GUIDELINES FOR GUARDIANS AD LITEM
WITH SAMPLE REPORTS AND FORMS

MAY - 2003

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GUIDELINES FOR GUARDIANS AD LITEM

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Notice:
Time Considerations

Upon appointment, please review the rules pertinent to guardians ad litem found in the Uniform Rules for the Surrogate's Court (22 NYCRR §207.12, §207.13, and §207.41). The following time periods must be kept in mind:

1. **Each guardian ad litem shall qualify within ten (10) days of notification of appointment or he or she may be deemed unable to act. Your appointment becomes effective upon qualification.**

2. **The report of the guardian ad litem in all proceedings other than accounting proceedings must be made in writing or, with the consent of the Surrogate, orally in open court, except as otherwise provided in SCPA 1754(4), within ten (10) days of the appointment of the guardian ad litem or from the date to which the proceeding is finally adjourned, unless extended by the court.**

   N.B. If it is not possible to render a complete report within this time period, then inform the court in writing of your progress and advise the court of the nature of the work that remains to be done and when it will be completed.

3. **The report of the guardian ad litem in an accounting proceeding, or his or her objections to the account, must be made in writing within twenty (20) days of the appointment of the guardian ad litem unless extended by the court.**

   N.B. If it is not possible to render a complete report within this time period, then inform the court in writing of your progress and advise the court of the nature of the work that remains to be done and when it will be completed.

4. **The guardian ad litem must file a supplemental report within sixty (60) days after the decree settling the account in which there is a direction for payment of money or delivery of property to or for the benefit of the ward of the guardian ad litem. This supplemental report will advise the court whether the decree has been complied with insofar as it affects the ward.**

The Surrogate's Court Rules (22 NYCRR §207.12, §207.13, and 207.41) have not been amended as of the date of this publication. Nonetheless, the most

recent Part 36 Rules of the Chief Judge appear to supercede the time restraints set forth in the Surrogate's Court Rules in that:

Every person or entity appointed pursuant to this Part shall file with the fiduciary clerk of the court from which the appointment is made, within 30 days of the making of the appointment, (i) a notice of appointment and (ii) a certification of compliance with this Part, on such form as promulgated by the Chief Administrator. Copies of this form shall be made available at the office of the fiduciary clerk and shall be transmitted by that clerk to the appointee immediately after the making of the appointment by the appointing judge. An appointee who accepts an appointment without compensation need not complete the certification of compliance portion of the form.

Wherever else possible, a reading of the Rules of the Surrogate's Court should be read in harmony with those of the Chief Judge.

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I. INTRODUCTION

The primary function of this monograph is to outline the basic duties and obligations commonly imposed on guardians ad litem in all proceedings and to analyze their special responsibilities in the type of proceeding in which they are most frequently appointed. Reliance on these guidelines alone will not necessarily be sufficient in performing the duties of a guardian ad litem, since they do not address all issues and problems confronting a guardian ad litem. Emphasis has also been placed on jurisdictional, procedural, and substantive problems encountered in proceedings affecting each class of persons in the category of a person under disability. If a guardian ad litem is unsure of the extent of the representation that is expected or appropriate, guidance from the court should be sought.

Attorneys desiring to be considered for appointments by the courts as guardians ad litem should, *inter alia,* apply to the Office of Court Administration to be placed on a list of potential appointees maintained by the Chief Administrator of the Courts and made available for use by the appointing judge in making such appointment. Refer to Appendix Schedule A for Part 36 of the Rules of the Chief Judge for Appointment of Fiduciaries. In most instances the prospective appointee whose appointment is subject to the Rules of the Chief Judge must certify (Certification of Compliance) in writing to the appointing judge, prior to the acceptance of the appointment, that the appointment will not be in violation of those Rules. Effective January 1, 2003, Part 36 requires that a list of other appointments received within the previous 12-month period be submitted by separate attachment concurrently with the Certificate of Compliance. The attorney/appointee must also execute a preprinted affirmation that he or she is not:

1. A judge or married to a judge.
2. Related to a judge or related by marriage to a judge within the 6th degree of relationship.
3. A Judicial Hearing Officer serving in the county.

4. A full-time employee of Unified Court System.

5. The spouse, brother/sister, parent, or child of a full-time employee of Unified Court System who holds a position at or above a salary grade of JG-24.

6. Certain state or county politicians or their relatives.

7. A former judge who left office on or after January 1, 2003.

8. A disbarred attorney or one removed from the appointment list.

9. A person convicted of certain crimes.

The rules limit the compensation by restricting the receipt of any one appointment for which the compensation anticipated to be awarded to an appointee in any calendar year exceeds the sum of $15,000. If a person or entity has been awarded an aggregate of $50,000 in compensation by all courts during the calendar year, that person or entity shall not be eligible for compensated appointments in the following year. The Chief Administrator of the Courts further has established requirements of education and training for placement on a list of available appointments. The training encompasses procedural and substantive trust and estate law as well as ethics. Attorneys who participate in these courses may be eligible for continuing Legal Education Credit.

The lists which are ultimately established are viable for two years only and each person or entity must re-register after such time.

Persons under disability are wards of the court (Wurster v Armfield, 175 N.Y. 256; Matter of Strauss, 56 AD2d 570), and protection of their rights is rooted in the public policy of the state (Matter of Bobst, 165 Misc2d 776; Matter of Arneson, 84 Misc2d 128, 130). Expression of that policy is found in various statutory enactments, such as Article 4 of the Surrogate's Court Procedure Act ("SCPA"). When the interests or rights of disabled persons may be affected by litigation and those rights or interests are not otherwise represented by a guardian, conservator, or committee, the champion of their cause is a guardian ad litem whose appointment, from the

earliest days, was necessary for an infant even though service had been made on testamentary guardians (Sharp v Pell, 10 Johns. 486).

The appointment of guardians ad litem is an important responsibility of the court. When the need to appoint a guardian ad litem exists, the Surrogate has the responsibility of designating an attorney who is qualified and competent to protect the interests of a person under disability in a particular proceeding. The existence of complex legal questions, the size of the estate or trust, the interests of the person under disability and other circumstances which might require a particular legal knowledge or skill, and the degree of experience of an attorney are factors considered in the selection of a guardian ad litem.

A guardian ad litem may be appointed at any stage in a proceeding upon the court's own initiative or upon a motion (New York Life Insurance Co. v V.K., 184 Misc2d 727; W. v M., NYLJ, July 28, 1997, at 28, col 5). Also, a temporary guardian ad litem may be appointed to determine whether a permanent guardian ad litem is required (see, Matter of Schuster, 274 AD2d 397).

The guardian ad litem stands guard over the interests of the ward. The guardian ad litem not only owes his or her appointment to the circumstance that he or she is an attorney and, as such, is an officer of the court, but also, in his capacity as an attorney, the guardian ad litem represents the ward as a private client (Matter of Balfe, 174 Misc. 279, affd 261 App Div 996; Matter of Merrick, 107 Misc2d 988, 990; see, Matter of Dwyer, 93 AD2d 355). The standard of care due the ward by the guardian ad litem is to act reasonably, as a prudent attorney would, in safeguarding the interests of any client.

The guardian ad litem has a duty to give the ward his or her undivided loyalty. Fidelity to that objective requires that the guardian ad litem be familiar, at a minimum, with the rights and duties of the office. No less is due the court that places its trust in the guardian ad litem's capabilities when making the appointment in the particular proceeding.

II. PERSONS FOR WHOM GUARDIAN AD LITEM APPOINTED

All persons under disability must appear by a guardian ad litem, except that an infant or incapacitated person may appear by the guardian of his property, an incompetent by the

committee of his property, a conservatee by his conservator (SCPA 402[1] still uses the terms "committee" and "conservator" even though these fiduciaries are now called "guardians" to reflect the continuing existence of these fiduciaries), and possibly an incapacitated person, as defined in Article 81 of the Mental Hygiene Law (MHL), by his or her guardian (MHL 81.21; see, Matter of Elsie B., 245 AD2d 146 [Article 81 permits a court to authorize a guardian to exercise virtually any right that the ward could exercise if he or she had capacity, except to execute a will or codicil]). A person under disability may also appear by a guardian ad litem where the court so directs because of possible adversity or conflict of interest, or for other cause (SCPA 402 [2]). In such a case, the appearance may be by both the guardian, committee, or conservator, as well as a guardian ad litem (SCPA 402[1]). However, where a conflict actually exists, the court must appoint a guardian ad litem, even if the person under disability has already appeared by his or her guardian (Matter of Burling, 41 Misc2d 742; Matter of Seviroli, NYLJ, December 17, 2002, at 21, col 5).

The phrase "persons under disability" is defined by statute (SCPA 103[40]). The class includes (a) infants, (b) incompetents, (c) incapacitated persons, (d) unknown persons or persons whose whereabouts are unknown, and (e) prisoners whose failure to appear is due to their confinement in a penal institution.

A. INFANTS

An infant is any person under the age of 18 years (SCPA 103 [27]). The infant must appear by a guardian ad litem when no appearance is made by a guardian of his or her property, or whenever the court so directs because of possible adversity or conflict of interest or other cause (SCPA 402[2]; Matter of Seviroli, NYLJ, December 17, 2002, at p. 21, col 5).

The provisions of the Civil Practice Law and Rules ("CPLR") governing the manner in which service of process is effected on infants are pre-empted by SCPA 307(4) which takes precedence whenever the two statutes differ. Both, however, mandate that service be made on the infant where he or she is over the age of 14 years. The failure to make service on both the infant over 14 years and a parent, guardian, or other specified adult renders the attempted service void (1 Warren's Heaton on Surrogates' Courts § 6.21). Note, however, that under SCPA 314

any person 16 years of age or over required to be served may admit service of process in writing (Matter of Orenstein, 61 Misc2d 306). Note also, that despite the fact that a 16-year-old can admit service, only an adult (i.e. one 18 or over) can execute a waiver of citation (SCPA 401[4]). When service is not made in accordance with the requirements of the statute, the court has no jurisdiction over the infant (Matter of Maroney, 20 AD2d 678). The defect is fatal and cannot be cured by the voluntary appearance of an attorney or parent for the infant (Leahy v Hardy, 225 App. Div. 323) or by the subsequent appointment of a guardian ad litem and his or her consent to the mode of service (Matter of Mortimer, 84 Misc2d 1086; Donovan v Flynn, 219 App. Div. 471). The appointment of a guardian ad litem is void whenever jurisdiction has not been obtained by proper service of citation on the infant (Potter v Ogden, 136 N.Y. 384). The lesson learned from these cases is that a guardian ad litem must scrupulously examine the papers on file that serve as a basis for the court's assumption of jurisdiction over his or her ward.

The necessity for dual representation of an infant by a guardian of his property and a guardian ad litem may, in limited circumstances, be unavoidable and is statutorily anticipated (SCPA 402; 1713[4]). Any infant over 14 years of age or the infant’s parent or guardian may petition the court for the appointment of a named attorney as guardian ad litem to protect the infant's interest (SCPA 403[1]).

The court having jurisdiction over the infant may entertain the application if the interests of the guardian and that of the infant conflict, or where valid reasons exist for the initiation of action by someone other than the guardian. Where similar factual situations exist, the court, on its own, may also appoint a guardian ad litem for such purposes (SCPA 1713[4]).

A typical situation triggering the appointment of a guardian ad litem is when the infant's funds are misappropriated by the guardian of his property. In that case, the guardian ad litem must seek the removal of the guardian of the property of the infant and consider the advisability of instituting an action against the guardian (Matter of Lanier, 112 Misc2d 491) and, perhaps, the bank designated as custodian of the funds along with the guardian. Where negligence of a bank is shown to have contributed to the defalcation, a recovery against the bank will follow (Matter of Leftridge, 113 Misc2d 68; cf.. Matter of Knox, 64 NY2d 484 [bank that allows a fiduciary to

negotiate a check payable to him as fiduciary without first establishing his authorization to do so will not, without more, be liable to the beneficiary when the fiduciary exceeds his powers by negotiating the check]).

B. INCOMPETENTS

An incompetent is any person judicially declared incompetent to manage his affairs (SCPA 103[26]). Although Mental Hygiene Law Article 78, which controlled the appointments of committees for judicially declared incompetents, was repealed and replaced by Article 81, there may still be persons for whom a committee had been appointed before the statute's repeal and who may have an interest in a proceeding in Surrogate's Court. In that case, the appointment of a guardian ad litem may be necessary. Like infants, incompetents are wards of the court (Wurster v Armfield, supra). Neither infants nor incompetents can waive service of citation or consent to probate or other proceedings, because the incompetent is not of sound mind and the infant not of full age. Consents possess the attributes of a stipulation (Matter of Frutiger, 29 NY2d 143), and their execution by competent adult persons is presumed.

The committee of an adjudicated incompetent may prosecute or defend a special proceeding in Surrogate's Court (SCPA 401) and shall do so unless the Court appoints a guardian ad litem. Where the committee does not appear or is disqualified because of a conflict of interest or other cause, an incompetent must appear by a guardian ad litem. An attorney cannot put in an appearance for an incompetent for the simple reason that the incompetent is incapable of employing counsel (Matter of Palestine, 151 Misc. 100; Matter of Brown, 131 Misc. 420).

SCPA 307(5) provides that service of process on an incompetent is to be made pursuant to CPLR 309(b), unless otherwise directed by the court. Citation must be served on the incompetent as well as the committee unless the court dispenses with service on the incompetent. The failure to effect service of process in accordance with statutory requirements deprives the court of jurisdiction over the incompetent (Hickey v Naruth Realty Corp. ,71 AD2d 668; cf., Cole v Lawas, 97 AD2d 912, 913 [court found that failure to make service on the conservatee in addition to the conservator could be cured *nunc pro tunc*]). A guardian ad litem must, therefore, check the manner of service meticulously.

In view of the long-standing precedents regarding service on infants and incompetents, guardians ad litem are well- advised to insist that service must meet the requirements of SCPA 307 (4) and (5) and to consider, with respect to incompetents and conservatees, that service on them be deemed ineffectual unless made on both the ward and the committee or conservator.

C. INCAPACITATED PERSONS

An incapacitated person is defined as any person who for any cause is incapable of adequately protecting his or her rights although not judicially declared incompetent, including a person for whom a guardian has been appointed pursuant to Article 81 of the Mental Hygiene Law (SCPA 103[25]).

In a case where there is any proof showing that a person is mentally and/or physically incapable of protecting his or her own rights, the court should appoint a guardian ad litem to represent the interests of the person under disability (Matter of Winston, 92 Misc2d 208; Matter of Arneson, 84 Misc2d 128). The appointment of a guardian ad litem reflects a determination by the court to the effect that the record presently indicates the need for the court to intervene to protect the interests of a party (Anonymous v Anonymous, 3 AD2d 590). An important factor to keep in mind when determining the advisability of the appointment of a guardian ad litem is that a decree rendered against a necessary party who is incapacitated and for whom no guardian ad litem was appointed is voidable and must be set aside upon his or her application (Matter of Arneson, supra, at 134).

D. PRISONERS

Persons sentenced to life imprisonment are deemed civilly dead (Civil Rights Law §79-a), while the civil rights of those confined to a state correctional facility are suspended during the term of their sentence (Civil Rights Law §79). Nonetheless, the conviction of a person for any crime does not work a forfeiture of any property or of any right or interest therein (Civil Rights Law §79-b; see also, Avery v Everett, 110 N.Y. 317). Consequently, civil death occurring on a person's sentence to life imprisonment does not defeat his or her right to inherit (Matter of Shaffer, 184 Misc. 855).

Section 79-a of the Civil Rights Law states that a sentence of imprisonment to life shall not be deemed to impair the validity of a marriage between such person and his or her spouse *(*see also, Domestic Relations Law §6). The incarceration of a spouse is not listed as one of the grounds

leading to disqualification of a husband or wife as a surviving spouse under section 5-1.2 of the Estates, Powers and Trusts Law ("EPTL"). However, the confinement of a spouse in a prison for a period of three or more consecutive years is grounds for a divorce (Domestic Relations Law §170 [3]).

The appointment by the Surrogate of a guardian ad litem for a prisoner is only authorized when his default in appearance is found by the court to be due to his confinement in prison. In case of a deliberate default, the prisoner forfeits his right of representation.

The appointment of a guardian ad litem may be unnecessary if there has been a prior appointment of a committee for a prisoner sentenced to life (Corrections Law §§320 et seq.) or a trustee or trustees for prisoners sentenced for a term less than life (Corrections Law §§350, et seq.). A committee or trustee appointed pursuant to the Corrections Law is competent to represent the prisoner in proceedings involving his property rights. Moreover, there is no deterrent, when the prisoner so elects, to his appearance by counsel of his own choice. However, if neither the prisoner nor the committee appears to represent the interests of the prisoner, a guardian ad litem will be appointed to represent the interests of the prisoner.

E. UNKNOWNS

Included in SCPA 103 [40] is the definition of persons under disability, any person who is unknown or whose whereabouts are unknown. The purpose of the statute is to protect the interests of any such person who has or may have an interest in the estate.

Inasmuch as the statute is not specific as to the situations in which it is applicable, the exercise of the power of appointment is deemed discretionary with the Surrogate. To some extent, the objectives of the statute may be gleaned from the contents of a petition which, in addition to other requirements, must set forth:

1. If any person be unknown or his or her name or whereabouts be unknown, a general description of such person showing his or her connection with the estate and his or her interest in the proceeding; and

2. If any person be included in a class and his or her name is unknown, the names and addresses of those persons of the class who are known, a general description of all other persons

belonging to the class, their connection with the estate, and their interest in the proceeding (SCPA 304[3][d], [f]).

Accordingly, where the affidavits of heirship do not dispel the possibility of relations of equal or nearer degree than those mentioned in the petition, the Surrogate will direct publication against unknown distributees and appointed a guardian ad litem for them (Matter of Dwenger, NYLJ, January 2, 2003, at p. 22, col 5; Matter of Brandenburg, NYLJ, December 18, 2002, at p. 19, col 1).

Also, SCPA 1123 and 1215 provide a substitute for a guardian ad litem by authorizing the Public Administrator to receive process or other notice as a necessary party in: (a) any proceeding where service of process or notice of or in behalf of any known or unknown person is directed by the court; (b) every proceeding for administration or probate where it appears that the persons applying or named in the petition are not all of the distributees of the decedent or where such persons are related to the decedent in the fourth degree of consanguinity or more remotely; and (c) every proceeding to effect distribution of money or property deposited for the account of unknown persons whose shares were deposited pursuant to SCPA 2218 (SCPA 1123[3]; 1215[1]).

F. UNBORNS

"Unborns" are not included in the definition of persons under disability. This category of unknowns, in limited circumstances, is protected by legislative as well as judicial action. For example, SCPA 315 [2] [iii] directs that the court shall appoint a guardian ad litem to represent or protect the person who eventually may become entitled to a remainder interest where there is no certain or presumptive remainderman in being or ascertained to represent future interests. Similarly, SCPA 2106(2) provides for the appointment of a guardian ad litem in a proceeding for the compromises of controversies where the interests of persons under disability or not in being are or may be affected. Moreover, CPLR 7704 requires that a guardian ad litem be appointed to represent a person not in being in a proceeding brought in the Supreme Court for an accounting and settlement of a trust. The settlement of a controversy which wipes out the contingent interests of unknowns, accordingly, can have no effect unless the interests of the unknowns or unborns are represented by a guardian ad litem (Fisher v Fisher, 253 N.Y. 260).

III. APPOINTMENT PROCEDURE

A. ELIGIBILITY FOR APPOINTMENT

Appointment as a guardian ad litem is limited to attorneys admitted to practice in New York State (SCPA 404 [1]). The appointment does not confer any status on the guardian ad litem as a party to the proceeding, but merely empowers the guardian ad litem to represent and act as the attorney for his or her ward. For this reason, the appointee is not subject to examination before trial as a party (Matter of Mars, 201 Misc. 329). Neither should the guardian ad litem, as attorney for a party, be examinable as a witness. No privilege, however, attaches to the information a guardian ad litem gathers in the course of representing his or her ward. While owing prime allegiance to his or her ward, the guardian ad litem has the concurrent obligation, as an officer of the court, to make a fair and objective report of the information he or she obtains through investigation (Matter of Ford, 79 AD2d 403). Therefore, the guardian ad litem may be compelled to disclose to other parties the names and statements of witnesses he or she procured. In any event, such information would necessarily be revealed because it is includible in the guardian ad litem's report (Matter of Roe, 65 Misc2d 143). The guardian ad litem must be competent to protect the rights of his or her ward, must have no rights adverse to his or her ward, must be responsible, and must have no business connection with the attorney or counsel of any party to the proceeding. Where the guardian ad litem discovers a conflict of interest after appointment, it must be brought to the attention of the court and permission to resign must be requested (Matter of Merrick, 107 Misc2d 988). These conditions have long since been incorporated into the statutes on the subject (SCPA 402, et seq.) along with the requirement that there be disclosure of such additional facts as the court may direct.

