FUNDAMENTALS OF WILL DRAFTING AND ESTATE ADMINISTRATION 2022

DSBA WEBINAR VIA ZOOM

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION

WEDNESDAY, MARCH 30, 2022 | 9:00 A.M. – 4:15 P.M.

6.0 Hours of CLE credit for Delaware and Pennsylvania Attorneys

ABOUT THE PROGRAM

This course is one of the seven Fundamentals courses which new bar members must take to comply with their Continuing Legal Education Commission requirements. Attendees will learn from experienced practitioners about the basics of estate planning and estate administration. This engaging and interactive program is designed to equip those new to the practice area with the tools needed to succeed and is full of practical tips. You will even get to see a case study to demonstrate the sorts of things you will need to know to practice in this area. Program Highlights: Overview of Estate Planning; Overview of Estate Administration; Basics of Will Drafting; Practice and Procedure Before the Register of Wills.

CLE SCHEDULE

9:00 a.m. – 10:30 a.m.

Overview of Estate Planning

The things any new estate planner should know in the form of a case study.

Barbara Snapp Danberg, Esquire
Baird Mandalas Brockstedt, LLC

Scott E. Swenson, Esquire
Connolly Gallagher LLP

10:30 a.m. – 10:45 a.m. | Break

10:45 a.m. -12:15 p.m.

Basics of Will Drafting

In a continuation of the case study, we will explain the import and significance of various provisions of the will.

Beth Gansen Knight, Esquire
Richards, Layton & Finger, P. A.

Matthew Paul D'Emilio, Esquire
McCollom D'Emilio Smith Uebler LLC

12:15 p.m. – 12:45 p.m. | Lunch (On your own)

12:45 p.m. – 4:15 p.m. (2:15 p.m. – 2:30 p.m. | Break)

Overview of Estate Administration

A high-level take on the concepts you should know and tips to bear in mind when administering estates in Delaware.

Practice and Procedure Before the Register of Wills

We will walk you through the probate process and explain the what, when and how of the necessary steps.

Moderator

Joseph Bosik IV, Esquire
Gordon Fournaris & Mammarella, P.A.

Panelists

P. Kristen Bennett, Esquire
Gawthrop Greenwood, PC

Joseph Bosik IV, Esquire
Gordon Fournaris & Mammarella, P.A.

Lisa L. Coggins, Esquire
Woloshin, Lynch & Associates, P.A.

Alex J. Mili, Jr., Esquire
New Castle County Register of Wills Office

Visit https://www.dsba.org/event/fundamentals-of-will-drafting-and-estate-administration-2022/ for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

Overview of Estate Planning

Barbara Snapp Danberg, Esquire
Baird Mandalas Brockstedt, LLC

Scott E. Swenson, Esquire
Connolly Gallagher LLP

Barbara Danberg is a partner at the firm of Baird Mandalas & Brockstedt, LLC and practices in the areas of estate and trust planning and administration, tax, business and succession planning. She represents clients before the Internal Revenue Service and fiduciaries and beneficiaries concerning trusts. Taking a personal approach, she guides small business owners from the formation and choice of entity to retirement and succession planning.

For over thirty years, Barbara has counseled families and businesses through the challenges that come with life's events, whether it is premarital planning, planning for the loss of a loved one, welcoming grandchildren or transitioning a family business to the next generation.

Barbara represents tax exempt entities, and represents clients on like-kind exchanges, retirement planning and commercial transactions. Admitted to practice in Delaware and Maryland Courts, Barbara is also admitted to practice before the Internal Revenue Service and the United States Tax Court. Barbara has taught as an adjunct professor at Delaware Law School at Widener University as well as in the paralegal program. While attending law school, Barbara was research editor of the Delaware Journal of Corporate Law and was published in the Journal in 1992. She graduated from the University of Delaware for her undergraduate degree in Political Science, then attended George Washington University for her paralegal certificate while working at the United States Department of Justice, Tax Division as a paralegal and then attended Delaware Law School at Widener University for her J.D.

Barbara is a member of the Estates and Trusts Section of the Delaware Bar, member of the Wilmington Tax Group, and The Estate Planning Council of Delaware. She is a three-time recipient of Delaware Today's "Five Star Delaware Wealth Manager": 2011-2013 and was named Top Lawyer in Delaware Today for Estate and Trusts in 2016, 2017, 2018, 2019, and 2020. She is a frequent speaker for tax-exempt entities on tax issues as well as estate and trust issues.

Born in Damascus, Maryland, Barbara has resided in Newark, Delaware with her husband and two daughters for over thirty years. She is the Planned Giving Chair for the Aviat Foundation Endowment which supports Mount Aviat Academy, in Childs, Maryland where her husband and children attended elementary school.

CONNOLLY GALLAGHER LLP

Scott E. Swenson

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Scott Swenson focuses his practice on estate planning and settlement, estate and trust litigation, and advising trustees and other fiduciaries on matters including trust administration, trust modification, and risk management. In doing so, he helps clients achieve their strategic planning objectives and finds cost-effective solutions to the problems and controversies faced by fiduciaries and beneficiaries.

Scott has represented a variety of institutional and individual clients, as fiduciaries and as beneficiaries, in trust and estate matters before the Court of Chancery and the Supreme Court of Delaware. His practice also includes taxation, alternative entities, non-profit organizations, tax controversies, and guardianship. *Chambers High Net Worth* has ranked Scott among Delaware's top practitioners in the area of Private Wealth Law and Private Wealth Disputes, calling him "highly communicative - an exceptional attorney." A Chambers market observer praised Scott's "calm, sensible approach" and continues: "He's an excellent addition to any team. He's responsive, approachable, and highly creative in his approach." Another market insider described Scott as "a consummate professional" and "truly the epitome of the Delaware way," noting that "no matter how the other side is behaving, or how emotional the matter becomes, Scott remains laser-focused on gracefully, cordially arriving at an agreeably solution for all the parties." Scott was also recognized by *The Best Lawyers in America* as the 2021 "Lawyer of the Year" for Trusts and Estates in Delaware, and as the 2019 "Lawyer of the Year" for Trust and Estate Litigation in Delaware. Scott is rated AV Preeminent®, *Martindale-Hubbell's* highest rating for lawyers.

Scott is also dedicated to *pro bono* service, serving on the board of directors of Delaware Careplan, Inc., a non-profit organization dedicated to managing special needs trusts, and acting as an attorney guardian *ad litem* for the Office of the Child Advocate. In addition, Scott is former Chair of the Delaware State Bar Association's Estates & Trusts Section, and presently chairs the Section's Continuing Legal Education Committee.

Education

- University of Pennsylvania Law School (J.D.; 2005); University of Pennsylvania Journal of International Economic Law (Senior Editor); Wharton Certificate in Business
- University of Maryland (B.A. Government & Politics, Economics; 2001)

Bar Admissions

- Delaware (2005)
- Maryland (2013)
- United States District Court – District of Delaware (2006)

Honors

- AV Preeminent®, Martindale-Hubbell
- Chambers USA: High Net Worth
- The Best Lawyers in America®, Trusts & Estates (2016-2020))
- SuperLawyers®, Rising Star, Estate & Trust Litigation (2012-2015)
- Delaware Today Top Lawyers - Trusts & Estates

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Representative Experience

- In re the Trust f/b/o Samuel Francis duPont under Trust Agreement dated August 4, 1936, 2018 WL 4610766, 2018 Del. Ch. LEXIS 315 (Del. Ch. Sept. 25, 2018)
- In the Matter of Trust Created under Will of Harold S. Schutt, 2017 WL 3527623, 2017 Del. Ch. LEXIS 200 (Del. Ch. July 17, 2017)
- In the Matter of the Anthony C. Perkins Descendants' Trust Under the Will of Jane Howard Perkins, Deceased, Del. Ch., C.A. No. 7103-VCL (2014)
- Parrott v. Sasaki, Del. Ch., C.A. No. 7227-VCL (2012)
- Otto v. Gore, 45 A.3d 120 (Del. 2012)
- In the Matter of Trust for Grandchildren of Wilbert L. and Genevieve W. Gore, 2011 WL 3444569, 2011 Del. Ch. LEXIS 112 (Del. Ch., July 29, 2011)
- Union Hospital v. Moor, Del. Ch., C.A. No. 3055-VCS (2010)
- In the Matter of Trust for Grandchildren of Wilbert L. and Genevieve W. Gore, 2010 WL 3565489, 2010 Del. Ch. LEXIS 188 (Del. Ch., Sept. 1, 2010)
- Humes v. Charles H. West Farms, Inc., 950 A.2d 661 (Del. Super. Ct. 2007)
- In the Matter of the Trusts Created for the Benefit of Charles Perry Griffith, Jr., et al, Del. Ch., C.A. Nos. 8397, 8398, 9441, 10000, 10001, 10002, 10003-ML (consolidated)
- Motors Liquidation Company (f/k/a General Motors Corporation), et al, v. Director of Revenue, Del. Super., C.A. Nos. N10C-10-287, -288, -289 (consolidated)
- In the Matter of the Estate and Trust of Francis Joseph Sarapulski, Del. Ch., C.A. No. 10113-VCG
- In the Matter of Trust Under Will Dated August 14, 1997 Created by Elizabeth Haskell Fleitas, Del. Ch., C.A. No. 6549-VCP
- In the Matter of the Will of Frances M. Cooke, Deceased, Del. Ch., C.A. No. 7071-ML
- In the Matter of the Trusts Under Agreement Dated December 30, 1996 and the Trusts Under Agreement Dated January 13, 2006 Created by Michael J. Farrell, 2008 WL 5459270 (Del. Ch. 2008)
- In the Matter of the Purported Trust Under the Will of Mary Nina Palmer, Del. Ch., C.A. No. 5616-MA
- Reliance Standard Life Ins. Co. v. Ross, 2009 WL 159184 (D. Del., Jan.

21, 2009)

Speaking Engagements

- Law Firm ILN-telligence Podcast from International Lawyers Network, February 2022
- Delaware State Bar Association, Fundamentals of Will Drafting and Estate Administration Webinar, "*Overview of Estate Planning*", September 2020
- Delaware Tax Law Institute, Widener University Delaware Law School, "*Recent Developments in Estate Planning: Recent Transfer Tax Letter Rulings*", December 2018
- Delaware State Bar Association, Fundamentals of Will Drafting and Estate Administration Seminar, "*Overview of Estate Planning*", October 2018
- Maryland State Bar Association Estate and Trust Study Group, "*A Comparative Look at Maryland and Delaware Trusts*", April 2018
- Delaware State Bar Association, Fundamentals of Will Drafting and Estate Administration Seminar, "*Overview of Estate Planning*", April 2017
- Choosing the Right Entity for Your Business Client, Delaware Tax Institute, Delaware Law School, Wilmington, Delaware (December 2, 2016)
- Understanding Delaware's Fiduciary Access to Digital Assets and Digital Accounts Act, Delaware State Bar Association, Wilmington, Delaware (January 29, 2015)
- Fundamentals of Will Drafting 2014, Delaware State Bar Association, Wilmington, Delaware (May 13, 2014)
- Basic Trusts for Real People, Delaware State Bar Association, Wilmington, DE (January 9, 2013)
- Basic Trusts for Real People, Delaware State Bar Association, Wilmington, DE (March 3, 2011)
- Durable Personal Powers of Attorney Act: The New Statute, Delaware State Bar Association, Wilmington, DE (September 24, 2010)
- Trust Planning and Drafting Techniques, Sterling Education Services, Wilmington, DE (May 13, 2008)

Publications

- "Know Your Limitations; The Importance of Statutes of Limitation For Trustees" Delaware Banker, Fall 2017, Vol. 13, No. 4 (pp. 10-13)
- "Possible Privilege Pitfalls; The Fiduciary Exception to the Attorney-Client Privilege" Delaware Banker, Spring 2016, Vol. 12, No. 2 (pp. 14-16)

- "When Does a Signed Trust Document Not Create a Trust?" Trusts & Estates, November 2013 (pp. 40-50) (co-author with Charles J. Durante and Greg J. Weinig)

Fundamentals of Will Drafting 2022
DSBA

March 30, 2022

Overview of Estate Planning

The following is a summary of the hypothetical client information we will use for purposes of our presentation:

Clients: Pamela Beesly and James Halpert

Residence: New Castle County, Delaware

Occupations: Sales Associate/Former Receptionist (Pam) and Assistant Regional Manager/Former Sales Associate (Jim)

Employer: Dunder Mifflin, a division of Sabre

- Both U.S. citizens.
- These clients have engaged in no prior estate planning.
- Second marriage for Pam; first marriage for Jim.
- No prenuptial agreement.
- No special needs family members.
- Pam is beneficiary of a trust set up by her grandmother.

Children:

1. Roy Anderson, Jr. (child of Pam only; his father is still living) – age 13 (wants to be a doctor)
2. Cici Halpert (child of both) – age 5
3. James Halpert, Jr. (child of both) – age 2

Guardians: Undecided.

Executors: Each other, then undecided.

Trustees: Undecided.

Disposition (generally):

- Would like specific tangibles to go to specific people.
- Would like to provide for each other for life (either by outright gift or in trust).
- Would like children to benefit in equal shares.

- Would like to make bequest to their favorite charity, the Rabies Awareness Fund.

Assets:

- Primary residence ($300K, mortgage of $200K) – joint.
- Vacation home in Scranton, PA ($150K, mortgage of $75K) – Jim.
- $5K in paper stocks – Jim.
- $30K brokerage account – Pam.
- $10K checking – joint.
- Each has $15K in solely owned savings accounts.
- Each has a $25K solely owned auto.
- $15K in jewelry – Pam.
- 50% interest in Athlead, a closely held company – Jim.
- Each has a $1M term life insurance policy.
- Each has an IRA worth $250K.
- $25K 401(k) account – Pam.

LAST WILL AND TESTAMENT

OF

JAMES HALPERT

I, **JAMES HALPERT**, of New Castle County, State of Delaware, declare this to be my Last Will and Testament and revoke all previous Wills and Codicils.

ARTICLE 1: TANGIBLE PERSONAL PROPERTY.

A. I bequeath all of my household goods and furnishings, jewelry and other tangible personal property, together with the policies of insurance relating thereto, to the persons named or described in any written memorandum signed by me and which identifies the tangible personal property and the person who is to receive it. If I leave more than one memorandum, the last reference to any article will govern its disposition.

B. I give any tangible personal property not so disposed of effectively above, including any policies of insurance on it, to my Spouse, if my Spouse survives me by thirty (30) days, but if my Spouse does not so survive me, then to My Children who survive me, to be divided in such manner as they agree in as nearly equal shares as is practicable. If My Children are unable to agree, I direct that those items upon which there is no agreement be sold and the proceeds of such sale be added to the residue of my estate to be distributed as hereinafter provided.

C. My Executor shall represent the interest of any minor or incapacitated person in any division of my tangible personal property.

D. My Executor shall pay, as an expense of settling my estate, all costs of delivering such tangible personal property, including the costs of packaging, delivery and insurance. My Executor may distribute any item directly to a minor, or a person with whom he or she resides, and will be fully discharged thereby.

ARTICLE 2: POWERS OF APPOINTMENT.

This Will is not intended to exercise any power of appointment.

ARTICLE 3: SPECIFIC BEQUEST.

If my Spouse does not survive me, I leave the sum of Ten Thousand Dollars ($10,000) to the **RABIES AWARENESS FUND**, of Scranton, Pennsylvania, or its successor, for its general purposes.

ARTICLE 4: RESIDUE.

A. I give all the residue of my estate not previously disposed of effectively to my Spouse, or if my Spouse shall predecease me, then my Executor shall divide the balance of the residue of my estate into equal shares for My Children who shall be then living and, per stirpes, for the issue who shall be then living of any such child who shall be then deceased, and shall administer and distribute each such share according to the provisions of Subsection B of this Article 4.

B. Shares Held for My Children. Trustee shall hold each child's share in further trust as follows:

(1) Trustee shall distribute the net income to the child for life and so much of the principal as requested in writing by the child as follows:

(a) One-half (1/2) of such share when the child attains the age thirty years (30), valued as of the child's thirtieth (30^{th}) birthday; and

(b) The remainder of such share at the age of thirty-five (35).

(2) In addition, Trustee may, from time to time, distribute so much, or all, of the principal to the child as Trustee deems appropriate to provide for his or her health, maintenance, education, and support. Trustee shall take into account other sources of funds available to the child.

(3) On the death of the child, Trustee shall distribute so much of the child's share as is then held hereunder, free from this trust, to such persons, including the child's estate, in such manner and amounts, and on such terms, whether in trust or otherwise, as effectively appointed by specific reference hereto in the last written instrument which the child executes and delivers to Trustee during lifetime, or, failing any such instrument, in the child's Will.

On the death of the child, Trustee shall distribute the balance of the child's share, to the extent not effectively appointed, free from trust, to the child's then living issue, per stirpes, but if no such issue is then living, then to my then living issue and the then living issue of my Spouse, per stirpes. However, any principal distributable to any of My Children for whose benefit a trust is then held under the provisions of this my Will shall instead be distributed to the Trustee of such share, to be added to its principal and disposed of as if an original part of it.

(4) Shares for Remote Issue. Subject to the provisions of Article 6, Trustee shall distribute each share set aside (at the time previously provided for dividing the residue of my estate into shares) for my issue more remote than My Children to such issue, per stirpes, free from trust.

C. If at any time my Executor or Trustee holds any portion of my estate not disposed of effectively under the previous provisions, then at such time my Executor or Trustee, as the case may be, shall distribute such funds to the **RABIES AWARENESS FUND**, of Scranton, Pennsylvania, or its successor, for its general purposes.

The charitable institution named above shall not be disqualified from receiving a distribution hereunder by reason of imperfections in corporate designations, changes of name, mergers, consolidations or conversions, if my Executor is reasonably satisfied as to the identity of such institution, and my Executor shall be fully protected and held harmless in acting in accordance with my Executor own determination in this respect.

ARTICLE 5: MERGER WITH SIMILAR TRUSTS.

If at any time a trust is set aside for any person or persons under the terms of my Will which is substantially the same as any other trust established for that person or persons, Trustee may merge the trust created hereunder with the other trust for such person or persons, and the two trusts shall thereafter be held, administered and distributed as one.

ARTICLE 6: MINORITY OR OTHER INCAPACITY.

If any property is otherwise required to be distributed to a beneficiary who has not attained age twenty-one (21) or is, in the sole opinion of my Executor or Trustee, unable to manage funds due to illness or infirmity, my Executor or Trustee, as the case may be, may:

A. Distribute such property to such beneficiary himself or herself; or

B. Apply such property for the benefit of such beneficiary; or

C. Hold the property not so distributed or applied in a separate trust hereunder for the benefit of such beneficiary, and distribute or apply the net income and principal thereof as provided in paragraphs A and B hereof.

Trustee shall distribute the property in such trust to the beneficiary upon his or her attaining age twenty-one (21), or upon the termination of his or her incapacity (as the case may be). If the beneficiary dies prior to such distribution, Trustee shall distribute the property to the beneficiary's estate.

Notwithstanding the foregoing, income (including income attributable to property held pursuant to this Section) which is required to be distributed to a beneficiary in order to qualify a trust hereunder for any tax deduction, exemption or credit, shall be distributed to such beneficiary or any guardian of such beneficiary's property, if requested in writing by such beneficiary or guardian.

ARTICLE 7: ALTERNATIVE METHODS OF DISTRIBUTION.

My Executor and the Trustee of any trust created in this my Will may distribute property in any manner which it deems to be in the best interest of a beneficiary, including: (i) distribution, either by hand or mail, to the beneficiary or the guardian of the person or property (whether the guardian is formally appointed or a natural guardian), (ii) distribution to a custodian for the beneficiary under the Uniform Transfers to Minors Act (or similar statute) of any state, irrespective of any monetary limits set forth in such statute, to be held by the custodian under the provisions of such Act until the beneficiary attains age twenty-one (21), or (iii) deposit to the account of the beneficiary in any federally insured depository, or (iv) direct application for the benefit of the beneficiary.

ARTICLE 8: SPENDTHRIFT PROVISION.

A beneficiary may not alienate or in any other manner assign or transfer his or her interest hereunder, and no one (including a spouse or former spouse) may attach or otherwise reach any interest of any beneficiary hereunder to satisfy a claim against that beneficiary, whether the claim is legal or equitable in origin. The provisions of this article shall not limit or otherwise affect any power

of appointment conferred upon a beneficiary or the right of a beneficiary to disclaim or release any interest created hereunder.

ARTICLE 9: ADMINISTRATIVE POWERS OF EXECUTOR AND TRUSTEE.

I authorize my Executor and the Trustee of any trust created in this my Will, in its sole discretion:

A. To sell at public or private sale, exchange for like or unlike property, convey, lease for terms longer or shorter than the administration of my estate and any trust, and otherwise dispose of any or all property held hereunder, for such price and upon such terms and credits as it deems proper.

B. To invest in any kind of property, real, personal, or mixed, regardless of the laws governing investments by fiduciaries, without any duty to diversify investments.

C. To execute securities transactions through any brokerage service, whether discount or full service.

D. To vote directly or by proxy at any election or stockholders' meeting any shares of stock.

E. To participate in any plan or proceeding, including any voting trust plan for liquidating, protecting or enforcing any interest in any property, or for reorganizing, consolidating, merging or adjusting the finances of any corporation issuing any such interest; to accept in lieu thereof any new or substituted stocks, bonds, notes or securities, whether of the same or a different kind or class, or with different priorities, rights or privileges; to pay any assessment or any expense incident thereto; and to do any other act or thing that it deems necessary or advisable in connection therewith.

F. To deposit, or arrange for the deposit of, securities at any securities depository or clearing house.

G. To make any division or distribution in cash or in kind, or partly in cash and partly in kind; to make reasonable valuations of the property so divided or distributed; and to elect to recognize taxable gain or loss resulting from a distribution. My Executor or Trustee, as the case may be, may consider the income tax basis of the property then available for division or distribution, as well as the circumstances of the beneficiaries, and need not make division or

distribution on a pro rata, asset by asset basis. My Executor or Trustee shall not adjust the interest of any beneficiary as a result of any action taken or forborne under the provisions of this paragraph.

H. To borrow money from any person or corporation and to pledge or mortgage as security any real or personal property.

I. To litigate, submit to arbitration, or settle any claim in favor of or against my estate or any trust hereunder, and to execute all agreements, deeds and releases necessary or proper in connection therewith.

J. To retain attorneys-at-law, accountants, investment counsel, agents and other advisers.

K. To pay the taxes and expenses of maintaining, repairing, improving and insuring any real property held hereunder.

L. Except as otherwise provided, to determine whether receipts and disbursements are allocable or chargeable to income or principal.

M. To exercise any option under any insurance contract or employee benefit plan as to the manner of payment of the proceeds thereof and any option granted to my Executor or my Trustee under the Code relating to the federal income taxes incurred by reason of such proceeds. Trustee shall not adjust the interest of any beneficiary on account of any increase in income taxes as a result of any such option so selected.

N. To receipt for the proceeds of any life insurance or employee benefit plan made payable to my Executor or my Trustee, to institute any suit or proceedings, and to take any action necessary to collect such proceeds. However, neither my Executor nor my Trustee need institute any suit or proceeding unless its expenses, including counsel fees and costs, are available in my estate or are advanced or guaranteed in an amount and in a manner reasonably satisfactory to it.

O. To renounce, in whole or in part, any property or interest in property which may become payable to my estate or any trust hereunder on my death (including the renunciation of any proceeds from an employee benefit plan), except to the extent that the disposition resulting from the renunciation is fundamentally inconsistent with my Will.

P. To divide any trust hereunder into separate trusts if the purposes for which the trust was created are better served thereby.

Q. To access, use, and control any digital device that I may own or have license to use (e.g., computers, tablets, peripherals, storage devices, mobile telephones, smartphones, etc.) for the purpose of accessing, controlling, deleting, transferring, and distributing any digital asset and digital account that I may own or have license to use, to the extent then authorized by law. I specifically authorize Executor to obtain any username, login, password or other electronic credential associated with any of my digital devices, digital assets and digital accounts.

ARTICLE 10: MISCELLANEOUS TRUST PROVISIONS.

With respect to the administration of each trust created in this my Will:

A. Except where otherwise provided, Trustee shall pay the net income of any trust hereunder when convenient to the beneficiary and agreed to by Trustee.

B. Any statute or rule of law to the contrary notwithstanding, any income accrued or on hand and not actually distributed to a beneficiary upon the termination of his or her interest shall be treated as though it had, in fact, accrued thereafter.

C. Trustee shall not be required to file any bond, with or without surety, inventory or account with any court or any officer or agent of any court, unless specifically ordered to do so by a court of competent jurisdiction.

D. Regardless of where I die domiciled, each trust created in this Will shall be regarded for all purposes as a Delaware trust under the exclusive jurisdiction of the Delaware Court of Chancery, and all matters pertaining to the validity, construction and application of the provisions of this Will or to the administration of the trusts created by it shall be governed by Delaware law.

E. No person or corporation dealing with Trustee shall be obliged to see to the application of money paid or property delivered to it, to inquire into the propriety of its exercising its powers, or to determine the existence of any fact upon which its power to perform any act hereunder may be conditioned.

F. Any person may add property to any trust hereunder, with the consent of Trustee, and such property shall thereafter be held by Trustee as a part thereof.

G. No individual Trustee hereunder shall be entitled to receive compensation for its services as such, but shall be entitled to reimbursement for out-of-pocket expenses.

H. Any corporate Trustee shall receive compensation for its services hereunder from time to time in accordance with the current rates then charged by it for trusts of similar size and character. If Trustee renders any extraordinary services, it may receive additional compensation therefor.

I. I hereby appoint as Trustee of any trust created under Article 4 of this Will, my friend, **OSCAR NUNEZ**, so long as he is willing and able to act, otherwise **FIRST NATIONAL BANK OF SCRANTON**. Trustee may decline its appointment as Trustee and Trustee may resign as Trustee by written notice delivered to the individual for whom the trust is set aside. In such case, the successor Trustee shall be the person or entity so designated in this Will, or if no person or entity is effectively designated, the successor Trustee shall be a bank or trust company designated by said beneficiary, or if he or she is a minor or otherwise incapacitated, by his or her natural or legal guardian, as the case may be.

Trustee shall, within sixty (60) days after such notice, deliver the assets held in such trust to the successor Trustee. If no successor Trustee has been appointed, Trustee may petition the appropriate Court to appoint a successor Trustee.

Upon delivery of the trust property to its successors, together with a statement of its activities for any period for which it has not reported, Trustee shall be without any further liability or responsibility to any past, present or future beneficiaries.

No successor Trustee shall be required to examine into the acts of its predecessor Trustee, and each successor Trustee shall have responsibility only with respect to the property actually delivered to it by its predecessor Trustee.

ARTICLE 11: PAYMENT OF DEATH TAXES, DEBTS AND EXPENSES OF ADMINISTRATION.

A. My Executor shall pay all my debts, my funeral expenses (regardless of legal limitations), costs of administering my estate and transfer taxes on my death, and may, in its sole discretion, pay a debt of mine secured by a mortgage on real property, from the residue of my estate without apportionment

among or charge against the respective interest of any beneficiary. However, my Executor may call upon the Trustee of any trust hereinbefore created for funds to be applied to the payment of my debts, funeral expenses, costs of administration, cash bequests and transfer taxes. My Executor shall not accept any property which is not included in my estate for purposes of computing such transfer taxes.

B. On the death of the beneficiary of any trust created hereunder, if the principal of such trust is included in the beneficiary's estate for transfer tax purposes, Trustee shall distribute to the Executor of the beneficiary's estate an amount equal to the sum of all additional transfer taxes payable by the Executor as a result of the inclusion of the trust in the beneficiary's estate. Certification of the Executor as to the amount of such additional taxes will be determinative for all purposes.

Trustee shall make such distributions directly to the appropriate payee, if so directed by the Executor.

C. Trustee shall pay any tax imposed under Chapter 13 of the Code as a result of a taxable termination attributable to such trust from principal, charging such payments ratably against the property in respect of which such termination occurred.

ARTICLE 12: CONTRIBUTION ON JOINT DEBTS.

If my Executor pays an obligation (including a bond secured by mortgage) owed by me jointly and severally with my Spouse, my Executor shall not exercise any right to contribution against my Spouse, regardless of the effect on any interest under this my Will.

ARTICLE 13: SIMULTANEOUS DEATH.

If my Spouse and I die under circumstances where the order of deaths cannot be determined, then for the purposes of this my Will and for the purposes of the administration of my estate my Spouse shall be deemed to have survived me and died immediately thereafter.

ARTICLE 14: TAX ELECTIONS.

My Executor may:

A. File a joint income tax return with my Spouse for any taxable year or period, or consent to the splitting of gifts made by me and/or my Spouse for gift tax purposes, and pay from my estate all or any part of the resulting tax liabilities; and

B. Deduct administration expenses for estate tax purposes or income tax purposes, and employ date of death values or alternate values for estate tax purposes.

My Executor shall have no liability to my estate or any beneficiary thereof as the result of its acting as previously authorized, and my Executor shall not seek reimbursement or contribution from any person or adjust the interest of any person as a result of any action taken or forborne under the provisions of this article.

ARTICLE 15: APPOINTMENT OF EXECUTOR.

I appoint as my Executor my Spouse, so long as my Spouse is willing and able to act, otherwise, my friend, **OSCAR NUNEZ**, so long as he is willing and able to act, otherwise my friend, **MICHAEL SCOTT**.

My Executor shall not be required to give bond before receiving letters testamentary as my Executor.

If ancillary administration is necessary, my Executor may appoint itself or such other person or entity as it may choose to act as my ancillary Executor.

The determination that an appointed Executor is not willing and able to act shall be evidenced by: (i) a death certificate; (ii) a resignation or renunciation executed by such Executor; or (iii) a statement to that effect by the physician attending such Executor.

ARTICLE 16: GUARDIAN OF MINORS.

If my Spouse does not survive me and if any child of mine is a minor at the time of my death, I hereby express the desire that my friends, **DWIGHT SCHRUTE** and **ANGELA MARTIN**, so long as either of them shall be willing and able so to act, shall have custody of any such child and shall be appointed guardian of the person of any such child if such appointment becomes desirable.

ARTICLE 17: ADOPTED PERSONS.

For all purposes of this Will, with regard to adopted persons, only a person adopted while under age twenty-one (21) shall be deemed to be a child and an issue of the adopting person and an issue of the ascendants of the adopting person and, furthermore, the children and issue of a person so adopted shall be deemed to be issue of the adopting person and his or her ascendants.

ARTICLE 18: DEFINITIONS.

