surrogate's Courts (Part 207) ("Uniform Rules")

2. Probate Estate: assets owned by a decedent (in his or her own name) who died with a validly executed Will.
 - a. Not included in probate estate, but may be includible for estate tax purposes:
 - i. Certain property owned by contract (i.e., IRAs, qualified plans, life insurance, Totten trusts).
 - ii. Certain property passing by operation of law (i.e., joint tenancies, tenancies by the entirety).

3. Intestate Estate: assets owned by a decedent (in his or her own name) who died without a validly executed Will. Distributees: persons who inherit from an intestate estate pursuant to the "state-created Will" under the laws of intestacy.

Identity of usual distributees (EPTL §4-1.1)

 - (A) If survived by a spouse and "issue" (children or descendants of deceased children). \$50,000 plus one-half to the spouse, remainder to issue.
 - (B) If no surviving spouse but issue survives, all to issue.
 - (C) If no surviving spouse or issue survives, all to parents (or survivor of them).
 - (D) If no surviving spouse, issue nor parents, all to the issue of the parents.

4. Will: document that disposes of all property owned by the author of the Will (the "testator"), which is revocable during his or her lifetime.
 - a. Codicil: a document that amends a Will, read together with the Will, as one Will. Codicils are problematic, since they must be submitted with the Will they amend, which causes potential for challenges.

 - b. Requirements for a valid Will (see EPTL §3-2.1):
 - Signed at the end by the testator (or by another person at his or her direction)

- Declared by the testator in the presence of the witnesses to be his or her Will.

- Attested to by the witnesses, signing their names and addresses at the end, within 30 days of each other.

c. A Will is usually typed, but can be handwritten (as long as it is executed and attested in accordance with EPTL §3-2.1). "Holographic" Wills (handwritten, but not executed and attested in accordance with EPTL §3-2.1) and "nuncupative" Wills (orally made by testator before two attesting witnesses) are only permitted in certain limited circumstances, such as by those in the armed forces or a mariner at sea. See EPTL §3-2.2.

B. Meet with Potential Clients

1. Who is the client?

a. The attorney for the "estate" should be viewed as the attorney for the fiduciary, and not for the estate beneficiaries or the estate in general.

2. An engagement letter should be prepared to advise the fiduciary of the attorney's rates, billing practices, conflicts, and the scope of the representation.

3. Practical tip: When obtaining information from the person seeking appointment as fiduciary, obtain a clean copy of his or her drivers' license, as this will be necessary to file with a financial institution to open an estate account.

C. Locate and Evaluate the Will

1. Locating the Will

a. A diligent search to find the decedent's Will is required.

b. Attorneys who prepare Wills should give the testator a photocopy or "conformed copy" (noting all signatures and any changes made to the Will during execution) at or after the execution thereof, which will state where the original is held.

- Usually, the attorney-draftsperson holds the original Will in his or her firm's vault.

c. Original Wills may also be filed with the Surrogate's Court of the county of the testator's domicile at the time of execution. See SCPA §2507. While such filing is not in the normal course, the attorney must confirm that no Will is on deposit in the Surrogate's Court of the county of the decedent's domicile at death.

NB: beneficiaries or fiduciaries named in any Will on deposit in the Surrogate's Court of the county of the decedent's domicile at death are necessary parties to the probate proceeding. See SCPA §1403(d).

d. Proceeding to Compel Production of Will

- If any party who may petition for probate of a Will has reasonable grounds to believe that any person has knowledge of the whereabouts or destruction of a Will, such party can petition the Surrogate's Court for an order directing such person to produce such Will or other writings within such person's control and be subject to examination. See SCPA §140I.