B. PETITION FOR APPOINTMENT

A guardian ad litem may be appointed upon the nomination of an infant who is over the age of 14 or his or her parent or guardian, or upon the initiative of the court. The petition of the infant or his or her parent or guardian must be accompanied by an affidavit of the nominated attorney showing: (a) that he or she is qualified to protect the rights of the infant and has no interest adverse to him or her; and (b) the circumstances which led to his or her nomination (SCPA 403[1][a]).

The parent of the infant or the person having legal custody of him or her or an adult person with whom the infant resides must additionally file an affidavit stating: (1) that he or she consents to the appointment of the attorney; (2) that he or she has no interest adverse to the infant and, if he or she has, whether he or she influenced the infant in the nomination; and (3) such additional facts as may be required by the court (SCPA 403 [1][b]).

The attorney nominated by the infant, provided he or she is qualified and has no interest inconsistent with that of the infant, is customarily appointed by the court; and the failure to do so is a reversible error in the absence of other circumstances warranting a disregard of the infant's nomination (Matter of Dumbra, 254 App. Div. 776; Matter of McKee, 254 App. Div. 871).

The statutory requirements of the petition for appointment of a guardian ad litem are complemented by the Uniform Rules for the Surrogate's Court ("Rules"). Under these Rules, the petition of an infant must state whether the infant has been influenced by the proponent, the accounting party, or the attorneys for the fiduciaries, or anyone connected with them in the selection of the infant's nominee, and whether the person nominated has suggested his or her appointment in person or through others. The affidavit of the nominated attorney must similarly state whether any of the foregoing parties or anyone connected with them has suggested or accelerated his or her nomination, and if so, he or she must disclose the facts (Rule 207.12).

The Rules also contain a catch-all provision that the application must satisfy the Court that the nominated attorney will have no undivided loyalty which might result in the failure to protect the infant's rights (Rule 207.12[b]).

A guardian ad litem is the court's appointee for the purpose of protecting the rights of an infant who is a ward of the court. His or her function is to see to it that such rights are guarded and preserved by the utmost vigilance and care (Matter of Eitingan, 192 Misc. 836, 840, affd 273 App. Div. 998).

The court's zealous regard for the rights of its ward has led to the adoption of a code of conduct that is uncompromising and admits of no breach even in the appearance of impropriety between the court's ward and its appointee. Wherever a question of conflict arises between the two, the course to be pursued by the guardian ad litem is clear. "The law" when dealing with a person

acting in a fiduciary capacity, "does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relationship is disclosed..." (Munson v The Syracuse, Geneva & Corning RR Co., 103 N.Y. 59, 74).

C. EFFECT OF FAILURE TO APPOINT

The failure to appoint a guardian ad litem for a person under disability renders the decree voidable on the application of the person adversely affected which, in the case of an infant, may be as late as his or her attainment of majority (1 Warren's Heaton on Surrogates' Courts, §8.18[1] [6th ed. revised]). A party's failure to notify the court of an adversary's disability before obtaining a default judgment is considered to be a fraud upon the court and a basis for vacating the judgment (New York Life Insurance Co. v V.K., 184 Misc2d 727). The decree, however, is not void as is the result when there is a failure to serve process on a necessary party. If no appointment of a guardian ad litem has been made because the Surrogate has found, pursuant to SCPA 403, that the appointment is unnecessary, the rights of the person under disability remain as fully adjudicated and concluded as though a guardian ad litem was, in fact, appointed (SCPA 406).

D. DISPENSING WITH APPOINTMENT

In limited circumstances, no harm can possibly be incurred by the failure to appoint a guardian ad litem, and in such instances, the expense placed on the estate by an appointment cannot be justified. The legislature has taken cognizance of this fact, and SCPA 403(3) authorizes the court to dispense with the appointment of a guardian ad litem whenever: (1) in an uncontested probate proceeding, such person will receive a share equal to or greater than the share to which he would be entitled if the decedent died intestate; (2) in an accounting proceeding, such person receives a specific bequest or a specific devise or a general legacy of a stated sum of money and the accounting party shows to the satisfaction of the court that such person has received his legacy or devise or will receive the same in full under the decree to be made; (3) in any proceeding, the Public Administrator is authorized by the court to receive process or notice on behalf of the person under disability *(*see, SCPA 1123 [2]; 1215 [1]); and (4) in a probate proceeding the decedent is survived by a spouse

who receives the entire estate under the propounded instrument and the petition alleges that probate assets do not exceed $50,000.

E. TERMINATION OF REPRESENTATION

The appointment of a guardian ad litem does not terminate with the rendition of a decree in Surrogate's Court, but continues so long as the interests of the ward needs protecting. If an appeal is taken from the decree, the duty of representation remains until the final determination of the appeal (Matter of Stewart, 23 App. Div. 17).

The representation of an infant by a guardian ad litem terminates upon the ward's attainment of majority (Matter of Fassig, 58 Misc2d 252). When the infant reaches majority the guardian ad litem files a final report and asks to be discharged (Matter of White, NYLJ, April 12, 1996 at p. 29, col 6; Matter of Steptoe, NYLJ, April 10, 1992 at p. 30, col 6). Presumably, a guardian ad litem's representation of an incompetent would similarly cease upon an adjudication that the ward has regained his competency. In such event, no further proceeding should be taken against the former infant or incompetent without leave of court until 30 days after he or she is notified to retain another attorney pursuant to CPLR 321(c) (Matter of Fassig, supra). If the ward dies, the authority of the guardian ad litem will terminate and will be superseded by the court-appointed legal representative of the estate of the ward. Although a guardian ad litem representing the interests of unknown heirs and distributees has no apparent duty to search for his or her unknown wards, in the event that the whereabouts and existence of such unknown wards is determined during the course of the proceeding, and if all such unknown wards are of full age and sound mind, then there would be no further need for the guardian ad litem and the duties of the guardian ad litem would terminate. The guardian ad litem should carefully consider his or her course of action on behalf of the ward if his or her appointment as guardian ad litem will terminate before the decree is rendered because the ward attains majority, regains competence, dies, or is located. The guardian ad litem can, in these instances, give the Court guidance on his or her allowance for services to the date of termination of the appointment.

The duty of representation does not extend beyond the scope of the proceeding in which the guardian ad litem was appointed (Matter of McGuire, NYLJ, July 6, 1998 at p. 30, col 2). Thus, when appointed in a probate proceeding, the guardian ad litem's inquiry is limited to the facts relating to the genuineness of the will and the validity of its execution (SCPA 1408 [1]).

F. FINALITY OF DECREE

When the interests of a person under disability are protected in a proceeding by a guardian ad litem appointed for that purpose, the proceeding is binding upon such person to the same extent as if such person were under no disability (SCPA 406; Matter of Howley, 100 N.Y. 206; accord Dunn v Eckhoff, 35 NY2d 698, 699), and the resulting decree is final and immune from subsequent direct or collateral attack (Matter of Silver, 72 Misc2d 963). To this extent, SCPA 406 represents a codification of existing case law *(*see, Matter of Howley, supra*)*. The statute accords the same finality to decrees which recite the appointment of a guardian ad litem as it does if the appointment of a guardian ad litem had been dispensed with by the Court as an unnecessary party pursuant to SCPA 403(3).

IV. DUTIES, RESPONSIBILITIES, AND COMPENSATION GENERALLY

The need for the appointment of a guardian ad litem may arise in any type of proceeding that comes before the Surrogate, but guardians ad litem are most commonly appointed in proceedings to probate a will and to settle the accounts of executors, administrators, and trustees. Other proceedings in which guardians ad litem are appointed with some frequency include: (1) construction proceedings pursuant to SCPA 1420; (2) compromise of wrongful death and personal injury actions; (3) heirship proceedings; (4) adoptions; and (5) compromises.

In each type of proceeding, the guardian ad litem will encounter problems of a special nature. However, there are certain duties common to every type of proceeding that a guardian ad litem must perform.

In all proceedings, each guardian ad litem shall qualify by filing his or her consent to act within 10 days of notification of appointment (Rule 207.13 [a]), or he or she may be deemed unable to act. Each guardian ad litem, on nomination and consent, must affirmatively assure the

court that he or she has no interest adverse to that of his or her ward, that no conflict exists which would prevent him or her from representing his or her ward (SCPA 404[2], Rule 36.1[d]) and that the appointment will not be in violation of the Rules of the Chief Judge (Rule 36.1[b] and [c]). The failure to file a consent and obtain the entry of an order of appointment prevents the guardian ad litem from acting, and his or her participation in a proceeding on behalf of an infant is a nullity which is not cured by the filing of the consent and order following the hearing (Matter of Weed, 107 Misc. 595). Printed forms for qualification and consent are generally available from the court.

After his or her appointment by the court, a guardian ad litem should file a notice of appearance pursuant to SCPA 404(3) and, when directed by the Surrogate, serve a notice of appearance upon all parties (Rule 207.9 [c]). Where the guardian ad litem deems it appropriate, service of a demand for pleadings can be made along with the notice of appearance (SCPA 302 [3]). The pleadings shall be served within five days of the demand unless otherwise ordered by the Surrogate (Rule 207.10).

The guardian ad litem must determine whether jurisdiction was properly acquired (Rule 207.13 [a]). This basic and most essential function is accomplished by examining the citations and affidavits of service on file to confirm that: (1) service has been timely and properly effected and (2) all necessary parties have been properly served with citation. Special attention should be paid to orders for publication. A natural person domiciled in New York cannot be served by publication unless it is shown that service by personal delivery cannot be effected within the state (SCPA 307 [3]). When the petition or affidavit accompanying the request for an order of publication is patently devoid of facts demonstrating due diligence and the evidence shows even a perfunctory search would have located the absent party, the order is a nullity (Matter of Roberts, 19 AD2d 391).

In all cases, a guardian ad litem must ascertain the particular interest of his or her ward in the proceeding and must consult with the ward whenever necessary. The extent of the guardian ad litem's contact with his or her ward, while discretionary with the guardian ad litem, should be measured by the particular circumstances and complexities of the proceeding.

The guardian ad litem should examine the entire court file. The obligations of the guardian ad litem, however, are not circumscribed by what appears of record. He or she may and should request supportive documents, such as contracts, income tax returns, and other evidentiary proof, that may aid the guardian ad litem in effectively protecting the rights of his or her ward, but a guardian ad litem should never engage appraisers, accountants, or other experts without the consent of the Court obtained on notice to other parties (Matter of Stralem, NYLJ, August 22, 1995 at p. 23, col 5).

The guardian ad litem, although he or she may be appointed in only one phase of an estate proceeding, does not act in isolation. He or she must personally attend all court proceedings and conferences and should confer with all attorneys to the extent necessary to protect his or her ward. The guardian ad litem should examine all proposed decrees or orders to ascertain that the proper provision has been included for the protection of the ward, especially when the decision directs the payment of money or property.

Every guardian ad litem is required to file such intermediate reports as may be necessary and appropriate, in addition to a final report and a supplemental report, within sixty days after entry of a decree settling the account, where the decree directs the payment of money or delivery of property to the ward (Rule 207.13[b]). The report should be timely filed and must include the guardian ad litem's findings, conclusions, recommendations, and objections, if any. The form and content of the report is more fully examined later.

A. REPORTS OF GUARDIANS AD LITEM

By statutory mandate, a guardian ad litem must file an appearance, take such steps, with diligence, as are deemed necessary to represent and protect the interest of the person under disability, and file a report of his or her activities, together with recommendations, upon the termination of his or her duties or at such other time as directed by the Court (SCPA 404 [3]).

The Rules direct that the report of the guardian ad litem be made in writing or, with the consent of the Surrogate, orally in open court within ten days of the guardian ad litem's appointment (twenty days in an accounting) or from the date to which the proceeding was finally

adjourned unless extended by the court (Rule 207.13). The submission of an oral report is uncommon.

The Rules further provide that no decree shall be made until the guardian ad litem reports his or her findings that he or she has examined all processes and papers to ensure they are regular and have been duly served (Ru1e 207.13). Additionally, Rule 207.13(c) states that no allowance shall be paid, except as provided in SCPA 2111, until the guardian ad litem files an appropriate report.

The report, like a brief, is judged not be its length, but by its content. The nature of the report will vary with the type of proceeding and circumstances presented. While there is no prescribed form, every report must: (a) identify the particular interest of the ward in the proceeding; (b) indicate that the court has proper jurisdiction over the ward, the other parties, and the subject matter of the proceeding; (c) set forth a statement of the actions pursued by the guardian ad litem to verify the court's jurisdiction; and (d) contain a statement of the activity or investigation conducted by the guardian ad litem which should include a recital of evidentiary matters such as statements of witnesses (Matter of Roe, 65 Misc2d 143). In addition, the report must include the findings, conclusions, recommendations, and a statement in detail of the objections, if any. The guardian ad litem must make specific recommendations, whether they be favorable or unfavorable to the ward. The primary allegiance of the guardian ad litem is the ward, but he or she has a concurrent obligation as an officer of the court to make a thorough, fair and objective report (Riley v Erie Lackawanna R. Co., 119 Misc2d 619). He or she cannot abdicate the duty of his or her office by concluding he will leave the decision in the hands of the court. Objections which may properly be taken but would not benefit the ward or increase his or her share of the estate should not be made (1 Warren's Heaton on Surrogate's Courts, supra § 8.13 [6]).

The guardian ad litem's report should document the facts and circumstances of the case to support his or her conclusions, and where appropriate, the guardian ad litem should describe the

factors which may render an appeal inadvisable, such as the risk of litigation, the unlikelihood of success, and the expense of the appeal. Moreover, the guardian ad litem can consider the issue of compensation for services to be rendered to perfect the appeal and consult the court in advance relative to the compensation and expenses of the guardian ad litem on appeal. It might be necessary in the case of an appeal for the guardian ad litem to apply to the court for an interim allowance for services and request prepayment or prompt reimbursement of disbursements incurred by the guardian ad litem on appeal (SCPA 2111).

When necessitated by the particular nature of a proceeding or when directed by the court, the filing of one or more intermediate reports may be required. Where a decree directs the payment of money or delivery of property to or for the benefit of the guardian ad litem's ward, the guardian ad litem must file a supplemental report within sixty days after entry of the decree showing whether it has been complied with as far as the ward is concerned. The fiduciary in that situation shall immediately notify the guardian ad litem in writing of the date and details of payment or delivery (Rule 207.13 [b]).

The report must be filed in timely fashion with the clerk and be accompanied by proof of service of a copy on all parties who have appeared. If the report cannot be filed within the time prescribed by Rule 207.13, the petitioner should be advised and his or her consent to delay obtained. Additional time should then be requested from the clerk, upon good cause shown, so that the court and other parties are made aware that there is good reason for the delay.

B. COMPENSATION

1. Amount of Compensation

SCPA 405 subdivision 1 provides that a guardian ad item shall receive reasonable compensation. The compensation of a guardian ad litem is determined in the same manner and is based on the same criteria that govern fixation of attorneys' fees in general (Matter of Burk, 6 AD2d 429, citing Matter of Potts, 213 App. Div. 59,62, affd 241 N.Y. 593). The following are

the criteria that are employed by the court in fixing fees and which should be covered in an affidavit of services filed by the guardian ad litem:

a) The nature and extent of the services, should be set forth in detail; and

b) The actual time spent and the necessity therefore. In Matter of Slade (99 AD2d 668), the Appellate Division observed that the guardian ad litem failed to present time records to substantiate the conclusory allegation that he had spent 126.5 hours on his assignment and concluded that the Surrogate must determine the reasonable value of the services performed based upon specific documentation of the time spent on each task listed in the guardian ad litem's affidavit. The matter was sent back to the Surrogate's Court for further proceedings. The courts have also emphasized the necessity of having time records contemporaneously maintained (Matter of Phelan, 173 AD2d 621). There the court stated "we have also repeatedly emphasized the significance of contemporaneously maintained time records as a component of an attorney's affirmation of legal services and have given little weight to after the fact estimations of time spent." Accordingly, any affidavit of services should have annexed to it a schedule of time for each item listed with the date and the circumstances of the services rendered. The total amount of time should be totaled and the affidavit of services should set forth the customary hourly rate charged by the attorney. It is important that the guardian ad litem indicate to all the interested persons, including the court, the total amount being sought.

c) The size of the estate versus the size of the ward's interest. Even if the size of the estate is substantial, the interest of the ward may be limited or dependent upon a contingency in the future which may or may not occur. Under those circumstances the courts have taken into consideration the fact that the interest to be protected by the guardian ad litem is limited or remote which, in turn, has affected the size of the compensation (Matter of Springett. 35 AD2d 927; Matter of Burk, supra [There, the court noted "The value of the incompetent's interest in this estate was relatively small"]). Of course, in an accounting, the guardian ad litem

will normally be required to do the same amount of work in reviewing the account whether the ward's share is large or small.

d) The complexity of the matter. The complexity of the matter or the difficulties encountered are a relevant criteria in fixing fees. For the most part, however, guardian ad litem assignments involve fairly routine matters such as the usual probate proceedings where the circumstances and the plan of the testator appear entirely normal and without any suspicion whatsoever. In those types of probate proceedings, to facilitate the fixation of the fee, the court has certain guidelines which it ordinarily follows and an affidavit of services under those circumstances will not be required. However, if the guardian ad litem is of the opinion that the probate assignment is other than fairly routine and that he or she is deserving of a fee beyond what would normally be allowed, it is suggested that the guardian ad litem consult with the probate clerk and be guided accordingly.

e) The results achieved. Naturally, if the guardian ad litem's services have resulted in benefit to the ward, this should be set forth in the affidavit of services as an additional element in the fixation of compensation.

f) The professional standing of guardian ad litem. The affidavit of services should indicate the level of expertise of the guardian ad litem in the area of the law in which he or she has been appointed.

g) The practical considerations. Agreements reached by the parties with respect to the fee of the guardian ad litem, while not binding on the court, may nevertheless be helpful in resolving the amount of the compensation. Accordingly, following the filing of his or her report, the guardian ad litem should consider discussing his compensation with the attorney for the fiduciary, stating the amount of time that has been expended and the hourly rate that he or she is accustomed to receiving with a view towards arriving at an acceptable fee. If an agreement is reached, a letter should be sent to the court by the attorney for the fiduciary

expressing his or her consent to the requested fee. The court may nevertheless require an affidavit of services from the guardian ad litem and must do so under the Rules of the Chief Judge whenever the fee is $5,000.00 or more since the court is required to render an opinion in support of the compensation allowed (22 NYCRR § 36.4 [b]).

2. Source of Compensation

The compensation paid to a guardian ad litem may be charged by the court against any or all of the following in such proportion as directed by the court:

a) the estate;

b) the interest of the person under disability; and

c) for good cause shown any other party (SCPA 405 [1]).

The authority to charge the guardian ad litem's fee against any other party in the proceeding for good cause shown is of fairly recent vintage, having been added only in 1993, and it apparently has limited application since most of the cases have held that a party can be charged with the payment of the guardian ad litem's fee only when that party's actions were unnecessary or produced unfounded litigation that resulted in the appointment of a guardian ad litem (Matter of Ault, 164 Misc2d 272). Historically, the real contest has been over whether the estate or the share of the ward should be charged with the guardian ad litem's fee. Initially, the courts were hesitant to charge the estate stating that such an award should not be made unless it were shown that the value of the services benefitted not only the ward but also the owners of the estate or

fund out of whose pockets the allowance is to be taken (Matter of Thaw, 182 App. Div. 368). However, subsequent cases the courts have rationalized that, in fact, in all cases the guardian ad litem's services are of benefit to the estate because the court cannot determine the questions before it without the presence of the disabled person and, accordingly, the services rendered by

the guardian ad litem are beneficial to the entire estate, for without the presence of the guardian ad litem, the disabled person is not bound by any judgment (Livingston v Ward, 238 N.Y. 193). Accordingly, the general tendency has been to charge the fee of the guardian ad litem against the estate and this is true even if the guardian ad litem is unsuccessful (Matter of Friedgood, 111 Misc2d 612) or the decree bars the ward from participating in the estate (Matter of Betts, 152 Misc. 426).