A. "My Spouse" refers to **PAMELA BEESLY**. However, if my Spouse is divorced from me or separated under a valid written agreement or decree of Court, my Spouse shall be treated as if my Spouse predeceased me.

B. "My Children" refers to my biological children, **CICI HALPERT** and **JAMES HALPERT, JR.**, and my Spouse's child, **ROY ANDERSON, JR**.

C. "Issue" of a person means all the lineal descendants of that person of all generations.

D. "Code" means the Internal Revenue Code of 1986, as amended, or any corresponding federal tax statute enacted after the date of this my Will. A reference to a specific section of the Code refers not only to that section but also to any corresponding provision of any federal tax statute enacted after the date of this my Will, as in effect on the date of application.

E. "Transfer taxes" means all applicable federal estate taxes (except additional estate taxes imposed under Section 2032A of the Code), state estate or inheritance taxes, and generation-skipping transfer taxes imposed on any direct skip (as defined in Chapter 13 of the Code) other than a direct skip from a trust or caused by a disclaimer, and any interest and penalties thereon. The term does not include federal and state gift taxes, generation-skipping transfer taxes imposed on a taxable termination, a taxable distribution or a direct skip from a trust or caused by a disclaimer, income taxes, real estate transfer taxes, or any tax or duty imposed by a foreign country or political subdivision thereof.

F. "Tangible personal property" includes, but is not limited to, collectibles, automobiles, boats, works of art, antiques, jewelry, personal or

household effects and equipment or ornaments, but excludes certificates of stock, notes, gold and other precious metals in bullion form, cash, or other physical evidences of intangible personal property.

G. Use of the verb "give" shall convey all interests in property, real, personal or mixed, in fee simple absolute unless further limited by express provisions to the contrary.

H. Use of any gender in this Will includes the masculine, feminine and neuter genders, as appropriate. Use of the singular number includes the plural and vice versa unless the context clearly requires otherwise.

I. In applying any provision of this my Will which refers to a person's issue, "per stirpes", the children of that person are the heads of their respective stocks of issue, whether or not any child is then living.

J. "Executor" means the executor, administrator, or personal representative of a decedent's estate, and shall include all persons serving in such capacity from time to time.

K. Use of the verb "shall" in this my Will indicates a mandatory direction, and use of the verb "may" indicates authorization to take action.

L. Reference to a beneficiary as "then living" is intended to mean that such beneficiary shall be living on the date of death of Testator or any immediately preceding income beneficiary, and such person shall not be required to survive until the actual date of distribution in order to take hereunder.

M. Captions, headings and sub-headings, as used herein, are for convenience only and have no legal or dispositive effect.

[*Signature Pages Follow*]

IN WITNESS WHEREOF, I, **JAMES HALPERT**, set my Hand and Seal this 30th day of March, 2022.

_____(SEAL)
JAMES HALPERT

Signed, sealed and declared by **JAMES HALPERT** to be his Will, in our presence, who, in his presence, at his request and in the presence of each other, sign our names as witnesses the day and year last stated above.

_____ residing at _____

_____ residing at _____

STATE OF DELAWARE)
: SS.
COUNTY OF NEW CASTLE)

Before me, the Subscriber, on this day personally appeared, **JAMES HALPERT**, _____, and _____, known to me to be the Testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, **JAMES HALPERT**, the Testator, declared to me and to the witnesses in my presence that the instrument is his last Will and that he had willingly signed or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence and hearing of the Testator, that such person signed the Will as witness and that to the best of the such person's knowledge, the Testator was eighteen years of age or over, of sound mind, and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Sworn or affirmed to and subscribed to before me by **JAMES HALPERT**, the Testator, subscribed and sworn before me by _____ and _____, witnesses, this 30th day of March, 2022.

_____
Notary Public/Notarial Officer

Wills: Delaware

by Matthew P. D'Emilio and Jennifer E. Smith, McCollom D'Emilio Smith Uebler LLC, with Practical Law Trusts & Estates

Law stated as of 10 Jan 2022 • Delaware, United States

A Q&A guide to the law of wills in Delaware. This Q&A addresses state laws and customs that affect wills, including the key statutes and rules related to wills, the rules of intestacy, the requirements for creating a valid will, common will provisions, information concerning fiduciaries, and information regarding changing wills after execution, special circumstances regarding gifts made under a will or gift recipients, and lost wills. Answers to questions can be compared across a number of jurisdictions (see Wills: State Q&A Tool).

States and municipalities are modifying schedules and procedures in response to the 2019 novel coronavirus disease (COVID-19) pandemic which may impact the creation, modification, and administration of estate plans. For information and ongoing updates, see Global Coronavirus Toolkit: United States: Curated Resources. For information on state-specific emergency orders and temporary legislation allowing remote witnessing or notarization, which may affect execution of estate planning documents, see COVID-19: Emergency Orders and Temporary Legislation Regarding Remote Execution of Estate Planning Documents Tracker (US).

Key Statutes and Rules

1. What are the key statutes and rules that govern wills in your state?

The rules and laws pertaining to wills and probate proceedings in Delaware are found in Delaware Code Title 12, which includes laws applicable to:

- Wills (12 Del. C. §§ 101 and 201 to 323).
- Intestacy, defining which parties inherit without a will (12 Del. C. §§ 101 and 501 to 1224).
- Probate proceedings (12 Del. C. §§ 101 and 1301 to 3125).
- Fiduciary relations, testamentary trusts, guardianship, digital assets, principal and income allocation, and other matters (12 Del. C. §§ 101, 3301 to 5007, and 61-101 to 61-605).

The Probate Procedures set out in Section XIX of the Rules of the Delaware Court of Chancery are relevant to wills (Del. Ch. Ct. R. 187 to 207).

Who Can Create a Will

2. Is there a minimum age requirement to create a will?

A person must be at least 18 years old to make a will in Delaware (12 Del. C. § 201).

3. What is the standard of mental capacity required to create a will?

To have the testamentary capacity sufficient to create a will in Delaware, a person must be of sound and disposing mind and memory (12 Del. C. § 201). When executing the will (not before or after execution), the testator must:

- Be capable of exercising thought, reflection, and judgment.
- Know what the testator is doing and how the testator is disposing of the testator's property.
- Have sufficient memory and understanding to comprehend the nature and character of the testator's act.

(*Matter of Langmeier*, 466 A.2d 386, 402-03 (Del. Ch. 1983).)

4. Can an agent under a power of attorney create a will on behalf of a testator?

In Delaware, an agent acting under the authority granted in a power of attorney cannot create or revoke any will or codicil for a principal. However, any person can sign the testator's name on the testator's will:

- At the testator's express direction.
- In the testator's presence.
- If the will is attested and subscribed in the testator's presence by two or more credible witnesses.

(12 Del. C. §§ 202 and 1306.)

For more information on executing a will, see Question 6. For more information on revoking a will, see Question 13: Revocation of a Will.

Permissible Form of Will

5. What form must the will take? In particular, please specify whether:

- Handwritten (holographic) wills are permitted.
- Oral (nuncupative) wills are permitted.
- Contractual wills are permitted.

- Statutory wills are permitted.
- Electronic wills are permitted.
- Out-of-state wills are binding.

Handwritten (Holographic) Wills

A holographic will is generally understood to be a handwritten will that is signed by the testator but not witnessed. Holographic wills are not valid in Delaware. However, handwritten wills that are witnessed and otherwise executed with will formalities are valid. (12 Del. C. § 202.)

Oral (Nuncupative) Wills

A nuncupative will is generally considered to be an oral will. Nuncupative wills are not valid (12 Del. C. § 202).

Contractual Wills

A testator may agree in a contract with another party to:

- Make a will.
- Give a legacy or devise.

(6 Del. C. § 2715.)

The agreement must be:

- In writing.
- Signed by either:
  - the person whose personal representative or heirs sought to be charged (that is, against which the agreement is to be enforced); or
  - a person lawfully authorized in writing by the decedent to sign for the decedent in the decedent's absence.

(6 Del. C. § 2715.)

Statutory Wills

Delaware does not permit statutory wills.

Electronic Wills

Delaware does not permit electronic wills (12 Del. C. § 3550(a)(1)).

Out-of-State Wills

Except for oral wills, Delaware accepts out-of-state wills that were executed in compliance with either:

- Delaware law.
- The law at the time of execution of the place where the will was executed.
- The law of the place where, at the time of the will's execution, or at the time of the testator's death, the testator was domiciled, had a place of abode, or was a national.

(12 Del. C. § 1306.)

Will Execution Requirements

6. What are the execution requirements for a valid will? In particular, please specify:

- Requirements for the testator's signature.
- Any requirements for witnesses to a will.
- Any requirements for the will to be notarized.
- An example of an attestation clause.
- The requirements for a self-proving affidavit.
- If electronic wills are permitted, any different execution requirements.

Testator's Signature

In Delaware, a will must be signed by either:

- The testator.
- A person subscribing the testator's name:
  - in the testator's presence; and
  - at the testator's express direction.

(12 Del. C. § 202.)

If the testator is physically capable of signing the will, the testator should sign the will. If the testator cannot sign or make a mark, the testator can have another person sign for the testator.

Witness Requirements

At least two witnesses must sign a will (12 Del. C. § 202). To serve as witnesses, the individuals must be competent, which means that when signing the will, the witness must have the legal capacity to testify in court to the facts to which the witness attests by signing the will (12 Del. C. § 203(a); *Hudson v. Flood*, 94 A. 760, 761 (Del. Super. Ct. 1915)).

To minimize claims of undue influence, a beneficiary or other interested person ideally should not serve as a witness. However, this does not in itself invalidate either:

- The will.
- The beneficiary's or interested person's interest in the testator's estate.

(12 Del. C. § 203(b).)

The witnesses must sign in the testator's presence (12 Del. C. § 202(a)(2)).

Notary Requirements

There is no requirement for a will to be notarized unless it includes a self-proving affidavit. All self-proving affidavits must be notarized. (12 Del. C. § 1305.)

Sample Attestation Clause

The attestation clause states the testator signed or acknowledged the will in the witnesses' presence and the testator declared to each of the witnesses that the document is the testator's will. The attestation clause typically takes the following form:

> "Signed, sealed and declared by the Testator to be the Testator's Will, in our presence, who, in the Testator's presence, at the Testator's request and in the presence of each other, sign our names as witnesses the day and year last stated above."

The witnesses sign the will and provide their addresses in the space directly below the attestation clause.

Self-Proving Affidavit

A self-proved will is admitted to probate without having to submit additional proof that it was validly executed under Delaware law (12 Del. C. § 1310). A self-proving affidavit is usually made a part of a will and executed concurrently with it as an attachment at the end. However, any will may be made self-proved after the will's execution (12 Del. C. § 1305).

The self-proving affidavit, without witness testimony or affidavits after the testator's death, creates:

- A conclusive presumption that execution requirements were met.
- A rebuttable presumption that all other requirements were met.

(12 Del. C. § 1310.)

In the self-proving affidavit, the testator and witnesses swear that:

- The testator declared the document to be the testator's will.
- The testator signed the will in front of the witnesses.
- The witnesses signed the will in each other's presence.

(12 Del. C. § 1305.)

The notary then acknowledges the testator's and witnesses' statements and identities (12 Del. C. § 1305).

A self-proving affidavit is not required to make a valid will. However, it can save time during the probate process. If the self-proving affidavit is not submitted with the will, the petitioner must gather proof that the will was properly executed, which can cause problems if witnesses cannot be located or if they died. Counsel should include a self-proving affidavit as part of every will execution, if practicable.

The Delaware Code provides a form for a self-proving affidavit that should be used (12 Del. C. § 1305).

For an example of a Delaware self-proving affidavit, including signature and witness lines and an attestation clause, see Standard Clause, Signature Pages for Will and Self-Proving Affidavit (DE).

Electronic Will Execution Requirements

Delaware does not currently permit electronic wills (see Question 5: Electronic Wills).

Limitations on Gifts to Fiduciaries and Attorney Draftsperson

7. Are there any limitations on beneficiaries a testator can name in a will? In particular, please specify if a will can provide for gifts to:

- Executors.
- Gifts to trustees named in the will.
- Gifts to guardians.
- The lawyer who drafted the will.

Gifts to Personal Representatives

In Delaware, a will generally can provide for gifts to executors.

Gifts to Trustees Named in the Will

A will generally can provide for gifts to trustees named in the will.

Gifts to Guardians

A will generally can provide for gifts to guardians.

Gifts to Lawyer Draftsperson

A will generally cannot provide for gifts to lawyer draftspersons (DE R RPC Rule 1.8(c); *Matter of McCann*, 669 A.2d 49, 55 (Del. 1995)).

Rights of Family Members to Inherit

8. Are a testator's will bequests affected by community property laws, elective share laws, or other local laws that prohibit a testator from excluding a beneficiary from taking a share in the estate? In particular, please specify if a will can disinherit:

- The testator's spouse.
- A child of the testator.

Disinheriting a Testator's Spouse

In Delaware, spouses cannot disinherit each other in a will unless there is a pre-nuptial or post-nuptial agreement where a surviving spouse expressly waives the rights to inherit and claim an elective share (12 Del. C. § 905). Absent this waiver, there are two remedies available to a spouse disinherited in a will depending on when the testator signed the will.

If the testator signed the will while married to a surviving spouse, the surviving spouse may choose to receive an elective share of the deceased testator's estate rather than taking under the testator's will. This right to an elective share applies even if the spouse is not expressly disinherited in the will.

The elective share is a statutory amount equal to one-third of the testator's elective estate, less all transfers to the surviving spouse by the testator (12 Del. C. § 901). The elective estate is the amount of the testator's gross estate for federal estate tax purposes, less certain statutory deductions, and includes the testator's probate estate as well as the testator's interests in other non-probate property, such as:

- Jointly titled assets.
- Pay-on-death and transfer-on-death accounts.
- Life insurance cash surrender value.
- Annuities.
- Revocable trust assets.

- Retirement accounts.

(12 Del. C. § 902.)

A surviving spouse must file a claim for an elective share within six months of the grant of letters testamentary or letters of administration (12 Del. C. § 906; *IMO Estate of Lambeth*, 2018 WL 3239902, at *2 (Del. Ch. Jul. 2, 2018), adopted sub nom. *Lambeth v. Kendall* (Del. Ch. 2018)).

The liability for the elective share is apportioned among the beneficiaries of testator's contributing estate (12 Del. C. § 908(a)). The contributing estate is limited to assets of which the testator was the sole owner at death and excludes:

- Any jointly owned property with rights of survivorship.
- Insurance proceeds payable to a beneficiary other than the estate.
- Any property held in trust. For example, the testator fully funding a revocable trust will essentially defeat an elective share claim.

(12 Del. C. § 908(b).)

If the testator signed the will before marrying the surviving spouse, that spouse is entitled to receive either the same amount as if the testator died intestate or the surviving spouse's elective share (12 Del. C. §§ 321 and 901; see Question 16).

Disinheriting a Child of the Testator

A child generally has no right to inherit from a parent, unless both:

- The child is born after the will was executed.
- The will does not expressly exclude the child, either specifically or as a class member (for example, as a member of the class of children born after the will is executed).

(12 Del. C. §§ 301 and 310.)

After-born children, including posthumous children, who meet these requirements are entitled to an intestate share of the decedent's estate, even if all living children of the decedent were expressly disinherited (12 Del. C. §§ 301 and 310). For more information about the inheritance rights of after-born children, see Question 14: After-Born Child.

Common Will Provisions

9.Discuss specific provisions commonly found in a will and the rules that apply to these provisions in your state. In particular, please discuss the following provisions and their effect:

- Incorporation by reference.
- Disposition of remains or for funeral wishes.
- No-contest clause.
- Rule against perpetuities.
- Sample rule against perpetuities clause.

Incorporation by Reference

Incorporation by reference is a general doctrine that may allow a testator to refer to outside documents and incorporate their provisions into a will. Delaware specifically authorizes incorporation by reference. It is often used in the context of:

- **Pour-over wills.** A pour-over will can incorporate the terms of a trust agreement by reference. This means that the will can refer to the trust agreement and direct that those terms apply, whether the trust exists when the will is executed or is created later, including at the testator's death. To incorporate a trust agreement by reference, the will must identify the trust and the trust must be set out in either:
  - a written instrument executed before, concurrently, or after the will's execution; or
  - another individual's will if that other individual predeceased the testator.

  (12 Del. C. § 211.)

- **Memoranda disposing of tangible personal property.** A testator may reference in the will a separate writing that directs the disposition of the decedent's tangible personal property. A general reference to this separate writing creates a legally enforceable writing, even if the testator creates or revises the writing after executing the will, if the writing:
  - is either in the testator's handwriting or is signed by the testator;
  - identifies the items and legatees with reasonable certainty;
  - is not inconsistent with the will terms; and
  - is not inconsistent with any other writing disposing of tangible personal property, unless the writing is dated, in which case the latest-dated writing controls. For example, a memorandum disposing of tangible personal property

is not effective to transfer property if there is a later-dated will, codicil, or memorandum disposing of the same property.

(12 Del. C. § 212.)

Disposition of Remains or Funeral Wishes

A testator may include in a will specific burial, cremation, or other directions for the disposition of the testator's remains (12 Del. C. § 262). However, these directions are typically expressed in a separate declaration like the form set out in 12 Del. C. § 265.

No-Contest Clause

No-contest clauses, also known as *in terrorem* clauses, attempt to prevent a beneficiary from contesting the dispositive provisions of a testator's will. They typically provide that a contesting beneficiary, and often the contesting beneficiary's children and more remote issue, are excluded as beneficiaries under the will if the contest is unsuccessful.

Delaware generally enforces no-contest clauses against a beneficiary who contests the will's validity or seeks to set aside or vary the will's terms, unless the beneficiary is determined by the court to prevail substantially or in other narrow circumstances (such as in any action to determine what is a contest within a no-contest clause or any action brought by a beneficiary to interpret a will) (12 Del. C. § 3329(b)). There are no Delaware cases interpreting what it means to prevail substantially in this context.

No-contest clauses are inapplicable to:

- Actions brought by the trustee of a trust or personal representative of a will.
- Agreements among beneficiaries in settlement of a dispute relating to the will or trust.
- Any action to determine whether a proposed or pending motion, petition, or other proceeding is a contest within the meaning of the statute.
- Any action brought by a fiduciary for construction or interpretation of a will or trust instrument.

(12 Del. C. § 3329(b).)

Rule Against Perpetuities

The common law rule against perpetuities is abolished for personal property held in trust (25 Del. C. § 503(a)). However, Delaware has a statutory rule against perpetuities for real property providing that an interest in real property held in trust must be distributed after 110 years (25 Del. C. § 503(b)).

Sample Rule Against Perpetuities Clause

"Notwithstanding the foregoing provisions, unless sooner terminated in the manner previously provided, any trust held hereunder shall end in its entirety or with respect to certain of its assets on the date, if any, required by the Delaware rule against perpetuities. Thereupon, Trustee shall distribute the principal of such trust or such assets, as the case may be, free from trust, to the beneficiary for whom the trust was set aside."

Executors

10. What are the rules regarding executor appointments in your state? In particular, please discuss:

- The terminology that is used to identify the person who is in charge of the estate (referred to here as the executor).
- Criteria for qualifying as an executor, including limitations on who a testator can name as executor.
- Rules regarding compensation of executors.
- Whether the drafting attorney can serve as executor.
- Priority rules for appointment of executor if the named executor fails to qualify.
- Who has authority to act when there are multiple executors.

Terminology Used to Identify Person in Charge of Estate

In Delaware, the person in charge of the estate is referred to as the personal representative.

Qualification as Personal Representative

A personal representative must:

- Not have been convicted of a felony.
- Not be mentally incapacitated.

- Be at least 18 years old.

(12 Del. C. § 1508; *In re Estate of Trammel*, 2010 WL 692328, at *1 (Del. Ch. Feb. 9, 2010).)

Compensation of Personal Representatives

Unless otherwise provided in the will, individual personal representatives are generally entitled to reasonable compensation. There is a non-exhaustive list of factors the court should consider in determining the reasonableness of a personal representative's compensation, including the following factors related to the administration of the testator's estate:

- Time spent.
- Risk and responsibility.
- Novelty and difficulty of issues.
- The personal representative's skill and experience.
- Any provisions in the will regarding compensation.
- Comparable rates for similar services.
- The character and value of the estate assets (and other estates that must be valued and reported on any tax return).
- The time constraints.
- The loss of other business by accepting the administration.
- The benefits the estate receives from the administration.

(Del. Ch. Ct. R. 192).

The will may provide that some or all the named personal representatives are not entitled to commissions. However, because will provisions regarding compensation are only one factor in determining reasonable compensation, the court is not obligated to award the compensation specified in the will if the court does not find it reasonable.

This same analysis applies to determine compensation for attorneys representing personal representatives (Del. Ch. Ct. R. 192).

Drafting Attorney as Personal Representative

Delaware has no rule prohibiting a drafting attorney from acting as personal representative for a client's estate. Attorneys may serve as personal representative and counsel for an estate, in which case they will receive both:

- Compensation as a personal representative.
- Fees for legal services, if such services are necessary and carefully documented.

(*In re Estate of Boyle*, 1995 WL 716768 (Del. Ch. Oct. 25, 1995).)

Failure of Named Personal Representative to Qualify

When a will does not nominate a personal representative or none of the persons nominated are able or willing to serve, the court appoints a personal representative in the following order of preference (if able and willing to serve):

- The decedent's spouse.
- The decedent's children.
- The decedent's parents.
- The decedent's siblings.
- Any nominee of the first class of persons which has a living member with capacity (where, if there is more than one member of this class, who all agree in writing to that nominee). If members of this class do not agree on the nominee, any class member may petition the court and the court determines who to appoint.
- If there are no living members of the above classes with capacity, or if no petition is filed within 60 days of the testator's death, the Register of Wills may grant letters of administration to someone the Register determines in its discretion.

(12 Del. C. § 1505.)

Multiple Personal Representatives

Absent an express provision in the will, co-personal representatives:

- May act independently in the regular course of administering an estate.
- Must act unanimously for an act not in the regular course of administration.

(*May v. duPont*, 216 A.2d 870, 872 (Del. 1966).)

In this context, regular means uniform in course, practice, or occurrence, routine, systematic, customary, not exceptional or unusual, and normal (*May*, 216 A.2d at 872-73). For example, a single executor acting alone may collect estate assets and pay estate expenses, while commencing litigation requires unanimity among all executors.

If the testator names multiple personal representatives, the testator should include language in the will about whether and under what circumstances co-personal representatives:

- May act independently.
- Must act unanimously.
- May act by majority, which requires unanimous consent if there are two co-personal representatives.

Trustees

11. What are the rules regarding appointment of trustees for testamentary trusts in your state? In particular, please discuss:

- Criteria for qualifying as a trustee.
- Rules regarding compensation of trustee.
- Priority rules for appointment of trustee if the named trustees fail to qualify.
- Who has authority to act when there are multiple trustees.

Qualification as Trustee

There are no statutory requirements for an individual to qualify as trustee in Delaware like those for qualifying as personal representative (see Question 10: Qualification as Personal Representative). However, a trustor, another officeholder, or beneficiary may petition the court to remove an officeholder (as defined in 12 Del. C. § 3326(a), which definition includes a trustee) or the court may remove an officeholder on its own initiative if either:

- The officeholder has committed a breach of trust.
- The continued service of the officeholder substantially impairs the trust's administration.
- The court determines (considering the trustor's intent and the beneficiaries' best interests) that, despite the absence of a breach of trust, there exists:
    - a substantial change in circumstances;

- unfitness, unwillingness, or inability of the officeholder to administer the trust property or perform its duties; or
- hostility between the officeholder and beneficiaries or other officeholders that threatens efficient trust administration.

(12 Del. C. § 3327.)

Trust companies may act as trustees. To act as a trust company, an entity must secure a certificate authorizing it to do business in Delaware from the State Bank Commissioner (5 Del. C. § 902). To be a Delaware trust company, an entity generally must be either:

- A bank, association, or trust company incorporated under Delaware law and having trust powers.
- A national banking association or federal association authorized and qualified to exercise trust powers in Delaware.

(12 Del. C. §§ 701 and 901.)

Compensation of Trustee

Absent a provision in the will or an outside agreement specifying trustee compensation, a trustee is entitled to reasonable compensation for acting as trustee (12 Del. C. § 3560(a)). A corporate trustee typically takes compensation under its fee schedule.

Even if the will specifies the trustee's compensation, the court may alter the amount of compensation allowed under the terms of the will if either:

- The duties of the trustee are substantially different from those originally contemplated.
- The compensation would be unreasonably high or low.
- There exist extraordinary circumstances requiring equitable relief.

(12 Del. C. § 3560(a).)

If the testator wants to use a corporate trustee, the testator should generally communicate with the corporate trustee before executing the will. Corporate trustees may:

- Not agree to serve depending on the value of, or nature of the assets in, the prospective estate.
- Insist that the will provisions include the terms of the corporate trustee's fee agreement or schedule.

Failure of Named Trustee

If the will creates testamentary trusts, the terms of the will typically specify both:

- The method for appointing a successor trustee.
- The identity of successor trustees.

The court generally appoints a successor trustee when both:

- All named successor trustees cannot serve.
- There is no mechanism for appointing further successor trustees.

(12 Del. C. § 3336.)

If the dispositive provisions of the trust instrument require immediate distribution (outright or to another trust with a serving trustee) to or for the benefit of one or more beneficiaries, the beneficiaries may, by unanimous vote, name a successor trustee without court approval (12 Del. C. § 3336).

Interested parties may appoint a successor trustee by nonjudicial settlement agreement (12 Del. C. § 3338(d)(4)). Interested parties include:

- All fiduciaries then serving.
- Beneficiaries and others who have a present interest in the trust.
- Beneficiaries whose interest would vest, regardless of the exercise or non-exercise of any power of appointment, if the present interest in the trust terminated on the effective date of the nonjudicial settlement agreement.

(12 Del. C. § 3338(a).)

Multiple Trustees

Unless otherwise provided in the will, when there is more than one trustee, the trustees act by majority decision (and two trustees must act unanimously) (12 Del. C. § 3323).

Guardians

12. What are the rules regarding appointment of guardians for minor children by will in your state? In particular, please discuss:

- Criteria for qualifying as a guardian.
- Whether a guardianship nomination in the will is binding or persuasive.
- At what age the guardianship terminates.

Qualification as Guardian

An individual must be 18 years of age or older to qualify as a guardian in Delaware. The Delaware Court of Chancery has both:

- The discretion to appoint guardians.
- The authority to establish rules concerning guardianship petitions

(12 Del. C. §§ 3901 and 3902.)

Guardianship Binding or Persuasive

If the sole surviving parent designates a guardian by written declaration or in the parent's will, the court appoints the named person as guardian of any minor children unless there is just cause to the contrary (12 Del. C. § 3902(b)).

However, after the first parent's death, the surviving parent has care and custody of their minor children unless the court finds dependency, neglect, or delinquency sufficient to remove the child from that parent's care (if removal is in the child's best interest) (*Martin v. Sand*, 444 A.2d 309, 314 (Del. Fam. Ct. 1982)).

Termination of Guardianship

A guardianship automatically terminates when the child attains age 18 unless the guardianship petition included allegations of incapacity other than age (12 Del. C. § 3909(a)).

Changes to Will After Execution

13. What are the rules regarding changes to a will after it is executed? In particular, please specify:

- How a will can be modified after it is executed.

- How a will can be revoked after it is executed.
- Whether a previously revoked will can be reinstated, and if so, how.

Modification of a Will

In Delaware, a testator may amend or fully revoke the testator's will until the testator no longer has testamentary capacity or dies. There are generally only two options for modifying an existing will during the testator's life:

- A codicil.
- A new will.

(*Ruth v. Ruth*, 123 A.2d 132, 133 (Del. Ch. 1956).)

A codicil amends an existing will. A testator may add, alter, substitute, or delete any part of a will by executing a codicil. A testator must execute a codicil in the same manner as a will to be valid. (12 Del. C. § 208; see Question 6.) When an existing will needs only a few simple changes, a codicil is typically appropriate.

However, using a codicil to modify a will provides a paper trail of the testator's changing wishes. In a probate proceeding, both the will and the codicil must be filed with the Register of Wills and become public record (12 Del. C. § 1301(a)).

If a testator reduces a beneficiary's share by codicil, the beneficiary is likely to have access, as part of the routine probate process, to the original will and the codicil that reduces the beneficiary's share. If the testator instead executes an entirely new will that either reduces a beneficiary's share or omits the beneficiary entirely, that beneficiary:

- Does not have access to the prior will as part of the routine probate process.
- May be unaware of the reduction or elimination of the beneficiary's interest.

It is often preferable to prepare a new will, rather than a codicil, if there is any reason to believe that any of the testator's changes may cause later disputes or challenges. It may be preferable to prepare a new will if there are numerous codicils, incorporating all operative portions of the will into one document.

Revocation of a Will

The testator may revoke a will in its entirety either by:

- Executing a later will (or a later instrument executed with will formalities) declaring the revocation.

- Intentionally burning, cancelling, tearing, or obliterating the will. This can be done by another person:
    - in the testator's presence; and
    - at the testator's direction.

(12 Del. C. § 208.)

For revocation by destruction to be valid, the testator must intend to revoke the will (*Meredith v. Meredith*, 157 A. 202, 204 (Del. 1931)).

The testator may revoke a part of a will by codicil if the provisions of the codicil are inconsistent with those of the will so that it shows the testator's intention changed (*Banning v. Latimer*, 153 A. 542, 545 (Del. Ch. 1931)).

Overcoming Presumption of Revocation

When an original will cannot be located at probate, there is a presumption that the testator destroyed the will with an intention to revoke it. However, to overcome the presumption of revocation, the proponent of the missing will must show by a preponderance of the evidence:

- That the testator executed a valid will.
- The will's terms.
- That the testator lost the will or unintentionally destroyed it.
- That the testator did not alter the testator's testamentary intent before the testator's death.

(*Matter of Estate of Dodd*, 2018 WL 3998428, at *4 (Del. Ch. Aug. 20, 2018).)

Revocation by Divorce or Annulment

Unless the will expressly provides otherwise, a divorce or annulment (but not a decree of separation) revokes any:

- Disposition or appointment of property by will to a former spouse.
- Provision conferring a power of appointment on the former spouse.
- Nomination of the former spouse as executor, trustee, guardian or other fiduciary.

(12 Del. C. § 209.)

Any will provisions revoked because of these rules are revived by the testator remarrying the former spouse (12 Del. C. § 209).

Reinstatement of a Will

A testator can republish a will by either:

- Re-executing the will.
- Executing a codicil that republishes or refers to the will.

(*Sloan v. Segal*, 2009 WL 1204494, at *12, n.67 (Del. Ch. Apr. 24, 2009).)