- If an attorney abandons his or her practice (by death or otherwise, the Appellate Division may appoint an "inventory attorney" to take custody and inventory the files of such attorney and take such action to protect the interests of the clients of such attorney. See 22 NYCRR §603.13G) (151 Dept.); 22 NYCRR §691.10(k) (2nd Dept.). This is intended to protect client privilege, while allowing such client's papers to be returned to him or her (or the legal representatives of such person), including any original Will.

e. Lost Wills. If the testator was in possession of the original Will, and at his or her death the original Will cannot be found, New York law presumes the testator revoked the Will. A copy of a Will can be admitted to probate subject to a special proceeding under SCPA §1407, if:

- it is established that the Will has not been revoked (but the presumption of revocation must be overcome if the original Will was in the testator's possession at death)

- execution of the Will is proven in the manner required for probate of an existing Will; and

- all provisions of the Will are clearly and distinctly proved by at least two credible witnesses, or by a copy or a draft of the Will prove to be true and complete.

D. Secure the Decedent's Property

1. Residence

a. The nominated executor must take steps to secure the residence, which may include changing the locks, ensuring continued function of the alarm system, etc. Important to guard against "gifts rigor mortis" (a/k/a "race to the residence" "gifts"), since the primary duty of the executor is to protect the assets of the estate. The attorney for the nominated executor should be cognizant of the fact that the fiduciary's liability may extend to a period of time before the issuance of preliminary letters. (See, Matter of Yarm, 119 A.D.2d 754, 501 N.Y.S.2d 163.)

b. If the decedent died alone in his or her rental residence in New York City, the police department will seal such residence. The nominated executor will need to petition the court

to gain access to the sealed residence. See SCPA §2003(1). The police report or property voucher may be used as proof of death, if a death certificate is not available.

2. Safe Deposit Boxes

a. Obtaining information about contents. The surviving joint lessee or person with registered access to the safe deposit box as of the death of the decedent may access the safe deposit box, even after the death of the decedent, to get and copy burial information - but no documents or other property can be removed. See SCPA §2003(2). Otherwise, a court order is required. See SCPA §2003(1).

3. Locate probate assets

a. Request post office to deliver decedent's mail to attorney.

b. Contact decedent's employer (or most recent employer) and review recent pay stubs.

c. Contact decedent's union or other business organization.

d. Review decedent's income tax returns for the prior 3 years for passive income items.

e. Review decedent's checking account (at least the prior year) to check for receipt of income and/or payment of expenses for property.

f. Notify Social Security Administration of death.

g. Check for unclaimed funds (NYS Office of the State Comptroller -www.osc.state.ny.us).

E. Preliminary Letters Testamentary

1. An executor can usually be appointed within a matter of weeks from filing. If an executor is needed sooner, the executor nominated in the Will can obtain "preliminary letters testamentary," after filing the probate petition, death certificate and Will. See EXHIBIT C.

2. The preliminary executor will have all powers and authority of an executor, except for the power to pay legacies or distributive shares. See SCPA §1412.

a. Exception: The preliminary executor can only dispose of specifically bequeathed or devised property with the written consent of the beneficiary or by order of the Court. See SCPA §1412(3)(a).

3. Usual reasons for obtaining preliminary letters testamentary:
 - a. Time-sensitive securities transactions
 - b. Real estate closings (death soon before scheduled closing)
 - c. Large number of necessary parties to the probate of the Will which may result in inordinate delay in obtaining full letters testamentary.
 - d. Will contest is anticipated
4. The preliminary executor must give notice to all parties who have appeared in the probate proceeding within 10 days of appointment

F. Small Estate Administration (Voluntary Administration)

1. Where the value of personal property owned by the decedent is \$30,000 or less (but not including the value of exempt property, see *infra* at F.2.b), probate may not be necessary, and a representative of the estate can be appointed by the court clerk immediately. See SCPA Article 13.

- a. See *infra* at F.3.a for forms of Affidavit.

2. Determining value of the "small estate"

- a. SCPA §1301(1) provides that the decedent must own less than \$30,000 or less in personal property.

- b. However, the value of certain exempt property set forth in EPTL §§5-3.1(a)(1)-(6) (passing to surviving spouse or children under age 21) is not included in the \$30,000 limitation:

1. Household goods, including computers, electronic devices used in the house, and clothing, not exceeding \$20,000 in value.