3. Counsel for Guardians

In situations where a person under disability is cited and he or she already has a guardian appointed by a court, such as a parent appointed as a guardian for an infant child, the guardian may appear by an attorney on approval by the court granted under an application pursuant to SCPA 403. Under those circumstances, the appointment of a guardian ad litem will be obviated and under SCPA 405(3), counsel for the guardian is entitled to the same reasonable compensation that a guardian ad litem would have been entitled to.

V. PROCEEDINGS IN WHICH GUARDIANS AD LITEM ARE APPOINTED

A. PROBATE PROCEEDINGS

In probate proceedings, a guardian ad litem must review the will to satisfy himself or herself that it was properly executed in accordance with the requirements of EPTL 3-2.1. A will which is not executed in compliance with the formalities prescribed by EPTL 3-2.1 cannot be given effect (Matter of Lavigne, 76 AD2d 975, affd 52 NY2d 1008; *see*, Matter of Snide, 52 NY2d 193. 197-198). Therefore, even if no one opposes probate of the propounded instrument, it must be rejected where the requirements of due execution are not met (SCPA 1408 [1]; Matter of Pirozzi, 238 AD2d 833).

The guardian ad litem must also be satisfied that the testator had testamentary capacity when the will was executed. In reaching this determination, a guardian ad litem must look to the following facts: (1) whether the testator understood the nature and consequences of executing a

will; (2) whether the testator knew the nature and extent of the property that he or she was disposing of; and (3) whether the testator knew those who would be considered the natural objects of his or her bounty and his or her relations with them (Matter of Kumstar, 66 NY2d 691; Matter of Slade, 106 AD2d 914).

Lastly, the guardian ad litem should be satisfied that the testator was free of restraint and undue influence. Undue influence exists when the mind of the testator is overpowered so that the will of another is substituted for his or her own (Matter of Walther, 6 NY2d 49). On the other hand, fraud is exercised where the testator acts as a free agent, but is deceived into acting by false data (Matter of Coniglio, 242 AD2d 901). While fraud may be present without undue influence, both are equally destructive of a will or that portion of the will affected (Matter of Weinstock, 40 NY2d 1).

When an attorney accepts appointment as a guardian ad litem to appear for and represent a person under disability in a probate proceeding, it is expected that the attorney will diligently perform his or her duties with an understanding of the nature of the guardian ad litem's responsibilities.

Considerations that should be addressed or that may invite more detailed investigation by the guardian ad litem include:

1. Use of a mark as a signature, an irregular signature, or employment of another to sign testator’s name at his or her direction. Use of a mark may indicate possible illiteracy which can raise the question of whether the testator knew and understood the contents of the Will. Use of a mark or irregularities in the signature and the employment of another to sign may be indications of a weakened and enfeebled condition which can affect the issues of testamentary capacity and undue influence.

2. Attesting witnesses related to or biased in favor of beneficiaries. An attesting witness's bias can raise a question of fact on the issue of due execution which will require submission of that issue to the jury.

3. Will is holographic - presence or absence of attestation clause. Where the Will has been prepared by the testator himself or herself without the assistance of an attorney, failure to conform with the statutory requirements of due execution is more probable. The lack of an attestation clause can increase such probability.

4. Serious mental or medical problems. Serious mental problems, such as senile dementia, or medical problems that inhibit rational thought can raise questions of testamentary capacity.

5. Does the Will represent an abrupt departure from prior wills, or are natural objects of the testator's bounty discriminated against without apparent foundation? These may be indications of undue influence or possible lack of testamentary capacity.

6. Was one or more beneficiary in a confidential relationship with the testator, either presumed (such as an attorney-client, doctor-patient, and clergy-parishioner) or apparent (such as a parent-child) where the beneficiary is dominant and the testator subservient in the relationship? Indications of dominance can arise from complete control of the testator's financial affairs through the use of powers of attorney or other transactions. The fact that the beneficiary under such circumstances, selects the attorney-draftsman, gives the testamentary instructions, or is present in the attorney's office while instructions are being given or during the will's execution requires additional scrutiny.

7. The attorney-draftsman or a member of his or her family is a beneficiary under the will. In these situations, the court may request an explanation of the circumstances under which the gift was made either by affidavit or conduct a Putnam hearing (Matter of Putnam 257 N.Y. 140; *see, e.g,* Matter of Arnold, 125 Misc2d 265).

8. The attorney-draftsman is the named executor or fiduciary. Such circumstances may raise questions of overreaching by the attorney in the process of his or her being selected as executor, particularly if he or she has had no relationship whatsoever with the decedent prior to such time *(see,* Matter of Weinstock, supra*; see also,* SCPA 2307-a).

The presence or absence of some of the above circumstances should shape the response and extent of the guardian ad litem's investigation. Some situations will require a formal examination of attesting witnesses under SCPA 1404, while under other conditions, an informal discussion with the attesting witnesses may be sufficient. A balanced judgment is required. For example, where the decedent is survived by a spouse and infant children, and the spouse is the mother of the children, a will leaving the entire estate to the surviving spouse will not likely arouse suspicion. Contrarily, if the decedent was elderly and left the bulk of his estate to a nurse to the exclusion of any family members, the guardian ad litem should thoroughly investigate all the facts and circumstances surrounding the execution of the will and the relationship of the decedent and the nurse and distributees. The SCPA 1404 examination of attesting witnesses to the execution of the will can be conducted either prior or subsequent to the filing of objections of the will to probate, but the better practice is to file objections after the conclusion of the SCPA 1404 examination, being mindful of the requirement that objections to probate are due ten days after the completion of the SCPA 1404 examination (SCPA 1410). The guardian ad litem who participates in a pretrial examination should be aware of Rule §207.27, which usually limits the period allowed to be covered by the examination to three years prior to the execution of the instrument and two years thereafter or the date of death, whichever is shorter. The time period may be extended on a showing of special circumstances (Matter of Partridge, 141 Misc2d 159). The usual fee for the filing of objections is waived where the party objecting is a guardian ad litem on behalf of his or her ward (SCPA 2402[16][a]).

Before filing formal objections to probate, the guardian ad litem should thoroughly consider the gravity of such a course and whether, following a thorough review of the facts and the law, the guardian ad litem believes there is substantial merit to his or her objections to the probate of the Will. If, following such an in-depth independent analysis, the guardian ad litem is still in doubt, a review with a member of the Surrogate's Court legal staff may be helpful, but it is no substitute for the guardian ad litem's own final judgment. Considerations which should weigh heavily in that determination are the nature and extent of the proof assembled and the burden of proof on the particular issue involved. For instance, the burden of proof of undue influence is on the contestant, and it may be very difficult even to avoid a directed verdict without very convincing proof. However, if the beneficiary is in a confidential relationship, this may require a preliminary explanation from him or her in order to avoid an inference of undue influence *(see,* Matter of Putnam, supra*).* That factor could enhance the possibility of success from the routine case of undue influence containing no elements of confidential relationship.

Ordinarily, it is with trepidation that an attorney advises his or client to file objections to probate where the will contains an *in terrorem* clause, as the client could lose whatever bequest he or she received under the will if the contest is unsuccessful. A guardian ad litem appointed to represent the interests of an infant or an incompetent can ignore that danger, as the statute itself provides that an infant or incompetent may object to the probate of a will without forfeiting any benefit thereunder (EPTL 3-3.5[b][2]). The guardian ad litem appointed to represent the interests of an incapacitated person, as opposed to an incompetent, does not enjoy that statutory dispensation. Although it is clearly arguable that the statute should have equal force where the ward is incapacitated but not judicially declared incompetent, the statute does not by its terms extend to the incapacitated person and a guardian ad litem in such a case should seek the court’s advice before jeopardizing his or her ward’s interest in the estate.

Naturally, prior to any filing of objections or trial thereof, efforts can be made by the guardian ad litem to resolve the matter by compromise or settlement, a subject matter which will be dealt with separately.

It is not the duty of a guardian ad litem in probate proceedings to delve into matters, such as accounting, discovery, construction, etc., that may arise in subsequent proceedings. However, if something comes to his or her attention that may be detrimental to the estate or his or her ward, he or she should report it to the Court. An example of an instance where a report should be made is when the ward may need an Article 81 guardian appointed to protect his or her own interests. Where the ward may have a right of election, the guardian ad litem should petition for court authorization to exercise it on his or her behalf (EPTL 5-1.1-A [c] [3][D]).

A sample of a guardian ad litem's report in a probate proceeding is annexed as Appendix Schedule B.

B. ADMINISTRATION PROCEEDINGS

The criteria for appointing guardians ad litem in Administration Proceedings are, of course, similar to those in other Surrogate's Court proceedings (an interested person under a disability). It is the guardian ad litem's responsibility to examine and investigate the file, to review the pleadings, to ascertain the interests of his/her ward, and to confer with all attorneys and request additional documentation, if necessary to the performance of his/her duties. Consultation with the ward(s) is recommended whenever possible.

All guardians ad litem must attend all court proceedings, and file a timely report advising the court of his/her conclusions and recommendations.

A typical report would include the following: (1) the nature of the proceeding and pertinent jurisdictional facts, (2) the ward's disability, (3) the relief requested by the petition and the ward's interest therein, (4) the date of the decedent's death, (5) the relationship of the ward to the decedent and to the petitioner, (6) whether there has been a proper investigation into the

existence of any Wills executed by the decedent, (7) whether the petitioner is eligible to be appointed fiduciary, (8) the assets of the estate, and (9) whether the guardian ad litem recommends approving the relief requested.

It bears noting, however, that in administration proceedings where the conflicts generally concern the appointment of a fiduciary and the contests, if any, involve eligibility to act as a fiduciary, guardians ad litem are more often involved in the ancillary reliefs requested in the underlying petitions. Depending upon the relief requested by the petitioner and the policies and customs of the particular Surrogate's Court where the administration proceeding is pending, certain additional relief, such as determinations of death (SCPA 2225, EPTL 2-1.7), determinations of paternity (EPTL 4-1.2), and even kinship (SCPA 2225) may need to be addressed. (See V "G" under Table of Contents).

Sample reports in Administration proceedings are annexed as Appendix Exhibit C.

C. ACCOUNTING PROCEEDINGS

It is recommended that all guardians ad litem read sections 1, 3, 4, 5, and 6 below. As to section 2, the guardian ad litem may review only those portions that are relevant to his or her particular appointment. The appendices may be consulted as needed. A sample of a guardian ad litem's report in an accounting proceeding is annexed as Appendix Exhibit D-1.

1. INTRODUCTION

a. Generally

An accounting is an itemized rendition of the administering of estate/trust assets by a fiduciary, to wit: the property a fiduciary is charged with and expenses said fiduciary is credited with is presented for approval by the Court (SCPA Article 22; 22 NYCRR 207.40, 207.41).

There are three ways in which a fiduciary may account:

1. A formal accounting, in which the court is asked to pass on the account - whether intermediate or final - and to issue a decree (Official Form JA-5 or JA-8) discharging the fiduciary. A formal accounting may be compulsory - brought by the court, sua sponte, or by one of numerous parties interested in the estate/trust (SCPA 2205, 2206), or voluntary - in which the fiduciary presents the account to the court with a Petition (Official Form JA-1) for its judicial settlement, on notice to all interested parties by Citation (Official Form JA-6) or Waiver of Citation and Consent to Accounting (Official Form JA-3) (SCPA 2208, 2210-2215); or

2. An informal accounting, which occurs outside of court, by which distribution of the estate/trust assets is made by agreement of all interested parties concerned, and Receipts and Releases (Official Form JA-2) concerning said accounting are executed by the parties and filed with the Court (SCPA 2202); or

3. The judicial approval of an informal accounting (See SCPA 2203).

A crucial aspect of the accounting in any respect is the differentiation between principal and income (EPTL 11-2.1). The distinction between principal and income is complicated by the recently enacted reforms to bring trust accounting and trustee investment practices in line with modern trends relating to investment strategy. For the purposes of this section, it is necessary to note that the new law seeks to avoid the investment dilemma faced by the trustee under the old law. Typically, the trustee was required to strike a balance between

investing for growth (favored by remainder beneficiaries) and investing for income (favored by current income beneficiaries). The new law seeks to avoid this dilemma by giving the trustee two options. The trustee now has the power to make equitable adjustments between principal and income (EPTL 11-2.3[b][5]) or to treat the trust as a uni-trust and to pay out 4% of its value annually to the income beneficiary (EPTL 11-2.4).

The new laws relating to principal and income are spread across EPTL and SCPA. They consist of the following:

- EPTL Article 11-A. The new Principal and Income Act
- EPTL 11-2.4. The new optional uni-trust provision.
- EPTL 11-2.3(b)(5). The trustee's power to adjust principal and income.
- EPTL 11-2.3A. Judicial review of trustee's power to adjust.
- EPTL 11-2.1(m). Effective date of the new Principal and Income Act.
- EPTL 7-1.13. Trustee's power to split trusts.
- SCPA 2308, 2309, 2312. Trustee's commissions under the new Principal and Income Act.

b. <u>The Proceeding</u>:

Before discussing the accounting proceeding, it would be well to remind the guardian ad litem that his or her report is due within twenty days of appointment (Uniform Rules for the Surrogate's Court [22 NYCRR §207.41]). After reading the following discussion on the accounting proceeding, many guardians ad litem will wonder how a complete report is possible within such a short period. If it is impossible to prepare the report in a timely fashion, the guardian ad litem would be well advised to inform the court in writing of his or her progress within the twenty day period and advise the court of the nature of the work that remains to be done and when it should be completed.

In an accounting proceeding, the executor, administrator, or trustee presents a summary of the administration of the estate to those persons interested in the estate or trust. The purpose of a formal accounting is to have the fiduciary's conduct examined and, if found to be acceptable, then to discharge that fiduciary from liability for his or her conduct during the period covered by the accounting. The role of the guardian ad litem in an accounting proceeding is three-fold: to review the account and all its attendant circumstances; to participate in the litigation of those actions alleged to be objectionable; and to review the final decree for accuracy and completeness.

Necessary parties to the proceeding will be served with a citation in the proceeding. Necessary parties are defined in SCPA 2210. In many instances, at the time when the citation is issued by the court, an attorney will be designated to receive service of process on behalf of the person under a disability. In most cases, the court will appoint that attorney to act as guardian ad litem of the person under a disability on the return date of the citation.

2. THE ACCOUNT AND ITS SCHEDULES

a. Preliminary Steps

The guardian ad litem should become familiar with the current accounting file and any other relevant files, e.g., the probate proceeding and other miscellaneous proceedings, including prior accounting proceedings. The purpose of this review is to ascertain the law of the case, including any changes to the fiduciary's duties and powers. The guardian ad litem should review the provisions of Rule 207.40 (22 NYCRR 207.40) to be sure that the accounting complies with the requirements of this rule.

Fundamental to all proceedings, including accounting proceedings, is the determination that the venue is properly placed and the court has acquired jurisdiction over all necessary parties by citation, waiver of citation, or authorized notice of appearance. The guardian ad litem should first determine whether jurisdiction was obtained over his or her ward

(SCPA 307). The guardian ad litem must determine whether jurisdiction was acquired over all necessary parties. The failure to obtain jurisdiction over all interested parties will affect the finality of the decree. It should be noted that interested parties include not only beneficiaries and unpaid creditors (including the taxing authorities), but also sureties of the fiduciary's bond, assignees, and, in some cases, the Attorney General (SCPA 2210).

Some situations may require an interview with the ward or discussions with a parent or guardian of the person and/or property of the ward. For example, where a trustee may invade the principal of a trust or where the trustee has sprinkling powers for the benefit of an infant, an investigation may be necessary to determine what the needs of the ward were during the accounting period.

Where the guardian ad litem represents more than one ward, a careful review of the interests of each ward must be made to determine the presence of a conflict between the wards. A simple example of a conflict would be in a trustee's accounting where one ward is an income beneficiary of a trust and the other is a remainder beneficiary. Because these parties have adverse interests, they each must be represented by a separate guardian ad litem. The conflict must be brought to the attention of the court immediately.

In an accounting proceeding, a beneficiary who has been cited may represent another beneficiary who has the same but successive economic interest in the estate. This is called virtual representation and is governed by SCPA 2210(14) and 315 (Michael P. Ryan, *A Primer on Virtual Representation,* Warren's Heaton on Surrogate's Courts,Legislative & Case Digest*).*

Finally, the guardian ad litem must review the nature of the accounting and the prayer for relief contained in the citation and petition. The accounting proceeding has an omnibus quality in that the petitioner is free to incorporate separate types of relief within the

accounting (construction, for example). See Appendix - Exhibit D-2, Typical Objections in an Accounting Proceeding.

b. Checklist for an Executor's Account:[1]

The following checklist for an executor's account (II [b]), examination of accounting schedules (II [c]), and checklist for trustee's account (II [d]) and examination of a trust accounting schedules (II[e]) were prepared by Charles J. Groppe and Alexander Neave of Putney, Twombley, Hall & Hirson and is used with their kind permission

In General - It is recommended that the reader consult as to preparation of an account, Groppe et al., Harris 5th Edition New York Estates: Probate, Administration and Litigation (1996). Hereinafter Groppe et al. Harris (1996) §- ; N.Y.S.B.A. Practical Skills Program, "Probate and Administration of Estates", Fall 2000 C.L.E. Program. For related materials to assist in reviewing an Account it is useful to refer to Examination Technique Handbook for Estate Tax Examiners, IRM 4350 dated August 31, 1990, and related material regarding preparation of U.S. Estate Tax Return Form 706, including instruction booklet for preparation of return.

A. Review will and any related trust instrument and the probate decree and any orders granting or limiting the Fiduciary's letters and ascertain:

(a) Plan of estate distribution.

(b) Existence of any construction questions, tax apportionment problems.

(c) Fiduciary's investment authority, e.g., direction to retain assets; direction to dispose of an asset. See Matter of Scheuer, 94 Misc.2d 538, 405 N.Y.S.2d 189

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(Surr. Ct. N.Y.Co. 1978); Matter of Donner, 82 N.Y.2d 574, 606 N.Y.S.2d 137 (1993). The Prudent Investor Act, EPTL 11-2.3 applies to fiduciary investments made or held on and after January 1, 1995, irrespective of the date of a decedent's death. It applies to Executors. The Act requires that a fiduciary determine within a reasonable time after acquiring initial assets whether to retain or dispose of such assets. Ascertain if the Executor made such determination. Propriety of investment conduct prior to January 1, 1995, will be judged by former law. EPTL 11-2.2. Groppe et al. Harris (1996) §12:45 et seq.

(d) Any limitations or restrictions on fiduciaries, e.g., limits on commissions, restrictions against distributions without further court order.

B. Review Surrogate's Court file to ascertain if fiduciary acted promptly to obtain letters for full,preliminary or temporary authority within reasonable time after decedent's death. See Matter of Yarm, 119 A.D.2d 754, 501 N.Y.S.2d 163 (2d Dep't 1986); Preliminary Letters Testamentary, SCPA 1412; Temporary Administration, SCPA Article 9; Power and duty of Executor before probate, EPTL 11-1.3. Review any intermediate accounting by the Executor and any Decree or Receipt and Release settling it. As to binding effect of prior judicial decree or receipt and release settling an account, see Matter of Zilkha, 174 A.D.2d 331, 570 N.Y.S.2d 807 (1st Dep't 1991).

C. Ascertain identity of:

(a) Appraisers and ascertain relationship, if any, to fiduciary or to purchaser of estate assets. Any conflict of interest?

(b) Purchasers of estate assets and relationship, if any, to fiduciary. Any conflict of interest? Matter of Donner, supra.

D. Obtain and review deeds, contracts, leases, closing statements, bank books, trust agreements, waivers, releases, ante-nuptial and separation agreements, divorce decrees, adoption decrees and, in general, all other documents bearing on transactions engaged in by fiduciary or decedent. Examination of the fiduciary will be permitted to extend to the affairs of corporations controlled by the estate. See Matter of Steinberg, 153 Misc. 339, 274 N.Y.S. 914 (Surr. Ct. Kings Co. 1934); Matter of Sturman, N.Y.L.J. June 9, 1989, p. 22, col. 4 (Surr. Ct. N.Y. Co.); Groppe et al. Harris (1996) §22:140 et seq.