If the testator makes a new will that revokes a prior will and the new will is invalid, the doctrine of dependent relative revocation may apply to revive the prior will if the testator:

- Did not intend to die without a will.
- Only revoked the old will on the condition that the new will is valid.

(*In re Petition for Will of Ainscow*, 17 A.2d 227, 228 (Del. 1940); *Ruth*, 123 A.2d at 133-34.)

Special Circumstances Regarding Gifts or Recipients

14. Please describe what happens if:

- A beneficiary does not survive the testator.
- A gift is not owned by the testator at the testator's death.
- There are not enough assets passing through the will to satisfy all the gifts.
- The gifted property is encumbered.
- The testator and a beneficiary or fiduciary to which the testator was married when the will was executed are no longer married when the testator dies.
- The testator gets married after the will is executed.
- A child is born after the will is executed.

- A beneficiary causes the testator's death.
- The testator and a beneficiary die at the same time.

Beneficiary Does Not Survive

In Delaware, if the will provides for what happens if a beneficiary predeceases the testator, the provision in the will controls (12 Del. C. § 2313(b)). If the will does not provide for what happens if a beneficiary predeceases the testator and the beneficiary is:

- A grandparent or a lineal descendant of the testator's grandparent, the gift passes to the beneficiary's descendants who survive the testator by at least 120 hours.
- Not a grandparent or a lineal descendant of the testator's grandparent, the gift lapses and becomes part of the residue.

(12 Del. C. § 2313(a).)

Gift Not Owned by Testator at Death

If a testator bequeaths specific property in the testator's will but disposes of that property before death, the bequest is generally extinguished, that is, it adeems. The beneficiary receives neither the gift, nor its equivalent value. However, if the disposed property was exchanged for property of substantial identity (the change of the property was merely formal, for example, if stocks and bonds were exchanged for other securities), the gift does not adeem and the beneficiary receives that new property as the bequest. (*Curtis v. Curtis*, 2 A.2d 88 (Del. 1938); *In re Dungan's Estate*, 62 A.2d 509, 510-11 (Del. Orph. 1948).)

This rule of ademption does not depend on whether the testator intended or did not intend ademption, but on the substantial identity test. The substantial identity test examines whether the testator's transfer of property (sold before death for cash or other property) is substantially identical to the received property. (*Matter of Hobson's Estate*, 456 A.2d 800, 802 (Del. Ch. 1982).)

Insufficient Assets

If an estate does not have sufficient assets to pay its obligations and all dispositions under the will, the gifts made to beneficiaries abate (that is, are reduced or eliminated) in the following order:

- Property not disposed of by the will.
- Residuary bequests and devises.
- General bequests and devises.

- Specific bequests and devises.

(12 Del. C. § 2317(a).)

The statutory order of abatement is a default rule. The testator can change the order of abatement in the testator's will. (12 Del. C. § 2317(b).)

Gifted Property Encumbered

Unless the will provides otherwise, a beneficiary receiving a gift of real property generally takes the property free and clear of any encumbrances. This means that any mortgage or lien on real property gifted by will is paid from the residue of the estate, unless either:

- The will specifically does not provide for the payment of debts.
- The property must be sold to pay the debts of creditors.

(*Equitable Tr. Co. v. Shaw*, 194 A. 24, 26-27 (Del. Ch. 1937).)

It is presently unclear in Delaware whether a beneficiary receiving a gift of personal property generally takes the personal property free and clear of encumbrances.

Effect of Divorce

Unless the will provides otherwise, if the testator divorces or the testator's marriage is annulled after the testator made a will, all provisions of the will that affect the former spouse become void. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this rule. These voided provisions include fiduciary appointments of, bequests to, and provisions conferring a power of appointment on, the former spouse. The former spouse is treated as having predeceased the testator for purposes of the will provisions. The testator remarrying the former spouse revives these provisions. (12 Del. C. § 209.)

Effect of Marriage

A surviving spouse of a decedent who signed a will before marriage (sometimes referred to as an omitted spouse or a pretermitted spouse) is entitled to that spouse's intestate share of the decedent's estate if the spouse both:

- Did not waive the right to inherit by agreement.
- Is not provided for in the will or otherwise.

(12 Del. C. §§ 321 and 323.)

Any surviving spouse of a decedent (whether the decedent made a will before or after the marriage, or whether the surviving spouse is provided for in the will or not) is entitled to an elective share of the estate (see Question 8: Disinheriting a Testator's Spouse).

After-Born Child

Unless the will expressly provides otherwise, if a child is born or adopted after a decedent signed a will and the child is not provided for in the will, that child is entitled to the same share the child would have received had the decedent died intestate (12 Del. C. § 301; see Question 8: Disinheriting a Child of the Testator). An after-born child is not entitled to a share of the decedent's estate if the decedent's will expressly excludes all children born after the will is executed from receiving anything under the will.

Children born after the will's execution include posthumous children (children born after the decedent's death) (12 Del. C. § 310).

Beneficiary Causes Testator's Death

A beneficiary that unlawfully and intentionally kills or participates in procuring the testator's death without certain statutory mitigating circumstances forfeits any interest that the beneficiary has in the testator's estate. The estate passes as if that beneficiary predeceased the testator. (12 Del. C. § 2322.)

Simultaneous Death

If title to property depends on whether a person survived the testator, there is insufficient evidence the person died before or after the testator, and there is no survivorship provision in the will, the property is disposed of as if each person had survived the other, except:

- One-half of jointly held property is distributed as if one joint tenant survived and the other one-half is distributed as if the other joint tenant survived (12 Del. C. § 703).
- Insurance proceeds are distributed as if the beneficiary predeceased the insured (12 Del. C. § 704).

(12 Del. C. § 701.)

Lost Wills

15. Please describe what happens if the original will is lost.

If an original will is lost or inadvertently destroyed, there is a presumption the will was revoked. However, on petition to the Delaware Court of Chancery, a copy may be admitted to probate by the proponent proving:

- The legal existence of the will.
- That the will was lost or inadvertently destroyed.
- The contents of the will, by clear and satisfactory evidence.
- That the testator did not alter the testator's testamentary intent before death.

(*In re Ainscow's Will*, 27 A.2d 363 (Del. 1942); *Matter of Estate of Dodd*, 2018 WL 3998428 at *4.)

Rules of Intestacy

16. Please describe how property passes if there is no will or if the terms of the will distribute assets according to the laws of intestacy in your state (who are the testator's heirs).

If there is no will or if the will's terms so provide, the estate assets are distributed according to the statutes governing intestate succession (12 Del. C. § 501). Under the Delaware intestacy statutes, if a decedent dies leaving:

- A surviving spouse and no issue or parents, all the intestate property passes to the surviving spouse.
- A surviving spouse and a parent or parents, but no surviving issue, the first $50,000 of the intestate personal estate, plus one-half of the balance, plus a life estate in the intestate real estate passes to the surviving spouse and the balance passes to decedent's surviving parent or parents.
- A surviving spouse and issue, all of whom are issue of both the decedent and the surviving spouse, the first $50,000 of the intestate personal estate, plus one-half of the balance, plus a life estate in the intestate real estate passes to the surviving spouse and the balance passes to decedent's issue, *per stirpes*.
- A surviving spouse and issue, one or more of which are issue of the decedent only, one-half of the intestate personal estate, plus a life estate in intestate real estate passes to the surviving spouse and the balance passes to the decedent's issue, *per stirpes*.
- Surviving issue and no spouse, all the intestate property passes to the surviving issue *per stirpes*.
- No spouse or any issue, to the decedent's:

- parents equally;
    - siblings and their issue, *per stirpes*; or
    - next of kin, *per stirpes*.

- Property not passing to the surviving spouse that passes to two or more persons passes to those persons as tenants in common.

(12 Del. C. §§ 502 and 503.)

FUNDAMENTALS OF WILL DRAFTING
DISPOSITIVE PROVISIONS

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A Will is a written set of legally enforceable orders directing the transfer of property to named beneficiaries effective upon the death of the maker. New Castle County Register of Wills Brochure. The body of a typical Will comprises an introduction, dispositive provisions, appointments of fiduciaries, and administrative provisions.

I. Introduction

1. Identification of Testator. The Testator should be sufficiently identified, e.g.," I, Joe C. Schmoe, of New Castle County, Delaware …."

2. Statement of Revocation. A Will should serve to revoke all prior Wills and Codicils to avoid confusion and prevent possible litigation.

   a. Delaware law provides:

      12 Del. C. § 208 Revocation of wills generally.

      A last will and testament, or any clause thereof, shall not be altered, or revoked, except by canceling by the testator, or by some person in the testator's presence and by the testator's express direction, or by a valid last will and testament, or by a writing signed by the testator, or by some person subscribing the testator's name in the testator's presence and by the testator's express direction, and attested and subscribed in the testator's presence by 2 or more credible witnesses; but this clause shall not preclude nor extend to an implied revocation.

   b. E.g., ….declare this to be my last Will and Testament and hereby revoke all prior Wills and Codicils made by me.

   c. Practice pointer: Recommend the testator track down any prior original Wills and Codicils and destroy them.

II. Dispositive Provisions

1. Tangible Personal Property. Tangible personal property includes all household effects, automobiles, boats, jewelry, artwork, collections, pets, etc. Tangible personal property may have sentimental value that exceeds its monetary value and

can be the subject of heated disagreement and litigation.

a. Consider including a definition of tangible personal property in the Will. If the testator owns a business, the definition should exclude from the definition of tangible personal property any items that are necessary for the operation of the business, e.g., cash register, inventory, truck, etc. Other terminology used instead of tangible personal property, e.g., "personal effects", "household effects", "belongings" are susceptible to different interpretations. For an example of a definition of tangible personal property, see outline for Tax Elections/Apportionment Provisions; Definitions, Kristen Bennett.

b. Establish ownership of tangible personal property, especially if it has significant value or will be left to someone other than the surviving spouse. Delaware law is that tangible personal property in the joint possession of spouses is presumptively held as tenants by the entireties. Du Pont v. Du Pont, 33 Del. Ch. 571, 98 A.2d 493.

c. Tangible personal property should be devised through a separate section of the Will and not as part of the residue of the estate. If part of the residue, it will be treated as distributable net income carried out to the beneficiaries the year of distribution. I.R.C §§ 662(a)(2) & 663 (a)(1); Treas. Reg. §§1-662(a)-3(b), 1.661(a)-2(f) and 1.663(a)-1. For further discussion, see outline for Tax Considerations, James J. Gallagher.

d. Individual items of tangible personal property cannot be divided, and many collections of tangible personal property may only be divided with a diminution in value. Therefore, consider the impact of a direction to divide tangible personal property in "equal shares" may have on such property. Consider instead "I give any items of tangible personal property owned by me at the time of my death (together with any policies of insurance on such items) to my children who survive me as equal shares as possible, with particular items to be divided among them as they shall agree. If a collection of items is involved, the testator may direct that the collection be treated as one item.

e. Anticipate possible disputes over particular items of property. The testator may want to include a "tie-breaker", e.g. having the executor decide disputes ("…or, in the event of disagreement, as my executor decides") or directing that such an item be sold "…or, any item subject to disagreement shall be sold by my executor to an unrelated third party and the proceeds shall be distributed in accordance with the residue of my estate".) Some testators may prefer a more creative approach to its distribution of tangible personal property, e.g., having each child selecting one item each turn,

taking turns in order of age, three turns each, with the remainder to be sold at auction; etc.

f. If the testator wants all tangible personal property to be sold, be sure to specify who will receive the proceeds, which may be in accordance with the residue, or added to the residue.

g. Some testators prefer to leave a memorandum to specify who will receive certain items of tangible personal property. This could be especially useful if one or more items are of significant sentimental value (family heirloom) or monetary value (a Ming dynasty chicken cup).

i. 12 Del. C. § 212 Bequest of tangible personal property by separate writing.

A will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities, and property used in trade or business. To be admissible under this section as evidence of the intended disposition, the writing:

(1) Must either be in the handwriting of the testator or be signed by the testator and must identify the items and the legatees with reasonable certainty;

(2) Must not be inconsistent with the terms of the will; and

(3) Must not be inconsistent with any other writing permitted by this section unless the writing is dated in which case the writing with the latest date will control.
Notwithstanding the foregoing, in the case of a writing that includes both provisions for dispositions that are consistent with the terms of the will or any other writing permitted by this section and provisions for dispositions that are inconsistent with the terms of the will or any other writing permitted by this section, such writing shall be admissible under this section as evidence of the intended disposition of those items of tangible personal property that would be disposed of by the provisions of the writing that are not inconsistent with the terms of the will or any other writing permitted by this section. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered

by the testator after its preparation; and it may be a writing which has no significance apart from its effect upon the dispositions made by the will.

ii. For example, "I give any items of my tangible personal property described in a written memorandum signed by me that I may leave at the time of my death (together with any policies of insurance on such items) to the individuals named in such memorandum. The written memorandum of gifts may be modified by me from time to time. In the event that I leave more than one memorandum, the most recent reference to any item shall control its disposition."

iii. A tangible personal property memorandum should be sufficiently descriptive to allow the executor and beneficiaries to easily determine the testator's intent, e.g., "I leave my diamond ring to Meg." vs. "I leave my Cartier, three carat, princess cut diamond engagement ring to my personal trainer, Margaret Muscle."

iv. Remember to distribute any property not covered by a memorandum in the event the testator never completes a memorandum or does not include all tangible personal property on the memorandum. "I give all of my tangible personal property not disposed of effectively by memorandum (together with any policies of insurance on such items) to…."

h. State who will be responsible for the costs of transporting, packaging and insuring tangible personal property, the beneficiaries of the property or the estate. If the estate will pay these expenses, they may be taken as a deduction for purposes of the accounting and an estate tax return.

2. Pets. Although pets are considered tangible personal property for the purposes of an estate, many pet owners do not consider them such.

a. Many clients will want to specify who will receive their pets at death. "I give any pets that I may own at my death to my sister, Katherine P. Feline. At the time I execute this Will, I own the following pets: a black and white, fourteen year old cat named Tiny, and an all gray, two year old cat named Spot."

b. Many of these clients also include a monetary gift to the person receiving pets to be used in their care. "I also give to my sister, Katherine P. Feline, the sum of Four Thousand Dollars ($4,000), with the intent, but not the

direction, that such monies be used in the care of my pets."

c. For discussion of pet trusts, see the outline for Testamentary Trusts, Matthew P. D'Emilio.

3. Specific Bequests. A specific bequest is "a gift by will of a portion of testator's estate which is so specifically described as to be capable of distinguishing it from the rest and is legally satisfied by delivery of that specific item." Matter of Hobson's Estate, 456 A.2d 800, 802 (Del. Ch. 1982). E.g., "I give my IBM stock to my son, Thomas J. Watson." "I give the sum of One Thousand Dollars ($1,000) to my uncle Frank N. Stein."

a. Many clients do not realize the impact a specific bequest could have on their estate, especially when they are not aware of the difference between probate and non-probate property. (For further discussion, see outline for Considerations in Will Drafting, Joseph Bosick, IV. To most clients, their estate is their total net worth and they "carve" up this value when determining who will receive what. However, a specific bequest must be made from the probate estate before any residuary bequests, but after debts and expenses have been paid. It is possible, that after the payment of debts and expenses, there is not sufficient probate property from which to make the bequest. Or, there might be enough property in the estate to pay debts and expenses and satisfy the bequest, but there would be very little or nothing in the residue.

i. When a specific bequest of cash will be made, consider making the bequest the lesser of a dollar amount or a percentage, e.g., "I give the lesser of the sum of Five Thousand Dollars ($5,000) or Five Percent (5%) of my probate estate to my friend, Cal R. Nickel."

ii. Consider also describing what happens to the bequest if the identified recipient has predeceased the testator.

b. The general rule of ademption, and the rule in Delaware, is that if the property constituting a specific bequest (the IBM stock in the example above) is not in the testator's possession at the time of death, then neither the asset nor a cash equivalent passes to the beneficiary. See Hobson's Estate, 456 A.2d at 802. The effect of ademption is that the bequest is considered expunged from the Will. See id.

4. Real Property

a. A Will devises all real property in the testator's name at the time of death.

By application of 12 Del. C. § 206, this includes real property that was acquired by the testator after the Will has been executed.

b. Under Delaware law, title to real property descends to directly to the beneficiaries, unless the property needs to be sold in order to satisfy the debts and expenses of the estate. The filing of an Inventory listing the property, parcel number and name of each beneficiary of the property serves in place of a deed to convey the property.

c. An executor may sell real property only when specifically directed to do so in the Will or when the assets of the estate are insufficient to satisfy its debts and expenses. See 12 Del. C. §§ 207(b) and (c) and 2701. A general power to sell real property is not sufficient to grant the power to sell real property: it must be a specific direction. E.g., "I direct my Executor to sell any real property I may own at the time of my death and distribute the proceeds with the residue of the estate."

d. Unless a Will provides otherwise, a devise of real property will be construed to pass a fee simple interest. See 12 Del. C. § 205.

e. Unless a Will provides otherwise, a devise of real property to multiple persons will be as tenants in common and not as joint tenants with right of survivorship. See 25 Del. C. § 701.

5. Residuary Bequests. The residue of an estate consists of all probate property not otherwise distributed in satisfaction of a bequest or the debts and expenses of the estate. It is a catchall.

a. Residuary bequests are often made as fractions or percentages.

i. "I give the residue of my estate to my surviving children in equal shares."

ii. "I give all other property I own at the time of my death, not otherwise distributed, to my surviving spouse, or if my spouse does not survive me, I give one-half (1/2) of my residuary estate to my then-living children in equal shares and one-half (1/2) of my residuary estate to my then-living grandchildren in equal shares."

iii. "I give the residue of my estate as follows: Ten Percent (10%) to The American Cancer Society; Thirty Percent (30%) to the Human Society; and the remainder to the Delaware Community Foundation."

b. Distributions are often made to issue, per stirpes or per capita.

i. Issue generally means those who have descended from a common ancestor. Consider defining issue in the document. See outline for Tax Elections/Apportionment Provisions; Definitions, Kristen Bennett.

ii. Per stirpes (in Latin, "by the roots") means proportionally divided between beneficiaries according to their deceased ancestor's share. E.g., if Testator left his estate to his "issue, per stirpes, and he had three children, Abe, Bee, and Dee, and Dee predeceased Testator survived by three children, Xavier, Yancy, and Zane, then Abe and Bee will each receive 1/3 of the estate and Xavier, Yancy and Zane will each receive 1/3 of 1/3 of the estate, or 1/9 each.

iii. Per capita (in Latin, "by the head") means divided equally among all members of the same class. If the Testator above left his estate to his "children, per capita", then Abe and Bee would each receive ½ of his estate. If the Testator left his estate to his "issue, per capita", then each of Abe, Bee, Xavier, Yancy and Zane will receive 1/5 of his estate. If the Testator instead left his estate to his "issue, per capita with right of representation", and Bee also predeceased the Testator survived by one child, Penny, then the estate would be distributed 1/3 to Abe, and 2/3 divided equally among Penny, Xavier, Yancy and Zane, or 1/6 each.

c. Lapses. A gift lapses when the beneficiary does not survive the testator or no one remains in a class of beneficiaries with no alternate distribution provided.

i. "I give one-half (1/2) of the residue of my estate to my sister, Eleanor Rigby, and the remaining one-half (1/2) to my children who survive me." If the testator's sister predeceased her, then the gift to her would instead be distributed to the other residuary beneficiaries in proportion to their interests. See 12 Del. C. § 2313A.

ii. "I give the residue of my estate to my children in equal shares." If one of the children predeceases the Testator survived by issue, then the issue of the deceased child will

take in his place, per stirpes. See 12 Del. C. § 2313.

iii. Instead of relying on the statutory defaults, consider specifying what happens if a beneficiary predeceases the testator or all members of a class of beneficiaries fail. E.g., "I give the residue of my estate to my brother, Donald Duck, or if he does not survive me, to his issue, per stirpes."

iv. Consider including a "catastrophe clause" to avoid the estate passing by intestacy, where appropriate. Distributions to one or more charitable organizations work well for this purpose because they are more likely to survive the testator than an individual (or be succeeded by another organization) and will not require the personal representative to search for distant and possibly numerous intestate heirs.

d. Intentional omissions. In some cases, a client will want to specifically omit one or more persons who would otherwise be entitled to share in the estate. If the Will is silent as to the omission, (e.g., "I leave the residue of my estate to my children, Ted and Fred" when the Testator had a third child, Ned) the chances of the omitted child succeeding on a claim of mistake are greater than if the Will explicitly omits the person (e.g., I have intentionally omitted my son, Ned, and his issue from receiving any share or serving as fiduciary of my estate.")

i. Advise a client who wants to explain the reasoning behind an omission to reconsider, especially if it may be libelous. Consider instead a generic statement such as "I have intentionally omitted Ned and his issue for reasons known to him."

III. Other considerations.

1. Gaps in Will. In the event the Will fails in one aspect or another, and the anti-lapse statute does not apply, then the intestate code will apply.

a. If the person designated as executor does not survive the testator, resigns or is removed without an alternate executor named or a process for determining an alternate executor given, then the intestate laws will apply.

See 12 Del. C. § 1505 (letters of administration with the will annexed).

b. If all gifts fail, the intestate laws will apply. See 12 Del. C. §§ 502 and 503. Generally, if the testator is not survived by a spouse, children or grandchildren, then the estate will be distributed to the testator's parents, if living, or if none, to the living siblings of the testator and the children of any deceased sibling, per stirpes, or then to the testator's next of kin.

2. Elective Share. Under Delaware law, a surviving spouse is entitled to a minimum estate, regardless of what a Will provides for him or her. See 12 Del. C. §§ 901, et. seq. for the rules on elective share. For further discussion, see Considerations in Will Drafting, Joseph Bosick IV.

CONSIDERATIONS IN WILL DRAFTING

Before delving into the actual drafting of a will, there are a number of considerations that practitioners should keep in mind. From testamentary capacity to beneficiary designations, seemingly simple decisions can have serious ramifications.

I. NON-DRAFTING CONSIDERATIONS FOR WILLS

A. Requirements for a Valid Will

Chapter 2 of Title 12 of the Delaware Code sets forth the requirements to create a valid will. In general, a will must be signed by a testator with the requisite testamentary capacity who is at least eighteen years old and must be witnessed by at least two individuals who are generally competent to act as witnesses.[1] This section will discuss these requirements in greater details using case law to supplement the statutory definitions.

1. *Testamentary Capacity*

In order for a will to be valid under Delaware law, the testator must be of "sound and disposing mind and memory."[2] However, in order to determine precisely what this phrase means, one must turn to case law.

An individual is said to have the requisite capacity to execute a will, i.e., testamentary capacity, if he or she is "capable of exercising thought, reflection and judgment, and . . . know[s] what he or she is doing and how he or she is disposing of his or her property."[3] In addition, the individual must "possess sufficient memory and understanding to comprehend the nature and character of the act."[4] In layman's terms, an individual needs to understand the extent of his property, to whom he is leaving such property, and that he is executing a legal document to that effect. This sets the bar rather low in terms of the required legal capacity to execute a will.[5]

It is also important to note that an individual does not have to possess testamentary capacity at all times, meaning that even someone with diminished capacity can still validly execute a will. That is, with respect to capacity, a will is not invalid so long as it was executed by the testator during a lucid interval.[6] Practically speaking, this means that even someone suffering from dementia or some similar disease may have the capacity to execute a will. However, should you be put in a position to make such a judgment call, it is best practice to err on the side of caution and avoid the risk of a will contest in the future.

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[1] 12 Del. C. §§ 201-203.
[2] 12 Del. C. § 201.
[3] *In re Estate of West*, 522 A.2d 1256, 1263 (Del. 1987).
[4] *Id*.
[5] *Davis v. Estate of Perry*, 2013 WL 53991, at *1 (Del. Ch. 2013).
[6] *Scholl v. Murphy*, 2002 WL 927381, at *2 (Del. Ch. Apr. 17, 2002); *see also In re Miller's Will*, 85 A. 803 (Del.Super. 1912).

While a full discussion of will contests is beyond the scope of this presentation, a brief explanation may prove useful when it comes to determining whether or not a client's will could withstand a beneficiary's challenge regarding capacity. In Delaware, the law presumes that an individual possessed testamentary capacity at the time the will was executed.[7] This means that an individual challenging a will has the burden to show by a preponderance of the evidence that a testator did not possess the requisite capacity.[8] However, if a challenger is able to show, by clear and convincing evidence that the will was executed by a testator of weakened intellect, was drafted by a person in a confidential relationship with the testator, and the drafter received a substantial benefit under the will, then the burden shifts to the proponent of the will to prove by a preponderance of the evidence that testator possessed the requisite testamentary capacity (often referred to as the *Melson* standard).[9]

With respect to the confidential relationship requirement of the *Melson* standard, it is worth noting that when such a relationship is between an attorney and a client, and the attorney does not stand to substantially benefit from the documents he drafted, the requirement fails and the burden of persuasion remains with the challenger.[10] From a drafter's perspective, this is good in that this typically means the challenger is faced with an uphill battle when contesting testamentary capacity.

Also common in will contests are claims of undue influence. As in will contests, the challenger bears the burden of persuasion, unless the *Melson* standard applies.[11] The Delaware Supreme Court has defined undue influence as:

> . . . excessive or inordinate influence considering the circumstances of the particular case; and the general rule is that the degree of influence to be exerted over the mind of the testator, in order to be regarded as undue, must be such as to subjugate his mind to the will of another, to overcome his free agency and independent volition, and to impel him to make a will that speaks the mind of another and not his own. It is immaterial how this is done, whether by solicitation, importunity, flattery, putting in fear, or in some other manner; but whatever the means employed, the undue influence must have been in operation upon the mind of the deceased at the time of the execution of the will.[12]

The court went on to outline the five crucial elements of undue influence as follows: 1) a susceptible testator; 2) opportunity to exert influence; 3) a disposition so to do for an improper purpose; 4) the actual exertion of such influence; 5) and the result demonstrating its effect.[13] As with contests over testamentary capacity, cases of undue influence are very fact specific.

The takeaway here is that all is not lost when faced with a client with diminished capacity, but that, along with the other factors for testamentary capacity and undue influence

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[7] *Matter of Langmeier*, 466 A.2d 386, 389 (Del.Ch. 1983).
[8] *In re Estate of Seppi*, 2011 WL 4132374, at *11 (Del. Ch. Aug. 30, 2011).
[9] *In re Last Will and Testament of Melson*, 711 A.2d 783, 788 (Del. 1998).
[10] *Seppi*, 2011 WL 4132374, at *12.
[11] *Melson*, 711 A.2d at 788.
[12] *Nardo v. Nardo*, 209 A.2d 905, 912-13 (Del. 1965) (*citing Connor v. Brown*, 3 A.2d 64, 71 (Del.Super 1938)).
[13] *Id*. at 913.

should raise red flags for you to proceed with caution. For that reason, it is always recommended that you paper the file as much as possible. I will come back to this concept later when discussing privity.

2. *Witnessing and Attesting the Will*

The second requirement with respect to executing a valid will is that the will must be "attested and subscribed in testator's presence by 2 or more credible witnesses."[14] Once again, case law clarifies precisely what this means.

It has been settled case law in Delaware for one hundred and seventy-five years that " . . . [e]ach of the witnesses must have seen the testator sign the will; or have heard him, in form or substance, acknowledge it to be his will."[15] The reference to hearing someone sign may seem a bit odd, but another individual can validly execute the testator's will, provided that such individual subscribe the testator's name in testator's presence and at the testator's express direction.[16] Essentially, if a testator is physically unable to sign, he may appoint an agent for the limited purpose of signing the will on his behalf.

Not only must the testator's signature be witnessed, but he must also witness the signatures of the witnesses. However, this only requires that the witnesses sign in the same room as the testator in such a place that the testator could seem them "if he choose [sic]," [17] meaning that the testator does not have to physically watch the witnesses sign their names to the will. So, it should come as no surprise that "[t]he law disfavors invalidating a will absent strong evidence mandating such drastic action."[18]

With respect to the credibility standard for witnesses, state law varies regarding an interested party, e.g., a beneficiary, an executor, etc., acting as a witness to will. In Delaware, 12 Del. C. § 203 specifically states, and case law confirms,[19] that an interested party can act as a witness to a will.

Finally, 12 Del. C. § 202(a)(2) requires that the witnesses attest the will. This is typically accomplished via an attestation clause, which both witnesses sign, found just below the testator's signature. For an example of an attestation clause, see Exhibit "A."

Although 12 Del. C. § 202(a)(2) technically does not require an attestation clause or any specific wording, which is confirmed by case law,[20] a drafter who fails to utilize such a clause does so at his own risk.

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[14] 12 Del. C. § 202(a)(2).
[15] *Rash v. Purnell*, 2 Harr. 448, 1838 WL 157, at *8 (Del.Super. 1838).
[16] 12 Del. C. § 202(a)(1).
[17] *Purnell*, 1838 WL 157, *8.
[18] *In re Estate of West*, 522 A.2d 1256, 1265 (Del. 1987).
[19] *In re Meservey's Will*, 155 A. 593.
[20] *See Zecca v. Zecca*, 1981 WL 88250, at *4 (Del.Ch. 1981); *In re Kemp's Will*, 186 A. 890, 894 (Del.Super. 1936) ("A formal attestation clause is a useful and desirable thing[,] . . . but in the absence of statute it is not necessary to the validity of a will."); *see also Matter of Last Will and Testament of Carter*, 1988 WL 64124 (Del.Ch. 1988)

B. Self-Proving Affidavits

Much like an attestation clause, a self-proving affidavit could be considered a drafted portion of a will. However, I have decided not to treat it as such because, for the most part, every attorney who drafts wills on a regular basis has a form affidavit. No matter how long or how short the actual will, a self-proving affidavit should always be added as the final page of the document.

Under Delaware law, self-proving affidavits are not required in order to create a valid will. So, one may wonder, why then should these affidavits be added to every will? In short, to greatly expedite the probate process.[21]

Entire CLEs have been devoted to the process of probating an estate, so for the sake of brevity and staying on topic, I will only briefly explain the admission of a will into probate. Under the rules of Chapter 13 of Title 12 of the Delaware Code, in order for a will to be admitted to probate, it must be "proved before the Register of Wills of the county in which the decedent was domiciled at the time of his death."[22] Prior to 1974, this meant the witnesses who attested the will had to actually appear before the Register of Wills for the proper county, who would examine the witnesses to ensure the will was properly executed, e.g., the testator had testamentary capacity, signed the will of his own volition, etc. When the Register was satisfied that the will complied with all necessary statutory requirements, the will would be admitted to probate.