2. Family bible, pictures, videos, computer software used by the family and books, not exceeding \$2,500 in value.

3. Domestic animals with 60 days' worth of food, farm machinery, one tractor and one lawn tractor, not exceeding \$20,000 in value.

4. One motor vehicle, not exceeding \$25,000 in value.

5. Money or other personal property, not exceeding \$25,000 in value.

3. Qualification as "voluntary administrator"

a. The person seeking to be appointed as the representative of the small estate needs to complete an Affidavit and file it with the clerk, who will promptly stamp it. The affidavit is provided on the courts' official form of Affidavit in Relation to Settlement of Estate under Article 13, SCPA. See Official Forms SE-1A (if decedent died before 8/29/2006) and SE-2A (if decedent died on or after 8/29/2006).

b. Who can be the voluntary administrator?

- Probate estates: nominated executor, or if he or she fails to qualify within 30 days of filing of the Will, the sole beneficiary, or next, the residuary beneficiaries.

- Intestate estates: voluntary administrator must be a "distributee" of the decedent in order to qualify, with first priority to the surviving spouse. See SCPA §1303(a).

4. If it is later discovered that the decedent owned property in excess of the prescribed value limitations, the voluntary administrator may subsequently petition the Surrogate's Court for a full probate or administration.

II. Probate Petition

A. Venue of Probate

1. A Will is submitted to probate in the county in which a New York domiciliary decedent was domiciled at his or her death.

a. If the decedent was not a New York domiciliary, venue is based on the situs of the assets within New York at his or her death.

B. Uniform Probate Forms

1. The Surrogates' Courts have official forms for a majority of the documents required for a probate proceeding.

a. These Official Forms are available at the Surrogates' Courts; or from legal publishers (e.g., Surrogate's Court Practice - Greenbook (LexisNexis)), or from the website of the Office of Court Administration - <http://www.nycourts.gov/forms/surrogates/probate.shtml>.

2. Computerized versions of these forms are available from the New York State Bar Association using HotDocs software.

C. Probate Petition

1. Use a recognizable form!.
2. The nominated executor(s) in the Will must be eligible to receive letters testamentary to be appointed as executor(s):

- a. Any natural person (or entity authorized to act as a fiduciary) OTHER THAN an infant, incompetent, a non-domiciliary alien (subject to certain exceptions), a felon or other person unqualified due to substance abuse, dishonesty, improvidence, want of understanding or otherwise. See SCPA §707(1).

- i. Note: a person who cannot read or write in English may be found ineligible in the discretion of the court.

- ii. Blindness or hearing-infirmities do not make someone ineligible, unless the person cannot perform their duties.

- iii. If the proposed executor ever was a convicted felon (committed a crime that would be a felony under New York law), he or she cannot serve as executor.

- (A) The Corrections Law provides that a felon may apply to the New York State Board of Parole to request a "Certificate of Relief of Civil Disabilities"

to have his or her civil disabilities removed (including serving as executor).

- (B) Even if the felon is convicted under Federal law, the felon may apply for relief under the Corrections Law.

3. Revocable Trusts

- a. Since 1997, the use of revocable trust (as a "pour over" beneficiary under a Will) has increased and led some Surrogate's Court to require more disclosure.

- This cuts against the "increased privacy" benefit of revocable trusts.

- Trusts created on or after 1997 are not subject to the "merger doctrine" (which prevented the grantor from acting as trustee and initial beneficiary, due to merger upon formation).

- b. Where a revocable trust is a beneficiary under a Will, many Surrogate's Courts may:

1. Require the filing of a copy of the trust agreement (the court may return the trust agreement after review, or may keep a copy in a more private file to discourage public scrutiny).

2. Require listing the trustees and beneficiaries in the probate petition.

c. There is no uniform rule among the Surrogate's Courts addressing the requirements of disclosure, but many courts favor disclosure of the parties to the revocable trusts, which arguably cuts against (to some degree) the "privacy" of such trusts in New York.