E. Review pleadings in any litigation involving the estate to ascertain if fiduciary engaged in any improper litigation or failed to assert possible defenses.

F. Ascertain whether Executor has considered potential liability under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and other Federal and State laws relating to liability for damage to environment. See City of Phoenix v. Garbage Services Co.,827 F. Supp. 600 (D. Ariz. 1993).

G. Review original documents, including Inventory of Assets (Official Form I-1) as published in Warren's Heaton Pamphlet Edition, New York SCPA-EPTL (Greenbook 2002) at p. SF-150 filed pursuant to Uniform Rules for Surrogate's Court §207.20 ("Uniform Rules"), Report required by Uniform Rules §207.42, Affidavit required by Uniform Rule §207.52, and cash and accounting statements, tax returns and estate and income tax records to ascertain:

(a) Did the fiduciary collect all assets? Did the fiduciary institute any necessary discovery proceedings under SCPA 2103? Did the fiduciary collect assets from and demand an accounting from all persons who acted as Attorney-in-Fact for the decedent?

(i) Objectant has burden of proof on the issue of whether assets are missing from the accounting inventory. Matter of Mann,41 A.D.2d 861, 342 N.Y.S. 2d 617 (3rd Dep't. 1973); Groppe et al. Harris (1996) §23:89; See Matter of Satnick, N.Y.L.J. Jan. 25, 1989, p. 26, col. 14 (Surr. Ct. Bx. Co. 1989); But see Matter of Bernsley, N.Y.L.J. April 10, 1992, p. 26, col. 5 (Surr. Ct. Richmond Co.) as to assets claimed by fiduciary that were once owned by decedent.

(ii) However, once an asset is traced into hands of fiduciary, fiduciary has burden of establishing proper expenditure or distribution. Matter of Taylor, 251 N.Y. 257 (1929); Matter of Wolf, 67 A.D.2d 930 (2nd Dep't 1979); Matter of Satnick, supra.

(iii) Whether Executors have failed or neglected to collect all assets is a proper line of inquiry. See Matter of Martin, N.Y.L.J. Jan. 10, 1990, p. 26, col. 3 (Surr. Ct. Nass. Co.) permitting inquiry as to Totten Trust accounts that "passed" on death to accounting Executor.

(b) Did the fiduciary segregate the estate assets and keep them separate from assets belonging to others? EPTL 11-1.6

(c) Did fiduciary keep adequate records? See Matter of Shulsky, 34 A.D.2d 545, 309 N.Y.S.2d 84 (2d Dep't 1970).

(d) Was cash kept invested and not idle? Cooper v. Jones, 78 A.D.2d 423 (4th Dep't 1981); Matter of Meister, 123 A.D. 2d 264 (1st Dep't 1986).

(e) Did fiduciary grant any improper options, mortgages, leases or make any improper loans or borrowings? In general, see EPTL Article 11.

(f) Did fiduciary act in accordance with Prudent Investor Act EPTL 11-2.3 for investment decisions made on or after January 1, 1995 particularly EPTL 11-2.3 (b)(3)(B) in implementing a plan to raise cash requirements?

(g) Did fiduciary properly consider all income and estate tax elections? EPTL 11-1.2. See Zimmerman v Pokart, 242 A.D. 2d 202, 662 NYS2d 5 (1st Dept. 1997); Matter of Lazarus, N.Y.L.J. Aug. 26, 1992, p. 22, col. 3 (Surr. Ct. N.Y. Co.). Did fiduciary properly handle all other tax matters including timely filing of returns, joining (or not joining) in filing spousal joint returns, claiming refunds, etc.? See Ascher, M.L., "Fiduciary Duty to Minimize Taxes," 20 Real Property, Probate and Trust Journal, No. 2, Summer 1985, p. 663.

(h) Did fiduciary consider Qualified Disclaimers? IRC §2518; EPTL 2-1.11.

(i) If fiduciary was also the attorney-in-fact for the decedent, Court may compel filing of account by attorney-in-fact for transactions engaged in by such attorney-in-fact. See Matter of Cohen, 139 Misc.2d 1082, 529 NYS2d 958 (Surr. Ct. Rensselaer Co. 1988). In any case, if the decedent had an attorney-in-fact, the fiduciary should review the actions taken under the power of attorney.

(j) Did fiduciary maintain neutral position as between beneficiaries? See Matter of Dunbar, 139 Misc.2d 955, 529 N.Y.S.2d 452 (Surr. Ct., Bx. Co. 1988); As to post mortem plan? See Schedule C(j), infra. As to distributions? See Schedule E(c), infra; see also Matter of Fales, 106 Misc.2d 419 (Surr. Ct. N.Y. Co. 1980) Matter of Colp, NYLJ Jan. 20, 1976, p. 8, col. 2 (Surr. Ct. N.Y. Co.); and Matter of Rappaport, 121 Misc.2d 447 (Surr. Ct. Nass. Co.

1983); Matter of Thomas, NYLJ August 12, 1988, p. 22, col. 4. (Surr. Ct. Nass. Co.); Gibbs, C. and Ordover, M., "Principal Income Adjustments", NYLJ, October 19, 1988, p. 3, col. 1.

(k) Consider Matter of Laflin, 111 A.D.2d 924, 491 N.Y.S.2d 35 (3rd Dept. 1985); Matter of Harris, 123 Misc.2d 247, 473 N.Y.S.2d 125 (Surr. Ct. Nass. Co. 1984) in cases where attorney/drafter or where multiple fiduciaries have been acting. See also Matter of Donner, supra, Matter of Corya, 148 Misc.2d 753, 563 N.Y.S.2d 581 (Surr. Ct. Suff. Co.), revd. 572 NYS2d 51 (2d Dep't. 1991). See also Comments infra at (i) on pages 14 and 15 relating to Schedule C; See Groppe, C.J., "The 'New' Putnam Rule: Problems Facing the Attorney/Legatee/Fiduciary," 61 NYS Bar Journal, No. 1 (Jan. 1989).

(l) Consider Matter of Stalbe, 130 Misc.2d 725; 497 N.Y.S.2d 237 (Surr. Ct. Queens Ct. 1985) in cases where fiduciary is also acting as attorney for the estate.

(m) In appropriate cases, request copies of any legal opinions rendered by counsel to the fiduciary with respect to matters affecting the administration of the estate. As to possible inapplicability of CPLR 4503 (Attorney-Client Privilege) see Hoopes v. Carota, 74 N.Y.2d 716 (1989); Matter of Baker, 139 Misc.2d, 5, 528 N.Y.S.2d 470 (Surr.Ct. Nassau Co. 1988); Matter of Fox, NYLJ, 5/9/97, p. 34, col. 3 (Surr. Ct. Nassau Co.); Matter of Herman, NYLJ, Aug. 21, 1991, p. 26, col. 3 (Surr. Ct. Nass. Co.); II Scott on Trusts, 4th Ed., §173.

(n) What will be the effect of the statute of limitations on potential objectants? Normal 6-year statute of limitations will apply. CPLR 213, subd. 1. But the statute does not begin to run with respect to assets never collected or not previously accounted for by a fiduciary. The statute does not begin to run in favor of a fiduciary until he openly repudiates the trust and asserts and exercises individual ownership over the trust property. Matter of Ashheim,

111 A.D. 176, 177, 97 N.Y.S. 607, aff'd 185 N.Y. 609 (1906); Matter of Barabash, 31 N.Y.2d 76, 334 N.Y.S.2d 890 (1972). The burden is on the fiduciary to show the repudiation; mere lapse of time is not sufficient. See Matter of Trubitz, NYLJ April 28, 1993, p. 22, col. 1 (Surr. Ct. N.Y. Co.). Accord as to defense of laches. Matter of Trubitz, supra.

(o) Has the accounting been verified by the accounting party? SCPA 2209.

c. Examination of Accounting Schedules[2]

The schedules referred to below are those contained in Form JA-7 of the Official Forms prescribed by the SCPA for "Non-Trust Accounting with Instructions" as published in Warren's Heaton Pamphlet Edition, New York SCPA - EPTL (Greenbook 2002) at p. SF-174. They differ somewhat from the schedules in JA-4 "Trust Accounting with Instructions" which is to be used by Executors where there is a trust involved. Most of the observations made below are applicable to each type of account. In any case, review the instructions on the forms for each schedule. See attached official form. 22 NYCRR §207.4(b) mandates that the official forms shall be accepted for filing in the Surrogate's Courts. Eff. April 1, 1998.

Schedule A - Principal Received

Compare list of assets set forth in Schedules of Federal Estate Tax Return (Form 706) or on Schedules of New York Estate Tax Return (Form ET-90) if the decedent died before February 1, 2000 and if no Federal Estate Tax Return was filed, or New York State Form ET-141, Estate Tax Domicile Affidavit, if decedent was a non-resident. Review the list of assets of the estate (Inventory of Assets) filed in the Surrogate's Court for the value of the estate pursuant to

[2]

Uniform Rules §207.20. Review copies of decedent's personal income tax returns to determine nature or existence of other assets. Check inventory of safe deposit boxes including corporate or partnership safe deposit boxes if decedent had access to such boxes as major or controlling business owner. Check all line adjustments and audit reports for changes.

(a) Has the Fiduciary collected and included all assets? If a "Q-TIP" Trust will be includible in the decedent's estate (see IRC §2056 (b)(7) and §2044) has fiduciary recovered estate tax from the beneficiaries of such Trust? See IRC §2207A and EPTL 2-1.12 and EPTL 2-1.8 (d-1). Has fiduciary collected all other amounts reimbursable to estate for estate taxes paid for others with respect to life insurance (IRC §2206), power of appointment property (IRC §2207) and property in which decedent had retained an income interest (IRC §2207B). Ascertain status of debts due the decedent or causes of action which the estate should pursue? Was the decedent owed any fees or commissions as fiduciary or otherwise? Has fiduciary collected amounts contributable by others to joint obligation, e.g., surviving spouse's joint share of joint income or gift tax liability?

(b) Has the fiduciary listed the date of receipt or acquisition of each such asset? Seek explanation of any delay in receipt and possible loss of income or asset value until date of collection.

(c) Are asset descriptions correct? Complete?

(d) Are the values listed the same as the date of death values? Matter of Hoff, 186 Misc. 684, aff'd 270 A.D. 891, aff'd 296 N.Y. 650 (1946). The estate tax values are presumptively the correct inventory values, except when the alternate valuation date is employed in the estate tax proceeding, in which case date of death values must be employed as

the inventory value. Are they correct? Are there any buy-sell agreements for liquidation and/or redemption of business interests? Are values overstated so as to produce a greater receiving commission, i.e., have only net values been shown to reflect outstanding loans or pledges secured by such assets? Title to real estate not vesting in the representative is not reported on Schedule A unless sold, and then only the net proceeds are included. Only the decedent's equity in an asset should be reported and any lien or encumbrance deducted.

(e) Does the schedule include any interest in a closely held business for which the fiduciary can be compelled to account separately? See Matter of Sturman, NYLJ June 9, 1989, p. 22, col. 4 (Surr. Ct. N.Y. Co.).

(f) Does the schedule erroneously include exempt property (EPTL 5-3.1), joint property (unless there are joint accounts for convenience only; Cf., Banking Law §675 and §678; see cases collected in Matter of Bobeck, 143 A.D.2d 90, 531 N.Y.S.2d 340 (2d Dept. 1988)); Totten Trusts (see Matter of Bobeck, supra); insurance proceeds paid to beneficiaries other than estate, or other non-testamentary assets? If so, any such property should not be reported on Schedule A, but should be reported on Schedule K, infra.

(g) Does the schedule include any real or personal property located outside New York State which must be accounted for in ancillary proceedings?

Schedule A-1 - Realized Increases

Calculate all increases on sales, liquidation or distribution of assets.

(a) See Prudent Investor Act EPTL 11-2.3 for investment decisions made on or after January 1, 1995; EPTL 11-2.2 will apply to investments held prior to that date. See comments to Schedule F, infra.

(b) Is the date of realization of each increase shown together with a description of the property from which it was derived?

(c) Are such increases correct? Are increases net of all costs and expenses?

(d) Has fiduciary incurred a "lost opportunity cost" by failing to collect increased value, e.g., by premature sale? By failing to exercise an option? By failing to make a tender? (Applies also to Schedule B, infra.)

(e) Did the fiduciary act according to an investment plan involving review and analysis and investment goals? See Matter of Donner, supra.

(f) Does the schedule report increases on new investments as well as increases on property shown on Schedule A?

(g) Does the schedule reflect that fiduciary disposed of improper investments within a reasonable time? (Applies also to Schedule B, infra.)

(f) Did fiduciary benefit personally from any expenses of sale? (Applies also to Schedule B, infra.)

Schedule A-2 - Income Collected

Are all interest, dividends, rents and other income reported by date received or, if a security was held for an entire year, on an annual basis?

(a) Compare schedule to published dividend record. Are reported amounts in accord with what should have been collected based on amounts held at given time?

(b) Was amount of income received reasonable or does account reflect under - or over - emphasis of income instead of "balancing" respective rights or principal and income beneficiaries? EPTL 11-2.1(a)(1). Consider whether there is any "delayed income" from underproductive property. EPTL 11-2.1(k).

(c) Did the fiduciary collect rent from occupants of real property for occupancy during any period of disputed title? Matter of Earle, NYLJ, 8/10/98, p. 33, col. 6 (Surr. Ct. Nassau Co.), Matter of Hulme, NYLJ 3/26/01, p. 32, col. 1 (Surr. Ct. West. Co.).

(d) Have receipts and expenditures been properly allocated between income and principal?

Schedule B - Realized Decreases

Calculate all decreases on sales, liquidation, distribution or on determination that an asset is uncollectible.

(a) Refer to comments for Schedule A-1, supra.

(b) Is the date of realization of each decrease shown together with a description of the property from which it was derived?

(c) Are such decreases correct? Are the decreases shown in full?

(d) Is any decrease due to fiduciary's negligent action or delay in timing of sale or liquidation? Did the fiduciary act according to an investment plan involving review and analysis and investment goals? See Matter of Donner, supra.

(e) Does schedule report decreases on new investments as well as on property shown on Schedule A?

(f) Does schedule report assets that fiduciary intends to abandon as worthless, together with a full explanation of reasons for such abandonment?

(g) Does schedule reflect all sales, liquidations and distributions which resulted in neither gain nor loss?

Schedule C - Funeral and Administration Expenses and Taxes

The burden of proof of establishing the propriety of the fiduciary's payment of expenses is on the fiduciary. Matter of Wolf, 67 A.D. 2d 930, 413 N.Y.S. 2d 33 (2d Dept. 1979); Matter of Shulsky, 34 A.D. 2d 545, 309 N.Y.S. 2d 84 (2d Dept 1970). Compare accounting to original records and to U.S. Estate Tax Return and to Fiduciary Income Tax Returns or to New York Estate Tax Return of decedent dying prior to February 1, 2000. Are amounts the same? Obtain explanation of differences. Calculate effect of expenses as deductions on estate tax versus income tax return and ascertain if fiduciary exercised tax options prudently. Has Warms adjustment been made? EPTL 11-1.2(A). See Schedule K, infra. Refer to EPTL 11-2.1(1)(4).

(a) Were expenses that were paid necessary and for proper purposes and were they reasonable in amount? Is the date of, and reason for, each expense set forth? Did fiduciary collect joint share of any debt under which decedent and another were jointly liable, e.g., surviving spouse's joint income or gift tax liability?

(b) Were excessive liability insurance or bond premiums, storage charges, bank service charges, rent, mortgage payments, interest and other recurring charges paid, indicating failure to terminate ongoing liabilities promptly? Did fiduciary promptly move

under SCPA 1805 for leave to pay any claim of his own against the estate so as to stop running of interest?

(c) Were funeral charges reasonable in view of size of estate and decedent's station in life? SCPA 103, subd.22; Matter of Lounsbery, NYLJ Mar. 30, 1981, p. 12, col. 6 (Surr. Ct. N.Y. Co.).

(d) Were delivery, storage and transportation charges relating to bequests of tangible personal property paid by fiduciary instead of by beneficiaries of specific bequests? See Matter of Boerner, 58 Misc.2d 144, 294 N.Y.S.2d 725 (Surr. Ct. Yates Co. 1968); Matter of Morawetz, 35 Misc.2d 762, 231 N.Y.S.2d 1000 (Surr. Ct. Albany Co. 1962); Matter of Beaudry, 206 Misc. 749, 134 N.Y.S.2d 893 (Surr. Ct. Kings. Co. 1954).

(e) Were personal expenses of fiduciary charged to the fund? Were unauthorized disbursements of fiduciary or his counsel charged to fund? Matter of Zalaznick, 84 Misc.2d 715, 375 N.Y.S.2d 512 (Surr. Ct. Bx. Co. 1975) aff'd 61 A.D. 2d 772, 402 N.Y.S.2d 973 (1st Dept 1978). But see Matter of Diamond, NYLJ Oct. 23, 1992, p. 26, col 6. (Surr Ct. Westchester Co.); Matter of Aitken, 610 N.Y.S.2d 436 (Surr. Ct. N.Y. Co.), Matter of Herlinger, NYLJ, April 3, 1994, p. 28, col. 16 (Surr. Ct. N.Y. Co.) and Matter of Sykes, NYLJ, Aug. 1, 1994, p. 29, col. 5 (Surr. Ct. Bx. Co.); See also Matter of Picker, 103 Misc.2d 594, 426 N.Y.S.2d 688 (Surr. Ct. Bx. Co. 1980).

(f) Were commissions paid to fiduciary before Court allowance and without beneficiary's consent? SCPA 2310 and 2311. Should fiduciary repay commissions with interest or pay interest to income beneficiaries? Matter of Crippen, 32 Misc.2d 1019, 224 N.Y.S.2d 116 (Surr. Ct. N.Y. Co. 1961). Matter of Newhoff, 107 Misc.2d 589, 435 N.Y.S.2d

632 (Surr. Ct. Nass. Co. 1980), aff'd and mod. 107 A.D.2d 417, 486 N.Y.S.2d 957 (2d Dep't. 1985) lv. to app. den. 66 N.Y. 2d 605, 499 N.Y.S. 2d 1025 (1985).

(g) Did fiduciary pay himself for "extra" services, e.g., brokerage fees, appraisal fees, in addition to his statutory commissions? See Matter of Tuttle 4 N.Y.2d 159, 173 N.Y.S. 2d 279 (1958); Matter of Abel, NYLJ Oct. 23, 1992, p.26, Col. 4. (Surr. Ct. Nass. Co.); Matter of Andresen, NYLJ May 25, 1982, p. 14, col. 6 (Surr. Ct. Westchester Co.).

(h) Did fiduciary pay fees or charges of agents, e.g., accountants or investment advisors? If so, are such fees or charges properly payable from the fund in addition to commissions and legal fees, such as custody fees? See EPTL 11-1(b)(9). Or are expenses shown properly payable by fiduciary or attorney out of their own commissions or legal fees? Matter of Badenhausen, 38 Misc.2d 698 (Surr. Ct. Richmond Co. 1963); Matter of Frank Woodruff, NYLJ Sept. 9, 1996, p. 29, col. 4 (Surr. Ct. Kings Co.); cf. Matter of Goldstick, 177 A.D.2d 225; 581 N.Y.S.2d 165 (1st Dept. 1992); Groppe et al. Harris (1996) §18:92.

(i) If the fiduciary employed a delegee pursuant to Prudent Investor Act EPTL 11-2.3 (a), were standards for selection and monitoring met? Were the fees reasonable? Should proceeding under SCPA 2115 be considered?