Recall that a formal attestation clause is not required to create a valid will, but "[w]here it recites a compliance with all the formalities of execution and is signed by the witnesses, it is prima facie evidence of due execution . . ."[23] However, this only proves that the testator signed in the presence of the witnesses. It does not negate the need for the Register to prove the will by examining the witnesses. There are procedures in place to account for situations where witnesses are unavailable or dead,[24] but the need to examine witnesses, or prove a will in general, can be avoided through use of a self-proving affidavit.

Pursuant to 12 Del. C. § 1305, "[a]n attested will may at the time of its execution or at any subsequent date be made self-proved," so long as the testator and witnesses acknowledge that all requirements were met with respect to capacity and execution. The acknowledgment must be made before an officer authorized to administer oaths (a notary, a notary public, etc.), under such officer's seal, and attached to the will.[25]

Presuming a will is self-proved, "[c]ompliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal

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(holding that a self-proving affidavit attached to a will constitutes a part of a will, and the witnesses can attest the will and the testator's signature on the affidavit).

[21] Matter of Last Will and Testament of Carter, 1988 WL 64124, at *3 (Del.Ch. 1988).

[22] 12 Del. C. § 1302.

[23] *In re Kemp's Will*, 186 A. 890, 894.

[24] 12 Del. C. § 1304.

[25] 12 Del. C. § 1305.

without the testimony of any witness . . . , and, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit, the will shall be admitted to probate subject to all other provisions of this title."[26] By accelerating a will's admission into probate, a self-proving affidavit also causes the six-month statute of limitations for an interested party to file a petition for review of the will to start running more quickly.[27] For an example of a self-proving affidavit, see Exhibit "B."

II. PROBATE V. NON-PROBATE PROPERTY

Often times clients come in laboring under the common misconception that everything they own will pass under their will. However, this is simply not the case. Generally speaking, it is only probate property that is controlled by a will. Probate property is property owned by the decedent in his name alone that does not have a survivorship feature or beneficiary designation and to which title will be transferred to the proper beneficiary via state probate proceedings conducted by the Office of the Register of Wills. Ultimately, an asset's status as probate property or non-probate property depends on how an asset is titled, the form of ownership, and the nature of the asset itself.

Although real property may be disposed of by will so long as the testator owns the property, or an interest therein, in his or her name alone,[28] it is worth noting that in Delaware real property is typically not considered probate property.[29] The reason for this is that under Delaware law title to real property vests in the heir or devisee at the moment of the decedent's death, subject to divesture,[30] whereas title to personal property vests in the hands of the executor.[31] There are, however, circumstances that may cause real property to be "converted" into personal property for probate purposes, i.e., where the real property is directed to be sold under the terms of the will or where the real property must be sold in order to pay debts and expenses of the estate.[32]

In addition, it is also important to keep in mind that real property is commonly transferred into the name of an individual's trust, whether revocable or irrevocable. Thus, before preparing a client's estate plan and drafting his or her will, it is imperative to ascertain the legal owner of the real property.

A. Joint Accounts

A joint account is an account, e.g., checking, savings, money market, etc., in which two or more individuals are treated as owners. Joint accounts are one of the most common non-

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[26] 12 Del. C. § 1310.
[27] *See* 12 Del. C. § 1309 (establishing the six-month statute of limitations).
[28] 12 Del. C. § 204.
[29] *See e.g.* Recapitulation page of the Inventory for the Register of Wills for New Castle County (listing "solely owned real estate" as a "non-probate asset").
[30] *In re Estate of Sexton*, 2007 WL 2303915, at *1 (Del.Ch. Aug. 8, 2007) (citing *In re Harris' Estate*, 44 A.2d 18, 19 (Del.Orph.1945)).
[31] *In re Estate of Morrell*, 1995 WL 783075, at *4 (Del.Ch. Dec. 26, 1995)
[32] *See generally id.*

probate assets. Because of their survivorship feature, at the death of one account owner, the property in the account immediately vests in the other account owner(s).

In addition to probate avoidance, joint accounts also allow one account owner to handle the affairs of the other account owner at such time as he or she becomes mentally or physically incapacitated. If the disabled account owner does not have a durable power of attorney in place, this could prevent the need to have a guardian appointed.

There are, however, certain dangers with joint accounts, namely that they can disrupt a testator's overall estate plan. For example, suppose Parent wishes to leave his or her estate equally between his or her two children, Child 1 and Child 2. If Parent names Child 1 as the joint owner with right of survivorship of a checking account, perhaps because Child 1 was caring for Parent, then the checking account will pass outside of probate and become the sole property of Child 1. With smaller accounts, this may not disturb an overall plan, but if the checking account constitutes one of Parent's primary assets, then Parent's probate estate will be greatly diminished, which in turn creates a very unequal distribution of Parent's assets in contradiction of the estate plan.

Another major concern with respect to joint accounts stems from the fact that each account owner is typically entitled to withdraw whatever funds are in the account prior to the death of the other owner. So, even if one account owner contributes all funds to the account, it does not preclude the other account owner from withdrawing the funds. That being said, there is case law that the contributing owner, or such owner's heirs or beneficiaries, could look to in order to overcome the nature of a joint account.

In *Dillon v. Dillon*,[33] mother and daughter opened joint accounts together, the largest of which was valued at $25,000 and funded solely with the mother's funds.[34] A few years later, mother executed a will that left a number of cash bequests that were in excess of her of her solely owned funds.[35] Due to some animosity between mother and daughter, mother then closed the smaller account, but reestablished it as a joint shortly before her death.[36]

The court recognized that the language of the joint account agreements conveyed legal title to the property to the daughter.[37] This meant that daughter had the right to withdraw funds from the accounts, appropriately or inappropriately, and the bank would be without liability. However, although legal title passed to the daughter and the accounts were not considered assets of the mother's estate, the Court held that the underlying facts and circumstance dictated a different equitable result.[38]

Because the mother's intentions with respect to her property as set forth in her will, which was executed after the opening of the larger account, as well as the testimony from the

[33] *Dillon v. Dillon*, 1987 WL 11282 (Del.Ch. 1987) (*affm'd*., 538 A.2d 1113 (Del. 1988)).
[34] *Id*. at *1.
[35] *Id.* at *2.
[36] *Id*.
[37] *Id*. at *3 (citing *Walsh v. Bailey*, 197 A.2d 331 (Del. 1964)).
[38] *Id*. at *3-4.

daughter that she understood that she was not to make withdraws from the account during her mother's lifetime, the Court imposed a resulting trust on the funds held in the larger account.[39] The daughter was required to satisfy the specific bequests under the mother's will with the funds in the larger account and distribute whatever remained to the residuary beneficiaries.[40]

With respect to the smaller account, the Court held that the funds passed to the daughter free of any resulting trust because the dispositive scheme of the will could be satisfied without use of funds held in the smaller account and the account was retitled jointly after the will was executed.[41] It is worth noting that due to the fact-specific nature of *Dillon*, the case has been distinguished by a number of other cases,[42] but the fact remains that it is still valid case law.

In the event that a client likes the convenience of joint accounts but does not want to disrupt his or her estate plan, there is another option – convenience accounts. "A convenience account is one that is created by the true owner of the funds by addition of one or more other names so that each person named will have access to the funds . . . in the event that the true owner is incapacitated and the funds are needed for his or her benefit."[43] However, at the death of the true account owner the funds in the account remain a part of his or her probate estate. Therefore, it is important to have your clients determine exactly how their accounts are titled. If there is any doubt, and the client does not want a joint account to pass outside of probate, it is my practice to put an article in the testator's will explicitly stating that any "joint" accounts are actually convenience accounts that are to be disposed of under the terms of the will.

B. Payable on Death Accounts

Payable on death ("POD") accounts, sometimes referred to as transfer on death ("TOD") accounts (often associated with securities) or Totten trusts, are accounts for which the owner designates a beneficiary or beneficiaries to succeed to the account at the account owner's death.[44] For example, the account might be titled "John Q. Smith, p.o.d. Jane A. Smith," "John Q. Smith, p.o.d. Jane A. Smith and James A. Smith, equally," or even "John Q. Smith, p.o.d. Jane A. Smith, or if she does not survive to James A. Smith." By titling an account in such a way, the account will pass outside of probate and will not be subject to the terms of the account owner's will. In this sense, POD accounts serve as a will substitute.

The major benefit of a POD account is that the account owner at all times is the sole owner and has complete control over the account. If the account owner wants to withdraw all of

[39] *Id*. at *4.
[40] *Id*.
[41] *Id*.
[42] *See In re Estate of Wicks*, 1993 WL 1501283, at *6 (Del.Ch. Oct. 4, 1993) (distinguishing *Dillon* based on the fact that decedent's will was executed two years prior to the creation of the joint accounts, the aggrieved beneficiary of the estate was not disinherited by use of joint accounts, and there was no concession that the accounts were for convenience only); *see also In re Estate of Fooks*, 1999 WL 959193, at *6 (Del.Ch. 1999) (distinguishing *Dillon* based on concession of deferred rights of use of the property in the joint accounts); *see also In re Estate of Gedling*, 2000 WL 567879, at *6 (Del.Ch. Feb. 29, 2000) (distinguishing *Dillon* because even though the joint accounts were created prior to the execution of the will, the terms of the will could be carried out specific gifts made without resort to the joint accounts).
[43] *In re Estate of Barnes*, 1998 WL 326674, at *2 (Del.Ch. 1998).
[44] For all intents and purposes, these types of accounts operate in same manner regardless of name.

the funds in the account, he is free to do so. Likewise, he is free to change to whom the account is payable. However, unlike a joint account, there is no joint owner to act on behalf of the account owner if he were to become incapacitated.

Another advantage of POD accounts is that there tends to be much less confusion as to the account designation. An aggrieved beneficiary of the account owner's probate estate can only attempt to invalidate a POD account by proving that the account owner lacked capacity to designate a beneficiary or that there was undue influence in the execution of the account paperwork. There can be no argument as to the nature of the account being a convenience only account that would be includable in the account owner's probate estate.

It is also worth noting that joint accounts and POD accounts can be combined. For instance, suppose the only asset of Husband and Wife is a large checking account on which Husband is the sole owner and from which all bills and expenses are paid. In order to avoid probate, Husband could make the account joint as to Wife and then designate that at the death of both Husband and Wife the account is payable to Child 1 and Child 2 in equal shares (or to the survivor of Child 1 and Child 2, their issue (either per stirpes or per capita), etc.). By titling/designating the account in such a way, the account will not be considered a probate asset of either Husband or Wife.

C. Life Insurance and Retirement Accounts

In general, life insurance and retirements are not considered probate assets because they will pass to a named beneficiary at the owner's death. However, the same is not true if the life insurance proceeds or retirement account is paid to the estate of the account owner. In that case, the proceeds become part of the probate estate and are disposed of under the account owner's will. If that was not the intended result, the outcome can be disastrous.

III. COORDINATING BENEFICIARY DESIGNATIONS

The importance of coordinating your client's beneficiary designation cannot be overstated. Depending on the type of account, designating the wrong beneficiary (or failing to designate a beneficiary) can result in adverse tax consequences in addition to altering a client's overall estate plan.

A. Failure to Designate a Beneficiary

Although the terms of a given contract will control, in general, many life insurance policies and retirement accounts designate an individual's estate as the default beneficiary when no person (or entity) is named.

The first and most obvious issue with this is that all of the proceeds become subject to probate. When the proceeds become probate property, they may end up being used to pay the debts of the decedent, including the 1.25% or 1.75% closing costs due to the Register of Wills. Additionally, the proceeds will not be disbursed to the beneficiaries until the probate administration is completed. In contrast, had the decedent named a spouse, child, or other

individual beneficiary, then the proceeds would not have been used to pay debts and expenses of the estate and would have been distributed quickly and efficiently.

For example, suppose Husband names Wife as the primary beneficiary of his $100,00 life insurance policy. If Wife predeceases Husband, and Husband fails to update his beneficiary designation on the policy, the likely result is that the proceeds will be paid to his estate at his death. If Husband's estate has no other liquid assets and $50,000 of debts and expenses, then ultimately there will only be $50,000 to distribute to Husband's heirs or beneficiaries.[45] Had Husband named Child as the contingent beneficiary (or updated his beneficiary designation at Wife's death to name Child as the new primary beneficiary), then at Husband's death Child would have received all $100,000, and tax free at that.[46]

While life insurance proceeds may be tax free, the same is not true for certain individual retirement accounts ("IRA") and qualified plans, e.g., a 401(k). If an individual's estate (or even non-qualified trust) is the beneficiary of the account, the results can be disastrous.

Because the contributions made to standard IRAs and qualified plans are tax-free, when money is withdrawn from the account it is taxed as ordinary income to the account owner at his, her, or its marginal tax rate.[47] The identity of the new account owner after the death of the original account owner determines which options are available with respect to the withdrawal, and therefore tax of, the account assets. In general, an individual account owner, whether a spouse or non-spouse, will have the option of taking required minimum distributions over his or her life expectancy, thereby delaying the tax due on the account assets.[48]

However, when an estate (or non-qualified trust) is named as, or is otherwise, the beneficiary of the account, the options are far more limited. With respect to standard IRAs, generally speaking, if the original account owner died before reaching his or her required beginning date ("RBD"), the account must be distributed in full by December 31 of the fifth year following the account owner's death.[49] For IRAs, the RBD is April 1 in the year after the individual reaches age 70½.[50] If the original account owner had already reached his or her RBD, distributions are based on the decedent's life expectancy.[51] While the latter may allow distributions to be stretched over a longer period of time, more often than not, the end result in both scenarios is the same. That is, due to the sound public policy of administering estates quickly and efficiently, the account will be distributed to the estate in full within a year or two.

With respect to qualified plans, the options available are roughly the same.[52] However, for their own administrative ease, as well as to avoid delay in closing a decedent's probate estate, many plan sponsors/custodians will simply require that all assets be distributed in a lump sum shortly after the decedent's death.

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[45] Ignoring any closing costs due to the Register of Wills.
[46] 26 U.S.C. § 101(a)(1).
[47] *See e.g.*, 26 C.F.R. § 1.408-4(a).
[48] *See generally* 26 C.F.R. § 1.401(A)(9)-3 (for qualified plans); *see generally* 26 C.F.R. § 1.408-2(b)(7) (for IRAs).
[49] *See*, 26 C.F.R. § 1.408-8 (cross-referencing 26 C.F.R. § 1.401(A)(9)-3); *see also* 26 U.S.C. § 401(a)(9)(B)(ii).
[50] 26 C.F.R. § 1.408-8.
[51] *See*, 26 C.F.R. § 1.408-8 (cross-referencing 26 C.F.R. § 1.401(A)(9)-2).
[52] *See*, 26 C.F.R. § 1.408-8 (explaining that IRA distributions rules are based on qualified plan distribution rules).

B. Designating a Minor as the Primary Beneficiary

It should be clear that failing to designate a beneficiary of a life insurance policy, IRA, or qualified plan could lead to a number of adverse results. However, even when an individual is named as a beneficiary, there are still certain pitfalls of which a practitioner should be aware.

For instance, due to the ability to stretch out IRA distributions over a beneficiary's lifetime, it may seem wise to designate a minor as a beneficiary. But, keep in mind that due to restrictions on the ability of minors to own property, most plan sponsors/custodians will not disburse the assets to a minor. The same is true of life insurance companies. Instead, the likely result is that the funds will not be distributed until the minor reaches the age of majority or a guardian is appointed (or approved if appointed under the decedent's will).

This is probably not an issue in situations where the decedent is still married to the minor's parent at the time of his or her death. But today, it is not uncommon for the decedent and the surviving parent of the minor to be divorced or otherwise separated. In such a situation, the decedent may not have wanted the surviving parent to have any control over the funds that he or she left to the minor. Even assuming the guardian is someone the decedent trusted wholeheartedly, in the case of a minor (or even adult) with special needs, it's possible that the inherited funds could jeopardize or disqualify the minor from receiving state or federal benefits.

One final consideration is that once the minor beneficiary reaches the age of majority, the guardianship is terminated.[53] In Delaware, this means that the minor will have unrestricted use of the assets once he or she turns eighteen. Again, this is something that many decedents may not have wanted.

C. Failure to Update Designations After Major Life Events

Another common mistake with respect to beneficiary designations is failure to update the designations after a major life event, such as marriage, divorce, or the birth of a child. State statutes attempt to alleviate some of the problems by making special provisions for these situations. For example, if a parent executes a will prior to the birth of his or her child and makes no provision in the will for such child, then that child is entitled to the share he or she would have received if the parent died intestate, unless the will specifies that subsequent births will not affect the will.[54]

Likewise, with respect to spouses, if an individual executes a will prior to getting married and there are no provisions for a spouse in the will, then the surviving spouse is entitled to the share of the decedent's estate that he or she would have received under the rules of intestacy.[55] In addition, spouses are afforded additional protection via the elective share statutes. These statutes prevent an individual from disinheriting his or her spouse by allowing such spouse to claim an amount equal to one-third of the decedent spouse's elective estate, less the value of any

[53] 12 Del. C. § 3909(a).
[54] 12 Del. C. § 301.
[55] 12 Del. C. § 321.

transfers to the surviving spouse by the decedent.[56] Generally speaking, an individual's elective estate is his or her federal gross estate reduced by allowable federal deductions for certain debts, expenses, taxes, and losses, and modified further.[57]

So, how might this have an effect on an individual's will or estate plan? Suppose Husband gets married for a second time and has two children from a prior marriage. Husband does not enter into a prenuptial agreement and dies just a few months after the second marriage. At the time of his death, Husband's major asset is his IRA, valued at $1,000,000, which is payable to his children equally, and the remainder of his assets are bank accounts with a value of $50,000, house in Husband's name alone valued at $275,000 with an outstanding mortgage of $150,000, and a car valued at $25,000. This means that even if Husband's real property is included in the value of his probate estate, the total value is only $350,000. Husband's elective estate has a value of $1,200,000 ($1,000,000 in his IRA, plus $350,000 in other assets, less an allowable deduction for the $150,000 mortgage balance), to which Surviving Spouse is entitled to $400,000 as her elective share.

If Husband failed to update his will, then Surviving Spouse is entitled to a life estate in the house, plus $37,500, i.e., fifty percent of the value of Husband's personal estate.[58] However, even if Husband had updated his will after his marriage, unless he left at least $400,000 to Surviving Spouse, it is more likely that she will choose to claim her elective share. If Husband's two children are his only other beneficiaries, then they could each be liable to Surviving Spouse in the amount of $200,000. Note that this same result does not necessarily follow if the $1,000,000 had been in life insurance proceeds because insurance proceeds are excluded from the contributing estate, which is the source from which the liability for an elective share is due.[59]

Changing the situation slightly, suppose instead that Husband dies prior to his second marriage holding all of the same assets, except Ex-Spouse is still the beneficiary of all property under Husband's will and is the beneficiary of his IRA. In Delaware, pursuant to statute, Ex-Spouse is treated as predeceasing Husband under his will.[60] This means that Husband's probate estate will not pass to Ex-Spouse. His IRA, however, will. Ex-Spouse could disclaim the assets, but she is in no way legally obligated to do so.

In other jurisdictions, like Pennsylvania, divorce also revokes spousal beneficiary designations.[61] However, in 2001, the United States Supreme Court held that the Employee Retirement Income Security Act ("ERISA")[62] preempts any state statute having a connection with a plan covered by the rules of ERISA.[63] ERISA covers a plethora of different profit sharing, pension, and retirement plans, most notably, 401(k) plans. So, regardless of state

[56] 12 Del. C. § 901(a).
[57] 12 Del. C. § 902(a).
[58] 12 Del. C. § 502(4).
[59] *See* 12 Del. C. § 908(b).
[60] *See* 12 Del. C. § 209.
[61] 20 Pa.C.S. § 6111.2.
[62] The Employee Retirement Income Security Act of 1974 (ERISA) (Pub.L. 93–406, 88 Stat. 829, enacted September 2, 1974, codified in part at 29 U.S.C. ch. 18).
[63] *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

statutes, care should be taken to review all beneficiary designations after divorce to ensure that a former spouse is properly removed as the beneficiary of the plan.

One last detail about plans governed by ERISA of which a practitioner must be cognizant is that ERISA requires the participant's spouse to be the beneficiary of the plan.[64] Only a properly executed spousal waiver allows the participant to choose a beneficiary other than the spouse.

In order to be properly executed, the waiver must be in writing, irrevocable, signed by the spouse, and witnessed by either a notary or a plan representative, and it must designate the new beneficiary.[65] Because a spouse must sign the waiver, this means that even a valid prenuptial agreement may not be enough to overcome the specific ERISA requirements, i.e., the participant is not yet married, and therefore has no spouse, at the time a prenuptial agreement is signed.

In addition, once a participant and his or her spouse are considered to be legally married, the ERISA rules apply and the spouse becomes the beneficiary of the plan. Consider, for example, Husband and Second Wife, who execute a valid spousal waiver naming Husband's son and daughter from his prior marriage as the beneficiaries of the his 401(k). Husband and Second Wife divorce. Then Husband marries Third Wife and dies shortly thereafter. The formerly validly waiver no longer has any effect and Third Wife is considered the beneficiary of the 401(k).[66] This alone is clearly not the result Husband intended, but imagine if Husband had also updated his will to remove his children, thinking that he had provided for them by leaving them his 401(k). The effect is as if Husband completely disinherited his children.

Clearly then, every practitioner should ensure that a client's beneficiary designations are up to date and coordinated with his or her overall estate plan. Failure to do so may result in the client's heirs and/or beneficiaries seeking legal recourse against the practitioner.

IV. PRIVITY OF BENEFICIARIES

So, what then becomes of the practitioner now faced with aggrieved heirs and/or beneficiaries? The answer lies in the Superior Court's 2004 ruling in *Pinckney v. Tigani*,[67] which detailed the rules with respect to beneficiary standing in a legal malpractice action.

In *Pinckney*, Defendant, who was a member of the Bars of both Pennsylvania and Delaware, was asked to draft a Supplemental Declaration of Trust on an expedited basis for a Pennsylvania settlor.[68] The trust was to be established for Plaintiff, the settlor's grandson, because the settlor was concerned Plaintiff would be disinherited by his father.[69] According to Defendant, he asked for settlor's financial information, but never received it, and was even told

[64] 26 U.S.C. § 401(a)(11).
[65] 26 U.S.C. § 417(a)(2).
[66] Please note that it is possible that the 1-year rule under § 401(11)(D) of the Internal Revenue Code may prevent this result if Husband and Third Wife were married for less than 1 year at the time of his death, but not every plan contains this safe harbor, and to be safe, practitioners should not rely upon it.
[67] *Pinckney v. Tigani*, 2004 WL 2827896 (Del.Super. 2004).
[68] *Id*. at *1-2.
[69] *Id*. at *1.

at one point that there was no time to review the financials due to the settlor's deteriorating health.[70]

Defendant then spoke with the settlor to confirm her wishes and to ensure that she was free of undue influence, and allegedly advised the settlor of the dangers of executing the documents without a complete review of her finances.[71] Defendant even went so far as to state in his engagement letter that the document was prepared without the opportunity to fully review all financial data. The letter also limited the scope of representation to the preparation of the single document.[72]

Having receiving the engagement letter and her draft document, the settlor informed Defendant that she wished to proceed. The settlor was then sent the final version of her document along with signing instructions. Shortly thereafter, the settlor died.[73]

After the settlor's death, Plaintiff brought an action against Defendant for legal malpractice.[74] Although there was no doubt that the trust was drafted and executed correctly, the trust could not be fully funded because a large portion of the settlor's assets were tied up in IRAs.[75] This, in turn, meant that Plaintiff received only $118,250 of the $250,000 that was bequeathed to him.[76]

First, the court determined that Plaintiff's action was one for tort and not contract, which was beneficial for Plaintiff because Defendant's engagement letter disclaimed contractual liability for anything other than drafting.[77] Next, because the decedent-settlor was a Pennsylvania resident, the drafting attorney was licensed in Pennsylvania, and the documents were executed in Pennsylvania, the court had to determine whether Pennsylvania or Delaware law applied to the case at bar.[78] Using the factors listed in Restatement (Second) of Conflicts § 6 and Restatement (Second) of Conflicts § 145, the court determined that the site of the purported negligence was Delaware, and therefore Delaware law applied.[79] As the court stated:

> While Defendant also is a member of the Pennsylvania Bar, he maintains an office in Wilmington, Delaware. Any advice provided or work completed by Defendant for the settlor probably was performed in Delaware; therefore, although the injury occurred in Pennsylvania, Delaware is the place where the conduct giving rise to the injury occurred. Wilmington is where the relationship between the parties was centered because that is where all consultation, drafting and advice by Defendant were performed. Moreover, Delaware's courts have a special interest in the standards of practice for Delaware lawyers. The question is

[70] *Id.* at *1-2.
[71] *Id*. at *2.
[72] *Id.*
[73] *Id*.
[74] *Id*. at *1.
[75] *Id*. at *1-2.
[76] *Id*. at *2-3.
[77] *Id*. at *4.
[78] *Id*. at *1-2, 9.
[79] *Id*. at *4.

> close, but under the Restatement (Second) of Conflicts § 145's analysis, Delaware has the most significant relationship to the case and thus, Delaware law applies. [80]

The court next had to determine to whom a scrivener-attorney owes a duty of care, which was a matter of first impression in Delaware.[81] The court analyzed the various approaches used in other jurisdictions to determine standing in the "estate planning, legal negligence context."[82] Turning first to strict privity, the court found that the approach has become "outdated" and "invites overly harsh results."[83] Next, the court analyzed non-privity, but ultimately held that it was "unwilling to abandon privity outright in Delaware," as privity "discourages grave robbing, gives estates repose and it eliminates courtroom séances."[84]

Finally, the court evaluated the use of Restatement (Second) of Contracts, specifically the third-party beneficiary rule set forth in § 302. Because Plaintiff relied on Pennsylvania case law, the court first considered *Guy v. Liederbach*,[85] a 1983 Pennsylvania Supreme Court decision.[86] With respect to tort actions against attorneys, *Guy* adopted a rule of strict privity; however, recovery was allowed in limited circumstances under contract using the third-party beneficiary doctrine.[87] In order to have standing, it must be clear from the face of the document that the testator intended to benefit the plaintiff, i.e., the plaintiff must have been a named beneficiary.[88] But, since the plaintiff in *Pinckney* brought a tort action for negligence, application of the third-party beneficiary doctrine under contract was of no help.

The court in *Pinckney* next examined case law from Illinois and Connecticut. It noted that these jurisdictions borrowed principles of the third-party beneficiary doctrine in order to define an attorney's duty in malpractice cases. [89] For example, in *Pelham v. Griesheimer,* the Supreme Court of Illinois held that "the best approach is that plaintiffs must allege and prove facts demonstrating that they are in the nature of third-party beneficiaries of the relationship between the client and the attorney in order to recover in tort."[90] By employing such an approach, a limit is imposed on the scope of the duty an attorney owes to non-clients.[91]

Having considered various approaches to the issue of standing, the court in *Pinckney* held:

> Lawyers are not entitled to bury their mistakes. Where a testator's intent is apparent on the face of a testamentary instrument and the bequest fails solely due to the scrivener's drafting, a disappointed heir should be allowed to proceed

[80] *Id*. at *5.
[81] *Id.* at *1.
[82] *Id*. at *5.
[83] *Id*. at *5, 8.
[84] *Id*. at *8.
[85] 459 A.2d 744 (Pa. 1983).
[86] *Pinckney*, 2004 WL 2827896, *6.
[87] *Guy*, 459 A.2d at 750-751.
[88] *Id*. at 750-751.
[89] *Pinckney*, 2004 WL 2827896, *7-8.
[90] *Pelham v. Griesheimer*, 440 N.E.2d 96, 99 (Ill. 1982).
[91] *Id*. at 100.

> against the scrivener in contract and, perhaps, tort. Where the drafting is correct, yet the bequest fails for other reasons, the disappointed heir must allege facts that irrefutably lay the bequest's failure at the scrivener's door.[92]

Returning to the facts of the case, the court ultimately ruled in favor of the Defendant, finding that Plaintiff's position only lead to a series of "what-if" questions.[93] That is, Plaintiff could not irrefutably prove that settlor would have hired someone to review her finances, or that she would have agreed to divert money from her IRAs to fund Defendant's bequest.

Although the court admittedly could have dismissed the case on the pleadings, it continued to analyze the facts in front of it since the parties created complete record and still found that Plaintiff loses on the merits.[94] Ultimately, the court gave more precedence to Defendant's expert regarding the standard of care for attorneys in Delaware, finding that an attorney does not owe a duty to the beneficiaries to ensure the sufficiency of assets to fulfill all bequests, as this would be a heavy burden.[95] The court summed up its position nicely with a quote from the Supreme Court of Washington.

> If we held that [the attorney] had such a duty, we would be expanding the obligation of a lawyer who drafts a will beyond reasonable limits ... an attorney's obligation is to use care to draft the will according to the testator's wishes. Once that duty is accomplished, the attorney has no continuing obligation to monitor the testator's management of his property to ensure that the scheme originally established in the will is maintained. The time and expense that would be required for the attorney to follow all of the testator's activities with respect to his property would prevent the attorney from being able to provide reliable and economical services to that client, and would constitute an overwhelming burden on the attorney's practice as a whole.[96]

In sum, Defendant's case file included a copy of his engagement letter and all correspondence with his client, which effectively eliminated any chance Plaintiff had to bring an action as a third-party beneficiary under contract law. And although the court expanded the limits of privity with respect to third-party beneficiaries in legal negligence actions, it held that Defendant met his duty to his client.[97] Due to this expansion of third-party standing, it is now more important than ever to keep detailed records and paper the file as much as possible.

V. CONCLUSION

As you will see, there are a number of factors to consider when drafting a will. Who will the beneficiaries be? How much should I leave to them? Who should I name as my executor? Who will be responsible for the payment of my debts and expenses? And the list goes on. But,

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[92] *Pinckney*, 2004 WL 2827896, *8.
[93] *Id*.
[94] *Id*. at 9.
[95] *Id*. at 10.
[96] *Strangland v. Brock*, 747 P.2d 464, 469 (Wash. 1987).
[97] *Pinckney*, 2004 WL 2827896, *10.

it is crucial to remember that there are a number of issues to address before the drafting process ever begins. Do not let something as simple as distinguishing between probate property and non-probate property or reviewing your client's beneficiary designations alter his or her whole estate plan.

EXHIBIT “A”

SAMPLE ATTESTATION CLAUSE (MALE/FEMALE)

IN WITNESS WHEREOF, I, [NAME OF TESTATOR/TESTATRIX], have hereunto set my Hand and Seal on this day, _____. 20___.