4. The petitioner also submits an Oath of Office and a Designation of the Surrogate's Court as agent for service of process.

5. Practical advice: Some Surrogate's Courts will require litigation backs submitted to the court to bear an explicit statement as to the applicability of 22 NYCRR 130-1.1a:

a. e.g., "By signing a paper, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, (1) the presentation of the paper or the contentions therein are not frivolous as defined in section 130-1.1(c) of this Subpart, and (2) where the paper is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom, and (ii) the matter was not obtained in violation of section 1200.41-a (DR 7-111) of this Title."

b. Other Surrogate's Courts even prefer not using backs for the initial probate papers (e.g., New York County). N.B. The courts now scan the filed documents so your papers submitted to the court should not be stapled together. Of course, this does not apply to the original instrument being filed such as the Will.

D. Citation and Waivers

1. A Citation is like a Summons in Supreme Court, which must be served upon all interested parties, and contains the return date set by the Surrogate's Court for the matter to be heard.

a. See EXHIBIT A for sample Citation. Note that a copy of the Will must be attached, and affidavit of service should recite that a copy of the Will accompanied the Citation.

b. Service of Citation may be (and usually is) waived in writing. See Waiver in EXHIBIT E.

c. Practical advice: The relief set forth in the Citation should be identical to the relief requested in the petition (under the "Wherefore" clause). Also, the Citation is process issued by the court. Consequently, the attorney presents a proposed Citation and waits for its approval by the court. Upon approval, the court will issue a certified copy of the Citation for service.

2. If service is not waived, the Citation must be served upon all interested parties.

a. The process service rules mirror those in the CPLR.

- New York domiciliaries must be personally served within 10 days of the return

date.

- Non-New York domiciliaries may generally be served by certified mail, return receipt requested, within 20 days of the return date (30 days is outside the United States).

- Proofs of service must be served at least 2 days prior to the return date. See Uniform Rules §207.7(c).

3. If an interested party is an infant (i.e., minor or a 21-year old who consented to appointment of a guardian after attaining age 18), a guardian ad litem may be appointed to accept service, even though such a procedure is rarely encountered. Service of process may, however, be served upon such infant's parent, guardian, or other adult person having care and control of such infant or with whom such infant resides. See SCPA §307(4). If the infant has attained age 14, the infant must also be served. See SCPA §307(4).

If the Surrogate's Court will not allow service upon the parent, virtual representation may make service (and appointment of the guardian) unnecessary (see *infra* at G.2)

If an interested party is a mentally retarded or developmentally disabled, service of a Citation is only complete if served upon (i) such party, (ii) the person with care and custody of such person (e.g., the director of a group home or other facility in which the person resides), and (iii) any court-appointed guardian. See, e.g., SCPA §307(5).

If all necessary parties cannot be served or identified, the nominated executor can seek appointment as preliminary executor to avoid delay.

E. Notice of Probate

1. Notifies persons named in the probate petition (but who are not interested parties as to the Will) that the Will has been submitted for probate.

a. Typically, these parties are non-family members named in the Will (e.g., friends, charities, etc.) as beneficiaries or the Attorney General in the case of charities (see *infra* at K).

b. Allows the recipients to appear in the proceeding, but their appearance is not required.

1. If these parties do appear, they can object to the probate of the Will only if they would be adversely affected by probate of the proffered Will.

2. The Notice of Probate may be sent by ordinary mail. Proof of mailing (by Affidavit of Mailing) is required to be filed with the Surrogate's Court.

F. Other Documents Filed by Petition (if applicable)

1. Affidavits of attesting witnesses

a. Usually a "self proving affidavit" is executed contemporaneously with, or shortly after, the execution of the Will and is attached to the Will.

b. If there is no "self proving affidavit", the Court will require that the attesting witnesses testify (or submit affidavits) regarding the capacity of the testator and the execution of the Will.