(j) Are attorney's fees reasonable? Matter of Potts, 123 Misc. 346 (Surr. Ct. Columbia Co. 1924), aff'd. 213 App. Div. 59 (4th Dept. 1925) app. den. 241 N.Y. 510 (1925); Matter of Freeman, 34 N.Y.2d 1 (1974). If there are multiple attorneys, the sum of all fees paid or claimed should not exceed a "single" fee. Matter of Gluck 279 A.D. 2d 575; 720 NYS 2d 149 (2d Dept. 2001) Matter of Mattis, 55 Misc.2d 511 (Surr. Ct. N.Y. Co. 1967); consider demanding affidavit of legal services and disbursements, and review any such affidavit

on file with the proceeding in Court pursuant to Rule 207.45 of the Uniform Rules. If attorney is also the fiduciary, check for compliance with SCPA 2111. Attorney may be surcharged interest on advance payment made without prior court approval. See Matter of Colon, NYLJ May 3, 1993, p. 34, col. 1 (Surr. Ct. Westchester Co.); Matter of Crippen, supra; Matter of Mattes, 12 Misc.2d 503, 172 N.Y.S.2d 303 (Surr. Ct. N.Y. Co. 1958). Check if attorney/fiduciary has complied with Surrogate's Uniform Rules §207.52, if applicable. If the attorney is also a legatee, is a "Putnam" inquiry warranted? If the attorney is also a fiduciary, is a "Weinstock" inquiry also warranted? See Matter of Weinstock, 40 N.Y.2d 1 (1976); Matter of Laflin, 111 A.D.2d 924, 491 N.Y.S.2d 35 (2d Dept. 1985); Matter of Harris, 123 Misc.2d 247, 473 N.Y.S.2d 125 (Surr. Ct. Nass. Co. 1985). See Groppe, C.J., "The 'New' Putnam Rule: Problems Facing the Attorney/Legatee/Fiduciary", supra. Amount of legal fee is affected by amount of Executor's Commission. See, e.g., Matter of Moore , 139 Misc.2d 26, 526 N.Y.S.2d 377 (Surr. Ct. Bx. Co. 1988); Matter of Orza, NYLJ Sept. 18, 1981, p. 6, col. 5 (Surr. Ct. N.Y. Co.).

(k) With regard to estate taxes, consider need for apportionment under EPTL 2-1.8, EPTL 2-1.12. Examine Federal and State estate tax returns.

(l) Were taxes paid timely and only in amounts necessarily required? The fiduciary may be surcharged for both interest and penalties caused by late filing. Matter of Newhoff, supra.

(m) If not, have all charges for interest and penalties on tax deficiencies been satisfactorily explained, or does basis exist to surcharge fiduciary for causing deficiency? If properly chargeable to estate, have they been charged to principal? EPTL 11-2.1(d)(1).

(n) Did fiduciary properly elect all available options of appropriate post mortem tax plan? EPTL 11-1.2. See Matters of Fales, Colp, Rappaport, supra.

(o) Did fiduciary properly investigate possible liability of decedent for past due income, gift, Social Security and other taxes owed directly by decedent, or for which decedent might be vicariously liable as transferee from another, or by reason of having been an Executor of another's Will or Administrator or Trustee?

(p) Did the fiduciary pay all proper Generation-Skipping Transfer (GST) Tax arising as a result of decedent's death? If the decedent had served as a Trustee of another trust, consider decedent's possible liability for failure to have paid or reserved for GST Tax previously due with respect to such trust.

(q) Ascertain how Executor allocated any GST Tax exemption under IRC §§2631, 2632.

Schedule C-1 - Unpaid Administration Expenses

Statement must itemize all unpaid claims and give basis for each claim.

(a) In general consider all questions as to reasonableness and appropriateness of claims as described for Schedule C, supra.

(b) If fees are claimed, have amounts thereof been set forth in the Citation issued in the proceeding to settle the account?

Schedule D - Creditors' Claims

Examine all vouchers and proofs of basis of claims. Examine official accounting instructions to ascertain categories of claims and manner or presentation.

(a) Did fiduciary improperly allow a claim barred by Statute of Limitations or Statute of Frauds or a claim not supported by competent evidence, e.g., "personal transaction or communication" between the decedent and the claimant supported only by claimant's own testimony, that would be barred by CPLR 4519 ("Dead Man's Statute").

(b) Did fiduciary pay his own claim without Court allowance? SCPA 1805.

(c) Was fiduciary on notice of possible liens and claims, against decedent or estate, e.g., if decedent died in hospital, or while receiving public assistance, this should have caused fiduciary to anticipate need to pay or to reserve against hospital charges or to reimburse welfare authorities before paying legacies. See e.g., Matter of Bailey, NYLJ Apr. 18, 1990, p. 24, col. 3 (Surr. Ct. Bx. Co.).

(d) Did fiduciary observe statutory priority in payment of claims? SCPA 1811.

(e) Has provision been made to provide for contingent claims? SCPA 1804.

(f) If decedent was not solely or primarily liable for payment, has fiduciary sought or recovered contribution from primary or co-obligor?

(g) Did fiduciary improperly or imprudently reject or dispute a claim thereby subjecting fund to unnecessary cost, interest, loss or compromise?

Schedule E - Distributions Made

Check dates and amounts of payments of money or delivery or property and examine receipts from recipients. Does schedule show charge against beneficiaries of estate taxes apportioned against them? See Schedule K, infra.

(a) Were payments made within reasonable time?

(b) If a pecuniary amount (e.g., a legacy) was satisfied "in kind", EPTL 11-1.1 (b)(20), was it done promptly? If there was undue delay and value of assets used to satisfy bequest had declined from date of death (requiring use of more assets to achieve some stated value) was there negligence? If value of assets used to satisfy bequest increased, did the fiduciary take into account the realized gain on the deemed sale? If payment of the legacy was delayed, is legatee entitled to interest, EPTL 11-1.5(d), or perhaps proportionate share of estate? See Matter of Schwarz, 614 N.Y.S.2d 668 (Surr. Ct. N.Y. Co. 1994); Matter of Paruch, 614 N.Y.S.2d 673 (Surr. Ct. Nass. Co. 1994); and Matter of Usdan, 480 N.Y.S.2d 81 (Surr. Ct. Nass. Co. 1984).

(c) Were distributions to or among other beneficiaries, e.g., several residuary legatees, made pro rata or were different items distributed to each? Consider fairness of such mixed or disparate distributions. See Matter of Baker, 92 Misc.2d 934 (Surr. Ct. Nass. Co. 1977).

(d) If the estate held underproductive property, as defined in EPTL 11.2.1(k), has appropriate distribution of "delayed income" been made, or does it need to be made, or may it not have to be made? See Matter of Grove, NYLJ May 8, 1981, p. 13, col. 1, rev'd 86 A.D.2d 302 (1st Dept. 1982), app. dsmsd. 58 N.Y.2d 689 (1982).

Schedule F - New Investments, Exchanges and Stock Distributions

The Principal and Income Act, contained in EPTL 11-2.1 has been replaced effective January 1, 2002, by the EPTL Article 11-A-1.1, entitled the "New York Uniform Principal and Income Act."

Article 11-A consists of six parts as follows:

Part 1 - Definitions and Fiduciary Duties

Part 2 - Decedent's Estate or Terminating Income Interest

Part 3 - Apportionment at Beginning and End of Income Interest

Part 4 - Allocation of Receipts During Administration of Trust

Part 5 - Allocation of Disbursements During Administration of Trust

Part 6 - Miscellaneous Provisions

It will be necessary to make reference to the new Uniform Act with respect to trust transactions after January 1, 2002, in many cases. Transactions prior to that date will be governed by the old law, EPTL 11-2.1 et. seq. See Groppe, C.J., "Uniform Principal and Income Act Will Work Fundamental Changes in Estate and Trust Administration," 74 N.Y.S. Bar Association Journal, No. 1 (January 2002).

In general, consider whether new investments were authorized by the governing instrument and EPTL 11-2.2. NOTE: The Prudent Investor Act, EPTL 11-2.3, will apply to fiduciary investments made or held on and after January 1, 1995. EPTL 11-2.2 will apply to investments held prior to that date. Check all capital changes against published sources and check all inventory adjustments.

(a) Did fiduciary leave cash uninvested for unduly long periods? Cooper v Jones, supra.

(b) Did Executor engage in investment activity instead of seeking to make necessary liquidations and then to distribute? Cf., Matter of Scheuer, supra.

(c) Did Executor "churn" assets, engage in margin trading, speculations, commodities trading, options trading? See, e.g., Matter of Tananbaum, supra.

(d) Were gains/losses reflected in estate income tax returns?

Schedule G - Personal Property Remaining on Hand

Compare to Summary Statement and to fiduciary's original records. Obtain or compute fair market value of assets on hand. Compute or check inventory value adjustments.

(a) Make physical count of securities and other assets on hand, if possible. Are assets of the estate segregated from fiduciary's name as fiduciary except where nominee registration is permitted? EPTL 11-1.6. If the securities were held in "street name," check the provisions of EPTL 11-1.10.

(b) Verify any bank deposit by examination of computer printout and such other records as are available. See Matter of Kane, 96 Misc.2d 272 (Surr. Ct. N.Y. Co. 1978). See EPTL 11-1.8 and 9.

(c) Uninvested cash balances should be held in interest bearing accounts. Failure to do so may result in a surcharge for lost interest. Matter of Slagle, NYLJ Jul. 13, 1998, p. 29, Col. 5 (Surr. Ct. N.Y. Co.).

Schedule H - Interested Parties and Proposed Distribution

See SCPA 2210 for list of parties to whom process must issue. If any interested party is a person under disability, provide requisite information relating to that person pursuant

to SCPA 304. Consult instructions in Official Form as to additional information required regarding possible Powers of Attorney, assignments and encumbrances. If any interested person has previously assigned his or her interest in the fund, that person must nevertheless be made a party to the proceeding. Matter of Pratt, NYLJ Oct. 25, 1985, p. 14, col. 4 (Surr. Ct. Nass. Co.).

Schedule I - Computation of Commissions

(a) Have commissions been improperly claimed on unsold real property, specifically bequeathed personal property, property passing by operation of law, exempt property? Matter of Solomon, 252 N.Y. 381 (1930); See Matter of McClure, NYLJ Jan.11, 1982, p. 15, col. 5 (Surr. Ct. Nass. Co.), Matter of Carpenter, NYLJ Apr. 11, 1984, p. 16, col. 4 (Surr. Ct. Suff. Co.); Matter of Saphir, 73 Misc. 2d 907, 343 N.Y.S. 2d 20 (Surr. Ct. Kings Co. 1973); but see Matter of Tucker, 75 Misc. 2d 318, 347 N.Y.S. 2d 845 (Surr. Ct. N.Y. Co. 1973).

(b) Have commissions been claimed on value of assets subject to pledge or lien, or only on excess over such pledge or lien? See Matter of Johnson, 156 Misc. 689 (Surr. Ct. Bx. Co. 1935); See also Matter of Marine Midland Bank, N.A., 457 N.Y.S.2d 720 (Surr. Ct. Erie Co. 1982) relating to Trustee's commissions.

(c) Have commissions been claimed and paid in advance without Court allowance or beneficiaries' approval? SCPA 2310 and 2311. Should fiduciary be surcharged interest if he paid estate assets to himself including amounts paid for fees and commissions without Court approval? Matter of Crippen, supra; See Matter of Radetsky, NYLJ Oct. 28, 1988, p. 23, col. 3 (Surr. Ct. N.Y. Co.).

(d) Has fiduciary's conduct been such so as to deprive him of commissions? See Matter of Tananbaum,177 A.D. 2d 225, 581 N.Y.S. 2d 165 (1st Dep't 1992); Matter of Miller, NYLJ Oct. 18, 1983, p. 15, col. 1 (Surr. Ct. Nass. Co.); See also 22 NYCRR 207.40(e).

(e) Have commissions been properly computed? See SCPA 2307 for commissions of fiduciaries other than trustees. Did the fiduciary receive a bequest in lieu of commissions? If so, did the fiduciary renounce the bequest in favor of statutory commissions? See SCPA 2307 (5)(b); Estate of Sidney Hillman, NYLJ Jan. 28, 1996, p. 29, col. 1 (Surr. Ct. Kings Co.).

(f) If Executor had to collect commissions payable to decedent as trustee, consider: What are the commissions of the trustee? Check SCPA 2308 and 2309 for commissions of individual trustees. Were annual statements furnished to current income beneficiaries and others as required by statute to permit annual commissions to be taken? See Matter of Manny, NYLJ June 10, 2002, p.37 col. 1 (Surr. Ct. West Co).

(g) Were income commissions for any given year paid only from the income derived from the trust during that year? SCPA 2308(4); 2309(4).

(h) If the fiduciary is a bank or trust company, does it have a minimum fee? Ask to see its published rates. See also SCPA 2312 (6) re: income commissions.

(i) Is the fiduciary also an attorney? Was required disclosure under SCPA 2307-a made to the decedent?

Schedule J - Statement of Other Pertinent Facts and of Cash Reconciliation

Any fact or circumstance not required to be described in any other schedule and

of which beneficiaries should be advised, should be set forth in this schedule. Further, if any fact or circumstance exists that the fiduciary believes might result in liability if not disclosed or if adequate notice of it is not given to the beneficiaries, such disclosure and notice should be given by setting forth a description thereof on this schedule. Examples are:

(a) Description of any jointly held property.

(b) Description of unsold real property.

(c) Calculation of Warms adjustment. See Schedule C, supra.

(d) Calculation of underproductive property adjustment and "delayed income". See Schedule E, supra.

(e) Were any renunciations/disclaimers filed by any of the estate beneficiaries or trust recipients (EPTL 2-1.11; IRC §2518)?

(f) Details of estate litigation. In general, list any litigation involving rights of the decedent or liabilities of the estate.

(g) Any other matters affecting any item shown or which should be shown in the accounting. The schedule must also contain a Reconciliation of Principal and Income Cash. A securities and cash proof is also useful.

(h) Statement of Proposed Distribution.

Schedule K - Estate Taxes Paid and Allocation of Estate Taxes

(a) Has fiduciary made proper allocation or received funds or property from beneficiaries sufficient to cover ratable share of estate tax? Check "tax clause" if any, in Will. See Matter of Wilkerson, NYLJ Nov. 17, 1977, p. 10, col. 4 (Surr. Ct. N.Y.Co.).

(b) Has fiduciary paid any death taxes or duties to any foreign country or political subdivision? Was such action necessary? (Normally New York law will not permit collection of such foreign national taxes out of domestic estate assets unless the governing instrument so directs.) See Matter of Herz, NYLJ Dec. 23, 1992, p. 26, col. 5 (Surr. Ct. Bx.Co.); aff'd 206 A.D.2d 283, 614 N.Y.S.2d 514 (1st Dept 1994), rev'd 85 N.Y. 2d 715, 628 N.Y.S. 2d 232 (1995); Matter of Leigh, NYLJ March 31, 1980, p. 14, col. 1 (Surr. Ct. N.Y.Co.).

d. Checklist for Trustee's Account[3]

In General - It is recommended that the reader consult as to preparation of an account, Groppe et al., Harris 5th Edition New York Estates: Probate, Administration and Litigation (1996). (Hereafter Groppe et al., Harris 1996 §__.)

A. Review Will or Trust Agreement and any Decree or Order granting or limiting the Powers of Fiduciary and ascertain:

(a) Plan of income and principal distribution.

(b) Existence of any construction questions.

(c) Fiduciary's investment authority, e.g., direction to retain assets; direction to dispose of an asset.

(d) The Prudent Investor Act EPTL 11-2.3 has been in effect since January 1, 1995, and is applicable (unless otherwise provided in the governing instrument) to investments made or held on or after that date. Propriety of investment conduct prior to that date will be judged by former law. EPTL 11-2.2. Groppe et al., Harris (1996) §12:45 et . seq.

[3]

(e) Other limitations on fiduciaries, e.g., limits on commissions or restrictions on distributions.

B. If this is a testamentary trust, review the Executor's accounting and the estate file in general to see that the trust received all the assets to which it was entitled.

C. Always review any prior accounting for the trust and any Decree, Judgment or Receipt and Release settling it. As to the binding effect of a Waiver and Consent, see Matter of Hunter, NYLJ, March 12, 2002, P. 25, Col. 3 and the commentary on the case by Gibbs, C and Carew, C., "Waiver and Consent: Fiduciary's Duty Under Matter of Hunter," NYLJ, April 19 2002, P.3, Col. 1. As to binding effect of prior judicial Decree, Judgment or Receipt and Release settling an account, see Matter of Zilkha, 174 A.D.2d 331, 570 N.Y.S.2d 807 (1st Dep't 1991). Review pleadings and any decision in litigation involving the trust. As to the doctrine of equitable deviation allowing Trustees to deviate from restrictions on investments, see In Re Aberlin, 264 A.D.2d 775, 695 N.Y.S. 2d 383 (A.D. 2 Dep't. 1999).

D. Consider the relationship(s), if any, among the Trustee and the persons interested in the principal and income of the trust.

E. Review the income tax returns filed by the Trustee.

F. Determine the following:

(a) Did the fiduciary collect all assets? The burden of proof of establishing that the fiduciary has either failed to collect an asset that should have been collected or failed to charge himself with the receipt of an asset, is on the objectant. Matter of Farah, 28 Misc. 2d 573, 215 N.Y.S.2d 908 (Surr. Ct. Nassau Co.), aff'd 18 A.D. 2d 1052, aff'd 13 N.Y. 2d 909, 243 N.Y.S. 2d 858 (1963).

(b) Did the fiduciary segregate the trust assets and keep them separate from assets belonging to others?. EPTL 11-1.6

(c) Did the fiduciary keep adequate records? See Matter of Shulsky, 34 A.D.2d 545, 309 N.Y.S.2d 84 (2d Dep't 1970).

(d) Was cash kept invested and not idle? Cooper v Jones, 78 A.D.2d 423 (4th Dep't 1981); Matter of Meister, 123 A.D.2d 264 (1st Dep't 1986).

(e) Did the fiduciary grant any improper options, mortgages, leases or make any improper loans or borrowings? In general, see EPTL Article 11.

(f) Did the fiduciary properly handle all tax matters including timely filing of returns and claiming refunds, etc.?

(g) Were there any Qualified Disclaimers? IRC §2518; EPTL 2-1.11.

(h) Did the fiduciary maintain neutral position as between beneficiaries? See Gibbs, C. and Ordover, M., "Principal Income Adjustments," NYLJ, October 19, 1988, p. 3, col. 1.

(i) What will be the effect of the statute of limitations on potential objectants? Normal 6-year statute of limitations will apply. CPLR 213, subd. 1. But the statute does not begin to run with respect to assets never collected or previously accounted for by a fiduciary. The statute does not begin to run in favor of a fiduciary until he openly repudiates the trust and asserts and exercises individual ownership over the trust property. Matter of Ashheim, 111 A.D. 176, 177, 97 N.Y.S. 607, aff'd 185 N.Y. 609 (1906); Matter of Barabash, 31 NY2d 76, 334 NYS2d 890 (1972). The burden is on the fiduciary to show the repudiation; mere lapse of

time is not sufficient. See Matter of Trubitz, NYLJ April 28, 1993, p. 22, col. 1 (Surr. Ct. N.Y. Co.). Accord as to defense of laches. Matter of Trubitz, supra.

G. Consider whether there is potential liability under Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and other Federal and State laws relating to liability for damage to environment. See City of Phoenix v. Garbage Services Co. , 827 F. Supp. 600 (D. Ariz. 1993).

H. Consider the relationship of the Trustee to the beneficiaries and whether the Trustee's attorney has a duty to the beneficiaries. Are communications between the Trustee and the attorney discoverable? See Hoopes v Carota, 74 NY2d 716, 544 NYS2d 809 (1989) affing 142 A.D. 2nd, 531 N.Y.S.2d 407 (3d Dep't 1988).

I. Since 1984, the Surrogate's Court has had concurrent jurisdiction with the Supreme Court over inter vivos (lifetime) trusts. SCPA 207. The Surrogate's Court filing fees under SCPA 2402 are different (higher) than those of the Supreme Court (CPLR 8018) for obtaining an index number. However, the Surrogate's Court has been limited to the lower fees under the CPLR when the accounting of an inter vivos trust is filed with it for settlement.

J. The New York Principal and Income Act, contained in EPTL 11-2.1 has been replaced by Laws of 2001,Chapter 243, dated September 4, 2001, which took effect on January 1, 2002. The new law, contained in new EPTL Article 11-A-1.1, is entitled the "New York Uniform Principal and Income Act."