_____(SEAL)
[NAME OF TESTATOR/TESTATRIX]

Signed, sealed, published and declared by [NAME OF TESTATOR/TESTATRIX] as [his/her] Will, in the presence of us, who at [his/her] request, in [his/her] presence, and in the presence of each other, have signed our names to [his/her] Will as witnesses the day and year stated above.

_____ Residing at _____
Witness City, State

_____ Residing at _____
Witness City, State

EXHIBIT “B”

SAMPLE SELF-PROVING AFFIDAVIT (MALE)

STATE OF DELAWARE :
: SS.
COUNTY OF _____ :

Before me, the subscriber, on this day personally appeared [NAME OF TESTATOR], _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are signed to the foregoing instrument and, all of these individuals being by me first duly sworn, [NAME OF TESTATOR], the testator, declared to me and to the witnesses in my presence that the instrument is his last Will, that he had willingly signed it, and that he executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence and hearing of the testator, that he or she signed the Will as a witness and that to the best of his or her knowledge, the testator was eighteen years of age or over, of sound mind, and under no constraint or undue influence.

_____
[NAME OF TESTATOR], Testator

_____
Witness

_____
Witness

Subscribed, sworn, and acknowledged before me by [NAME OF TESTATOR], the testator, and subscribed and sworn before me by _____ and _____, witnesses, on this day, _____, 20__.

_____
Notary Public

SAMPLE SELF-PROVING AFFIDAVIT (FEMALE)

STATE OF DELAWARE :
: SS.
COUNTY OF _____ :

Before me, the subscriber, on this day personally appeared [NAME OF TESTATRIX], _____, and _____, known to me to be the testatrix and the witnesses, respectively, whose names are signed to the foregoing instrument and, all of these individuals being by me first duly sworn, [NAME OF TESTATRIX], the testatrix, declared to me and to the witnesses in my presence that the instrument is her last Will, that she had willingly signed it, and that she executed it as her free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence and hearing of the testatrix, that he or she signed the Will as a witness and that to the best of his or her knowledge, the testatrix was eighteen years of age or over, of sound mind, and under no constraint or undue influence.

_____
[NAME OF TESTATRIX], Testatrix

_____
Witness

_____
Witness

Subscribed, sworn, and acknowledged before me by [NAME OF TESTATRIX], the testatrix, and subscribed and sworn before me by _____ and _____, witnesses, on this day, _____, 20__.

_____
Notary Public

FUNDAMENTALS OF WILL DRAFTING

SUPPLEMENT TO CONSIDERATIONS IN WILL DRAFTING

This supplements the material titled “Considerations in Will Drafting.”

1. Page 8, Section III. Coordinating Beneficiary Designations, A. Failure to Designate a Beneficiary references the rate of the closing cost due to the Register of Wills. It is currently 1.75% for all counties and the New Castle County charges an additional 0.25% technology fee resulting in a total fee of 2%.
2. Page 9, Section III, Coordinating Beneficiary Designations, A. 4th full paragraph on page 9, states that the RBD occurs after the individual reaches age 70 ½ . That age has been changed to be 72 ½.

Dated: March 18, 2022

Basics of Will Drafting

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OVERVIEW

Beth Knight is a "a brilliant attorney … bright in the extreme, with an excellent eye for detail" (*Chambers HNW*).

Beth's practice encompasses estate planning, estate administration, tax planning, and wealth preservation. She represents high net worth individuals in implementing sophisticated estate plans, as well as fiduciaries and beneficiaries in the administration of estates and trusts. *Chambers High Net Worth* reports, "Clients are comfortable talking to her, which is what everyone needs."

Beth also represents banks, trust companies, and individuals regarding fiduciary duties and the administration, construction, and interpretation of trust instruments. She advises institutions and individuals on creating Delaware trusts and reforming and relocating existing trusts to Delaware, ensuring that her clients benefit from the unique advantages of Delaware trust law.

In addition, Beth advises clients on formation and operational issues relating to family planning vehicles and closely held businesses in the form of Delaware partnerships and limited liability companies in all types of transactions, including financing, restructuring, and dissolution.

PRACTICES

Trusts & Estates
Tax
Limited Liability Company & Partnership Advisory

EDUCATION

- Villanova University, LL.M., 2015
- University of Iowa College of Law, J.D., with high honors, 2005
  Journal of Transnational Law and Contemporary Problems
- University of Northern Iowa, B.A., *summa cum laude* with honors, Economics and Political Science, 2002
  Phi Beta Kappa, Golden Key Society

LEADERSHIP

- Delaware State Bar Association
  - Estates and Trusts Section, Trust Act Committee

- Tax Section, Vice Chair, 2019-2020, Secretary, 2018-2019

RECOGNITION

- *Chambers HNW*, Private Wealth Law, 2021, 2020, 2019, 2018
- *The Best Lawyers in America*, since 2019
- *Delaware Today* Top Lawyer, 2021; Top Vote Getter, Estate, Probate + Trusts, 2021

BAR ADMISSIONS

- Minnesota, 2006
- Delaware, 2005

MCCOLLOM
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UEBLER LLC
ATTORNEYS AT LAW

Mr. Matthew P. D'Emilio

Matthew P. D'Emilio is the managing member at McCollom D'Emilio Smith Uebler LLC in Wilmington, Delaware. Mr. D'Emilio practices in the areas of estate planning and wealth transfer, estate and trust litigation, estate and trust administration, business transactions, and tax law. In addition, Mr. D'Emilio is regularly involved in a variety of other trust matters including trust modifications, terminations, mergers, decantings, nonjudicial settlements, and trust situs changes.

He routinely counsels both individual and corporate trustees in all matters related to estates and trusts, including providing representation in the Delaware Court of Chancery and the Pennsylvania Orphans' Court. Mr. D'Emilio also represents many individual clients across the country in estate planning and asset protection planning, and frequently advises on highly sophisticated wealth transfer strategies. Mr. D'Emilio also provides general business and tax planning advice to companies and non-profit entities, and serves as Assistant General Counsel to the Supreme Council of the Royal Arcanum, a fraternal benefit society in the United States and Canada.

Since 2016, Mr. D'Emilio has been recognized by Chambers and Partners as a leading Private Wealth Attorney (Band 2), and he has been recognized by Super Lawyers as a Delaware Rising Star in the areas of estate planning and trust and estate litigation since 2012. In 2016, Mr. D'Emilio was named one of Delaware Business Times "40 under 40." Since 2015, Mr. D'Emilio has been selected for inclusion in The Best Lawyers in America® in the area of Trusts and Estates.

Mr. D'Emilio is admitted to practice in the states of Delaware, Pennsylvania, and Massachusetts, and in the U.S. District Court for the District of Delaware and the United States Tax Court.

He received his B.S. from Villanova University and his J.D. from Widener University School of Law. He also received a Certificate in Estate Planning and an LL.M. in Taxation from Villanova University Charles Widger School of Law.

Overview of Estate Administration

Practice and Procedure Before the Register of Wills

Moderator

Joseph Bosik IV, Esquire

Gordon Fournaris & Mammarella, P.A.

Panelists

P. Kristen Bennett, Esquire

Gawthrop Greenwood, PC

Joseph Bosik IV, Esquire

Gordon Fournaris & Mammarella, P.A.

Lisa L. Coggins, Esquire

Woloshin, Lynch & Associates, P.A.

Alex J. Mili, Jr., Esquire

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JOSEPH BOSIK IV is a Director at the Wilmington law firm of Gordon, Fournaris and Mammarella, P.A. Joe received his Bachelor of Arts in Business & Economics from Ursinus College and earned his Juris Doctor, cum laude, from Chapman University, Fowler School of Law, with an emphasis in tax law. He also served as an articles editor for the Chapman Law Review. Joe earned his LL.M. in Taxation at Villanova University School of Law.

Prior to joining GF&M, Joe externed for the Tax Division of the United States Attorney's Office, where he was exposed to a variety of complex tax issues. Joe is a member of the Estates and Trusts, Taxation, and Elder Law Sections of the Delaware State Bar Association, as well as the Delaware Estate Planning Council and the Wilmington Tax Group.

Outside of GF&M, Joe is on the Board of Trustees of the Cameron Logan Scholarship Fund, a charitable organization that provides tuition offsets for students attending Salesianum School and grants to graduating seniors at Kennett High School.

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P. Kristen Bennett is an attorney with the law firm of Gawthrop Greenwood, PC in Wilmington, Delaware. Ms. Bennett is admitted to practice in Delaware and Pennsylvania, and focuses her practice on estate planning, tax law, and estate and trust administration. She not only assists her clients with setting up special or supplemental needs trusts, but she also advises clients on the administration of these trusts. Kristen is passionate about the law, and enjoys helping her clients navigate a sometimes confusing area of the law with care, understanding and compassion. She keeps abreast of the ever-changing laws that affect her clients, so that she can give them the most current and up-to-date information possible.

Kristen is a member of the Board of Directors for Delaware CarePlan, Inc. and for the Alliance for Health Equity, and devotes many hours of time and energy in assisting these worthy organizations.

Lisa L. Coggins

Lisa L. Coggins
Attorney

Lisa concentrates her practice on the areas of estate planning, estate and trust administration, guardianship, business formation and documentation and commercial bankruptcy. Lisa routinely represents individuals, businesses, executors/personal representatives and trustees in various matters throughout Delaware. Additionally, Lisa often serves as a court appointed attorney ad litem in guardianship actions and represents clients through Delaware Volunteer Legal Services. Lisa has been certified as a mediator by the Superior Court for the State of Delaware.

Practice Areas

- Estate Planning
- Estate & Trust Administration
- Guardianship
- Business Formation & Documentation
- Commercial Bankruptcy

Bar Admission

- Delaware 2002
- Massachusetts 2002
- New York 2002
- Florida 2003
- U.S. District Court, District of DE 2003

Education

- University of Delaware – B.A., 1997
- Widener University Delaware Law School – J.D, 2001

Professional Associations and Memberships

- Delaware State Bar Association
- Estates and Trusts Section
- Women and the Law Section
- Corporate Law Section
- Delaware Bankruptcy American Inn of Court

(https://www.google.com.ph/maps/place/3200+Concord+Pike,+Wilmington,+DE+19803,+USA/@39.8002541,-75.550529,17z/data=!3m1!4b1!4m5!3m4!1s0
75.5483403?hl=en)

Alex Mili has served as Chief Deputy Register of Wills for New Castle County since 2008, having previously served for six years as Senior Assistant City Solicitor in the City of Wilmington Law Department. He is admitted to the bars of Delaware, Pennsylvania and New Jersey. He earned a J.D. from Delaware Law School, M.B.A from Wilmington University, and B.A. from University of Delaware. He received the Master Advocate designation from National Institute of Trial Advocacy and he was inducted into Academy of American Legal Writers, which also conferred to him the Robert H. Jackson Award for exemplary achievement in legal writing. He is the author of the chapter on estates and trusts in *History of the Delaware Bar from 1995 to 2010* (a publication of the Delaware State Bar Association).

FUNDAMENTALS OF ESTATE ADMINISTRATION

AND

THE PERSONAL REPRESENTATIVE AND COUNSEL

I. OPENING THE ESTATE

A. Is Probate Necessary?

Will an estate need to be probated? This is often one of the first questions asked when a decedent's representative contacts his or her attorney. Of course the answer is, "it depends."

***Practice Point*:** Even if probate is not required, the decedent's original will and death certificate need to be filed with the appropriate Register of Wills. 12 *Del. C.* §1301. If you hold the original will, you can use the decedent's obituary to file the decedent's original will at the Register of Wills.

In order to effectively counsel a decedent's representative, it is necessary to determine the nature and/or type of assets owned by the decedent at the time of his or her death to determine whether or not an estate will need to be opened. Regardless of whether or not the decedent has a Will, an estate must be opened if:

1. The decedent had more than $30,000.00 in personal property in his or her sole name; or

2. The decedent had an interest in Delaware real estate in his or her sole name.

Generally speaking, assets/personal property that would be subject to probate would include any property, real or personal, owned by the decedent in his/her sole name at the time of his/her death. Of course, as with any rule, there are exceptions:

1. Retirement accounts on which a beneficiary is listed such as a 401(k) plan, 403(b), or IRA. The decedent is the sole owner of such an account; however, the funds held therein are not probate assets if there is a valid beneficiary designation operative at the time of the death. The funds instead pass to the beneficiary outside of the decedent's estate. The funds are not subject to claims of creditors of the estate nor are they subject to probate fees. An exception to this exception exists however if there is no beneficiary designation; the estate is the beneficiary; or there is a beneficiary designation but for some reason it is not valid and/or inoperative. In that case the funds would be payable to the estate and be included as probate assets.

***Practice Point*:** If the decedent was 72 or older at the time of death, determine whether the decedent's required minimum distribution was paid in full prior to the decedent's death. If the required minimum distribution was not paid in full, the remainder of the required minimum distribution must be withdrawn from the retirement plan by December 31st of the year of death.

Failure to fully distribute the required minimum distribution results in a substantial tax penalty. The remainder of the required minimum distribution is paid to the beneficiary of the retirement plan.

2020 Exception for required minimum distributions: The Coronavirus Aid, Relief, and Economic Security (CARES) Act waives the required minimum distributions in 2020. No taxpayer is required to take a distribution from a qualified retirement plan in 2020.

***Practice Point*:** The Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act") dramatically changed the pay-out options for a non-spouse beneficiary of a retirement plan. A non-spouse beneficiary is not permitted to take distributions over his or her life expectancy, unless the non-spouse beneficiary falls into an exception to the new rule. Under the new rule, the non-spouse beneficiary must withdraw the funds from the retirement plan by the 10th anniversary of the decedent's death. The distributions may be taken at any time and in any amount during the 10-year period, including equal distributions over the 10-year period, all the funds in the first year, all of the funds in the last year, or any other combination.

Exceptions to the 10-year rule:

1. The beneficiary is less than 10 years younger than the decedent - then the beneficiary may take distributions over his or her life expectancy;
2. The beneficiary is a minor and the child of the decedent – then the beneficiary may take distributions based on his or her life expectancy until the beneficiary obtains the age of majority, upon reaching the age of majority, the beneficiary must withdraw the remaining funds over the next 10-years;
3. The beneficiary is disabled (as of the decedent's death) – then distributions paid to a conduit trust or a see-through accumulation trust for the disabled beneficiary may be based on the disabled beneficiary's life expectancy.

***Practice Point*:** Retirement accounts payable to the estate can increase the income tax due on such accounts. When retirement plans are paid to the estate there are only two distribution options: lump sum distribution or distribution over 5 years. A lump sum distribution is easier and allows the estate to be closed on the normal time table but the income tax on a lump sum distribution can be as high as 43% (federal & state). Distribution over 5 years can save taxes, but will require that the estate stay open until the retirement plan is fully distributed.

Practice Point: The retirement plan is included in the decedent's estate for federal estate tax purposes.

2. Life insurance/Annuities. Like the retirement accounts mentioned above, proceeds from a life insurance policy or an annuity will not be considered probate assets if there is a valid beneficiary designation which is operative at the time of death. The proceeds are not subject to claims of creditors of the estate nor are they subject to probate fees. An exception to this exception exists however if there is no beneficiary designation; the estate is the beneficiary; or there is a beneficiary designation but for some reason it is not valid and/or operative. In that case the proceeds would be payable to the estate and be included as probate assets.

***Practice Point*:** Life insurance and annuities are included in the decedent's estate for federal estate tax purposes.

3. Transfer on Death and/or Payable on Death Accounts. Such accounts include a designation by the decedent that upon his/her death the funds will pass to a certain person(s) (the beneficiary). The funds are paid to the beneficiary as opposed to the decedent's estate. The funds are not subject to claims of creditors of the estate nor are they subject to probate fees.

***Practice Point*:** TOD designations are typically used for stocks, securities, and brokerage accounts while POD designations are typically used for cash or cash equivalent accounts like savings accounts, certificates of deposit, and savings bonds.

***Practice Point*:** Transfer on Death ("TOD") and Payable on Death ("POD") accounts are governed by contract law and are not testamentary in nature. 12 *Del. C.* § 809(a). Therefore, the decedent must have had contractual capacity, which is a higher standard than testamentary capacity, to complete a TOD/POD designation.

***Practice Point*:** The Delaware Division of Motor Vehicles allows TOD designations for vehicles. Division of Motor Vehicles Form MC2025.

***Practice Point*:** Assets and accounts that pass by TOD, POD or beneficiary designation are included in the decedent's estate for federal estate tax purposes.

4. Jointly Owned Property. Property which is jointly owned by the decedent and another person is also generally not considered a probate asset. When the decedent owns property jointly with his/her spouse (tenants by the entirety) or with another individual(s) (joint tenants with right of survivorship), the decedent's interest in the property passes to the surviving joint tenant(s) immediately upon death by operation of law. The subject property is not subject to claims of creditors of the estate nor is its value subject to probate fees. Of course, as noted above with any rule, there are exceptions.

i. Property Owned By Tenants In Common. When property is owned by the decedent and another party as tenants in common, the decedent's interest in the property is distributable through the decedent's will or by intestacy. Accordingly, it is possible for such ownership interest to be included in the decedent's estate. It is also possible for the co-interest owned by the decedent to be owned jointly, in which case the decedent's co-interest would pass to the surviving joint tenant and the survivor would then own the property as a tenant in common with the other tenant.

ii. Convenience Accounts. Through various case law in Delaware an exception to the effect of joint titling of some financial accounts has developed. It has become a common practice over the years for elderly or otherwise incapacitated adults to add another party as a joint tenant to their financial

accounts to enable that party to assist them with handling their finances. A common example would be a widowed parent adding a child to his/her accounts. Courts have found that when a party is added as a joint tenant to a financial account solely for the *convenience* of the decedent and not with any particular donative intent, the status of the joint titling will be disregarded and the funds will be considered part of the decedent's estate.

5. Any property owned by the decedent but which he/she transferred to an inter vivos trust prior to his/her death will not be considered a probate asset. However, the administration of assets in a revocable trust is very similar to the administration of probate assets. The assets are subject to creditor claims against the trust arising prior to the decedent's death (12 *Del. C.* § 3337) and are part of the decedent's estate for federal estate tax purposes.

***Practice Point*:** When dealing with both probate assets and assets owned by a revocable trust, the personal representative and trustee must be mindful of which entity is paying the decedent's debts and the expenses of the estate administration. See *Conaway v. Baird*, 2017 WL 1153376 (Del. Supr. 2017).

6. Assets Located Outside of Delaware. Real estate owned in another state and the tangible personal property located at such real estate is governed by the laws of the state where the property is located. While these assets may be subject to probate in Delaware, they will be subject to probate in the state where the property is located and will be included in the decedent's estate for estate tax purposes.

***Practice Point*:** Most of the non-probate assets can be distributed to the beneficiaries relatively quickly. The beneficiaries have a greater role in claiming these assets than the personal representative. Usually, the beneficiaries not the personal representative are required to complete the paperwork with the custodian of the asset.

If a decedent does not have solely owned real estate, has less than $30,000.00 in solely held personal property, then the executor named in the decedent's will, or if there is not a named executor or the named executor cannot serve then the qualified next of kin (spouse, children, parents, brothers, sisters, grandchildren, grandparents, in that order) may acquire possession of that personal property through a "small estate affidavit." 12 *Del. C.* § 2306. Such an affidavit may be presented to banks, the motor vehicle department, etc., as evidence of the authority to handle the assets of the decedent.

If there is a will and the estate qualifies as a "small estate", the person(s) administering the assets must still comply with the terms of the will. If there was no Will, the person obtaining the assets must distribute them according to the intestate laws of Delaware as described below.

B. The Initial Filing.

If it has been determined that probate is necessary, an estate will need to be opened with the ROW in the county in which the decedent was domiciled at the time of his/her death. In order to open an estate a Petition for Authority to Act as Personal Representative ("PR") along

with a certified death certificate and the original will (if there is a will) must be filed by the appropriate party with the ROW. It should be noted that if the decedent had a will, Delaware law requires that whoever is in possession of the original will must file it with the ROW regardless of whether or not probate is necessary.

Letters Testamentary - if the decedent had a will, the executor named in the will (or the successor executor as the case may be) would request to be granted letters testamentary in his/her petition. If the will has not already been filed with the ROW, the executor would need to do so at that time.

Letters of Administration - if there is no will, the party who is seeking to be appointed the PR would request to be granted letters of administration in his/her petition. Those entitled to request to act as the PR would be, in preferential order, the decedent's spouse, children, parents and siblings. In the event no one petitions to be appointed within 60 days from the date of death, then any interested person (such as a creditor) may petition to be appointed.

Once the estate is opened and letters are granted, the PR will be given a short certificate to evidence his/her appointment and authority to act for the estate. The short certificate will be necessary for the PR to gain access to the decedent's financial accounts and safe deposit boxes and retitle assets, among other things. Delaware law (12 *Del.C.* § 2101) provides that notice must be posted within 40 days of the grant of letters in the county website and/or county courthouse in the county in which letters were granted. In addition, newspaper notice is published in the county at least three times during that period (not less frequently than once a week for three successive weeks). The Register of Wills may skip the newspaper publication requirement if the gross personal estate did not exceed $30,000.00 and the gross real and personal estate did not exceed $35,000.00.

II. ADMINISTERING THE ESTATE

The ultimate goal of estate administration is a full and proper distribution of a decedent's assets and settlement of his/her debts that is in accordance with applicable law and the wishes of the decedent.

A. Counseling the Personal Representative

Once a PR has been appointed, it is important for him/her to know his/her duties and responsibilities as soon as possible. Ideally, the PR will be informed of them prior to being appointed, however, this does not always happen. PRs often seek an attorney after being appointed. Regardless of when in the process an attorney becomes involved, it is important to make sure the PR is fully aware of his/her duties in order for them to proceed with administering the estate properly and, if necessary and possible, to fix any mistakes that may have already been made.

The PR should be made aware of all the important deadlines and the documents that will need to be filed with the ROW, as well as his/her fiduciary duties to the creditors and

beneficiaries of the estate and that all parties must be treated fairly.

Practice Point: Provide the personal representative with a written list of the deadlines and record those deadlines in your calendar.

Basic Timetable

1. Meeting with you to review estate and trust administration (completed);

2. Open the estate for administration in the Register of Wills Office (completed/estimated to be completed on _____);

3. Gather information about assets and values as required;

4. Re-title and redirect assets (as required);

5. Pay debts and administration expenses of the estate (as required);

6. File the Inventory with the Register of Wills on or before **[3 months after date of letters]**;

7. Creditor claim period ends 8 months after death [DATE];

8. File decedent's final personal income tax returns with the Internal Revenue Service by **April 15, 20__** and Delaware Division of Revenue by **April 30, 20__**;

9. File the First and Final Account and closing documents with the Register of Wills by **[one year after date of letters]**;

10. Must take decedent's final IRA required minimum distribution payment by December 31, 20__;

** Required minimum distributions are suspended for 2020 pursuant to the CARES Act.**

11. Transfer of IRAs as necessary no later than September 30, [year following year of death];

12. File estate and trust income tax returns with the Internal Revenue Service by **DATE** and Delaware Division of Revenue by **DATE**;

13. Prepare Receipts and Releases for the beneficiaries; and

14. Make distributions.

Further, the PR must be aware that he/she has a duty to follow the provisions of the decedent's will or the prevailing state law if the decedent died without a will. It is very important for the PR to understand that he/she will have to account for his/her actions to the

ROW and ultimately the beneficiaries. The PR should be advised from the start that it is imperative that he/she keep good records and save all receipts, invoices or other documentation relating to expenses or claims that are paid. Further, the PR should keep track of his/her time spent working on the estate. Also, it is very important that the PR open a separate estate account (or accounts, if necessary) in which to deposit the funds of the estate. Estate funds should never be co-mingled with the PR's personal funds.

The specific tasks that will need to be performed by the PR will vary from estate to estate and will depend greatly on the nature of the assets, the terms of the will and the beneficiaries involved. Generally, though, the PR will need to open the estate, marshal and safeguard the estate assets, make any necessary tax filings, complete and file documents required by the ROW, pay expenses related to the estate, address claims filed against the estate and pay allowed or legitimate claims, and, at the appropriate time, make distributions to the beneficiaries according to the terms of the will.

In order for the PR to fully appreciate his/her responsibilities, he/she needs to be aware of the possible consequences should he/she fail to act properly. The PR has a fiduciary duty to the beneficiaries and creditors of the estate. The PR is legally responsible for the assets of the estate. To the extent the PR mishandles those assets, he/she may be liable to the creditors and/or beneficiaries for any losses attributable to the mishandling. For instance, if a PR allowed homeowner's insurance to lapse on real property and a fire destroyed the property, the PR may be personally liable for that loss. In addition to marshaling the decedent's assets, the PR must preserve and protect them as long as he/she has possession of them.

The PR must also be mindful of the appropriate time for paying claims or making distributions to beneficiaries. The PR should only pay claims that have been properly vetted to ensure they are valid and legally enforceable against the estate. The PR should refrain from paying bills or debts of the decedent that haven't resulted in valid claims against the estate. Further, the PR should resist making distributions to beneficiaries until such time that all valid claims against the estate have been paid and the estate formally closed. In the event a PR makes an early distribution which leaves the estate insolvent, the PR may be personally liable to cover any outstanding valid claims against the estate.

B. Assets that Require Special Attention

1. Low Digit Delaware License Plates. In Delaware, license plates are owned by the State. (21 *Del. C*. § 2125) However, the person to whom the license plate is registered has the ability to assign the license plate to someone else. It is the ability to assign the license plate to another party that is valuable.

Do not allow a low digit license plate to expire. If the car to which the license plate is tied is sold, do not transfer the license plate with the car unless you account for the value of the license plate. A Delaware license plate may be placed in retention, usually until its expiration date, for a fee.

If the license plate will be distributed to a beneficiary the DMV has a simple

process to swap the decedent's license plate with the beneficiary's license plate. DMV Form MV71.

If the license plate will not be distributed to a beneficiary, the personal representative should arrange for the license plate to be sold.

2. Firearms. There are two main issues when an estate owns firearms: felons and the National Firearms Act ("NFA").

Felons. Do not allow firearms to be in the possession of a felon or distributed to a felon. The personal representative is deemed to have constructive possession of firearms owned by the estate. If the personal representative is a felon this is a problem, constructive possession is sufficient to violate federal criminal laws. A new personal representative will need to be appointed. Even if a firearm is specifically bequeathed to a felon, it cannot be distributed to the felon. Both the attorney and the personal representative can be criminally liable for distributing firearms to a felon.

NFA. The NFA pertains to certain firm arms – automatic machine guns, short barreled rifles, short-barreled shotguns, suppressors/silencers, bombs, grenades and similar 'destructive devices.' These firearms are required to be registered with ATF. Unregistered NFA firearms are illegal and must be surrendered to the ATF. There are special, more restrictive, rules regarding the transfer of NFA firearms. Paperwork must be filed with the ATF before a NFA firearm can be transferred.

3. Interests in S-corporations. Small businesses, including solely owned LLCs, are often taxed as S-corporations. An S-corporation is a pass through entity, similar to partnerships and trusts. The S-corporation files its own income tax returns, but the shareholders report the income and deductions on their personal income tax returns.

Shareholders of an S-corporation are limited to individuals (US citizens or US residents only, non-citizen non-residents cannot own an interest in an S-corporation), s-corporations (parent/subsidiary), grantor trusts, qualified subchapter S trusts ("QSST"), electing small business trust ("ESBT"), certain non-profits, and estates.

An estate can only hold the decedent's interest in the S-corporation for 2 years from date of death (subject to very limited exceptions). If an estate holds s-corporation stock for longer than 2 years the corporation may lose its s-corporation status.

If S-corporation shares are being distributed to a qualifying trust, an election must be made to qualify the trust as a shareholder. See 26 *USC* § 1361(d)(2) and Treasury Regulation 1.1361-1(j)(6)(ii).

4. Business Interests Subject To Transfer Restrictions. Despite a bequest in a will or trust, an interest in a business that is subject to transfer restrictions cannot be transferred to the beneficiary unless the transfer restrictions are satisfied. Transfer restrictions include, but are not limited to, buy-sell agreements, redemption agreements,

restrictions on who can be a shareholder. A bequest that violates the business's transfer restrictions will fail. See *In re Estate of Conaway*, 2012 WL 524190.

C. Stepping-Up the Basis

Basis is an income tax concept and determines the amount of capital gains tax paid when an asset is sold. Your basis is generally what you pay for an asset, although it can be increased or decreased in certain circumstances. For example, if you buy a share of DuPont stock for $100, your basis is $100. If you sell the stock for $125, your gain is $25 ($125 sales price - $100 basis = $25 gain) and you will owe capital gains tax on the $25 gain.

When someone dies most of their assets receive a stepped up basis equal to the fair market value of the asset on date of death. The basis step-up wipes out built-in-capitals gains, saving the estate or beneficiaries significant capital gains tax.

By way of example: If, on the date of death, the decedent owns a share of DuPont stock with a basis of $100 and a fair market value of $125, the stepped-up basis for the DuPont stock is $125. If the estate or a beneficiary sells the stock for $125 there is no capital gain and thus no capital gains tax owed. If the estate or a beneficiary sells the stock for $145, there is a $20 gain on the sale of the stock and capital gains will be assessed on the $20 gain.

The basis of an asset is stepped up to be the fair market value of the decedent's date of death or the 6 month alternative valuation date. The alternative valuation date is only available for taxable estates. Determining the fair market value of an asset on the decedent's date of death varies by asset type. For example:

1. Real estate – the basis is determined by an appraisal.

2. Stocks and securities - the basis is the mean of the high and low value on the date of death; when death occurs on a weekend or legal holiday the mean of the high and low on the business day proceeding date of death and the first business day following the date of death are averaged; for stocks trading ex-dividend (dividend declared prior to decedent's death but paid after decedent's death) the dividend is factored into the basis.

3. Mutual funds – the basis is the public redemption price; when death occurs on a weekend or legal holiday, the basis is the public redemption price on the first business day preceding the date of death.

4. Assets like qualified retirement plans (401(k)s, 403(b)s, IRAs, etc), installment obligations, and assets that are income in respect to a decedent (IRD) do not receive a stepped-up basis on death.

D. Preparing and Filing the Estate Inventory

One of the PR's many duties is to file an inventory of the estate assets. The Inventory serves two very important purposes. First, it discloses all of the assets of the decedent which

come into the hands of the PR for administration, together with the value of these assets on the date of the decedent's death. Second, it establishes the chain of title to real property owned by the decedent. Under Delaware law the title to real property passes automatically to the beneficiaries upon the decedent's death by operation of law. A new deed is not required to be filed to show the passage of title to real estate from a decedent's estate to a beneficiary. The Inventory serves this purpose by identifying the real property and the name and address of the beneficiaries who received it.