- An attesting witness may execute an affidavit after the decedent's death by being presented with a court-certified copy of the Will to review.

Practical advice: Since the Court will generally require that the court-certified copy of the Will accompany the filed affidavit, it is advisable to physically attach the copy to the affidavit to ensure it is returned.

2. Affidavit of kinship and family tree (see Uniform Rules §207.16(c))

a. This is required where there is only one distributee (or none) or where the distributees are grandparents, aunts, uncles or first cousins or first cousins once removed.

b. The affidavit must be completed by a disinterested party, establishing the family members of the decedent based on personal knowledge.

3. Affidavit of Comparison proving a correct copy of the Will

a. The Surrogate's Courts require that the attorney provide a photocopy of the original Will, together with the original Will, so that the Court may use it for copying.

b. The attorney certifies that the photocopy is a true and accurate copy of the original Will to facilitate this.

4. Affidavit of Due Diligence (if necessary)

a. If the whereabouts of an interested person are unknown, the attorney must prepare an affidavit outlining the steps that he or she undertook to locate such interested person. See Uniform Rules §207.16(d).

- The Court will usually require publication of the Citation to alert such unknown heirs, and may also require the appointment of a guardian ad litem or the Public Administrator to represent the interests of such person.

- Often, heir search firms are employed to conduct a search and provide an affidavit of due diligence.

5. Original Certificate of Death

6. Proposed Citation
7. Proposed Decree
8. Filing Fee (by attorney check) - based upon the value of the probate estate (see SCPA §2401, et seq.). The current (2011) maximum filing fee for probate, administration and accounting proceedings is \$1,250.00 (see SCPA §2402(7)).

G. Interested Parties

1. Interested parties in a probate proceeding (see SCPA §1403):
 - a. Distributees of the testator
 - b. Nominated executor(s) (but not successors if the nominated party is not under a disability)
 - c. Anyone designated in the Will as a beneficiary or fiduciary whose rights or interests are adversely affected by any other instrument offered for probate that is later in date of execution of the Will (or amends or modifies such instrument, such as a Codicil).
 - d. Anyone designated as beneficiary or fiduciary in a Will on file with the Surrogate's Court as a beneficiary or fiduciary.
 - e. Anyone adversely affected by the exercise of a power of appointment in the offered Will.
 - f. To the testator (if testator is alleged to be dead).
 - g. Department of Taxation and Finance (where testator is a non-New York domiciliary).
 - h. To the fiduciary of any deceased interested party, or if none has been appointed, to all interested parties of such deceased' s estate.
 - i. Attorney General (re: charitable bequests).
2. Virtual Representation
 - a. Where authorized by the Will, parties that have similar economic interests in the estate situated may be "virtually represented" by another, making service of Citation upon them unnecessary. See SCPA §315.
 - b. The test is whether the potentially represented party fails within the statute and that such party's interests (or a class to which such party belongs) is actually represented.

c. Types of virtual representation:

- Vertical virtual representation: the interest of the represented party succeeds (is derived from) the interest of the representing party.

- E.g., where parent is granted a power of appointment, a child who is a permissible appointee of such power can be virtually represented by the parent, because their interests in the property subject to the power of appointment are vertically identical.

- Horizontal virtual representation: the represented party has the same type of interest as the representing party.

- E.g., the represented party and the representing party each have 1/4 interest in the estate.

- Note: Horizontal virtual representation is not available in probate proceedings and must be authorized in the governing instrument.

H. Overview of the Probate Process

I. The probate petition and other necessary documents (including a proposed probate citation and decree) are filed with the Probate Department of the Surrogate's Court.

a. Unique to Surrogate's Court, personnel in the Probate Department will review the Probate Petition and other documents to ensure that the forms are complete before a file number is assigned and the matter is set down on the court calendar. Sometimes the petitioner's attorney (or a paralegal) will bring the papers to the Probate Department, to review the papers with court personnel, ensuring that any questions are answered.

b. Practical advice: For fastest process, file with attorneys' check covering filing fee and the desired number of Certificates of Letters Testamentary desired (\$6 each), together with a self-addressed stamped envelope.