Article 11-A consists of six parts as follows:

Part 1 - Definitions and Fiduciary Duties
Part 2 - Decedent's Estate or Terminating Income Interest
Part 3 - Apportionment at Beginning and End of Income Interest

Part 4 - Allocation of Receipts During Administration of Trust

Part 5 - Allocation of Disbursements During Administration of Trust

Part 6 - Miscellaneous Provisions

While not incorporated in the new "New York Principal and Income Act" but essential to it and enacted and effective simultaneously, are new EPTL 11-2.3(b)(5), a new "Trustee's Power to Adjust" current distributions and new EPTL 11-2.4, an "Optional Unitrust Provision." It will be necessary to make reference to the new Uniform Act with respect to trust transactions after January 1, 2002, in many cases. Transactions prior to that date will be governed by the old law, EPTL 11-2.1 et. seq.

e. Examination of Trust Accounting Schedules.[4]

The schedules referred to below are those contained in Form JA-4 ("Trust Accounting with Instructions") of the Official Forms prescribed by the SCPA for "Account for Trustees" as published in Warren's Heaton Pamphlet Edition, New York SCPA - EPTL (Greenbook 2002). They differ somewhat from the schedules in Form JA-7 ("Non-Trust Accounting with Instructions") in the same Greenbook. The instructions accompanying each schedule are important checklists of what to look for in the schedules. Most of the observations made below are applicable to each type of account. In any case, review the instructions on the forms for each schedule. See attached official form JA4. Part 207 of the NYCRR (specifically 22NYCRR 207.4(b)) mandates that the official forms shall be accepted for filing in the Surrogate's Court. Eff. April 1, 1998.

Schedule A - Statement of Principal Received

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Compare list of assets set forth to Schedules of Executor's Accounts or prior account of Trustee.

(a) Has the fiduciary listed the date of receipt or acquisition of each such asset? Seek explanation of any delay in receipt and possible loss of income or asset value until date of collection.

(b) Are descriptions correct? Complete?

(c) Are the values listed the same as the values shown on hand at the end of the prior accounting, if any. Are they correct? Are there any buy-sell agreements for liquidation and/or redemption of business interests? Are values overstated so as to produce a greater receiving commission? Have asset values been shown net to reflect outstanding loans or pledges secured by such assets?

Schedule A-1 - Statement of Increases on Sales, Liquidation or Distribution

Check all increases on sales, liquidation or distribution of assets.

(a) Is the date of realization of each increase shown together with a description of the property from which it was derived?

(b) Are such increases correct? Are increases net of all costs and expenses?

(c) Has fiduciary incurred a "lost opportunity cost" by failing to collect increased value, e.g., by premature sale? By failing to make a tender? (Applies also to Schedule B, infra.)

(d) Does the schedule report increases on new investments as well as increases on property shown on Schedule A.

(e) Does the schedule reflect that fiduciary disposed of improper investments within a reasonable time? (Applies also to Schedule B, infra.)

(f) Did the fiduciary benefit personally from any expenses of sale? E.g., did the fiduciary profit from brokerage commission on sales? (Applies also to Schedule B, infra.)

Schedule B - Statement of Decreases due to Sales, Liquidation, Collection, Distribution or Uncollectibility

Check all decreases on sales, liquidation, collection, distribution or on determination that an asset is uncollectible.

(a) Is the date of realization of each decrease shown together with a description of the property from which it was derived?

(b) Are such decreases correct? Are the decreases shown in full?

(c) Is any decrease due to the fiduciary's negligent action or delay in timing of sale or liquidation? Did the fiduciary act according to an investment plan involving review and analysis and investment goals?

(d) Does schedule report decreases on new investments as well as on property shown on Schedule A?

(e) Does schedule report assets that fiduciary intends to abandon as worthless, together with a full explanation of reasons for such abandonment?

(f) Does schedule reflect all sales, liquidations and distributions which resulted in neither gain nor loss?

Schedule C - Statement of Funeral and Administration Expenses and Taxes Charged to Principal

The burden of proof of establishing the propriety of the fiduciary's payment of expenses is on the fiduciary. Matter of Wolf, 67 AD2d 930, 413 NYS2d 33 (2d Dept. 1979); Matter of Shulsky, 34 AD2d 545, 309 NYS2d 84 (2d Dept 1970). Compare the items shown in this schedule to the amounts which may have been allowed in a prior decree settling the Executor's or Trustee's account. Fees, disbursements and commissions may have been allowed by a prior Decree which are set forth in this accounting. Generally consider:

(a) Were expenses that were paid necessary and for proper purposes and were they reasonable in amount? Is the date of and reason for each expense set forth?

(b) Were excessive liability insurance or bond premiums, storage charges, bank service charges, rent, mortgage payments, interest and other recurring charges paid, indicating failure to terminate ongoing liabilities promptly?

(c) Were personal expenses of fiduciary charged to the fund? Were unauthorized disbursements of fiduciary or his counsel charged to fund? Matter of Zalaznick, 84 Misc2d 715, 375 NYS2d 512 (Surr. Ct. Bx. Co. 1975); But see Matter of Diamond, NYLJ October 23, 1992, p. 26, col. 6 (Surr. Ct. West. Co.); Matter of Picker, 103 Misc2d 594, 426 NYS2d 688 (Surr. Ct. Bx. Co. 1980).

(d) Were commissions paid to the fiduciary before Court allowance and without beneficiary's consent? SCPA 2310 and 2311. Should fiduciary repay commissions with interest or pay interest to income beneficiaries? Matter of Newhoff, 107 Misc2d 589, 435 NYS2d 632 (Surr. Ct. Nass. Co. 1980), aff'd 107 AD2d 417, 486 NYS2d 956 (2d Dept. 1985) lv. to app. den. 66 NY2d 605, 499 NYS2d 1025 (1985).

(e) Did the fiduciary pay himself for "extra" services, e.g., brokerage fees, appraisal fees, in addition to his statutory commissions? See Matter of Tuttle 4 NY2d 159, 173 NYS2d 279 (1958); Matter of Abel, NYLJ October 23, 1992, p. 26, col. 4. (Surr. Ct. Nass. Co.); Matter of Andresen, NYLJ May 25, 1982, p. 14, col. 6 (Surr. Ct. West. Co.).

(f) Did the fiduciary pay fees or charges of agents, e.g., investment advisers, accountants? If so, are such fees or charges properly payable from the fund in addition to commissions and legal fees, such as custody fees? See EPTL 11-1(b)(9). Or are expenses shown properly payable by the fiduciary or attorney out of their own commissions or legal fees? Matter of Badenhausen, 38 Misc2d 698 (Surr. Ct. Richmond Co. 1963); cf., Matter of Tananbaum 177 AD2d 225, 581 NYS2d 165 (1st Dep't 1992); Groppe et al. Harris (1996) §18:92.

(g) Are attorney's fees reasonable? Matter of Potts, 123 Misc. 346 (Surr. Ct. Columbia Co. 1924), affd. 213 App. Div. 59 (4th Dept. 1925) app. den. 241 N.Y. 510 (1925); Matter of Freeman, 34 NY2d 1 (1974). If there are multiple attorneys, the sum of all fees paid or claimed should not exceed a "single" fee. Matter of Mattis, 55 Misc2d 511 (Surr. Ct. N.Y. Co. 1967); consider demanding affidavit of legal services and disbursements.

(h) Did the fiduciary pay all proper Generation-Skipping Transfer Tax arising as a result of any taxable termination or distribution?

(i) Have all charges for interest and penalties on tax deficiencies been satisfactorily explained, or does basis exist to surcharge fiduciary for causing deficiency? If properly chargeable to the trust, have they been charged to principal? EPTL 11-2.1(d)(1).

Schedule C-1 - Statement of Unpaid Administration Expenses

Statement must itemize all unpaid claims and give basis for each claim.

(a) In general consider all questions as to reasonableness and appropriateness of claims as described for Schedule C, supra.

(b) If fees are claimed, have amounts thereof been set forth in the citation issued in the proceeding to settle the account?

Schedule D - Statement of All Creditors' Claims

Examine all vouchers and proofs of basis of claims. Examine official accounting instructions to ascertain categories of claims and manner or presentation.

(a) Did fiduciary improperly allow a claim barred by Statute of Limitations or Statute of Frauds or a claim not supported by competent evidence, e.g., "personal transaction or communication" between the decedent and the claimant supported only by claimant's own testimony, that would be barred by CPLR 4519.

(b) Did fiduciary pay his own claim without Court allowance? SCPA 1805.

(c) Was fiduciary on notice of possible liens and claims, against decedent or estate, e.g., if decedent died in hospital, or while receiving public assistance, this should have caused fiduciary to anticipate need to pay or to reserve against hospital charges or to reimburse welfare authorities before paying legacies. See e.g., Matter of Bailey, NYLJ Apr. 18, 1990, p. 24, col. 3 (Surr. Ct. Bx. Co.).

(d) Did fiduciary observe statutory priority in payment of claims? SCPA 1811.

(e) Has provision been made to provide for contingent claims? SCPA 1804.

(f) If decedent was not solely or primarily liable for payment, has fiduciary sought or recovered contribution from primary or co-obligor?

(g) Did fiduciary improperly or imprudently reject or dispute a claim thereby subjecting fund to unnecessary cost, interest, loss or compromise?

Schedule E - Statement of Distributions of Principal

Check dates and amounts of payments of money or delivery of property and examine receipts from recipients. Check the instrument to ascertain whether the distributions were discretionary or directed upon attainment of certain ages or for other reasons. If discretionary, was the discretion properly exercised?

(a) Were payments made within reasonable time?

(b) If a pecuniary amount was satisfied "in kind", EPTL 11-1.1(b)(20), was it done promptly? If there was undue delay and value of assets used to satisfy bequest had declined from date of required distribution (requiring use of more assets to achieve same stated value), was there negligence? If value of assets used to satisfy bequest increased, did the fiduciary take into account the realized gain on the deemed sale?

(c) Were distributions to or among similar beneficiaries, e.g., several residuary beneficiaries, made pro rata or were different items distributed to each? Consider fairness of such mixed or disparate distributions. See Matter of Baker, 92 Misc2d 934 (Surr. Ct. Nass. Co. 1977).

(d) If a marital deduction legacy or "exemption equivalent", "credit shelter" or "by-pass" trust is involved, was it "pecuniary", "fractional", "hybrid", and, if appropriate, was

Rev. Proc. 64-19 observed? See Matter of McKee, NYLJ July 16, 1986, p. 12, col. 5 (Surr. Ct. N.Y. Co.).

(e) If the trust held underproductive property, as defined in EPTL 11-2.1(k), has appropriate distribution of "delayed income" been made, or does it need to be made, or may it not have to be made? See Matter of Grove, NYLJ May 8, 1981, p. 13, col. 1, rev'd 86 AD2d 302 (1st Dept. 1982), app. dsmsd. 58 NY2d 689 (1982).

(f) Did the Trustee improperly liquidate prior to final distribution? See Matter of Wood, 177 AD2d 161, 581 NYS2d 405 (2nd Dept. 1992).

Schedule F - Statement of New Investments, Exchanges and Stock Distributions

In general, consider whether new investments were authorized by the governing instrument and EPTL 11-2.2. Check all capital changes against published sources and check all inventory adjustments. Refer to Principal and Income Act. EPTL 11-2.1.

(a) Did fiduciary leave cash uninvested for unduly long periods?

(b) Did Trustee "churn" assets, engage in margin trading, speculations, commodities trading, options trading? See, e.g., Matter of Tananbaum, NYLJ December 18, 1990, p. 22, col. 6 (Surr. Ct. N.Y. Co.).

(c) Were gains/losses reflected in trust income tax returns?

(d) Were stock splits and stock dividends properly allocated between principal and income?

Schedule G - Statement of Principal Remaining on Hand

Compare to Summary Statement and to fiduciary's original records. Obtain or compute fair market value of assets on hand. Compute or check inventory value adjustments.

(a) Make physical count of securities and other assets on hand. Are assets of estate segregated from fiduciary's own assets and registered in fiduciary's name as fiduciary except where nominee registration is permitted? EPTL 11-1.6. Were the securities held in a brokerage account in "street name?" Check EPTL 11-1.10.

(b) Verify any bank deposit by examination of computer printout and such other records as are available. See Matter of Kane, 96 Misc2d 272 (Surr. Ct. N.Y. Co. 1978). See EPTL 11-1.8 and 9.

(c) Have the asset values been shown net to reflect outstanding loans or pledges? See comment re Schedule H.

(d) Consider whether the investments are sufficiently diversified. See EPTL 11-2.3 (b)(3)(c).

Schedule A-2 - Statement of All Income Collected

Are all interest, dividends, rents and other income reported by date received or, if a security was held for an entire year, on an annual basis?

(a) Compare schedule to published dividend record. Are reported amounts in accord with what should have been collected based on amounts held at given time?

(b) Was amount of income received reasonable or does account reflect under - or over - emphasis of income instead of "balancing" respective rights of principal and income beneficiaries? EPTL 11-2.1(a)(1). Consider whether there is any "delayed income" from underproductive property. EPTL 11-2.1(k).

(c) Have receipts and expenditures been properly allocated between income and principal?

Schedule C-2 - Statement of Administration Expenses Charged to Income

Refer to suggestions supra for examining Schedule C. Refer to EPTL 11-2.1(1)(1),(2),(3),(5).

(a) Were expenses paid for proper purposes and were they reasonable in amount? (b) Is the date of and reason for each expense set forth?

Schedule E-1 - Statement of Distribution of Income

Refer to suggestions supra for examining Schedule E. Refer to EPTL 11-2.1(c).

(a) Were payments made in a timely manner and in accordance with the instrument?

Schedule G-1 - Statement of Income on Hand

Refer to suggestions supra for examining Schedule F.

Schedule H - Statement of Interested Parties

See SCPA 2210 for list of parties to whom process must issue. See also SCPA 315, subd 7, and Rule 207.18 of the Uniform Rules, for additional requirements if Virtual Representation is used (see the appendix for an explanation of SCPA 315, virtual representation). If any interested party is a person under disability, provide requisite information relating to that person pursuant to SCPA 304. Consult instructions in Official Form as to additional information required regarding possible Powers of Attorney, assignments and encumbrances. If any interested person has previously assigned his or her interest in the fund, that person must nevertheless be made a party to the proceeding. Matter of Pratt, NYLJ October 25, 1985, p. 14, col. 4 (Surr. Ct. Nassau Co.).

Schedule I - Statement of Computation of Commissions

(a) Consider: What are the commissions of the Trustees? Check SCPA 2308 and 2309 for commissions of individual trustees and SCPA 2312 for commissions of Corporate Trustees based on "reasonable compensation." EPTL 11-2.2 imposes a higher standard or investment responsibility upon trustees and other fiduciaries having "special investment skills." SCPA 2114 provides for judicial review of reasonable compensation determined by a Corporate Trustee.

(b) Have commissions been claimed on value of assets subject to pledge or lien, or only on excess over such pledge or lien? See Matter of Marine Midland Bank, N.A., 457 NYS2d 720 (Surr. Ct. Erie Co. 1982).

Schedule J - Statement of Other Pertinent Facts and of Cash Reconciliation

(a) Were any renunciations/disclaimers filed by any of the trust beneficiaries or trust recipients (EPTL 2-1.11; IRC § 2518)?

(b) Details of trust litigation. In general, list any litigation (e.g., construction proceeding) involving rights of the beneficiaries or liabilities of the Trustees.

(c) Any other matters affecting any item shown or which should be shown in the accounting. The schedule must also contain a Reconciliation of Principal and Income Cash. A securities and cash proof is also useful.

(d) Statement of Proposed Distribution, if applicable.

Schedule K - Statement of Estate Taxes Paid and Allocation Thereof

See EPTL 2-1.8 and 2-1.12 and instructions in Official Form.

(a) Has fiduciary made proper allocation or received funds or property from beneficiaries sufficient to cover ratable share of estate tax? Check "tax clause" if any, in

governing instrument. See Matter of Wilkerson, NYLJ November 17, 1977, p. 10, col. 4 (Surr. Ct. N.Y. Co.).

(b) Has fiduciary paid any death taxes or duties to any foreign country or political subdivision? Was such action necessary? (Normally New York law will not permit collection of such foreign national taxes out of domestic estate assets unless the governing instrument so directs). See Matter of Herz, NYLJ December. 23, 1992, p. 26, col. 5 (Surr. Ct. Bx. Co.); aff'd 206 AD2d 283, 614 NYS2d 514 (1st Dept 1994), rev'd 85 NY2d 715, 628 NYS2d 232 (1995); Matter of Leigh, NYLJ March 31, 1980, p. 14, col. 1 (Surr. Ct. N.Y. Co.).

3. ADDITIONAL CONCERNS FOR THE GUARDIAN AD LITEM

The guardian ad litem should investigate whether there was any transaction in which the fiduciary had a personal interest. He or she should determine whether the fiduciary purchased any of the assets of the estate, made any claims against the estate, or has a special relationship with a purchaser or creditor of the estate. If the fiduciary is the attorney and there is no co-fiduciary, attorney's fees may only be paid with prior court approval (SCPA 2111). It may be advisable to examine the relationship between the fiduciary and his or her attorney. In Matter of Kellogg NYLJ, December 30, 1999, p 21), Surrogate Preminger denied commissions to an attorney who acted as real estate broker for the fiduciary.

4. THE REPORT ON THE ACCOUNT

Following the review of the account, the guardian ad litem will file a report that will include: 1) the date of his or her appointment, 2) the identity and the nature of the interest of the ward in the estate, 3) the history of the estate, 4) a review of jurisdiction and venue issues, 5) a review of the individual schedules of the account, 6) any possible conflict of interest on the part

of the fiduciary, and 7) recommendations as to the advisability of filing objections on behalf of the ward.

The Uniform Rules (22 NYCRR, § 207.41) require that the report of the guardian ad litem in accounting proceedings be made in writing within twenty (20) days of appointment. This may be extended by the court. Compare this to the rule (22 NYCRR §207.13) that requires the guardian ad litem to file a report in other proceedings within ten (10) days of appointment.

It is important to note that once the issues have been resolved, either by stipulation of settlement or by the court's decision after trial, the guardian ad litem is charged with examining the proposed decree for accuracy and completeness. Once the decree has been signed, the guardian ad litem has a final duty. He or she must file a supplemental report within sixty (60) days after the decree, showing whether the decree has been complied with, insofar as it affects the ward (22 NYCRR § 207.13 [b]).

5. PROCEDURE FOR CONTESTING THE ACCOUNTING

If the guardian ad litem determines that there are errors in the account and the fiduciary agrees to correct the errors, an amended account will be filed, and if satisfactory, the guardian ad litem will file a final report recommending its approval.

If there is no agreement, the guardian ad litem may (1) request a conference to resolve the controversy or (2) file objections. There is no filing fee charged for objections to the account and settlement by the guardian ad litem under SCPA 2402 (16) (a).

If the dispute is settled by a conference, the proposed stipulation will be submitted for court approval along with a report by the guardian ad litem stating why he or she supports the stipulation (SCPA 2106). If no settlement is reached, the guardian ad litem should file

objections, and the matter should proceed to trial following any pre-trial disclosure. A decision sustaining or dismissing each of the objections and a supplemental account and follow-up report by the guardian ad litem should conclude the matter.

The guardian ad litem will review and consent to the decree presented when certain that the adjustments and distributions are proper and consistent with prior determinations of the court. The guardian ad litem should review the receipts and satisfactions for the distributions directed to be made in the decree. A guardian ad litem in a proceeding in which a decree has been entered directing payment or delivery of property to the guardian ad litem's ward must file a supplemental report within sixty days after a decree, settling the account showing whether the decree has been complied with insofar as it affects the ward (Rule 207.13 [b]).

For more information on objections in accounting, see Appendix Exhibit D-2, Typical Objections in a Fiduciary's Accounting.

6. THE FINAL DECREE

It is important to note that the role of the guardian ad litem does not end with the stipulation of settlement in a contested matter. When the decree is prepared by the accounting fiduciary and settled for signature, it is important that the guardian ad litem give that proposed decree his or her close attention. Once the decree has been signed, the guardian ad litem is responsible for verifying that the distribution to his or her ward is made and comports with the terms of the decree. The rules of the Surrogate's Court (22 NYCRR § 207.13[b]) provide as follows:

> A guardian ad litem in a proceeding in which a decree has been entered directing payment of money or delivery of property to or for the benefit of the guardian's ward must file a supplemental report within 60 days after a decree settling the account, showing whether the decree has been complied with insofar as it affects the ward. In all such cases the fiduciary shall immediately notify the

guardian in writing of the date and details of payment or delivery.

Therefore, the decree must be given the closes scrutiny that it deserves. In order to help that process, a checklist is included, see Appendix Exhibit D-3. It addresses the types of concerns the court has when reviewing the proposed decree.