The PR should attempt to obtain as much information regarding the decedent's assets as he/she can. Depending on the estate, this could be a simple task or an extremely difficult one. Retrieving the necessary information may involve searching the decedent's files for financial statements, stocks and bonds, tax returns and other records to determine what financial holdings the decedent had. Additionally, the PR will need to access the decedent's home to determine what items of tangible personal property the decedent owned. If the decedent was not closely related to the decedent then contacting family members for information may be required.

Once the PR compiles the decedent's asset information, he/she will need to complete the inventory. The PR may employ qualified and disinterested appraisers to assist the personal representative with establishing the date of the death value of property reported on the Inventory. Generally for inventory purposes, a good faith value for any real property is sufficient. For tangible personal property, many of the items may have little to no value, such as household goods and furniture. To the extent there are items of potential value, an appraisal should be done. Additionally, date of death values will need to be obtained for the decedent's financial accounts. Real property and jointly owned property must be included on the inventory, but are not considered probate assets. Once completed, the inventory must be filed with the ROW.

Pursuant to 12 *Del. C*. §1905(a), the inventory must be filed with the ROW within 3 months of the grant of letters. This deadline may be extended by the ROW upon request of the PR or his/her counsel. The PR must also file a copy of the Inventory in the ROW in each county in the State of Delaware where the decedent owned real property. The Inventory is reported on Form 600RW which is filed with the ROW. The form includes an affidavit by the PR required under 12 *Del.C.* § 1905(b) and (c), swearing that he or she has made an inquiry into the assets of the decedent. If diligent inquiry has been made, and the PR can obtain no knowledge of any goods or chattels of the decedent, or any debts or credits due the decedent, he or she may be excused from filing the inventory upon submission of an affidavit to that effect to the Register of Wills. This affidavit will be certified by the Register of Wills. 12 *Del.C.* §1908.

The Inventory must contain a list of all goods and chattels of the decedent, a list of all debts and credits due or belonging to the decedent, and a statement setting forth a general description of all real estate in Delaware in which the decedent had an interest. In addition, the names of each person entitled to an interest in the real or personal estate and their relationship to the decedent should be included. 12 *Del.C.* § 1905(a). The tax parcel number for the real estate and the recording information for the Deed where the decedent obtained title to the real property may also be included as a substitute for what would otherwise be reported in a Deed from the estate to the beneficiary.

If a legal action affecting the title to real estate of the decedent in Delaware is brought in any court, the PR must file a notice of the pendency of such action within ten (10) days in the ROW in each county where the decedent owned real estate at the time of death other than the county in which letters were issued. 12 *Del.C*. § 1905(d). Presumably, the claim is initiated in the County where letters were issued and no further notice is required. The actions for which notice is required include caveats against the Will, petition for review, petition for instructions and any other action which could affect title to real estate.

If the personal representative discovers additional assets after the Inventory is filed, an additional Inventory or list must be made and filed with the Register of Wills' Office. 12 *Del.C*. § 1910. As a practical matter, often an additional Inventory is not filed. Instead, after-discovered assets are generally reported on the next accounting filed for the estate.

An Inventory must include all of the assets which come into the hands of the PR, including life insurance, pension, bonus, stock options, or other employee benefit or incentive plan which are payable to the decedent or the decedent's personal representative. 12 *Del.C*. §1901(c). It is only when these assets are payable to a person, trust, or corporation other than the decedent or the decedent's PR that they need not be reported. The family Bible, clothes of the decedent's and family stores laid in before the death of the decedent are also specifically excluded from the Inventory. 12 *Del.C*. § 1901(b).

Any PR who fails to file the Inventory within three (3) months after the letters are granted is personally subject to a penalty of $1.00 per day for each day delinquent. The penalty starts to run one (1) month after notice of the delinquency is given by the Register of Wills Office. 12 *Del.C*. § 1906(a). Failure to file the Inventory required by 12 *Del.C.* § 1905 after being ordered to do so by the Court of Chancery will subject the personal representative to penalty for contempt of court. 12 *Del.C*. § 1906(b). Extension requests should be directed to the Register of Wills and are frequently granted.

E. Handling Creditor Claims

Claims against a decedent's estate arising prior to the decedent's death must be filed/presented within 8 months from the date of death and those arising after the decedent's death must be filed within 6 months after such claim becomes due or arises. 12 *Del. C.* §2102.

Claims against the estate are presented either by a written statement of claim sent to the PR indicating the name and address of the claimant, the basis of the claim and the amount claimed or by filing a written statement of claim (in the appropriate form) with the Register of Wills. Additionally, a claimant may initiate an action against the PR, in an appropriate court, to assert a claim, however the action must be filed within the time periods noted above. 12 *Del. C.* §2104.

The PR should attempt to obtain as much financial information regarding the decedent's debts as he or she can. Retrieving the necessary information may involve searching the decedent's files for statements, invoices and bills. Reviewing bank statements may provide information regarding the bills paid by the decedent on a regular basis. If the PR was not closely related to the decedent then contacting family members for information may be required. A PR

is deemed to have notice of any mortgages or judgments (which are liens against the decedent's real property as of the date of death) if the same are properly recorded in the county where the estate is pending. 12 *Del. C.* §2103. Additionally, to the extent the decedent directs payment of a specific debt/obligation in the will, the PR may need to contact the creditor to obtain a final invoice.

***Practice Point*:** Federal law provides that if a fiduciary fails to give the IRS notice of the fiduciary relationship (by filing Form 56 discussed below), an IRS notice of deficiency is effective if it was mailed to the decedent at the decedent's last known address. 26 *USC* § 6903(a).

***Practice Point*:** Under federal law, the decedent's unpaid personal income taxes have priority over other claims, other than estate administration expenses and judgments. 31 *USC* § 3713-a.

A PR is not obligated to inform the decedent's creditors (or potential creditors) that they may have a claim against the estate. However, to the extent claims are filed against the estate, the PR will need the decedent's financial information to be able to determine whether or not the claim is valid and if it should be paid or rejected. In the event a claim filed against an estate is later rejected by the PR, the claimant may, within 3 months of the notice of rejection, file an action against the estate to enforce the claim. These cases are generally filed as debt actions and litigated in the law courts...Superior Court, Court of Common Pleas or Justice of the Peace, depending on the amount at issue. 12 *Del. C.* §2102(c).

Pursuant to Delaware law (12 *Del. C*. § 2105), after the payment of administrative expenses and fees of the estate and any executor or administrator commissions are payed, valid/allowed claims are paid in the following preferential order:

1. surviving spouse allowance (12 *Del. C*. §2308) – a surviving spouse may request an allowance of up to $7,500 (current amount) from the decedent's estate.

2. funeral expenses;

3. child support;

4. medical bills related to decedent's last illness;

5. wages of servants and laborers employed at the decedent's home or farm for up to 1 years wages;

6. taxes;

7. rent (arrears or coming due) for up to 1 year;

8. judgments against the decedent;

9. recognizances, mortgages and other obligations of record, requiring payment of money;

10. obligations and contracts under seal;

11. general contracts; and

12. other demands.

In the event an estate has insufficient assets to cover the administrative expenses and all of the valid claims filed against the estate, the administrative expenses are paid first and if there are funds remaining, then the claims are paid according to the preferential order noted above. If there are not enough funds remaining to pay an entire category of claims, then the remaining funds are paid to that category of claims on a pro-rata basis. If there are claims that fall into lower priority categories, then those claims are rejected and not paid. In most estates, it is advisable for the PR to withhold making any distribution to beneficiaries and any payments on claims until after the claims period has passed. By waiting, the PR can make sure that lower priority claims or beneficiary distributions are not made before higher priority claims. To the extent a PR makes an improper payment or distribution, he or she could be personally liable to a higher priority claimant should there be insufficient estate assets to pay the claim.

If an estate does not have enough liquid assets (ie. cash) to pay the valid claims or if there is a direction to sell assets in the will, the PR will need to sell the assets of the estate. Delaware law vests title to the personal property of an estate in the PR. As such, the PR can sell personal property without obtaining a court order. Depending on the type of personal property involved, it may be necessary for the PR to have an appraisal performed to determine its value. Once property is sold, the proceeds must be deposited in the estate account.

In the event the proceeds from sale of personal property do not cover the expenses and claims of the estate, any real property will need to be sold. If there is a direction to sell real property in the will, then the PR may sell the real property without the need for a court order. If there is no direction to sell, then the PR will need to file a petition to sell real estate to pay debts of the estate with the Court of Chancery. 12 *Del. C.* §2701. This is true even if the will *authorizes* the PR to sell real property but does not *direct* the sale. If the estate sells the real property whether by direction or court order, the proceeds of the sale will be used to pay the remaining debts of the estate. To the extent there is a surplus of sale proceeds after payment of the estate debts, such surplus is paid to the beneficiaries who would have otherwise received the real property that was sold. 12 *Del. C.* §2711.

When estate property must be sold in order to pay debts of the estate, personal property is sold before real property and both types will abate in the following order:

1. Property not disposed of by the will;

2. Residuary bequests and devises;

3. General bequests and devises;

4. Specific bequests and devises. 12 *Del. C.* §2317.

Of course, if the terms of the will provide for an alternate order of abatement, the will is

controlling.

F. Preparing and Filing the Accounting

An accounting of the administration of the estate is due within 1 year of the opening of the estate. This deadline may usually be extended by up to 6 months by the Register of Wills upon request of the PR. The accounting is essentially a written summary of what transpired during the administration of the estate...i.e. what was in the estate upon the decedent's death; what came in and what went out; what expenses there were; which claims were paid; how much is due in probate fees; and how much is left over for distribution to the beneficiaries. In many estates the first accounting is also the final accounting, however, for complicated estates several accountings may be necessary. In the event "interim" accountings are necessary, they are due annually until a final accounting is filed.

The accounting uses the assets included on the inventory as the starting point for the administration. To the extent personal property has been sold, the value of the sale proceeds will be reflected on the accounting. If the sale of personal property generated proceeds in excess of the value reported on the inventory for that same property, then a gain of the difference would be noted on the accounting. If the amount is less, then a loss would be reflected on the accounting. The same is true for any financial accounts that change in value from the time they are reported on the inventory to when they were liquidated or closed out and deposited in the estate account. Of course, the PR should be keeping records of any transaction they enter into involving any assets of the estate to support the amounts they ultimately report on the accounting. Any income earned by the estate will need to be reflected on the accounting as well as any other receivables and/or recovered assets that were not listed on the inventory. This can occur when the PR comes into the possession of estate assets of which the existence was unknown at the time the inventory was filed.

All expenses incurred by the PR in connection with administering the estate should be reflected on the accounting. Such expenses may include, without limitation, professional fees (i.e. accountants, lawyers...); mileage; supplies; appraisals; clean-out services; insurance premiums; repairs/maintenance of estate assets; storage rental; and a myriad of other expenses that may arise during the course of an estate's administration. Generally, the expenses will vary based on the type of assets held in the estate and the related responsibilities of the PR. Additionally, there will most likely be filing fees or probate fees incurred. Generally, an administrative expense is appropriate when it is reasonable and necessary for administering the estate. It is imperative that the PR keep good records! The PR may be required to provide the ROW with his/her receipts, invoices and proof of payment to support administrative expenses claimed on the final accounting. The PR (or any fiduciary) should NEVER use cash to pay bills or make distributions.

The PR may choose to take commission for his/her services in administering the estate. To the extent the PR takes a commission, it must be reflected on the accounting. Any commission received by the PR is considered taxable income and may require the filing of a Delaware income tax return by the PR. The commission may be calculated on an hourly basis or by a percentage of the value of the estate. Either way, the PR's commission will need to be reasonable under the circumstances. It is advisable that the PR keep detailed written time

records throughout the administration if he/she intends to take a commission for his/her services. When handling an estate, the more of a paper trail, the better. This documentation will also be necessary in the event exceptions are filed to the accounting.

Once complete, the accounting, along with several attachments, must be filed with the Register of Wills. Ideally, the PR will be able to obtain signed waivers/consents from the beneficiaries regarding the accounting, which will also be filed with the Register of Wills. If all of the beneficiaries sign waiver/consents to the accounting, the need for a notice period for the filing of exceptions (ie. objections) to the accounting will be obviated. Otherwise, if one or more of the beneficiaries do not sign waiver/consents, the PR will need to file NC 1 notices for such beneficiaries with the Register of Will along with the accounting. At such time that the Register of Wills has completed its review of the accounting and approved the same, the Register of Wills will then send out the NC 1 notices to the beneficiaries. The beneficiaries will have three months from the date notices are sent to file exceptions to the accounting.

G. Taxes

There are several different tax regimes that you need to be aware of when administering estates; however, not all of the regimes will apply in every estate.

As an initial matter, the decedent's social security number should not be used after the decedent's death. The estate should obtain its own taxpayer identification number ("TIN" or EIN"). The EIN can be obtained online, for free, from the IRS website (IRS.gov), the application is Form SS-4.

Be wary of companies offering to obtain the EIN for you. There are several companies that will offer to obtain an EIN for you for charges ranging from $50-$500, usually after paying the fee, the website will direct you to the IRS's website.

Another initial tax filing is IRS Form 56 "Notice of Fiduciary Relationship." This is filed at the beginning and end of the estate administration process. It puts the RIS on notice of who to contract regarding any tax matters that occurred prior to or subsequent to the decedent's death.

H. The Decedent's Final Income Tax Return (IRS Form 1040, DE 200).

1. The decedent's final income tax returns are due on the normal schedule, April 15th for the federal income tax return and April 30th for the Delaware income tax returns. Extensions of time to file must be applied for by the personal representative.

2. If the decedent was making estimated quarterly income tax payments, those payments do not have to continue after the decedent's death. If the decedent was married or the personal representative believes that the decedent will owe income taxes, those payments should continue to be made.

3. The personal representative has the sole authority to file the income tax returns. If a spouse dies, the surviving spouse may only file a joint return with the deceased spouse with the consent of the personal representative. Usually, it makes sense for a joint income tax return to be filed; however, in second marriages this is not always

done.

4. If a refund is due to the estate of the decedent, IRS Form 1310 is used to claim the refund. Form 1310 may be signed by a surviving spouse, the personal representative appointed by the Register of Wills, or if the person who is handling the decedent's estate (i.e. a trustee, someone using a small estate affidavit). Refunds can be a probate estate and often can push an estate over the $30,000 limit for small estates.

5. Income earned after the decedent's death belongs to the estate or trust and should be reported separately on the estate's income tax return, discussed below. However, this can be difficult because financial institutions will often continue to use the decedent's social security number for tax reporting purposes for the remainder of the calendar year. Dealing with income earned after the decedent's death but reported under the decedent's social security number is beyond the scope of this Fundamentals CLE. Practitioners who do not have a tax background should refer these issues to the decedent's accountant.

I. Estate Fiduciary Income Tax Return (IRS Form 1041, DE 400)

1. An estate (and most irrevocable trusts) is separate taxpayer for income tax purposes and must file its own income tax return if the estate meets the filing threshold ($600).

2. Unlike most taxpayers, who file income taxes based on a calendar year January 1st to December 31st, estates file on a fiscal tax year. The tax year starts the day after the decedent's death and ends the following year on the last day of the month proceeding the month that the decedent died. For example, if a decedent dies on March 12, 2017, the estate's tax year starts on March 13, 2017 and ends February 28, 2018. The returns are due 3 ½ months later. In this example, the federal return would be due on June 15, 2018 and the Delaware return would be due on June 30, 2018.

Extensions of time to file are available; however, unlike individual taxpayers an estate can only obtain a 5 month extension of time to file.

Note, when an income tax return is on extension in DE it is due on the 15th of the month instead of the last day of the month.

3. The decedent's estate and revocable trust may elect to be taxed as one entity by making a § 645 election. When the election is made it is made on the estate's initial fiduciary income tax return. The estate and trust file on the estate's tax year.

Once made the 645 election lasts for 2 tax years or until the end of the tax year in which the estate tax clearance letter is issued. The estate tax clearance letter is discussed in more detail in the estate tax section below.

If there is a trust and the trust does not elect to make the § 645 election to file with the estate, the trust's tax year is a calendar year. The tax year starts the day after the decedent's death and ends on December 31st.

4. Estates are pass-through entities. If the net income is distributed to the residuary beneficiaries, the estate does not pay the income tax associated with the income. Instead, the estate issues each beneficiary a schedule K-1 and each beneficiary will report his or her share of the income on his or her personal income tax return. If the net income is not distributed to the beneficiaries, then the estate will pay the income tax associated with the income. Because estates are subject to very compressed income tax brackets, reaching the highest marginal rate of 37% once it has $12,950 (in 2020) of income, it is better to distribute the net income.

The estate will usually pay the capital gains tax on any capital gains realized by the estate. The capital gains tax rate for estates is the same as it is for individuals.

5. Estates and trusts are subject to the Net Investment Income Tax ("NII Tax"), also referred to as the Medicaid surtax. The NII tax is a 3.8% tax on investment income such as interest, dividends, capital gains, rents, and royalties. Estates and trusts are subject to the NII Tax on all of its income over $13,500.00 (2021) The NII Tax is part of the Affordable Health Care Act ("ACA").

J. Estate Tax Return (IRS Form 706, DE 900)

The preparation of the federal estate tax return is outside of the scope of this Fundamentals CLE; the materials are limited to a brief overview.

1. Delaware repealed its estate tax as of January 1, 2018. From July 1, 2009 through December 31, 2017, Delaware had a state level estate tax. The Delaware estate tax exemption was the same as the federal estate tax exemption except in 2010 when there was not a federal estate tax. In 2010, Delaware's estate tax exemption was $3,500,000. If the decedent died on or before December 31, 2017, it may be necessary to file a Delaware estate tax return (DE form 900) or an Affidavit that no Delaware estate tax is due.

2. There are several situations when it is necessary to file a United States Estate (and Generation-Skipping Transfer) Tax Return ("Form 706"): the estate is taxable, the estate is electing portability, the estate is allocating generation-skipping transfer ("GST') exemption, and certain non-resident estates with US situs property.

3. The Tax Cuts and Jobs Act of 2017 made several changes to the tax code, including changes to the estate tax exemption. In 2018, the base federal estate tax exemption was increased to $10,000,000 and indexed for inflation. The federal estate tax exemption for 2022 is $12,060,000 per person. The decedent's available exemption is reduced by the value of lifetime taxable gifts made by the decedent and increased by a deceased spouse's unused exemption (if a portability election was made.) In 2026, the base federal estate tax exemption will drop to $5,000,000 and the exemption will continue to be adjusted annually for inflation. If the estate is over the threshold exemption then a return must be filed even where deductions, such as the marital

deduction, result in no estate tax being due. The federal estate tax rate is a flat 40%.

The federal estate tax return is due 9 months after the decedent's death. One 6-month extension of time to file the return is available, the extension request must be timely filed. Note, that an extension of time to file does NOT include an extension of time to pay. If estate tax is due an estimated estate tax payment should be made with the extension request.

The IRS use to automatically issue an estate tax closing letter once it had reviewed the return. Now, the IRS only issues an estate tax closing letter upon request and after the new $67.00 fee is paid. Estate tax closing letters may be requested at pay.gov. You are not required to obtain an account transcript prior to requesting the closing letter in order to determine whether the closing letter is ready to be issued.

4. Portability

The current tax act provides an opportunity for the spouse to take advantage of the decedent's unused estate (and gift) tax exemption, the "portability election". This option requires making an election by timely filing a Form 706, even if an estate tax return is not otherwise required. By making the portability election, the unused portion of the decedent's $12,060,000 exemption is added to the surviving spouse's exemption as an addition to the surviving spouse's exemption available for the surviving spouse's gift and estate tax purposes.

In some cases, but not all, the requirements for the contents of the federal estate tax returns are simplified. The executor is not required to report the ***value*** of assets that qualify for a charitable deduction or the marital deduction on a return being filed solely for portability. The executor must still identify the property, the recipient, and the "executor's best estimate" of value. See Treasury Regulation § 20.2010-2(a)(7). Note property that passes to a credit shelter trust does not qualify for the marital deduction unless a QTIP election is made.

However, even under the simplified rules, preparing an estate tax return is expensive. Many clients will be put off by the cost to prepare and file the return and will elect not to file even if filing may be beneficial. In a blended family, the children of the decedent from a prior relationship may be unwilling to expend the funds to file a return for the benefit of the decedent's surviving spouse.

Note, if an estate tax return is filed solely for the purpose of electing portability then Form 8971, discussed below, does NOT need to be filed.

Practice Point:

a. Confirm portability decision in writing. Portability is still new and there is concern that the decisions regarding portability may expose a practitioner or an executor to future liability. Heirs may contend that portability is not needed and the estate should not have used the estate's resources to make the portability election. On the other hand the estate may forgo the election and then find out

that the surviving spouse's estate is subject to federal estate tax.

Here is sample language for a letter to a client confirming the client's decision regarding the portability election:

> As discussed in our meeting, the current tax act provides an opportunity for the spouse to take advantage of the decedent's unused estate (and gift) tax exemption, the "portability election." This option requires making an election by timely filing a Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return. This would carry-over the unused portion of your husband's $12,060,000 (2022) exemption for your use as an addition to the exemption available to you for gift and estate tax purposes.
>
> **Option:** This will confirm that you do not want to file a 706 to preserve decedent's unused exemption for portability purposes.
>
> **Option:** This will confirm that you are planning to file a 706 to claim decedent's unused exemption.
>
> **Option:** We understand that you are still considering whether you want to take the necessary steps to persevere decedent's unused exemption, or would like to discuss this further.
>
> Some attorneys require that the executor (and sometimes the surviving spouse too) to sign a statement confirming that the estate is not going to make a portability election.
>
> b. Address the expense of the portability election as early as possible, preferably during the estate planning process. This can be especially important with second marriages and blended families. I often include language in a pre-nuptial agreement or as a separate agreement between spouses requiring the surviving spouse to pay for the preparation of the estate tax return if the deceased spouse's estate was not otherwise required to file the return. Here is sample language:
>
> > i. **Jane** agrees that the personal representative of her estate will, at **John's** request, timely file any and all documents necessary to make the election provided in § 2010(c)(5) of the Internal Revenue Code of 1986, as amended by §303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, or any similar or corresponding law, for the deceased spousal unused exclusion amount with respect to **Jane's** estate to be available to be taken into account by **John** and his estate. Said documents may include, but are not limited to, an estate

tax return for **Jane's** estate even if her estate does not owe any federal estate tax at her death. If **John** makes said request and **Jane's** estate would not be required to file an estate tax return or other necessary documents except to make the election, **John** shall make the arrangements for the preparation of said estate tax return (or necessary documents in connection with said election) and pay the cost of preparing said estate tax return or other documentation and all other costs incurred in connection with said election. **Jane's** personal representative shall fully cooperate with the preparation, execution and filing of the necessary documents (including said estate tax return) and shall promptly furnish all documents and information as shall be reasonably requested for that purpose.

ii. **John** agrees that the personal representative of his estate will, at **Jane's** request, timely file any and all documents necessary to make the election provided in § 2010(c)(5) of the Internal Revenue Code of 1986, as amended by §303(a) of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, or any similar or corresponding law, for the deceased spousal unused exclusion amount with respect to **John's** estate to be available to be taken into account by **Jane** and her estate. Said documents may include, but are not limited to, an estate tax return for **John's** estate even if his estate does not owe any federal estate tax at his death. If **Jane** makes said request and **John's** estate would not be required to file an estate tax return or other necessary documents except to make the election, **Jane** shall make the arrangements for the preparation of said estate tax return (or necessary documents in connection with said election) and pay the cost of preparing said estate tax return or other documentation and all other costs incurred in connection with said election. **John's** personal representative shall fully cooperate with the preparation, execution and filing of the necessary documents (including said estate tax return) and shall promptly furnish all documents and information as shall be reasonably requested for that purpose.

4. Address the use of the ported exemption with the surviving spouse, his or her accountant and financial advisors. The surviving spouse may only use the unused exemption of the last deceased spouse. If Karen, as John's surviving spouse, ports $2,000,000 of unused exemption, gets remarried to Tom, and is then widowed again,

Karen will lose John's unused exemption since he is not her last deceased spouse. However, if Karen uses the ported $2,000,000 to make lifetime gifts before Tom dies, she doesn't lose anything.

K. Information Regarding Beneficiaries Acquiring Property from a Decedent (IRS Form 8971)

Form 8971 is outside of the scope of this Fundamentals CLE only a brief summary is provided.

Form 8971 is required to be filed if Form 706 is filed, except for Form 706s filed solely to elect portability. It is due 30 days after the Form 706 is filed with the IRS. There are substantial penalties associated with this return and can be assessed for a variety of reasons including, but not limited to, failure to file, failure to provide all of the information, failure to give to the beneficiary, failure to update.

The purpose of Form 8971 is to provide both the beneficiary and the IRS cost basis information regarding the assets that the beneficiary inherits.

L. Distribution

1. Timing of Distributions

Ideally, final distribution to the beneficiaries should not occur until the applicable claims period has passed, all claims have been addressed/paid, the accounting has been approved and the estate has been closed. Estate beneficiaries are generally the lowest priority for distribution from the estate, so only after all administrative claims, the PR's commission and all valid claims filed against the estate are paid is the balance remaining in the estate available for distribution to beneficiaries. Generally, it is best for the PR to resist making a distribution to beneficiaries until after the accounting has been approved and the estate closed because until that point in the administration of the estate, there could be additional expenses incurred by the PR even if all the claims to date have been paid. If the PR makes final distribution prior to the approval of the final accounting, there will be no assets left in the event exceptions/objections to the final accounting are filed. If the PR is unable to claw back any of the distributed assets, he/she may be personally responsible for any additional costs.

Distribution usually occurs at least 8 months after the decedent's death and within one year of opening the estate. 12 *Del. C*. § 2311. Assets are rarely distributed before the 8-month creditor claim period expires to avoid creditor issues and the personal representative's exposure to personal liability. Specific bequests must be paid within 13 months of the date of letters or the estate will owe the recipient interest on the bequest. 12 *Del. C.* § 2312(c). Specific bequests made in a revocable trust should be paid within 13 months of decedent's death, otherwise the trust will owe the beneficiary interest. 12 *Del. C.* § 3593.

Partial distributions to beneficiaries can be tricky. Before making partial distributions to the residuary beneficiaries all specific bequests should be made. In addition, if partial distributions are needed then partial distributions should be made to all of the residuary beneficiaries in proportion to the residuary beneficiaries' interest. If partial distributions are not made to all of the residuary beneficiaries in proportion to each beneficiary's interest in the residue there may be unintended income tax consequences. The beneficiary who receives the partial distribution will pay income tax on a greater share of the estate's income.

2. Method of Distribution

Distributions can be made 'in-kind' or assets can be sold and distributions made in cash. The personal representative determines how distributions should be made. Selling assets and distributing cash to the beneficiaries is simpler, but not always preferred.

3. Receipt, Release, and Indemnification Agreements.

Receipt, Release, and Indemnification Agreements should be signed by the beneficiary prior to distributions being made. By signing the Agreement, the beneficiary is acknowledging that the property is being distributed to the beneficiary, releasing the personal representative (and sometimes the attorney) from all liability connected with the administration of the estate, and agreeing to refund the estate, up to the amount of the distribution, the beneficiary's share of any liability that arises after the distribution is made.

Sample Receipt, Release, and Indemnification Agreements for partial distributions, specific bequests, charitable distributions, distributions of tangible personal property, and final distributions are included in the materials for your reference.

4. Abatement and Partial Intestacy

Once it is finally time to make final distribution to the beneficiaries, such distribution must be made in accordance with the terms of the decedent's will or, if there is no will, the intestacy statute as discussed below. Whether or not any property had to be sold during the estate administration to pay claims against the estate will certainly affect the final distribution. When estate property must be sold in order to pay debts of the estate, personal property is generally sold before real property and both types typically abate in the following order: i. property not disposed of by the will; ii. residuary bequests and devises; iii. general bequests and devises; iv. specific bequests and devises. Of course, if the terms of the will include an alternate order of abatement, the will is controlling. Prior to making final distribution, it is advisable for the PR to obtain releases from the beneficiaries.

In the event that a decedent (i) does not have a will; (ii) has a will that does not cover all of the decedent's assets or (iii) has a will that was successfully contested and no prior will exists, his/her probate assets will pass according to Delaware's Intestacy

Statute (12 *Del. C*. §§ 502 and 503). Under the Intestacy Statute, the ultimate heir(s) of the decedent's estate will depend on whether or not there is a surviving spouse, issue, surviving parents and/or siblings and the decedent's estate will pass in order of the preferences set forth in such statute on a per stirpal basis. In extreme cases where the decedent has no surviving kindred of any degree, the decedent's estate will the escheat to the state.

5. To the extent there is a surviving spouse, the intestate share of the surviving spouse is set forth in 12 *Del. C.* §502:

a. If the decedent has no surviving issue or parents, then the entire intestate estate passes to the surviving spouse;

b. If the decedent has no surviving issue, but is survived by a parent or parents, the surviving spouse receives the first $50,000.00 of the intestate personal estate, one-half (1/2) of the balance of the intestate personal estate and a life-estate in any intestate real estate;

c. If the decedent has surviving issue, all of whom are also issue of the surviving spouse, the surviving spouse receives the first $50,000.00 of the intestate personal estate, one-half (1/2) of the balance of the intestate personal estate and a life-estate in any intestate real estate; or

d. If the decedent has surviving issue, one or more of whom are not issue of the surviving spouse, the surviving spouse receives one-half (1/2) of the balance of the intestate personal estate and a life-estate in any intestate real estate.

6. The portion of the intestate estate that does not pass to the surviving spouse pursuant to §502 or the full intestate estate in the event there is no surviving spouse will pass as determined by 12 *Del. C.* §503 and set forth below:

a. To the decedent's issue, per stirpes;

b. If no surviving issue, to the decedent's parent or parents equally;

c. If there are neither surviving issue nor surviving parents, to the decedent's siblings and the issue of any predeceased siblings, per stirpes;

d. If there are no surviving issue, parents or issue of either parent, then to the decedent's next of kin and the issue of any predeceased next of kin, per stirpes.

7. <u>Minors</u>.

If the decedent's will directs how distributions to minors should be made follow the directions in the will. If there are no directions or the decedent died intestate distributions to minors should be made in accordance with the Delaware Uniform

Transfers to Minors Act – 12 *Del. C.* Ch. 45.

The personal representative may designate a custodian for the minor if a custodian is not appointed in the will or the appointed custodian is unable to serve. 12 *Del. C.* § 4505.

Transfers are made to "John Public as custodian for Child Public under the Delaware Uniform Transfers to Minors Act." 12 *Del. C.* § 4509.