2. If Citation is required (i.e., all interested parties have not executed a Waiver of Citation), the Surrogate's Court issues a Probate Citation and designates a return date for the probate proceedings.

3. Prior to the return date, all interested parties must either be properly served or execute waivers thereof.

4. At least 2 days prior to the return date, all proofs of service or waivers must be filed with the Surrogate's Court.

5. On the return date, the Surrogate's Court will have a calendar call to determine whether the probate will be uncontested.

a. If the probate is uncontested (e.g., all parties have waived service and consented to probate), counsel for the petitioner does not generally have to appear and the matter will be marked for decree, to be issued shortly after the return date. N.B. If one or more of the interested parties is under a disability, then the court will have to appoint a guardian ad litem and the decree will be made subject to the report of that guardian ad litem.

b. If parties appear to contest the probate, the Court may set the matter down for a conference to attempt to resolve any issues. If not, dates will be set for SCPA 1404 depositions, objections, and discovery. depositions.

6. If the Surrogate's Court grants probate, a Probate Decree is entered, whereupon Certificates of Letters Testamentary will issue to the petitioner, evidencing his or her appointment as Executor of the Estate.

a. It is advisable to obtain an original Certificate of Letters Testamentary for each financial institution holding assets of the decedent, as original evidence will be required (and usually such Certificate must be dated within 6 months of presentment).

I. Appearance

1. A party appears in a proceeding by pleading, filing a waiver, appearing in open court on the record or by having his or her counsel appear on his or her behalf.

2. Counsel appears in a probate proceeding (or other proceeding) by filing a Notice of Appearance together with an Authorization to Appear.

a. Signed by the counsel, the Notice of Appearance directs copies of all papers submitted to the Surrogate's Court be served upon the appearing counsel.

b. Signed by the client before a Notary Public, the Authorization to Appear authorizes his or her counsel to appear on his or her behalf.

J. Types of Letters Sought

1. Letters Testamentary appoint a person as Executor, and Letters of Trusteeship appoint a person as Trustee of a trust created under the Will.

2. Preliminary Letters Testamentary appoint the nominated Executor(s) as "Preliminary Executor(s)" under SCPA §1412. See supra at IE.

3. Limited Letters Testamentary appoint a person as Executor, subject to specified limitations (usually in the case of a party seeking the right to file a suit or claims on behalf of the decedent.) See SCPA §702.

4. Letters of Administration c.t.a. (with Will annexed) appoint a person entitled to act as executor when no executor is named in the Will (or all persons so named have died, renounced, or

have become unqualified or were removed).

K. Special Situations

1. Charitable beneficiaries

a. Where a charity is a beneficiary, in addition to the charity itself, the New York State Attorney General (Charities Bureau) is another interested party who must be served with Citation (but usually waives service of Citation).

b. General bequest vs. residuary beneficiary.

2. Person under a disability (e.g., infants or incompetents)

a. Guardian

L If the person already has a guardian (such as one appointed under Article 81 of the Mental Hygiene Law), that guardian appears on his or her behalf. If the person does not already have a guardian, the Surrogate's Court will appoint a guardian ad litem to appear and represent his or her interests in that proceeding. The appointment of a guardian ad litem is not necessary in uncontested probate proceedings where the person under a disability is entitled to receive his or her intestate share or more. There are special rules for serving process upon a party who is mentally retarded or developmentally disabled.

3. Public Administrator

a. Each county has a Public Administrator whose primary function is to act as the administrator of estates where no relative is available to serve as administrator. See SCPA Articles 11 (New York City) and Article 12 (Nassau, Suffolk, Westchester and certain upstate counties).

b. Under SCPA §1112, the Public Administrator has the authority to take possession of, manage and collect rents on property of an intestate decedent when: The decedent is not known to have left anyone eligible to receive letters and dies intestate owning property within the county, and any personal property arrives in the county for the intestate decedent after his or her death.

c. The Public Administrator must be cited in probate proceedings where there are (or may possibly be) unknown parties.