D. CONSTRUCTION PROCEEDINGS

The purpose of a construction proceeding is to resolve an ambiguity in a will. A proceeding can be commenced by a fiduciary (executor or trustee) or any interested person. A fiduciary must not take a position in favor of any beneficiary as to a construction. The fiduciary should bring the construction issue to the attention of the court while remaining neutral. Where a fiduciary is also a beneficiary and takes a position in his or her own self-interest, attorneys' fees will be denied (Matter of Tully, NYLJ, June 5, 2000, p 25, col 4). The duty of a guardian ad litem is usually limited to the filing of a report stating a position on behalf of the ward.

A proceeding can also be brought for the construction of an *inter vivos* trust.

In addition to an independent proceeding, a construction can be requested in the context of any other proceeding. Most often, this occurs in an accounting proceeding (SCPA 1420[2]).

A construction will not be entertained until an instrument is admitted to probate (Matter of Zurkow, 74 Misc2d 736). Until then, the instrument is not a valid will and it is not entitled to a construction. However, the guardian ad litem can bring a construction issue to the attention of the court in the probate proceeding and it will be deferred until probate is finalized (SCPA 1420[3]; Matter of Cohen, NYLJ, May 30, 2000, p 28, col 6).

The petitioner in a construction proceeding must demonstrate a "present necessity." Academic questions will not be addressed (Matter of Mount, 185 N.Y. 162). Typical of an academic question is a request to determine remaindermen prior to the termination of a life estate

(Matter of Miller, 109 AD2d 999). There are exceptions Matter of Dinger, NYLJ, October 6, 1998, p 33, col 4).

In a construction proceeding, process will issue to all interested persons (SCPA 1420). Virtual representation may apply (SCPA §§ 315, 1420[5]). Where a charity has an interest the Attorney General must be made a party.

The purpose of a construction proceeding is to ascertain the intentions of the testator or testatrix (Matter of Carmer, 71 NY2d 781). The court will search for the dominant plan. Construction is usually accomplished within the four corners of the will Matter of Cord, 58 NY2d 539). Therefore, a hearing is usually not held. Affidavits bearing directly on intention are not considered (Matter of Cushing, NYLJ, September 7, 1999, p 33, col 6). However, the facts and circumstances surrounding execution such as age of testator/testatrix and size of estate may always be considered (Matter of Fabbri, 2 NY2d 236; Matter of Ross, NYLJ, February 22, 2000, p 25,col 6).

To assist in resolving an ambiguity the rules of construction are frequently applied. The rules attribute to a testator or testatrix preferences which would be held by the average person. They are found in case law. Examples of the rules are:

The presumption against intestacy ; It is assumed that a person who executes a will did not intend to have any property pass by intestacy. The presumption that the testator/testatrix intended by other provisions to dispose of all property is strengthened by the absence of a residuary clause Matter of Oliverio, 99 Misc2d 9).

The presumption favoring relatives ; The likelihood is that the testator/testatrix intended to provide for relatives rather than non-relatives Matter Gulbenkian, 9 NY2d 363).

Examples of technical rules are:

Where two clauses are irreconcilable effect is given to the latter clause Van Nostrand v Moore, 52 N.Y. 2);

Where technical words are used they are given their legal meaning unless a contrary intent is disclosed (Matter of Krooss, 302 N.Y. 424).

Be aware of the statutory rules of construction which include:

EPTL 2-1.14	Partly ineffective dispositions of trust remainder
EPTL 2-1.8	Estate tax apportionment
EPTL 3-3.3	Anti-lapse
EPTL 3-3.4	No residue of a residue
EPTL 9-1.3	Rule against perpetuities
EPTL 13-1.3	Ademption
EPTL 8-1.1(c)(1)	Cypres

For examples of issues addressed by guardians ad litem in a construction:

Matter of Herrig	122 Misc2d 740
Matter of Cooper	169 AD2d 972, app den, 78 NY2d 851
Matter of Boyd	161 Misc2d 191
Matter of Florio	NYLJ, October12, 1999, p 27, col 6

Where there is a real controversy, the parties can enter into a compromise which is submitted to the court for approval under SCPA 2106 (Matter of Scully, NYLJ, November 28, 2000,p 30, col 2). There are, however, limitations on a compromise. The parties cannot dismantle a testamentary trust and distribute the corpus.

E. WRONGFUL DEATH AND PERSONAL INJURY PROCEEDINGS

As in other proceedings, guardians ad litem are appointed to represent the interests of minors, incapacitated persons, incompetents, missing persons, and alleged abandoning parents or spouses whose whereabouts are unknown in proceedings involving wrongful death and personal injury. If the court in which the action for wrongful death is pending has not approved the

amount of recovery (EPTL 5-4.6), that issue is left for the Surrogate to decide and the guardian ad litem should include in his or her report his determination on the adequacy of the settlement. The guardian ad litem must analyze the adequacy of the settlement in terms of the liability, the insurance coverage, the financial standing of the defendant, the injuries and/or cause of death of the decedent, the next-of-kin, and the level of support that they were accustomed to. Many settlements are direct payments of awards or compromised amounts. However, many wrongful death recoveries, particularly where the decedent was survived by infant children, take the form of a structured settlement. The guardian ad litem should, of course, first determine that the court has jurisdiction over his or her ward and over all other necessary parties.

In determining whether or not the amount of the settlement is adequate, the guardian ad litem should consider:

1. All available insurance to contribute to the settlement. In medical malpractice cases, most doctors maintain at least $1,000,000.00 in malpractice insurance, often with an excess policy of up to $1,000,000.00 more. In negligence cases, consider whether the homeowners' insurance of both the decedent and the defendant are available resources to collect from.

2. The income potential of the decedent and the lost earnings to the distributees as the result of the decedent's death.

3. The financial standing of the defendant; if the available insurance seems inadequate to compensate for the loss and the defendant has significant assets from which a larger recovery might be paid, the guardian ad litem should question the attorney who prosecuted the personal injury or wrongful death action as to why the decision was made not to pursue the other assets of the defendant.

4. In negligence actions, the possible liability of the decedent.

5. The possibility of a defendant's verdict if the action were to proceed to trial.

Assuming that the amount of the settlement is adequate, the guardian ad litem must next consider whether the proposed allocation of the wrongful death proceeds is properly calculated. The courts generally distribute the proceeds of a wrongful death action in accordance with the

formula set forth in Matter of Kaiser (198 Misc. 582), although some cases do merit variation from the formula (*See* Matter of Acquafredda, 189 AD2d 504; Matter of Uravic, 142 Misc. 775 [where one or more of the distributees suffer from an illness or injury which would make them dependent for a period past their twenty-first birthday or possibly for the rest of their lives]). The guardian ad litem should not rely on the petitioner having properly calculated the percentages of the recovery to which the distributees are entitled, but should do his or her own calculations. If the share of the guardian ad litem's ward is be paid by structured settlement, the guardian ad litem should ensure that the cost of the annuity plus any upfront cash paid to the ward totals at least the ward's Kaiser share, i.e., if the ward's Kaiser share is $175,000.00, and the total of the cost of the annuity plus any upfront cash to the ward is less than that sum, the guardian ad litem should not approve the compromise. The guardian ad litem should also insist on seeing a copy of the correspondence from the structure company which will detail the cost of the annuity and the payout, and indicate the company which will be writing the annuity.

The guardian ad litem should also review the administration proceedings to determine whether letters were properly issued. This means verifying that all distributees are before the Court and were before the Court at the time letters were issued and whether or not there was an abandoning parent or spouse (EPTL 5-1.2, 4-1.1, 4-1.4). Checking the permanent Court file will also reveal any claims that may have been filed against the estate. It is the guardian ad litem's duty to report to the Court on the validity of claims.

The guardian ad litem should then review fees and disbursements, remembering that the retainer fee, whether one-third or sliding scale, is applied to the net recovery after deducting the attorney's proper disbursements. Retainer agreements are not binding on persons under a disability, and the Court will frequently reduce a fee relating to the share to a person under a disability while preserving the agreed fee over the remaining portion. The guardian ad litem should report to the Court on the work performed by the attorney, whether or not the matter went to trial and whether or not there were any appeals, and the result of the attorney's efforts (Matter of Freeman, supra*;* Matter of Potts, supra, 123 Misc. 346, affd 213 App. Div. 59, affd 24l N.Y.

593). All petitions for compromise of an action for wrongful death or personal injuries must contain all of the elements set forth in Uniform Rule for Surrogate's Court § 207.38; the guardian ad litem should be certain that the petition complies.

Finally, the guardian ad litem should also be aware of the possible allocation between wrongful death and personal injury in cases where death was not instantaneous and there exists a possibility of pain and suffering. For a sample guardian ad litem report in a wrongful death compromise proceeding, see Appendix Exhibit F.

F. GUARDIANSHIP, SUPPLEMENTAL NEEDS TRUSTS, AND CONSERVATORSHIPS

1. GUARDIANSHIP UNDER ARTICLE 17 OF THE SURROGATE'S COURT PROCEDURE ACT

Under Article 17 of the Surrogate's Court Procedure Act there is a guardian of the property of an infant, and on rare occasions, of the person. The role of a guardian ad litem in this area is limited to those times when a guardian of an infant petitions the court for relief that would potentially impact on the infant's interest. For example, when there is real property in the name of the guardianship and the guardian either looks to sell the interest of the infant or alter its makeup by attempting to mortgage the interest or in some manner to change the character of the interest, the court will appoint an independent guardian ad litem to review the proposal and report back to the court before any final determination is made.

In rare instances a guardian ad litem may be appointed when an infant objects to the guardian's handling of his or her affairs. In those cases the court will ask the guardian ad litem to act as its fact finder to determine what the situation is and what steps need to be taken to rectify

the situation. For a sample guardian ad litem report in a guardianship proceeding, see Appendix Exhibit G-1.

2. <u>SUPPLEMENTAL NEEDS TRUSTS</u>

A guardian ad litem may be appointed in the Surrogate's Court to advise the Surrogate whether the proposed supplemental needs trust is appropriate and whether it should be approved by the court. The issue generally arises in two situations: where a testamentary trust provides for a disabled beneficiary; and where an application to create a self-settled supplemental needs trust is made.

A supplemental needs trust ("SNT') is an irrevocable, discretionary trust established for the benefit of a "person with a severe and chronic or persistent disability" (EPTL 7-1.12[a][4]). A SNT is intended to supplement, not supplant, impair, or diminish government assistance such as Medicaid or Social Security Disability (EPTL 7-1.12[a][5][I]). An SNT can be established by a third party trust or can be self-settled. An SNT established by a third party is either inter vivos or testamentary and established with the funds of someone other than the disabled person, the disabled person's spouse, or someone legally responsible for the disabled person. A self-settled SNT is established for the benefit of a disabled person under the age of 65 with funds from any of the following: the disabled person; the disabled person's spouse; or someone legally responsible for the disabled person.

A guardian ad litem may be appointed in a miscellaneous proceeding where a decedent established a testamentary trust for the benefit of a disabled person. Because the trust is not set up as an SNT, the beneficiary of the trust may become ineligible for government assistance. The trustee or other interested party may petition the court for permission to pay the trust corpus

into an SNT. Pursuant to EPTL 10-6.6(b)(2), a trustee who has been granted absolute discretion to pay out principal to a beneficiary may pay the principal to a trust for the benefit of the beneficiary provided the following conditions are met: the payment by the trustee must not reduce any fixed income of the income beneficiary, the payment must be in favor of a beneficiary; and the payment must not violate EPTL 11-1.7 which prohibits the exoneration of a fiduciary from liability for failure to exercise reasonable care (EPTL 10-6.6[b][2]). As long as the proposed transfer does not violate any of the aforementioned conditions, the transfer into an SNT may be approved (Matter of Grossjean, NYLJ, December 10, 1997, at p 35, col. 6; Matter of McAllister, NYLJ, August 20, 2001, at p 36, col. 2). The guardian ad litem must review the proposed application to determine whether it is in the best interest of the disabled person to establish an SNT. Further, the guardian ad litem must review the proposed SNT and report on whether it should be approved by the court.

The majority of applications for approval of Supplemental Needs Trusts concern self-settled trusts which require court approval. The proceeding is a miscellaneous proceeding commenced by an appropriate petitioner who may be a parent, grandparent, legal guardian, or the court acting sua sponte. The disabled person must be under the age of 65. The petition should contain background facts and the source and amount of the funds to be used to fund the SNT. A copy of the proposed SNT should be attached as an exhibit to the petition.

In some instances, counsel for the petitioner may seek to have counsel fees paid from assets of the SNT. Counsel must specifically request the court to fix attorneys' fees and attach an affirmation of legal services.

The petitioner must give notice of the application by serving a citation or process upon the trust beneficiary, for whom the court will appoint a guardian ad litem, the provider of government assistance, which is usually the local county Department of Social Services or the State Department of Health, or both, and any potential claimants.

The first thing that the guardian ad litem must determine is whether the proposed SNT is necessary and/or appropriate. The guardian ad litem must determine whether the disabled person's expenses will exhaust the disabled person's funds and render her impoverished. If so, an SNT may be appropriate. If, however, the disabled person's income exceeds her expenses, then an SNT may not be appropriate (Matter of LaBarbara, NYLJ, April 26, 1996, at p. 36, col. 6).

The guardian ad litem must also review the proposed SNT to ensure that it contains the following provisions/restrictions:

a. The trust provisions describing the manner in which the trust's funds are to be spent should be general, rather than specific;

b. Any amendments to the trust, particularly those which are needed to allow the beneficiary to maintain eligibility for government benefits, can be made only with prior court approval;

c. The trustee cannot retain counsel for potential or actual disputes with the provider of government benefits without prior court approval;

d. There trust must provide that upon the death of the disabled person the State will receive all amounts remaining in the trust up to an amount equal to the total

medical assistance paid on behalf of the individual by the State (42 USC §1396p[d][4][A]);

e. There should not be any provision insulating the trust from any prospective or actual creditors' claims;

f. The trust should provide that the statutory compensation to the trustees may be reduced by the court;

g. The trust should not contain any provision exonerating the trustee from liability for failure to exercise reasonable care, diligence and prudence during the management of the trust;

h. The trust should provide that after repayment to the State of any sums owed for medical assistance, the balance should be payable to the estate of the beneficiary;

i. The trust must provide for the filing of an annual account with the court and, in the court's discretion, the submission of a proposed budget for the following year;

j. The trust should provide for the posting of a bond, if necessary;

k. The trust should contain a provision allowing the trustee to resign only with the court's permission.

If any of the provisions are omitted from the proposed SNT, the guardian ad litem must alert the court and ask for the inclusion of the provision, where appropriate. For a sample guardian ad litem report in a proceeding where the court is asked to approve a Supplemental Needs Trust, see Appendix Exhibit G-2.

3. CONSERVATORSHIP

Pursuant to Article 77 of the Mental Hygiene Law, the Surrogate's Court had the power to appoint a conservator of the property where it appeared that a person interested in the estate was entitled to property as a beneficiary of an estate (Mental Hygiene Law Section 77.01(3), repealed L.1992, c. 698, Section 1, *eff.* April 1, 1993). In 1993 New York's conservatorship law, Article 77 of the Mental Hygiene Law, was repealed and replaced by Article 81 of the Mental Hygiene Law. Any order under Article 77, however, shall continue in full force and effect until modified by a Judge pursuant to Article 81. Thus, the court may appoint a guardian ad litem in a conservatorship proceeding, even though the conservatorship law has been repealed. The role of the guardian ad litem in the conservatorship proceeding is to protect the conservatee's rights and interests with regard to intermediate and final account (MHL 77.31, repealed L. 1992, c. 698, Section 1, eff. April1,1993). The compensation of the guardian ad litem is to be fixed by the court and payable out of the estate of the conservatee *Id.*

G. OTHER PROCEEDINGS

1. DETERMINATIONS OF DEATH

There are two statutes, SCPA 2225 and EPTL 2-1.7, which permit the court and the parties to act as if a person is deceased, even in the absence of definitive proof of death. The statutes are resorted to in different circumstances and the presumption of death is employed quite differently under the two statutes. SCPA 2225 is most often utilized in an accounting proceeding, typically where the public administrator or chief financial officer of the county is the accounting party and the identities of the decedent's distributees have not been firmly established. This is the so-called "kinship hearing" which will be discussed at more length

below. Suffice to say here that in the kinship proceeding the court is not being asked to employ the fiction that the person whose estate is being administered is deceased; that is already an established fact. What the court may be called upon to do in the kinship hearing is make a determination that a person who would otherwise be a distributee or legatee of the decedent's estate has predeceased the decedent, without issue, permitting the court to order distribution of the estate as if the missing distributee or legatee were proven to have predeceased the decedent. The court's presumption of the death of the distributee is solely for purposes of distributing the decedent's estate, it is not the equivalent of a finding of death under EPTL 2-1.7 (Matter of Schrake, 129 Misc2d 671).

Conversely, a proceeding under EPTL 2-1.7 will result in a determination that the subject of the proceeding is deceased for purposes of any action or proceeding involving any property of such person, contractual or property rights contingent upon his or her death , or the administration of his or her estate (EPTL 2-1.7[a]). The guardian ad litem appointed to protect the interests of an alleged decedent must be satisfied that the person has been absent for a continuous period of at least three years, that a diligent search was made, that despite that diligent search the person has not been seen or heard from, and that there is no reasonable explanation other than death for the person's continued absence. If another reasonable explanation exists, the guardian ad litem should object to the relief requested, even if taking that position is difficult. For example, where the alleged decedent had left a letter for his wife shortly before his disappearance wherein he referred to health problems, financial difficulties, and the opportunity for a "fresh start," the court found that a reasonable explanation existed for the alleged decedent's absence, and declined to invoke the presumption of EPTL 2-1.7 which

would have permitted the absentee's wife to receive the proceeds of a life insurance policy (Kutner v New England Mutual Life Ins. Co., 57 AD2d 697).

Expect to review police reports, Coast Guard reports, FAA reports and flight manifests, even weather reports from established meteorological services (See EPTL 2-1.7 re: specific perils, which would allow for a determination of death prior to the expiration of the period prescribed by the statute).

If the guardian ad litem recommends dispensing with a hearing, the court will consider doing so, although allowing a determination of death without a hearing is rare.

2. KINSHIP PROCEEDINGS

SCPA 2225 is the operative statute in kinship hearings. If a diligent and exhaustive search has been made to locate distributees or legatees, and none other than those who have established their kinship to the decedent have made a claim to share in the decedent's estate, the court may make a determination that no distributee exists, except those who have proven their status as heirs. The guardian ad litem will be appointed to represent distributees whose whereabouts are unknown. The guardian ad litem must be satisfied that the petitioner (although it could be the objectants in an accounting proceeding, for instance) must prove kinship back to the nearest common ancestor between the decedent and the alleged distributee. (See 22 NYCRR 207.16 re: proof of distributions/family tree). Unless the estate is of minimal value and the succession is clear, or the proffered evidence is convincing, the court will conduct a hearing on the proof presented. For a detailed outline on kinship and other status hearings, see Appendix, Exhibit H.

3. DETERMINATIONS OF PATERNITY

EPTL 4-1.2 prescribes the standards for inheritances by non-marital children of the decedent. The Surrogate's Court is usually asked to make a determination of paternity incidental to an application for letters of administration, in order to establish the identities of the decedent's distributees, or, less frequently, to determine the eligibility or priority of applicants for letters of administration. This type of relief is often requested when there is a possibility of a claim for wrongful death on behalf of the decedent.

In the vast majority of these cases, the applications fall under EPTL 4-1.2(a)(2)(C). The guardian ad litem appointed to represent either alleged non-marital child(ren) or marital child(ren) of the decedent in such a proceeding must be aware of the proof required to establish paternity under this statute.

EPTL 4-1.2(a)(2)(C) requires the satisfaction of a two-prong test. Petitioner must establish paternity by clear and convincing evidence ***and*** that the putative father has openly and notoriously acknowledged the child as his own (See Matter of Smith, NYLJ, February 6, 1996, p. 27, col. 2 [nature of proof]).