III. ETHICAL ISSUES

Resources

1. Delaware Lawyers' Rules of Professional Conduct

2. ACTEC Commentaries on the Model Rules of Professional Conduct – available online at www.actec.org/publications/commentaries/

3. Delaware State Bar Association Committee on Professional Ethics – www.dsba.org/publications/ethics-opinions-index/

4. Principles of Professionalism – adopted by the DSBA and the Delaware Supreme Court

5. The ABA devotes substantial materials to ethics, including ETHIC Search, the ABA Ethics Research Service, on its website, www.americanbar.org

A. Who Is the Client?

Generally speaking, the lawyer representing an executor or trustee represents that person in his or her fiduciary capacity. The DSBA Committee on Professional Ethics opined on this issue several years ago. In its Opinion 1989-4, it concluded:

> … under Delaware law the term "estate" merely refers to the aggregate property interests of a decedent and is not a separate legal entity with its own legally cognizable interests. Therefore, we are of the view that while in common usage an attorney is said to represent "the estate," in fact he or she represents the executor in the management of that estate…
> DSBA Ethics Opinion 1989-4.

The lawyer does not represent the individual interests of beneficiaries, although the lawyer owes the beneficiaries certain duties. *Riggs Natl Bank of Washington, DC v. Zimmer*, 355 A.2d 709, 714 (Del. Ch. 1976) ("The fiduciary obligations owed by the attorney at the time he prepared the memorandum were to the beneficiaries as well as to the trustees.")

The ACTEC Commentaries on the Model Rules of Professional Ethics, 5th Edition ("the Commentaries") discuss the duties that the attorney owes to the beneficiaries in its comments to Rule 1.2, stating:

> The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate although he or she does not represent them. The duties, which are largely restrictive in nature, prohibit the lawyer from taking advantage of his or her position to the disadvantage of the fiduciary estate or the beneficiaries. In addition, in some circumstances the lawyer may be obligated to take affirmative action to protect the interests of the beneficiaries. The beneficiaries of a fiduciary estate are generally not characterized as direct clients of the lawyer for the fiduciary merely because the lawyer represents the fiduciary generally with respect to the fiduciary estate. The scope of the representation of a fiduciary is an important factor in determining the nature and extent of the duties owed to the beneficiaries of the fiduciary estate.

When communicating with beneficiaries, it is strongly suggested that the lawyer notify the beneficiaries that he or she does not represent their individual interests, and that they may want to obtain independent counsel; failure to do so could be deemed malpractice.

Suggested language for letter to beneficiaries:

> "As you know, our firm represents your sibling, John, in his capacity as executor of your mother's estate and as trustee of her trust. Copies of both her Will and her Restated Revocable Trust U/A 0/00/0000 are enclosed for your records.
>
> We are writing to all of you at this time to formally notify you of our representation. Since you are beneficiaries of the estate and trust, Delaware rules require us to clarify the nature of our representation to avoid any confusion. Although our firm represents John in his fiduciary capacity as executor and trustee, we cannot represent any beneficiary in matters involving the estate or trust, nor can we advise you about your rights in the estate or trust. This does not mean that we cannot provide you with information. While our communications with John are confidential, he has authorized us to provide all the beneficiaries with information relevant to their respective interests."

B. Attorney-Client Confidentiality

1. The Deceased Client. Your ethical obligation of confidentiality continues even after the death of a client. A lawyer cannot disclose confidential information following the client's death without authorization (by the client during lifetime or by personal representative following the client's death). When you have authorization to disclose confidential information disclosures should ordinarily be limited to information that the lawyer would be required to reveal as a witness in a judicial proceeding. Purposes for which information may be given include forestalling litigation, preserving

assets, and furthering family understanding of the decedent's intention.

2. The personal representative of a deceased client can claim attorney-client privilege. See DE Rule of Evidence 502(c).

Note, there is an exception to attorney-client privilege in some instances for people who have a claim to an estate either through intestate or testate succession or inter vivos transaction. See DE Rule of Evidence 502(d)(2). You should keep this possibility in mind when you are papering your file.

3. The Fiduciary.

a. The Fiduciary Exception. There are exceptions to the attorney-client privilege when you represent the fiduciary. In *Riggs Natl Bank of Washington, DC v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976), the Court of Chancery compelled the production of a legal memorandum prepared by the trustee's attorney over the trustee's objections based on attorney-client privilege and the attorney work product privilege. The memo was based on communications between the trustee and his attorney and was not prepared in contemplation of litigation. At 711-712. The trust paid the attorneys' fees related to the preparation of the memo. At 712-713. The Court found that the attorney's legal services were for the benefit of the trust beneficiaries and that trustee's fiduciary duty to the beneficiary required that the memo be produced. *Id*.

The source of payment of legal fees is no longer a primary factor in whether the communications are protected under the attorney-client privilege doctrine. 12 *Del. C.* § 3333(a) provides that when the trustee pays the attorneys out of the trustee's own funds, the communications are deemed to be protected by attorney-client privilege. However, the attorney client privilege protection may still be defeated. In *J.P. Morgan v. Fisher*, the Court of Chancery found that 12 *Del. C.* § 3333 did not overrule the holding in *Riggs*.

The fiduciary exception does not apply to attorney client communications in preparation for and during litigation defending claims against the fiduciary (12 *Del. C*. § 3333(b)).

The fiduciary exception is not the rule in all states. State law varies considerably on this matter.

b. Successor Fiduciaries. A successor fiduciary can claim the attorney-client privilege between the former fiduciary and the attorney. See generally *In re Estate of Catherine M. Fedor*, 811 A.2d 970 (N.J. Super. Ct. Chanc. Div. 2001) and *Moeller v. Superior Court*, 947 P.2d 279 (1997)

C. Attorneys' Fees

Rule 1.5 imposes a reasonableness standard for fees, based on certain enumerated factors (e.g., time and labor involved, novelty and difficulty, amount involved and results obtained, etc.); R.l.5(b), requires attorneys to communicate to the client, preferably in writing, the scope of the representation and the basis or rate of fees and expenses.

For estate administration fees, guidance can be found in Delaware Chancery Court Rule 192, which enumerates a similar list of factors:

Rule 192 expressly authorizes attorney's fees based on hourly rates, the value of the probate estate, and the value of the taxable estate, subject to the reasonableness requirement.

Prior to 1996, Rule 192 provided that attorney's fees and executor's commissions be calculated based on the value of the "commissionable estate" and a fixed percentage set by the Rule. Court approval was needed for fees exceeding the maximum fee permitted by the schedule. Occasionally, attorneys still use the old Rule 192 fee structure when determining his or her fee. Although not unreasonable on its face, you should use caution in setting fees based solely on the old Rule 192 fee structure and be able to justify the fee under the current Rule 192 and the factors enumerated in Rule 192(b).

When defending a challenge to the appropriateness of attorneys' fees, the attorney cannot charge the estate or trust for the fees and costs incurred in such defense.

D. Miscellaneous Ethical Issues

1. Withdrawing Representation and Bad Fiduciaries

What about situations in which a lawyer wishes to decline or terminate the representation? MRPC Rule 1.16 distinguishes between mandatory and permissible non-representation. The ACTEC Commentaries to Rule 1.16 provide:

> Mandatory Withdrawal/Prohibited Representation. A lawyer should never accept representation of a client or, having commenced the representation, continue same, unless the lawyer can perform the required work; can avoid conflicting interests; and is not physically or mentally impaired from diligently completing the representation.
>
> Also, the representation must not result in the violation of any Rule of Professional Conduct applicable to the lawyer or any other law applicable to either the lawyer or the client. The most common problems facing the estates and trusts lawyer in this regard include conflicts of interest arising after the representation of joint clients (e.g., husband and wife) has commenced and the misconduct of a fiduciary client who either refuses to follow the lawyer's advice or, having breached a fiduciary obligation owed to others, refuses to correct the matter. The lawyer's withdrawal is mandatory when the lawyer's own conduct will violate a Rule of Professional Conduct or a law if the lawyer continues the representation.
>
> Finally, a lawyer must always withdraw from a representation if the lawyer is discharged by the client (whether with or without cause). If the client has diminished capacity, the lawyer should consider whether the client has the requisite capacity to terminate

the representation and whether the lawyer can or should take actions authorized by MRPC 1.14 (Client with Diminished Capacity) to protect the client and the client's interests.

Permissive Withdrawal. Withdrawal is permissive in most (but not all) jurisdictions if it is the client's conduct that will violate the law, although a lawyer may never assist the client in violating the law or breaching any fiduciary obligation. When a lawyer withdraws from representation, the duty of confidentiality imposed by MRPC 1.6 (Confidentiality of Information) continues, although, if the representation involves judicial proceedings, the lawyer may be required to explain the withdrawal to the court. See ACTEC Commentary on MRPC 1.6 (Confidentiality of Information). Applicable state law and ethics opinions should always be consulted to determine the nature and extent of the disclosures, if any, mandated or permitted to be made by the withdrawing lawyer to the court or other parties.

A lawyer may withdraw from the representation of a client whenever withdrawal can be effected either without material adverse effects on the interests of the client or for one or more of the reasons stated in MRPC 1.16(b). Common instances in trust and estate practice justifying permissive withdrawal include (1) a fiduciary client's insistence on engaging in misconduct, as explored in the prior paragraph; (2) a lawyer's discovery that a fiduciary client has used the lawyer's services to engage in misconduct; (3) an estate planning client wishes to pursue an estate plan which the lawyer finds repugnant; (4) the client fails to timely pay the lawyer's bill and has been given reasonable warning in advance of the withdrawal that the lawyer will withdraw unless the obligation is fulfilled; (5) an executor persists in failing to provide the lawyer with information or take other action required to enable the lawyer to provide the legal services called for; or (6) other "good cause" exists (often involving mutual antagonism between lawyer and client and the breakdown of the lawyer-client relationship). See ACTEC Commentary on MRPC 1.4 (Communication), particularly Dormant Representation and Termination of Representation

When withdrawing representation, the lawyer must take "reasonably practicable" steps to protect the client's interests, such as giving adequate notice, giving the client time to employ alternative counsel, refunding unearned fees and returning the client's property and papers.

Does the withdrawing attorney also need to take "reasonably practicable" steps to protect the estate? If the personal representative has committed a breach of his or her fiduciary duties or committed a crime are there additional steps that the withdrawing attorney must take? Does the attorney have a duty to inform the beneficiaries of the estate of the misconduct? What about the Register of Wills or local law enforcement?

While the withdrawing attorney may have some duties to the estate and its beneficiaries, the fiduciary is the client. The withdrawing attorney must consider his or her duties to the former client (Rule 1.9), the duty of confidentiality (Rule 1.6), the scope of the representation and previous communications with the beneficiaries (Rule 1.2), and the duty of candor toward the tribunal (Rule 3.3) before disclosing the personal representative's misconduct.

The Delaware State Bar Association Committee on Professional Ethics Opinion 1992-2 (the "Ethics Opinion 1992-2") provides some guidance in this area, although the opinion is only advisory. A copy of the Ethics Opinion 1992-2 is included in the

materials.

In Ethics Opinion 1992-2, the personal representative misused estate funds for her own personal use. As a result the estate had insufficient funds to pay the creditors and the beneficiaries were harmed. The bank statements evidenced her theft and she confessed to the attorney. The attorney withdrew from representation, but the successor personal representative wanted the attorney to represent her and finish the estate work. The committee opined that the attorney could represent the successor personal representative provided that the original personal representative consented or the attorney referred the estate's claim against the original executor to an independent attorney. The committee further opined that the attorney could not share documents evidencing the original personal representative's theft with the police, but could share those documents, but not the original personal representative's statements, with the successor personal representative since the documents were estate records.

Ethics Opinion 1992-2 did not address the attorney's duty of candor towards the tribunal under Rule 3.3; however, it can be an issue. The Register of Wills is a judicial officer. See Delaware Constitution of 1987 Article IV, § 1, 21, and 22 and 12 *Del. C.* § 2501.

2. Limiting Liability Rule 1.8(h)(1)

A lawyer shall not make an agreement **prospectively** limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement. Rule 1.8 (h).

3. Safekeeping Property - Rule 1.15

This rule explains an attorney's obligations when holding a client's property, and generally governs client funds that are held in trust or escrow. However, it is also applicable to the estate planning practice in situations where the attorney holds the client's original estate planning documents for safekeeping and in the estate administration context when the attorney holds original stock certificates, savings bonds or other estate property.

The rule requires that property "be identified and appropriately safeguarded." The documents should be stored in a manner that keeps them safe from fire and theft, and allows the documents to be easily located and retrieved. My office uses two separate systems to track original documents that are stored in our vault – an index card catalog and an Excel database. We also stamp the fist page of the copies of the documents that are given to the client, so that it is easy for the client and the client's agent or fiduciary to locate the original document.

ACTEC commentaries to Rule 1.8 suggest that the attorney confirm in writing that the attorney is holding the original. This can be done with a confirmatory letter to

the client after the documents are executed, or by having the client sign a receipt. If original client documents are returned to the client you should always have the client sign a receipt; it protects you if the client loses the original documents.

4. Serving as a Witness Rule 3.7

In a will contest matter, the attorney who drafted the estate planning documents is generally called as a fact witness at trial. Therefore the drafting attorney cannot serve as the litigation attorney defending the will contest. *Estate of Waters*, 647 A.2d 1091 (Del. 1994).

5. Multi-Jurisdictional Practice of Law Rule 5.5

This issues arises more frequently in the estate planning context than it does in an estate administration practice.

Note, however, that an attorney must be admitted to the Delaware Bar and be able to practice in the Supreme Court of Delaware in order to represent an executor before the Register of Wills. Court of Chancery Rule 188(a). As such, the attorney must have a physical office located in the State. Delaware Supreme Court Rule 12(a).

IV. COMMON ESTATE DISPUTES

While the administration of most estates proceeds without incident, various disputes and litigation can and do arise on a regular basis. In Delaware, estate disputes are heard by the Court of Chancery ("Chancery Court"). While in the past, many estate disputes were initially filed through the Register of Wills ("ROW"), Rule 207 of the Chancery Court Rules provides that petitions which concern estates of decedents and that require judicial action by the Chancery Court are to be filed as civil actions with the Chancery Court.

A. Will Contests/Caveats. Will contests (petition for review of proof of will, 12 *Del. C*. §1309) and caveats (12 *Del. C*. §1308) are increasingly common causes of action in the Chancery Court. Such cases are initiated by the filing of a petition directly with the Chancery Court. A will contest is filed after the will at issue has been admitted to probate, within 6 months after the grant of letters. A caveat is filed prior to the will's admission to probate. In such litigation, the most common claims are that the decedent lacked testamentary capacity and/or was unduly influenced to execute the will at issue. Other claims often include that the will was not executed with the necessary testamentary formalities required by Delaware law or that the will is a forgery. Challenges against wills are difficult to litigate. Emotions of the parties often run very high which can make finding an amicable resolution extremely difficult.

B. Removal Actions. If the beneficiaries are not pleased with the performance of the PR in administering the estate or if there are allegations of breaches of his/her fiduciary duties, they may petition the court to remove the PR and replace him/her with another party. Such an action is initiated with the filing of a petition with the Chancery Court. Generally, for a removal

action to be successful, the petitioner must show that the PR is precluded from serving pursuant to 12 *Del. C.* §1508 or has breached his/her fiduciary duties or is hostile to the beneficiaries in some respect.

C. Elective Share Petitions. Pursuant to 12 *Del. C.* §901, a surviving spouse may choose to take an elective share of the decedent's estate rather than what they are left in the decedent's will or if they are not included in the will. The spousal right to an elective share basically prevents a decedent from disinheriting his/her spouse. Such an action is initiated with the filing of a petition with the Chancery Court within 6 months from the granting of letters. The calculation of an elective share can be complex and takes into consideration property and assets that are not otherwise subject to probate. A spouse can waive his/her right to seek an elective share and such a waiver is commonly found in pre or post nuptial agreements. Additionally an elective share may be defeated in the event a decedent transferred property to a trust.

D. Exceptions to Inventory and/or Accounting. Exceptions to an inventory and/or an accounting are also a frequent source of litigation. These actions are initiated by the filing of exceptions a/k/a objections (usually by a beneficiary) with the ROW in response to the inventory and/or accounting filed by the PR for the decedent's estate. The case is litigated before the Chancery Court. These cases often include allegations that the estate inventory does not include all of the decedent's assets and/or the estate was not administered properly. A major area of contention found in exception relates to the commission charged by the PR and the expenses for which he/she requests reimbursement as well as other administrative expenses paid from the estate.

E. Petition to Sell Real Estate. To the extent claims against the estate are in excess of the value of the personal (tangible & intangible) property and if the decedent's will does not include a direction to sell real estate, a PR may file a petition to sell real estate with the Chancery Court in order to pay debts of the estate.

F. Petitions for Decree of Distribution. In the event the PR is faced with conflicting claims to estate assets, he/she may file a petition for decree of distribution in accordance with 12 *Del. C.* § 2331. The petition may also be filed by someone claiming to have an interest in the decedent's estate. This situation also commonly arises in estates where the terms of the decedent's will are ambiguous or contain conflicting dispositive provisions. Such a petition may also be warranted in an estate where it is unclear as to the identity of the actual heirs of the decedent's estate or if there is some question concerning the appropriate law to apply.

G. Petitions to Determine the Order of Preference of Creditors. 12 *Del.C.* § 2106 sets forth an order of preference of claims against the estate. A personal representative may file such a petition with the Chancery Court in the event he/she is unable to determine the correct order of preference to be given between 2 or more creditors.

H. Jointly owned bank accounts. "[T]wo methods exist for commencing a civil suit in the Court of Chancery: file a complaint under Rule 3; or open a joint bank account." *Speed v. Palmer*, 2000 WL 1800247 n.2 (Del. Ch. 6/30/2000).

I. Miscellaneous. In addition to the above, there are a host of other issues that may arise for which the filing of a petition may be necessary. Petitions to compel return of assets, petitions to compel an accounting, petitions for admission of a copy of a decedent's will to probate, and other similar petitions may need to be filed with the Chancery Court during the administration of the decedent's estate. Estate matters are initiated by the filing of a petition or a complaint pursuant to Chancery Court Rule 3 and require a verification to be signed by the petitioner/claimant. Additionally, a summons must be issued and service of process made according to Chancery Court Rule 4. Generally, estate matters are litigated according to the Chancery Court Rules as any other litigation case. To the extent an aspect of probate procedure is not prescribed by a statute or court rule, Chancery Court Rule 205 provides that the procedure shall conform to the general practice of the Chancery Court or as the Court may proceed in any lawful manner.

The Register of Wills Office

And

The Fundamentals of Delaware Probate

By:
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Joseph Bosik IV, Director, Gordon, Fournaris & Mammarella, P.A.

I. Preparing to Open the Estate

A. Opening Petition

1. Required information: Pertinent information about the decedent, the Petitioner, and the decedent's next of kin

a. Date of death. This date will determine the creditor's claim period (eight months from death). 12 Del.C.§ 2105. If the decedent died in testate, this date will determine who has the "right of first refusal" and whether renunciations will be required. 12 Del.C.§ 1505(d).

b. Manner of appointment as personal representative: testacy or intestacy

i. Testacy.

(a) Is there an original will? *See Putney v. Putney*, 487 A.2d 1125, 1127 (Del. 1984)(recognizing that a missing original will is presumed to be destroyed *animo revocandi* by the testator). Copies of wills cannot be accepted in lieu of original Wills because the absence of the original Will imposes a rebuttable presumption that the testator destroyed the original Will as means of revocation of that Will. To rebut the presumption of revocation, the proponent of the copy of the Will must petition the Court of Chancery for an Order admitting the copy in lieu of the original Will. *In Re Estate of Heigle*, 2007 WL 1532287, at * 1 (Del.Ch. May 7, 2007) M. Glasscock ("To overcome the presumption of revocation, the party seeking to establish the validity of the missing will must show that: (1) a valid will was executed by the decedent; (2) the terms of the missing will; and (3) the will was lost or unintentionally destroyed and that the decedent's testamentary intent was not altered prior to his death.").

(b) Is the original will properly executed? It is not enough that the document says "Last Will and Testament" in bold letters at the top. It must be property executed (signed by the testator and two witnesses). 12

Del.C. 202. *But see In Re Will of Russell Carter*, 569 A.2d 933 (Del. 1989)(holding that a will can be deemed validly executed when the testator signed the self-proving affidavit but not the will).

(c) Who is the named executor in the will? Only the named executor can apply for letters testamentary. If the named executor does not handle the estate, a renunciation is required **before** someone else can handle the estate.

(d) Republication by Codicil. By statutory definition, an original codicil is an original Will. See 1 Del.C. § 301(22)("'Will' means 'last will and testament' and includes 'codicil'."). Delaware law recognizes the common law doctrine of republication by codicil. See *Sloan v. Segal et al.,* 2009 WL 1204494, at * 12 n. 67 (Del.Ch. Apr. 24, 2009) V.C. Strine. Therefore, when an original codicil is filed along with only a copy of the Will identified in the original codicil, the Register of Wills accepts the original codicil along with the copy of the Will, as the original codicil's republication of the copy of the earlier Will, but only if the codicil expressly and unambiguously states an intent to republish the Will identified in the codicil (i.e., "I hereby amend my Will dated January 1, 2014" as opposed to "I hereby amend my last Will" without any further context to confirm which Will was the "last" Will).

(e) Scrivener's Affidavit Cannot Graft Omitted Text Onto a Will. Delaware is not among the minority of jurisdictions that have adopted Restatement (Third) of Property: Wills & Other Donative Transfers § 12.1 (2003), which provides:

> A donative document, though unambiguous, may be reformed to conform the text to the donor's intention if it is established by clear and convincing evidence (1) that a mistake of fact or law, whether in expression or inducement, affected specific terms of the document; and (2) what the donor's intention was. In determining whether these elements have been established by clear and convincing evidence, direct evidence of intention contradicting the plain meaning of the text as well as other evidence of intention may be considered.

The decision of *IMO Estate of Benjamin Daland*, C.A. 2920-MA (Del.Ch. Feb 15, 2010), expressly declined to adopt Restatement Section 12.1, on the grounds that "it is not within the court's power to insert additional language in the will to correct an alleged mistake of omission."

If a will contains a true drafting error (as distinguished from a mistake of omission), a scrivener's affidavit may be filed with the Register of Wills,

but only to the extent necessary to clarify and correct patent or latent ambiguities. A patent ambiguity arises when the error is evident from the content of the will itself (for example, a will executed in 1986 bequeaths a "my 1994 Porsche" but the testator owned a 1984 Porsche at the time of execution). A latent ambiguity arises when the error in the will is only evident upon considering extrinsic evidence (for example, a will bequeaths property to "my nephew John" and extrinsic evidence confirms that two of the testator's siblings each had a son named John). A scrivener's affidavit can be docketed with the Register of Wills in the foregoing instances, but only to the extent necessary to put the drafting error into context and explain how the error should be corrected.

A scrivener's affidavit cannot be filed to supplement text that may have been inadvertently omitted from the drafting of the will. If the drafter inadvertently omitted a residuary clause, a scrivener affidavit cannot supply the omitted residuary clause. If the drafter inadvertently omitted a beneficiary, a scrivener affidavit cannot supply the name of the omitted beneficiary.

ii. Intestacy.

(a) The family tree. If there is no will, the statutory order of preference is set forth in 12 Del.C. § 1505, and the date of death is determinative. For the first sixty days following death, the family tree is the pecking order: priority will be hierarchically given to the following classes: (i) spouse of the decedent; (ii) children of the decedent; (iii) parents of the decedent; (iv) siblings of the whole blood and half-blood of the decedent. If there is more than one individual in the class, letters will be granted to all in the class who do not renounce and are not incapacitated. Renunciations will be needed in order to override this pecking order.

(b) Beware of subsequent testacy. If an estate is opened as an intestate estate, but the decedent's will is belatedly discovered after the estate has been opened, letters of administration will be automatically revoked when the executor named in the belatedly discovered will applies for letters testamentary. See 12 Del.C. § 1542.

c. Type of appointment (five categories of letters)

i. Letters Testamentary – named executor seeking letters

ii. Letters of Administration – no will to name an executor, so authority to administer the estate is derived from 12 Del.C. § 1505

iii. Letters of Administration with Will Annexed – there is a will, but for some reason the executor cannot administer the estate (e.g., is dead, is disqualified by a felony conviction, chooses not to

administer). The Will is annexed because it governs the administration of the estate, but the Will does not confer the administrator's authority to administer the estate, and so letters testamentary cannot be issued.

iv. Successor Letters – the administrator is taking over for someone who was previously appointed (e.g., personal representative died, resigned before completing the administration, was removed by the Court for neglect of duties)

v. Letters of Ancillary Administration (Exemplified opening documents from domiciliary jurisdiction are needed)

d. Ancillary administration and a note on domicile. The domicile of the decedent at the time of death will determine which jurisdiction will be the primary jurisdiction in the event that an estate is administered in more than one jurisdiction. *See New York Trust Co. v. Riley,* 16 A.2d 772, 785-86 (Del. 1940), aff'd 315 U.S. 343, reh. den., 315 U.S. 829 ("While there may be two [or more] administrations in the same estate, the one domiciliary, the other ancillary, the principal administration or appointment must be that place where the deceased had her last domicile [and] the administration had at the domicile of the decedent is to be regarded as the principal administration, and that all other administrations, granted by reason of personal assets found in a state foreign to that of the domicile, are regarded as subordinate or ancillary."). The Register of Wills evaluates domiciliary/primary jurisdiction to open an estate in New Castle County based on the following guidelines:

i. Whether the decedent resided in New Castle County

ii. Whether the decedent owned personal property in New Castle County

iii. Whether the decedent owned real property in New Castle County

iv. Whether the decedent was involved in some cause of action that gives rises to a tort in Delaware (such as an automobile collision or toxic tort suit in which the corporate defendant is incorporated in Delaware)

v. Whether the decedent had some nexus in Delaware that in light of the specific circumstances is approved by the Register.

e. Felony conviction. A convicted felon can become a personal representative only under very narrow circumstances. Such narrow circumstances are guided by the statutory prohibition against issuing letters to anyone convicted of a crime that disqualifies from taking an oath. 12 Del.C. § 1508. The Delaware Court of Chancery held that "[t]he kind of crime that disqualifies one from taking an oath is an infamous crime." *In Re Estate of Jackson*, RW Folio 99783, 1992 WL 1368644, *2 (Del.Ch. Jan. 18, 1993) Kiger, M. (internal citations omitted). A felony conviction per se is not necessarily an infamous crime. *State ex rel Wier v. Peterson*, 369 A.2d 1076, 1076 (Del. 1976)("Not every felony is necessarily a crime of infamy; on the contrary, the totality of the circumstances in each case must be examined before a determination may be made that a specific felony is infamous.").

Rather, the following two-prong inquiry guides the determination of whether a felon's crime is infamous, and therefore, a disqualification from administering an estate: (1) the purpose of excluding those convicted of the crime at issue, and (2) the type and circumstances of the crime committed. *IMO Estate of Trammell*, RW Folio 271-S, 2010 WL 692328, at *1 (Del.Ch. Feb. 9, 2010)(Glasscock, M.), *affirmed* sub nom., 7 A.3d 485 (Del. 2010)(table).The balance of equities must overwhelmingly be in the petitioner's favor. It is incumbent upon the petitioner to present a justification for why the petitioner's criminal conviction does not involve a crime that should disqualify from administering an estate.

f. Names and addresses of next of kin. A complete list of the next of kin enables the Register of Wills to (i.) ascertain who has standing to challenge a Will, (ii.) assure notice to all possible beneficiaries in the event of per stirpeal descendancy for lineal descendants who pre-decease the intestate decedent or inherit a lapsed testate bequest, (iii.) confirm the identity and number of class members of class gifts (e.g., "divided among all of my nephews"), and (iv.) provide a reliable cross-reference of consanguinity for the genealogical community.

B. Rule 190 Application and Affidavit: the client's portion and the attorney's portion

1. Client's Rule 190 Affidavit: Document attesting to the fact that the information contained in the Opening Petition is accurate. This is the oath that the client would have taken if he/she personally appeared at the office of the Register of Wills.

2. Attorney's Rule 190 Application: Document signed by the attorney for the estate attesting to the fact that the attorney represents the Petitioner and is licensed to practice in Delaware; obviates the need for the Petitioner to personally appear at the Register of Wills Office.

C. Trust Inquiry Form. Why is it necessary? Completion of the Trust Inquiry Form is necessary because the Register of Wills must notify the Register in Chancery of the name and address of the trustee of any testamentary trust in which there will be funds available upon closing the estate. See 12 Del.C. § 3538(a). When there is a Will, the Trust Inquiry Form inquires whether the Will creates a trust. If the Will does create a trust, the Trust Inquiry Form further inquires as to whether there will be funds available for the trust upon the closing of the estate. If the Will does create a trust and there will be funds available for that trust upon the closing of the estate, the Trust Inquiry Form requires the name and address of the trustee of that trust, so that the Register of Wills may fulfill its obligation to the Register in Chancery.

D. Foreign Power of Attorney. Is the personal representative a Delaware resident? If not, *see* 12 Del.C. § 1506. If the petitioner resides outside of Delaware (including any entity personal representative incorporated outside of Delaware), the petitioner must appoint the Register as his or her irrevocable power of attorney to accept service of process, including accepting of all notices and process issued by any court in the State of Delaware in relation to any suit, matter or cause affecting or pertinent to the estate in which the letters are issued. Thereafter, all process served on the Register of Wills will be forwarded by certified mail to the personal representative. ****__**Please note**__ that creditors' claims will not be forwarded to non-resident personal representatives, because the procedure for creditors' claims is separately prescribed by 12 Del.C. § 2104(a) and Chancery Court Rule 191, which are uniformly applicable to all decedent's estates in Delaware, without regard to the residence of the personal representative.

E. Opening Costs Worksheet. A case information sheet that provides all necessary information that will enable the prompt processing of the opening petition. Because the Register of Wills is a clerk of the Court of Chancery, 12 Del.C. § 2501, this requirement is modeled upon the requirement of the similar case information sheet that is filed for each new matter initiated with the Register in Chancery. The case information sheet is also the document by which the Register of Wills determines and dockets statutory fees. As to fees, it is the general policy that all fees, except closing costs, are to be paid up front at the time the petition is filed.

F. Ancillary documents to consider when opening an estate.

1. Small Estate Affidavit: Does the estate even need to be opened? Formal probate is not required unless the decedent solely owned real property (or some portion thereof as tenant in common) in his or her name alone and/or had solely held assets the value of which exceeds $30,000. See 12 Del.C. § 2306 and Section IV.C. *infra.*

2. Joint Property Affidavit/No Estate Tax Affidavit/Combined Affidavit: Can jointly owned property be transferred to the surviving joint owner without probate? The proper affidavit to be filed is dependent upon the decedent's assets; Delaware's estate tax exemption currently mirrors the federal

exemption ($5,490,000 per person). **Please note** that if an estate is opened, the opportunity to file a joint property affidavit is forfeited, even if the decedent's real estate was jointly owned with right of survivorship and there are no other solely held assets. See 12 Del.C. § 1905(e). In other words, once you open, you have to also close.