4. Non-resident decedents

a. The Department of Taxation and Finance must be served when letters are sought regarding the estate of a non-resident decedent. See Tax Law §971-a.

L. Ancillary Probate

1. Where a non-New York decedent owns real property located in New York, the decedent's Will must be probated in the decedent's domicile state, and the probated Will is submitted to the Surrogate's Court of the county in which the real property is located. N.B. There may be occasions when original probate of a non-domiciliary is appropriate, but the practitioner should refer to article 16 of SCPA (1605, specifically) for more information on that point.

a. The primary reason to use revocable trusts is to hold foreign real estate to prevent ancillary probate.

b. Use of limited liability companies.

2. See Official Forms AP-1, AP-2 and AP-3.

III. Petition for Intestate Administration

A. Intestacy

1. Interested parties for the Petition for intestate administration (see SCPA §1003):

a. Distributees of the decedent

b. Every person who has a right of administration prior or equal to that of the petitioner.

2. The administrator will generally be required to obtain a surety bond (see SCPA §805).

a. However, the Surrogate's Court may grant a waiver upon motion and showing of cause.

b. The premiums for the bond will be an expense of administration.

c. Practical advice: before submitting the petition for administration, determine whether the proposed administrator has any credit problems that may make obtaining a surety bond difficult or impossible.

B. Uniform Administration Forms

1. Petition for Letters Administration (Official Form A-1)

2. Administration Citation (Official Form A-2)

3. Decree Appointing Administrator (Official Form A-3)

C. Petition for Administration

1. The Petition for Administration is very similar to the Probate Petition, with the following differences (see EXHIBIT B):

a. It alleges that the decedent died without a Will, as a diligent search has been made for any Will, but none has been found. N.B. An interesting problem arises when a copy of a Will is found but not the original. While there is a presumption of revocation by destruction that attaches to a missing Will, the issue becomes the duty of the attorney to advise the court of the discovery of a copy. Best practice indicates that the court should be informed of the existence of a copy in order to determine if adversely affected parties should be cited and have their chance, slim though it might be, to prove that the Will was not lost in an act of revocatory destruction.

b. It alleges that a search has been made of the records of the Surrogate's Court for another application for letters, but none has been found.

2. Persons who may petition for letters of administration (see SCPA §1002).

a. Persons interested in the estate (entitled to receive a share in the estate, either primarily or contingently)

- Priority is granted based as follows (see SCPA §1001(1)):

(A) Surviving spouse

(B) Children

(C) Grandchildren

(D) Father or mother

(E) Brothers or sisters

(F) Other distributees, preference given to the person entitled to the largest share in the estate, subject to certain guidelines. If a distributee is deceased or is an infant or incompetent, special rules apply.

b. Persons not interested in the estate (but only upon the consent of all distributees)

c. Public Administrator

d. Chief fiscal officer of the county

e. Creditor

f. Person interested in an action in which decedent would be a proper party.

D. Overview of the Administration Process

1. Very similar to the probate process, with the potential added complexity of:
 - a. the surety bond,
 - b. potential interested parties (thereby increasing the likelihood that not all parties will waive service of Citation), and
 - c. greater likelihood that the Public Administrator or guardian ad litem will be required.
2. If all heirs are not identifiable or if the identity of all heirs cannot be established with certainty, a genealogical search may be required to assemble a family tree.

E. Letters of Administration

1. Letters of Administration evidence the appointment of the Administrator.
 - a. If the Court has waived the requirement of a bond, the Letters of Administrator will bear a legend at the top limited to the Administrator's ability to collect assets up to the amount reported in the Petition for Administration, subject to the Court's review.
2. Limited Letters of Administration appoint a person as Administrator subject to certain limitations imposed by the Court.
3. Letters of Administration d.b.n. ("de bonis non") appoint a person to act as administrator where all persons who have received letters of administration have died or have become unqualified or were removed.

IV. Avoiding Probate Contests

A. Recognize potential of a Will contest

1. Any time a beneficiary is treated differently
2. Examples:
 - a. Children inheriting different amounts
 - b. One child receiving an inheritance outright; another child receiving the inheritance in trust
 - c. Executor commission to one child

B. Common objections to a Will

1. Lack of testamentary capacity
2. Mistake Improper execution of the Will.
3. Fraud
4. Undue influence

C. At the client meeting prior to execution of the Will

1. Meet with the testator/testatrix alone
2. Do not meet with the testator/testatrix and a favored child, or any potential beneficiary.
3. If meeting with the testator/testatrix and a beneficiary, make sure at least one meeting is alone between lawyer and testator/testatrix.
4. Make and keep notes of the meetings and drafts of the instrument.

D. At the execution of the Will

1. No beneficiary should attend the Will execution
2. Use independent witnesses for the Will execution
 - a. Do not use a beneficiary as a witness
 - b. Do not use employees of the testator or testatrix
 - c. Do not use employees of the beneficiary
 - d. Understand the witnesses' ability to read and understand English
 - e. Allow the witnesses to interact with the testator

E. After the execution of the Will

1. Create a memorandum to file about meetings and Will execution:
 - a. Identify who was in attendance
 - b. Include details about what was discussed that would show competence

- c. Describe a discussion of family members by the testator/testatrix
- d. Describe a discussion of major assets the testator/testatrix knows about
- e. Describe a discussion of what the disposition of the estate is at least in general terms such as the percentage each beneficiary will receive and whether it is in trust or outright
- f. Beware of terms such as "the family believes" instead of "testator believes"
- g. Do not keep handwritten notes once you create the typed memorandum

F. Time records: a trap for the unwary

- 1. Assume time records will be seen by the challenger to the Will
- 2. Take a little more time reviewing bills when a potential Will challenge exists to avoid time entries giving a challenger an opening
- 3. Avoid entry which states "teleconference with client" when the conversation was with a beneficiary who was attorney-in-fact and not with the testator/testatrix who was the actual client
- 4. Example:
 - a. Avoid: "Teleconference with beneficiary, draft will"
 - b. Better: "Teleconference with beneficiary about bills he has to pay for his mother as attorney-in-fact; drafted will"

G. Beware of emails

- 1. Use the phone or communicate in person
- 2. Assume e-mails to your client and with your colleagues will be produced to the other side in a challenge

H. Consider a revocable trust

- 1. To probate a Will, notice has to be given to beneficiaries and statutorily identified potential beneficiaries
- 2. For a revocable trust, no notice has to be given in most jurisdictions. If someone wants to challenge a revocable trust, he or she must institute a lawsuit.

3. Caution: Level of competence to create a revocable trust (contractual capacity) is higher than to create a Will (testamentary capacity).
4. All the assets have to be moved to the trust or you might have a Will contest.
5. Revocable trust makes a challenge harder, but not impossible.

I. Problems with videotaping a Will execution

1. If more than one take, appears to be staged.
2. Testator/testatrix may freeze in front of camera.
3. Testator/testatrix may look confused, making your case harder.
4. If you make a change in the Will during the meeting, the camera will appear to have stopped and started again.
5. Malfunction of the video machine may raise questions about the execution ceremony.
6. N.B. Unless there is a compelling reason to do so, and unless the videotaping is accomplished by a professional, the execution ceremony should not be videotaped.

J. Other considerations

1. If the competence of the testator/testatrix may be more questionable today than when a previous Will was executed, but a change is desired, use a Codicil so only the Codicil is open to challenge, provided the terms of the original instrument possess an independent and important validity. Moreover, the doctrine of dependent relative revocation may operate to revive an earlier instrument after a later instrument has been denied probate.
2. Consider consulting a litigator with estate experience before a Will execution if you believe a challenge is possible. (An excellent idea.)