3. Extension Request: File if you will be unable to meet the statutory deadlines; can generally request an extension of up to 6 months from the due date of the Accounting.

II. Filing the Inventory of the Estates Assets

A. General Rules – 12 Del.C. § 1905

1. Valuation: Assets are valued as of the decedent's date of death, including accrued income. This value becomes the estate/trust/ beneficiary's basis in the property. Values on the inventory will carry over to the accounting when calculating the net personal estate upon which the closing costs (1.75%) will be imposed.

2. Appraisals. Not required but generally advisable for "hard to value" assets such as real property, closely held business interests, and tangible personal property.

3. Stocks and bonds. The date of death value is the average of high/low values on date of death. Permutations of this rule require that for deaths occurring on a weekend or holiday, the mean of means is used. There are also software programs that can compute these values.

B. The Components of the Inventory – what is listed on Schedules A through E.

1. Schedule A - Real Property: Although reported on the Inventory, real property is not generally a probate asset. Under Delaware law, title to real property vests in the beneficiary at the moment of death, subject to being divested to pay debts and expenses of the estate. Schedule A serves to transfer title to the beneficiary.

   a. Conversion to personal property when there is a direction to sell real estate in the will. See *In Re Estate of Morrell*, 1995 WL 783075,at *4 (Del. Ch. Dec. 26, 1995). The direction is what converts realty to personalty. (Note the legal distinction between "direction to sell" and "authorization to sell". They are not synonymous.) Property must be sold and proceeds must be applied to pay debts and expenses of the estate. See 12 Del.C. § 2701.

b. Court Petition - personal representative must petition the court to sell real property when no authority to sell under the Will or decedent dies intestate. This can be petition filed either by the personal representative (12 Del.C. § 2701) or by a creditor of the estate who awaits payment (12 Del.C. § 2702).

2. Schedule B - Stocks and Bonds: Includes more than paper certificates; also report brokerage accounts, bond portfolio, etc. on this Schedule C.

3. Schedule C - Mortgage, Cash, and Notes: Here, mortgages refer to mortgages under which the decedent was the mortgagee/lender (money owed to the decedent that remained outstanding as of the date of the decedent's death, and therefore, imputed to the decedent as an asset). The word "mortgage" on Schedule C does not refer to deductions for mortgage payments for which the decedent was the mortgagor/borrower.

4. Schedule D - Joint Property: Like real estate, joint property is not property since title vests in the joint owner(s) by operation of law. It still needs to be reported on Schedule D, as Schedule D is transmitted to the real estate tax assessment authorities to update the tax records.

5. Schedule E - Miscellaneous: This includes household goods and furnishings, vehicles, business interests, etc. No appraisal is necessary when reporting and valuing such contents to the Register of Wills. This schedule also includes payable on death benefits for whom there is no living beneficiary. If the benefit is payable to "Estate of DECDENT", it is listed as an asset on Schedule E.

III. The Accounting and Closing Documents Filed with the Register of Wills

A. *The Accounting*

1. An Accounting is required to be filed every year from the date that letters are issued until the estate is closed. 12 Del. C. § 2301(a). However, for sufficient cause, the Register of Wills may extend the due date for the filing of the Accounting up to six (6) months. 12 Del. C. § 2301(c).

2. Begin with the value of "Total of Probate Assets" from the "Recapitulation" page, i.e., the final page, of the Inventory and add additional assets received during the course of the administration. Likewise, subtract from such value losses sustained during the course of the administration.

a) Common additions

(1) Refunds – It is not uncommon for a personal representative to receive refunds for taxes, insurance premiums, overpayments to assisted living facilities, etc.

(2) Interest and Dividends – Be sure to include reinvested dividends. Although cash is not actually received, additional assets are received.

(3) Gains from the sale of estate assets – For example, if the date of death/Inventory value of an asset is $100 and the personal representative sells it for $125, then an additional $25 will be reported on the Accounting.

(4) Proceeds from the sale of real property – In Delaware, title to real property vests in the heir or devisee at the moment of the decedent's death, subject to divesture. *In re Harris' Estate,* 44 A.2d 18, 19 (Del.Orph.1945). As such, real property is not considered probate property. However, if the property is required to be sold by the decedent's Will or the property must be sold to pay the decedent's debts and/or administrative expenses, the proceeds are converted to personal property and are subject to probate.

i. With testate estates, the decedent's Will generally authorizes the personal representative to sell real property. Provided the personal representative reasonably believes, at the time of such sale or exchange, that it is necessary to sell the property in order to pay the debts of the decedent or the expenses of administration, the property can be sold without the need for the beneficiaries to join in the deed and without the need for Court intervention. 12 Del. C. § 207(c).

(i) However, where the Will does not authorize the sale of real property or the decedent died intestate, the personal representative will likely have to Petition the Court of Chancery in order to sell the property. 12 Del. C. § 2701, *et seq*.

ii. Where the property is required to be sold by Will, all net proceeds must be included.

iii. Where the property must be sold in order to pay debts and expenses, all net proceeds must be included.

(i) One option to avoid selling the property is to have the beneficiaries make contributions to the estate in order to pay the debts and expenses. They may wish to do

this if they would prefer to take title to the property instead of receiving a cash distribution.

b) Losses.

(1) Losses from the sale of estate assets – Calculated in the same manner as gains, i.e., amount realized less date of death value. Note that although assets may depreciate or decline in value, the loss is only applicable if incurred upon the disposition of the asset.

3. After calculating the subtotal, the personal representative then deducts allowable debts and expenses, attorneys' fees, and commissions paid to the personal representative. This will result in another subtotal, which will be the amount that is subject to closing costs (1.75% in New Castle County and Kent County; 1.25% in Sussex County).

a) General Rules

(1) The Register of Wills Office publishes notice shortly after an estate is opened. *See generally* 12 Del. C. § 2101.

(2) Interestingly, notice is not required to begin the running of the statute of limitations for making claims against an estate. Debts that arose prior to the decedent's death are barred against the estate, the personal representative, and the beneficiaries unless properly presented within eight (8) months of the decedent's date of death. 12 Del. C. § 2102(a).

i. Pursuant to 12 Del. C. § 2014, a claim is properly presented as follows:

(i) Delivery by the claimant (including by mail) "to the personal representative of a written statement of claim indicating its basis, the name and address of the claimant, and the amount claimed." 12 Del. C. § 2014(1).

(ii) The filing of a written statement of claim, i.e., Claim Form, with the Register of Wills (Form 4). 12 Del. C. § 2014(1). The statement requires the name and address of the decedent, the name and address of the claimant, the amount of the claim, the basis of the claim, the date the claim has or will become due, whether the claim is secured, contingent, or unliquidated, and whether the claim is being timely filed. There is a $20/claim fee.

(a) Note that when a statement of claim is filed with the Register of Wills, the estate cannot be closed until the Register of Wills receives proof that the claim has been paid or otherwise provided for, generally in the form of a Release. If the estate is insolvent, this may require a letter to the creditor to this effect.

(iii) The commencement of a judicial proceeding "against the personal representative in any court where the personal representative may be subject to jurisdiction, to obtain payment of the claim against the estate," provided that no presentation is required with respect to proceedings against the decedent pending at his or her date of death. 12 Del. C. § 2014(2).

(3) Claims that arise at or after the decedent's death are barred against the estate, the personal representative, and the beneficiaries unless properly presented within six (6) months after the claim arises or after performance by the personal representative is due. 12 Del. C. § 2102(b). *See also* See Cummings v. Estate of Lewis, 2013 WL 979417 (Del. Ch. Mar. 14, 2013).

(4) If a claim is not otherwise barred by 12 Del. C. §§ 2102(a), (b), it may be rejected by the personal representative of the estate. If a claim is rejected, it shall be forever barred unless an action or suit is commenced within three (3) months after notification to the claimant of such rejection. A rejection shall be in writing and delivered to the claimant in person or mailed to the claimant's last known address. The Court of Chancery may extend the three (3) month period for claims that are not presently due or that are contingent or unliquidated, but not beyond the applicable statute of limitations. 12 Del. C. § 2102(c).

(5) Note that 12 Del. C. §§ 2102(a), (b) are inapplicable with respect to debts for which notice is presumed. The personal representative is deemed to have notice only of mortgages (but not of the bonds accompanying such mortgages) and judgments creating liens against real estate at the decedent's date of death, provided such mortgages and judgments are of record in the county in which letters were granted. 12 Del. C. § 2103.

(6) 12 Del. C. § 2105 sets forth the order of preference of claims. Following the payment of administration expenses, fees, and commissions, claims shall be paid in the following order: "(1)

Surviving spouse's allowance as provided in § 2308 of this title; (2) Funeral expenses; (3) Child support arrears or retroactive support due as of the date of the decedent's death; (4) The reasonable bills for medicine and medical attendance during the last sickness and for nursing and necessaries for the last sickness of the decedent; (5) Wages of servants and laborers employed in household affairs or in the cultivation of a farm; but no servant or laborer shall be allowed this preference for more than 1 year's wages; (6) Taxes imposed by the State; (7) Rent for not exceeding 1 year; and this, at the election of the party entitled, may be of rent in arrear or rent growing due; (8) Judgments against the decedent, which shall include judgments before justices of the peace and decrees of a court of equity against the decedent for the payment of money; (9) Recognizances, mortgages and other obligations of record, for the payment of money; (10) Obligations and contracts under seal; (11) Contracts under hand for the payment of money, or delivery of goods, wares or merchandise; (12) Other demands." 12 Del. C. § 2105(a).

i. There is no preference for the payment of any claims over any other claims that are in the same class, and claims due are not given preference over claims not due. 12 Del. C. § 2105(b).

(i) If the estate has insufficient funds to pay all claims, payments in the applicable class are prorated.

(ii) Although a decedent's debts are not the personal responsibility of the personal representative, there may be personal liability if claims are not paid in the proper order.

ii. Generally speaking, with solvent estates, the personal representative does not need to be concerned with 12 Del. C. § 2105 since all claims will be paid.

b) Deductible Debts and Expenses

(1) Administrative Expenses – These are post-death expenses incurred in connection with the administration of the decedent's estate. Common examples include:

i. Fees paid to the Register of Wills in order to open the estate

ii. Appraisal fees (whether for real property or tangibles)

iii. Professional fees, e.g., accountant fees

iv. Expenses of the personal representative, e.g., travel, meals, lodging, etc.

v. Expenses of maintaining real property; there are separate tests based on whether or not the property must be sold

(i) Where the property is not required to be sold, the estate is allowed deductions for related expenses incurred in the month of death and the three (3) months thereafter.

(ii) Where the property is required to be sold all related expenses incurred until the time of sale are allowed as deductions. If the gross sale proceeds are listed as an addition on the first page of the Accounting, then settlement costs can also be deducted.

(iii) Real property related expenses include utility bills, landscaping, insurance, property taxes, etc.

(2) Debts of the Decedent – These are debts incurred by the decedent prior to death, but not paid until after death. Common examples include:

i. Medical/hospital bills

ii. Credit card bills

iii. Taxes (including estate taxes)

iv. Mortgage payments

(i) Note that mortgage payments are not limited to the three (3) month rule discussed above. A mortgage is a valid debt of the decedent, and therefore can be paid at anytime. In addition, if the mortgage liability is joint and several, a deduction is still allowed for payments made, the rationale being that each borrower, including the decedent/the estate, is 100% liable for the debt. *See In re Keil's Estate*, 145 A. 2d 563 (Del. 1958).

v. Claims against the estate.

(3) Funeral Expenses – This is a broad category and includes fees paid to the funeral home; fees paid to the church, temple, etc.; cost of a headstone and inscription; costs of the luncheon; costs for flowers, etc. *See Smolka v. Chandler,* 20 A.2d 131, 133-34 (Del.Ch. 1941), for the Court's consideration of the special nature of a funeral expenses and the concomitant duty of a personal representative to pay those expenses: "The funeral of a deceased person is a work of necessity, as well as charity and piety. It is the duty of [a personal representative] to bury the deceased in a manner suitable to his degree and the circumstances of the estate; and if this duty is performed by the personal representative, or indeed by another not officiously but from necessity, the law implies a promise of reimbursement out of the assets of the estate for the reasonable expenses incurred and paid[.]". *Id.* at 133-34.

(4) Attorneys' Fees – Note that attorneys' fees do not require proof (initialing the Accounting is acceptable), even when debts and expenses must otherwise be proved.

(5) Commissions – A personal representative's commission may be set forth in the decedent's Will; however, when not provided for and not expressly disallowed by the Will, commissions are subject reasonableness standard. *See* Chancery Court Rule 192(a). Any commission paid to a personal representative is treated as taxable income.

c) Proving Debts and Expenses

(1) Previously, proof of all debts and expenses claimed as a deduction had to be submitted to the Register of Wills for review and approval. Generally, this meant submitting copies of the bill and corresponding copies of cancelled checks or account statements.

(2) As of October 1, 2016, an affidavit may be submitted in lieu of receipts when total debts and expenses do exceed $100,000; however, attorneys should still collect and retain all backup documentation to prove debts and expenses in the event they are called upon to do so. Both the personal representative and the attorney for the estate must sign the affidavit.

B. *Register of Wills Closing Documents*

1. In addition to the Accounting, there are a number of additional documents that must be filed in order to close an estate.

a) Form 5 (Beneficiaries Entitled to Share in Distribution of Estate)

(1) Pursuant to 12 Del. C. § 2302(a), every Accounting shall be accompanied by a statement that includes the names and mailing addresses of each beneficiary entitled to share in the distribution of the estate. In addition, the statement shall include the name and address of any legally incapacitated beneficiary (including minors), as well as the name and address of the guardian, trustee, or parent (whether natural or adoptive) of such beneficiary. Finally, the statement must include the name and address of any beneficiary who has waived notice of the filing and consented to the approval of the Accounting.

b) Form 2 (Waiver of Notice and Consent for Approval of Accounting)

(1) In short, this is an irrevocable waiver by a beneficiary consenting to the approval of the Accounting by the Register of Wills. 12 Del. C. § 2302(a). As explained in more detail below, use of this document greatly expedites the administration process. The beneficiary's signature on the Form 2 binds him or her with respect to the filing and approval of any and all Accountings; however, best practice is to obtain new Forms 2 for each Accounting to be filed.

i. Form 1 – If even one beneficiary fails to sign a Form 2, then he or she will be sent a Form 1 by the Register of Wills Office. This is the default rule under 12 Del. C. § 2302(b), which provides that "[up]on the filing of an account with the statement of names and addresses of beneficiaries as provided in subsection (a) of this section, the Register of Wills shall forthwith mail to such beneficiaries or to the guardian, trustee or parent of any legally incapacitated beneficiary, a notice in writing of the filing of the account and that the same shall be open for inspection and exception for 3 months from the mailing of the notice." Therefore, if all beneficiaries do not sign a Form 2, the estate will remain open for at least three (3) months, i.e., the inspection and exception period.

(i) Within three (3) months of the mailing of Form 1, a beneficiary who has not signed Form 2, may file written exceptions to the Accounting with the Register of Wills. 12 Del. C. § 2302(d). *See also* Del. Const., Art IV., § 32, ¶2. Even though exceptions are filed with the Register of Wills, they are heard by the Court of Chancery. The personal representative bears the initial burden of proof.

ii. Form 3 – This is form that is signed on behalf a legally incapacitated beneficiary by such beneficiary's guardian, trustee, or parent in order to waive notice of the filing and consent to the approval of the Accounting.

c) Commission Letter

(1) If a personal representative elects to take a commission, he or she must file a letter with the Register of Wills stating that such commission will be treated as earned income when filing his or her state income tax return and that a copy of the letter may be made available to the Delaware Divisions of Revenue. If the personal representative is a non-resident, the letter must also provide that the personal representative will file an out-of-state resident form with the State of Delaware since money was earned in Delaware.

d) Rule 190 Petition and Affidavit

(1) The Rule 190 Petition for closing is signed by the attorney for the personal representative in the presence of a notary and provides the following information: (1) the name of the individual appointed as personal representative of the estate; (2) the date letters testamentary/letters of administration were granted; and (3) that the Petitioner (the attorney for the estate) represents the personal representative and is admitted to practice before the Supreme Court of the State of Delaware. Previously, the Petition included a statement that the personal representative was unable to personally appear at the Register of Will, typically because of "unusual inconvenience," but this is no longer required.

(2) The Affidavit for closing is signed by the personal representative in the presence of a notary and provides the following information: (1) that all statements contained in the Accounting are true and correct; and (2) that the personal representative has performed his or her duties with honesty and integrity.

e) Releases from Creditors

(1) As previously mentioned, where claims have been filed by a creditor with the Register of Wills via Form 4, a Release signed by the creditor will need to be submitted indicating that the claim was paid or otherwise provided for.

f) No Estate Tax Affidavit / Joint Property Affidavit / Combined Affidavit

(1) The specific affidavit to be filed will depend on the facts of a given estate. The pertinent facts are whether an estate has been opened for probate, whether there is joint property, and whether the filing of a Delaware estate tax return is necessary. *See* 12 Del. C. § 2304.

i. If the estate is opened for probate, there is no Delaware estate tax return due, and there is no joint property, then a No Estate Tax Affidavit should be filed.

ii. If the estate is opened for probate, there is no Delaware estate tax return due, but there is joint property, then a No Estate Tax Affidavit should be filed. The joint property is covered on the Inventory.

iii. If the estate is opened for probate, there is a Delaware estate tax return due, and there is no joint property, then no separate document needs to be filed; however, the last page of the Accounting should be marked to indicate that a Delaware estate tax return has or will be filed.

iv. If the estate is opened for probate, there is a Delaware estate tax return due, and there is joint property, then no separate document needs to be filed; however, the last page of the Accounting should be marked to indicate that a Delaware estate tax return has or will be filed.

v. If the estate is not opened for probate, there is no Delaware estate tax return due, and there is no joint property, then no separate document needs to be filed.

vi. If the estate is not opened for probate, there is no Delaware estate tax return due, but there is joint property, then a Combined Affidavit (along with the original Will, if any, and a certified death certificate) should be filed.

vii. If the estate is not opened for probate, there is a Delaware estate tax return due, and there is no joint property, then no separate document needs to be filed.

viii. If the estate is not opened for probate, there is a Delaware estate tax return due, and there is joint property, then a Joint Property Affidavit (along with the original Will, if any, and a certified death certificate) should be filed.

g) Estate Tax Clearance Letter.

(1) This is only applicable when a Delaware estate tax return must be filed. After receiving a clearance letter from the IRS with respect to the federal estate tax return, the personal representative will send the federal clearance letter to the Delaware Division of Revenue, which will issue its own clearance letter. This, in turn, must be sent to the Register of Wills. *See* 12 Del.C.§ 2304 & 30 Del.C. § 1507(c). After all documents are approved by the Register of Wills and beneficiaries, the Register of Wills will issue a formal closing document. Thereafter, the personal representative can begin the process of making final distributions.

IV. Finalizing Administration and Making Distributions

A. *Considerations Prior to Final Distributions*

1. Before distributions can be made, the personal representative must determine the identity of the beneficiaries. If the decedent died testate, the Will controls. If the decedent dies intestate, the heirs are determined by statute.

a) Intestacy

(1) The share of the surviving spouse is determined under 12 Del. C. § 502 as follows:

i. If the decedent is not survived by issue or parents, then the entire intestate estate is payable to the surviving spouse.

ii. If the decedent is survived by parents but no issue survive the decedent, then surviving spouse receives the first $50,000 of the intestate personal estate, plus one half of the balance of the intestate personal estate, plus a life estate in the intestate real estate.

iii. If the decedent is survived by issue all of whom are also the issue of the surviving spouse, then the surviving spouse receives the first $50,000 of the intestate personal estate, plus one half of the balance of the intestate personal estate, plus a life estate in the intestate real estate.

iv. If the decedent is survived by issue, at least one of whom is not the issue of the surviving spouse, then the surviving spouse receives one half of the intestate personal estate, plus a life estate in real estate.

(2) The share for all others is determined under 12 Del. C. § 503, which provides for the distribution of the remainder (if there is a surviving

spouse) or then entire (if there is no surviving spouse) intestate estate as follows:

i. To the issue of the decedent, per stirpes.

ii. If there is no surviving issue, to the decedent's parent or parents equally.

iii. If there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister, per stirpes.

iv. If there is no surviving issue, parent or issue of a parent, then to the next of kin of the decedent, and to the issue of a deceased next of kin, per stirpes.

(i) To determine next of kin, consult a table of consanguinity. A version can be found here: http://depic.delaware.gov/wp-content/uploads/sites/48/2017/02/chart.pdf.

v. Note that any property passing under this 12 Del. C. § 503 to two (2) or more persons passes as tenancy in common.

(3) Where the heirs and next of kin are unknown, the personal representative should consider engaging a genealogical search company and petitioning the Court of Chancery for a Decree of Distribution. The procedure for the petition is set forth in 12 Del. C. § 2331, *et seq*. One prerequisite to the petition is the filing of an Accounting. 12 Del. C. § 2332(a). In addition, the petition shall contain the names and addresses of all persons known to the petitioner who claim or may claim an interest in the estate and shall state whether notice has been given to such persons. *Id*.

(4) It is also important to remember Delaware's anti-lapse statute. Pursuant 12 Del. C. § 2313(a)(1), "[i]f a devisee or legatee who is a grandparent or lineal descendant of a grandparent of the testator is dead at the time of the execution of the will, fails to survive the testator or is treated as if the devisee or legatee predeceased the testator, the issue of the deceased devisee or legatee who survived the testator by 120 hours take in place of the deceased devisee or legatee, per stirpes." A testator has the ability to opt out of this default rule.

2. Next, the personal representative needs to determine if sufficient estate assets remain to pay legacies and bequests. Where heirs and beneficiaries are entitled

to a set percentage, there should be no issues. However, if there are specific bequests or set amounts to be distributed, it is possible that such legacies and/or bequests have adeemed or abated.

a) Ademption

(1) Ademption is the failure of a bequest because the item has been lost, destroyed, given away, etc. For example, if the testator leaves his Rolex to his son, but sells the Rolex prior to his death, the bequest adeems and it is treated as though it "had been expunged from the will." *In re Hobson's Estate*, 456 A.2d 800, 802 (Del.Ch. 1982).

b) Abatement

(1) Abatement is the reduction or elimination of a legacy or bequest due to an insufficiency in estate assets. Under 12 Del. C. § 2317, unless a decedent's Will provides otherwise, property abates in the following order, with personal property to be abated prior to real property in each class:

i. Property not disposed of by Will.

ii. Residuary bequests and devises.

iii. General bequests and devises.

iv. Specific bequests and devises.

(2) Abatement within each class is pro rata. 12 Del. C. § 2317(a).

3. Although a detailed discussion beyond the scope of this presentation, a brief discussion of the spousal elective share is warranted.

a) General Rules

(1) A surviving spouse has the right to elect an amount up to one third (1/3) of the elective estate, less the amount of transfers to the surviving spouse. 12 Del. C. § 901.

i. The elective estate is a decedent's gross estate for federal estate tax purposes, less certain allowable deductions.

(2) Whether or not a federal estate tax return is due, the personal representative much provide the surviving spouse with a completed copy of a federal estate tax return. 12 Del. C. § 902.

(3) The surviving spouse has six (6) months from the date of the grant of letters to file an elective share claim with the Court of Chancery or by mailing/delivering such petition to the personal representative.

b) Liability for Payment

(1) If an elective share must be paid, it is paid from the "decedent's contributing estate." 12 Del. C. § 908(a).

(2) Pursuant to 12 Del. C. § 908(b), the contributing estate consists only of the portion of the elective estate of which the decedent was the sole owner at death and was not otherwise transferred to the surviving spouse. "The decedent's contributing estate does not include any jointly owned property with the right of survivorship of which the decedent was a joint owner, any insurance proceeds which are payable to a beneficiary other than to the estate, or any property held in trust." *Id*.

B. *Making Distributions*

1. The type of distribution, e.g., specific v. residuary, will impact its timing.

a) Specific Distributions

(1) Presuming there has not been any abatement or ademption, specific distributions should be paid as soon as practicable.

(2) "Except where circumstances justify a longer period, pecuniary legacies shall bear interest at the rate of 4 percent per annum payable from the estate beginning 13 months after the first appointment of a personal representative until payment unless a contrary intent is indicated by the will." 12 Del. C. § 2312(c).

b) Residuary Distributions

(1) Sometimes personal representatives feel an obligation to make immediate distributions. This can be problematic if the personal representative distributes all of the assets prior to paying all debts and does not have refunding agreements. In fact, the personal representative could face personal liability in such a situation.

i. One option is to make interim, partial distributions during the course of the administration. From a tax standpoint, it is generally best to make equal, pro rata distributions to all beneficiaries.

(2) Final distributions should not be made until all known (or expected) debts and expenses have been paid or otherwise provided for. It is best practice to wait to make final distributions until the estate is official closed by the Register of Wills and an estate closing letter is issued.

i. If an estate is not required to be opened, the personal representative should wait at least eight (8) months, i.e., the creditor's claim period under 12 Del. C. § 2102(a), before making final distributions.

2. Although not required by law, prior to making distributions, whether specific, interim, or final, a personal representative should generally obtain a Release (or Receipt and Release; Release and Refunding; Receipt, Release, Refunding, and Indemnity Agreement; etc.). While the release portion of such a document is of key importance, the refunding portion is equally as critical. As mentioned above, in the absence of a refunding agreement, the personal representative could face personal liability if the estate incurs additional debts and expenses after making final distributions. For example, the statute of limitations on the assessment of federal taxes is a minimum of three (3) years; it is unlikely that the personal representative would delay making final distributions until such time period has elapsed.

3. When the beneficiary is a minor or incapacitated, there are additional factors that should be considered, such as the need for the appointment of a guardian, disqualification from government benefits, etc.

a) Minor Beneficiary

(1) Sometimes a decedent's Will specifies who will receive the property on behalf of a minor, e.g., a trustee of a testamentary trust, a custodian under a Uniform Transfers to Minors Act ("UTMA") account, etc. If the Will is silent or if the decedent died intestate, the personal representative still has some options available.

i. If the Will does not expressly nominate a custodian under the UTMA, but authorizes distribution to a custodian, then pursuant to 12 Del. C. § 4505(c), the personal representative may designate a custodian and transfer the assets.

(i) Under 12 Del. C. § 4520(1), the custodianship and account terminate upon the minor attaining age twenty-one (21).

ii. If there no authorization provisions or the decedent dies intestate, then 12 Del. C. § 4506(a) allows the personal representative to transfer the assets to a custodian.

(i) If the distributable amount exceeds $50,000, the custodian nominated by the personal representative must be approved by the Court of Chancery.

(ii) Under 12 Del. C. § 4520(2), the custodianship and account terminate upon the minor attaining age eighteen (18).

iii. If for any reason the personal representative is unable to rely on the UTMA, a guardian should be appointed (via petition to the Court of Chancery). Pursuant to Chancery Court Rule 180 and 12 Del. C. §§ 3901(b), (l), it is unnecessary to petition the Court for the appointment of a guardian if the minor will receive $25,000 or less. Where the minor stands to receive $25,000, either a limited or plenary guardian must be appointed. In the case of a plenary guardianship petition, there must be a showing of good cause. Chancery Court Rule 180(c).

b) Incapacitated Beneficiary

(1) Where the beneficiary is no longer a minor, the UTMA is no longer applicable. Therefore, if a guardian has already been appointed, distribution should be to the guardian. Otherwise, a guardian may need to be appointed in order to receive the property on behalf of the incapacitated beneficiary.

c) Beneficiary Receiving Need-Based Government Assistance

(1) A discussion of Medicaid and other needs based government assistance programs are far beyond the scope of this presentation. However, if a beneficiary is receiving needs based government assistance, the personal representative should take care not to disqualify the beneficiary from eligibility.

i. Certain needs based programs, such as Medicaid, have resource limits. For example, if an individual has more than $2,000 in countable resources, he or she will be ineligible for Medicaid.

ii. Unfortunately, a qualified disclaimer under I.R.C. § 2518 and/or 12 Del. C. § 601, *et seq.* is of no assistance.

Although for federal and state purposes, the disclaimant under a qualified disclaimer is treated as having predeceased, for Medicaid purposes, the individual is still treated as having made a transfer.

iii. One option is to use a first-party (self-settled) special needs trust. These are creatures of federal law, so care must be taken to comply with all necessary rules, e.g., the individual must be under age sixty-five (65). *See* 42 U.S.C. § 1396p(d)(4)(A). For that reason, it would be best to consult an expert in Medicaid law.

C. *Small Estate Affidavits*

1. Generally, everything discussed above presupposes that an estate is required to be opened with the Register of Wills. However, pursuant to 12 Del. C. § 2306, an estate is not required to be opened if the decedent had less than $30,000 in his or her individual name and did not own any Delaware real property, either solely or as tenants in common.

2. If the above-referenced requirements are met, then an attorney or the Register of Wills can issue a small estate affidavit so that the personal assets can be collected and distributed.

a) Individuals to Be Appointed

(1) If there is a valid Will, the small estate affidavit is issued to the named executor, provided the executor is not disqualified from acting, e.g., has not committed a felony. 12 Del. C. § 2306(b). When the decedent died intestate or the named executor is unable to act, preference is given to the following persons in the following order:

i. Spouse

ii. Children

iii. Parents

iv. Siblings

v. Grandchildren or grandparents

vi. Funeral directors

(2) Pursuant to 12 Del. C. § 2306(a), the list of individuals entitled to a small estate affidavit also includes any lineal descendant of a

grandparent of the decedent; the personal representative, guardian, or trustee of any otherwise eligible individual; and the trustee of a trust created by the decedent. There is no order of preference for these individuals.

b) Contents of Affidavit

Pursuant to 12 Del. C. § 2306(a), the affidavit must contain the following sworn statements:

i. No petition for the appointment of a personal representative is pending or has been granted.

ii. Thirty (30) days have elapsed since the death of the decedent.

iii. The value of the personal estate, other than jointly owned property, does not exceed $30,000.

iv. All known debts of the decedent have been paid or otherwise provided for.

v. The surviving spouse's allowance has been or otherwise provided for.

vi. The decedent did not own any Delaware real property, either solely or as tenants in common.

vii. The affiant will furnish a copy of the affidavit to any person or entity having custody of the decedent's property.