4. DISPOSITIONS OF REAL PROPERTY

The Surrogate, under Article 19 of the SCPA, exercises jurisdiction over proceedings seeking authorization to dispose of a decedent's real property. These proceedings are also entertained by petitions for advice and direction (SCPA 2107). As notice of these proceedings must issue to all persons interested, the disability of any party dictates the appointment of a guardian ad litem. In all appointments, the guardian ad litem should become totally familiar

with the substantive and procedural rules of the proceedings and should be prepared to conduct a full investigation of the circumstances and file a written report relative thereto.

By way of overview, the guardian ad litem should:

a. Qualify according to practice and ascertain that no conflict of interest exists in the appointment.

b. Consider and confirm the basis for jurisdiction over the proceedings, parties, and venue (SCPA 1904).

c. Ascertain that the petition seeks a form of disposition (SCPA 1901) and is for an appropriate purpose (SCPA 1902) as defined by statute. The report should reflect whether or not the proposed disposition would be contrary to the provisions of a will or other instrument affecting the property.

d. Undertake to interview the ward and other parties to the proceeding, including any experts who may have furnished appraisals or other documentation in support of the petition. The guardian ad litem should be prepared to recommend whether a further appraisal or other evaluation would be appropriate.

e. Determine and report to the court findings as to the condition of the premises and the cost of maintaining the same. The guardian ad litem should also consider the terms of the proposed disposition, whether or not it is the result of an arms-length transaction, and recommend, if appropriate, alternative means of disposition. Special consideration may need to be given to dispositions to an interested party *(see, e.g.,* SCPA 1915).

f. Recommend whether the sale is in the best interests of the ward as to price, value, and terms of sale, as well as other matters, as the circumstances may dictate.

g. Participate in and/or initiate such other proceedings preliminary to the final disposition as may be appropriate.

h. Following the filing of his or her report, appear and participate at the hearing, if any, to protect the interests of the ward.

i. Following the court's determination, review and/or prepare for submission the necessary order granting or dismissing the petition.

j. In some instances, the guardian ad litem may be called upon and should be prepared to attend the closing to protect the interests of his or her ward. In such instances, a further report should be filed in the nature of confirmation of the disposition.

5. SCPA 2106 - COMPROMISE OF PROCEEDINGS

With the ever-increasing volume of litigation in the Courts and the concomitant emphasis on conciliation, it is important that every guardian ad litem consider a possible compromise of the controversy in the proceeding in which he or she is appointed. Since litigation is costly and time consuming, and the results uncertain, the courts favor compromise of controversies. Where parties are adults, it is usually possible for them to resolve matters between themselves to their mutual satisfaction without the need for court approval. However, where there are infants or other persons under disability, court approval is necessary under SCPA 2106 in order to effectuate the settlement. A compromise under SCPA 2106 involves resolution of disputes between beneficiaries as distinguished from a compromise of claims for or against the state under SCPA 1813 which may be *ex parte*. However, a SCPA 2106 compromise must be based on the consent of all those beneficially affected (See Matter of Rappaport, 102 Misc2d 910).

The application for approval of a compromise may be commenced by a verified petition in a new proceeding or by supplemental petition in a pending proceeding. In most cases, the compromise application will be by supplemental petition, together with a proposed agreement growing out of a pending proceeding, such as a probate or construction proceeding. The

proposed agreement should be executed by all of the adult beneficiaries. If the compromise is one which requires the approval of the court because the interests of persons under disability may be affected thereby (SCPA 2106), the court will either approve or disapprove the compromise as presented; it has no authority to modify the terms of the compromise (Matter of Camarda, 133 AD2d 114).

One of the most important elements in a compromise proceeding is that there be a genuine controversy relative to the disposition of the estate. In order to authorize a departure from the plan selected by the testator, there must be an actual dispute, the eventual outcome of which may be in doubt. In addition, the compromise must adequately protect the interests of disabled and unborn parties.

Implicit in the "compromise" is a process of mutual concessions. Accordingly, it follows that approval must be denied to any so-called compromise agreements which do not award some compensation to each infant or person under disability who possesses a potential right, no matter how remote. The elimination of such a right without compensation is not a compromise, but a surrender or the making of a gift, and will not meet with the approval of the court. It follows that the guardian ad litem has no authority to bind an infant to a proposed settlement. The guardian ad litem should execute the agreement of compromise only after explicitly being authorized to so, following the filing of his or her report showing the effects of the agreement upon his or her ward and showing that it is reasonable and just insofar as the ward is concerned. If the court agrees, it will authorize the guardian ad litem to execute the agreement on behalf of the infant, in which case it becomes completely binding and valid upon the interests of all persons under disability, including unborns.

6. ADOPTIONS

In either a private placement adoption (Domestic Relations Law §115) or an agency adoption (Domestic Relations Law §112; Social Services Law §384), a guardian ad litem will be appointed for any party under a disability. A guardian ad litem may be required for the infant

involved or for one or both of the natural parents when either of them is an infant, incarcerated, or otherwise incapacitated. Whenever the identity of a natural parent is known but he or she cannot be served personally, the court will order substituted service upon the parent which may provide for service by publication and appoint a guardian ad litem for the parent. A guardian ad litem for a missing parent:

1. Should check the sufficiency of jurisdiction over his ward, and should try to locate his ward and determine if he or she wishes to contest the petition for adoption.

2. Should review the allegations in the petition and be concerned that the grounds for terminating his ward's parental rights (abandonment) have been met (Domestic Relations Law §111[2]; Social Services Law §384-b [4]).

3. After consulting with an incarcerated parent, and depending upon his ward's wishes, may consent to the petition and file a report, along with the parent's written consent, or he may request pretrial discovery and a hearing. Often, when the parent is incarcerated, the petition alleges that the incarcerated parent abandoned the child and has forfeited his right to contest the adoption. Appropriate discovery in this case would include phone logs of attempts by the parent to communicate with the child or the person having custody of the child, copies of written correspondence, deposition testimony of witnesses to the parent’s attempts to communicate with the child, and any evidence indicative of an attempt by the person having custody of the child to prevent the incarcerated parent from communicating. Attempts by the incarcerated parent to provide financial support for the child, in accordance with the parent’s means, is also relevant and probative on the issue of abandonment. If a deposition and/or

hearing is requested, an order to produce will have to be prepared for the signature of the Surrogate providing for the delivery of the parent to the Court on the date of trial.

The guardian ad litem appointed for the infant should:

1. Check the sufficiency of jurisdiction over his ward and all parties involved.

2. If the child is brought into this state for adoption, be concerned that all of the provisions of Domestic Relations Law §115-a have been satisfied.

3. Examine the facts and allegations raised in the petition by independent inquiry. If an agency adoption is involved, the guardian ad litem should examine the agency's case record on the child. Consultation with the petitioner's attorney is necessary and advisable for the guardian ad litem.

4. Contact the foster home and the caseworker in agency adoptions.

5. Be concerned with the best interests of the child.

All guardians ad litem are required to attend the Court's proceedings and file a timely report advising the Court of findings, conclusions, and recommendations. Uniform Rules for Surrogate's Court §§207.54 through 207.62 are applicable to all agency and private-placement adoption proceedings in Surrogate's Court. The guardian ad litem should be familiar with these Rules and be certain that these Rules have been complied with and that all documents required to be filed in the adoption proceeding have been properly filed in accordance with the Rules.

VI. CPLR 4519 (The Deadman's Statute) by Hon. C. Raymond Radigan

In view of the fact that the new Rule 36 of the Chief Judge sets forth procedures for the apportionment and education of guardian ad litems, I thought it appropriate to update my article

on the Dead Man's Statute published twenty-five years ago to aid appointees in Surrogate Court appointments where knowledge of the statute is often mandated.

HISTORY:

In early English law, only parties and their close relatives could testify, as the law did not want outsiders meddling in the affairs of litigants. Suddenly, there was a change in thinking and, accordingly, from the 17th century to the middle of the 19th century, neither a party nor a person interested in the event was competent to testify and litigants were required to prove controversies by those who used to be considered meddlers. In 1848, New York, following again a new thinking in English law, eliminated the incompetency of interested witnesses and then nine years later, eliminated the disability of a party testifying. As a result, we now have CPLR 4512. The effect of the new law was that third parties, interested parties and parties could testify.

Between 1848 and 1869, the legislature, the courts and the evidence experts had an opportunity to observe the workings of the abolition of incompetency of interested parties and witnesses, and there slowly generated a thinking in the law that something must be done to deal with possible perjured testimony as it affects decedents and claims against their estates. In 1869, the general provisions of our present Dead Man's Statute came into being. It was thought that, since death silenced one party, the law should silence the other.

Civil Practice Act §347 became known as the Dead Man's Statute and, when our civil practice act was being reviewed again prior to enacting the Civil Practice Laws & Rules, there was a heated debate as to whether the Dead Man's Statute should be eliminated. Instead of eliminating it, the statute, word for word, was transferred to CPLR 4519 when the CPLR came

into being on September 1, 1963. It was decided at the time not to repeal it, and discussions to eliminate the statute or to make modifications should be tabled for a further study. One of the main reasons for this was that no agreement could be reached for a good substitute for the Dead Man's Statute and the statute still lives.

It is interesting to note that, in spite of the fact that there has been a request by some of the experts in the field of evidence and some appellate judges to do away with the Dead Man's Statute, very few changes in the statute have been made over the last 75 years. One could read "Greenfield on 347" today even though the book was published over 75 years ago and obtain one of the most concise outlines of the statute without fear that the bulk of what you are reading may be obsolete. I first wrote this article twenty-five years ago and now in 2003 there is little change to report as I do a redraft.

THE ACT:

CPLR 4519 provided that upon the trial of an action or a hearing upon the merits of a special proceeding a party or a person interested in the event or a person from, through or under whom such party or interested person derives his interest or title by assignment or otherwise shall not be examined as a witness in his own behalf or interest or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a lunatic (now reads mentally ill) or a person deriving his title or interest from, through or under a deceased person or lunatic (now mentally ill person) by assignment or otherwise concerning a personal transaction or communication between the witness and the deceased person or lunatic except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf or the testimony

of the lunatic or deceased person is given in evidence concerning the same transaction or communication (the statute should be amended to refer to an incapacitated person under MHL Article 81. Unfortunately, many of our statutes have not been so amended).

The statute in clear language tells us who cannot testify against whom and what it is that cannot be testified to. The statute goes on to tell us that a stockholder or an officer of a banking corporation is not an interested party. The fact that costs may be interposed against you does not make you an interested party, and there are certain provisions dealing with powers of appointment.

The interest of a person that the statute is referring to is not something uncertain, remote or contingent. The interest must be present, certain and vested, and that is why a wife could testify but her husband could not as to personal transactions or communications with the decedent in a suit commenced either by the estate of the decedent against her husband or by the husband against said estate. Of course, the wife's testimony will be subject to a credibility test.

WHEN THE STATUTE APPLIES:

Basically, the tainted testimony is when one who has an interest is alive and is attempting to testify against an estate, and the party is testifying on his own behalf. In addition, anyone that you obtained your interest from, through or under you cannot testify. Accordingly, you could not call as a disinterested witness someone from whom you obtained your title by transfer, assignment or sale, and the statute concerns itself with transactions and communications which are broadly construed to include every method by which one person can derive an impression or information from the conduct, condition or language of another (Holcomb v Holcomb, 95 N.Y. 316). Therefore, any knowledge that one gains by use of any of

their senses from the deceased could be barred. The statute embraces every variety of affairs that can form a subject to negotiations, interviews or actions between two persons. If the deceased could contradict, explain or qualify the testimony, if living, the subject matter should come within the statute.

A party could testify if he is testifying against his own interest or against the interest of his successor but he cannot testify when he is attempting to gain from his testimony. One need not be hurt or injured by the testimony. It is just a question as to whether they are benefited or not. Too often we observe during court proceedings that attorneys are waiting for words before raising objections under 4519. The statute is much broader than conversations. It includes every means by which one obtained information from a decedent. If you obtained your information independently from a transaction or conversation with the decedent, you would be permitted to testify if you are an interested person. An example of this would be if you perpetually read letters sent by your grandmother to your mother and you were able to offer an opinion as to the genuineness of your grandmother's signature as a result of your reading these letters. You would be permitted to testify since the gaining of your information was not from a direct conversation or transaction with the decedent. But, if the transaction did involve you with the decedent, the testimony would be barred. An example would be a physician who presents a claim against the estate for services rendered to the decedent. He cannot testify to the visits made or the treatment that he rendered. He could not state whether he was with the decedent or not or whether a conversation took place or not. Once the performance of services is proved by others, the claimant can then testify to the value of his services and what work he

did in the absence of the deceased and without the immediate or personal participation of the decedent (Lerche v Brasher, 104 N.Y. 157).

You cannot prove something by the negating of the doing of a particular thing with the decedent for you cannot disconnect a particular fact from a transaction and attempt to testify on the basis that this fact rests independently from a transaction with the decedent when in truth the event had its origin in or directly resulted from a personal transaction with a decedent.

It is important for us to realize that one need not be a party to a proceeding to be barred. In fact, sometimes parties are not barred because the particular issue that is in controversy does not deal with a transaction or communication with the decedent while the testimony they offer through witnesses is barred because the witness is interested and his testimony is tainted. The issue is always whether the person testifying will gain or lose as a result of his testimony or one from, to or under whom the interest resulted will gain or lose. An example of a non-party being interested would be a second mortgagee testifying in litigation regarding the validity of the first mortgage. The second mortgagee's testimony could possibly elevate the second mortgage into a first lien and, therefore, he is an interested witness and could be barred.

In probate proceedings, neither the legatees nor distributees may testify as to personal transactions and communications with a decedent. If a distributee waives his rights in the estate, he thereby enlarges the proportionate share that the other distributees will receive and accordingly he would still be barred since the other distributees take from the witness. A legatee, however, who releases his interest to the estate releases it really to the personal representative and the other beneficiaries under the will do not take from, through or under him and, therefore, he is permitted to testify.

An agent is not barred from testifying and an interested person may testify regarding conversations he had with an agent even if the agent is deceased since the interested party does not derive his title from the agent but from the principal.

Where an attorney-draftsman of a will or others in a confidential relationship with a decedent are legatees under the will, a satisfactory explanation for the bequest must be given as there is an inference of undue influence (Matter of Putnam, 257 N.Y. 140). However, CPLR 4519 is a bar to his offering testimony as to the satisfactory explanation (Matter of Hayes, 49 Misc2d 152).

A party need not prove that he is a competent witness. The person alleging the disqualification has the burden of proof. A fiduciary has a duty to interpose an objection, should not waive 4519 on his own unless he has a valid reason for doing so, and cannot waive the statute as to his own claim (Matter of Kennedy, 56 Misc2d 1092). The statute does not apply to attesting witnesses in probate proceedings. They can testify but there is a statutory provision limiting the amount they may receive under a will when they must testify (EPTL 3-3.2). A nominated executor in a propounded will or a prior will is competent to testify providing he is not also a legatee or distributee. The nominated fiduciary can object even before his status is established by the probate of a will. The word "survivor" under the statute has been construed to mean "surviving partner" and, accordingly, the surviving partner will be entitled to raise 4519. One cannot cross-examine a protected party as to a personal transaction with the decedent and then expect to take the stand and attempt to testify as to conversations with the decedent as this does not open the door (Corning v Walker, 100 N.Y. 547). However, one could testify as to what documents one found upon the decedent's body or apartment after

death as transactions that happened after death are not protected by the statute (Matter of Abwender, 241 App. Div. 566).

While one may be barred from testifying, you may nonetheless be able to utilize CPLR 4518 by having certain business records introduced into evidence in a competent manner and thereby obviate the restrictions of 4519. However, a nurse, attempting to recover for services rendered, could not introduce her nurse's book records into evidence pursuant to 4518 based on her testimony alone, since the shop book rule under 4518 may not be utilized to circumvent 4519 when the entries are made by the interested party or he dictated them to his secretary (Eby v Grieves, 53 Misc. 428; Matter of DeSimone, 151 Misc. 87; Matter of Mulderig, 196 Misc. 527; Matter of Mogan, NYLJ, April 13, 1962, p. 13, col. 3). If entries were made in the ordinary course of business and this was properly established, the business entries could be utilized (Matter of Mulderig, 196 Misc. 527). Foundation testimony by a sole proprietor was held to be competent to authenticate business records (Trotti v Estate on Buchanan, 2000, 272 AD2d 660, 706 NYS2d, 534 [3rd Dept.]).

There are very few cases in the surrogate's court relating to communications or transactions with a lunatic, now referred to as an incapacitated or mentally ill person.

There are over 56 different proceedings that can be commenced in the surrogate's court, and the statute could very well be raised in any one of these proceedings; but we find that it usually arises in probate, accounting and discovery proceedings.

WHEN THE STATUTE DOES NOT APPLY:

The statute does not apply in any discovery afforded under Article 31 or the various disclosure proceedings afforded under the Surrogate's Court Procedure Act, such as section

1404, examination of attesting witnesses; 2211, examination of a fiduciary in an accounting proceeding; 2102, examination of a fiduciary dealing with assets of an estate, and the inquisitorial examination afforded in discovery proceedings under Article 21 (SCPA 2103, 2104) of the Surrogate's Court Procedure Act even if the surrogate presides over such discovery proceedings (Philips v Kantor, 31 NY2d 307). By taking such testimony, you may not succeed in obtaining summary judgment based on that testimony as one would never know whether the statute would be waived or the door opened at the trial or hearing (Phillips v Kantor, supra). However, in a recent case, the court held that a party may offer another party's deposition in evidence when the latter party subsequently died. Accordingly, a plaintiff could first read in the testimony of the now deceased defendant and then take the stand and testify (Ward v Kovacs, 55 AD2d 391). The theory is that the statute should be an equalizer, not a sword to unduly favor one side.

A person to be barred by the statute must have an interest in the event at the time that the testimony is to be given. If the decedent had a transaction with two people dealing with a joint and several note and only one of the parties is made a defendant by the estate, the other could testify because at the time that person is testifying he is not interested in the event as any judgment would not help or hinder him as a remaining debtor. This is so, even though his testimony may discourage any further suit.

While stockholders other than those in banking corporations are precluded from testifying, officers, employees and agents of the corporation can testify. A stockholder of a corporation may testify to lay the foundation for the admissibility of books of the corporation since his testimony is not dealing with personal transactions or communications with the

decedent but merely testifying as to how books and records are kept in the ordinary course of business. Accordingly, in many instances, corporations are immune from the statute, especially when they are aided by the shop book rule.

The maker of a note is not the one that the endorser takes from, and the maker therefore can testify. But a prior endorser cannot testify since subsequent endorsers take through the prior endorser.

A party who has already received his share of the estate is not an interested party in a subsequent judicial settlement of an account (Matter of Lese, 176 App. Div. 744) and an administrator is not interested in the event and may testify regarding his wife's claim for services rendered to a decedent (Matter of Taylor, 206 Misc. 69).

In a right of election proceeding, a spouse could be barred from testifying unless the testimony deals with testamentary substitutes since Article 5 of the Estates, Powers and Trusts Law clearly provides that 4519 does not apply (EPTL 5-1.1b).

In a proceeding to determine the right of election of a spouse, the decedent's attorney testified that the surviving spouse read an antenuptial agreement and that he, in the presence of the decedent, explained it to her. The surviving spouse can take the stand and state that she never read the agreement and it was not explained to her as this is a transaction with the attorney and not the decedent (Matter of French, 8 AD2d 660).

There is a difference between being interested in the result and interested in the event. A wife of a claimant would certainly be interested in the result but she is not interested in the event and, therefore, she should be permitted to testify on behalf of her husband although he would not be permitted to testify as to personal transactions with the decedent.

While an estate representative or an attorney-draftsman ordinarily could testify, if he is not interested since he is not a legatee or distributee (such as, in a probate proceeding), he does become interested in an accounting proceeding dealing with objections which allege that he failed to account for all the assets or dealing with claims that he allowed and paid or dealing with his own claims against the estate or when he commences an action against another estate. When a fiduciary commences an action against another estate or is a party to a proceeding commenced by or against another estate, the Dead Man's Statute will apply as to the estate representative although this rule is not favored (see Fisch on Evidence §269).

If a stockholder disposes of his stock, even during the course of the trial, he no longer is interested in the event and may testify although his testimony will be reviewed cautiously as he is certainly interested in the result. The thing that must be watched is whether when you are giving up your interest the person who may benefit is not to take from, through or under you as that will prevent you from being a witness.

Where a mortgagor executes a bond and mortgage and there is a subsequent foreclosure action, the mortgagor would be permitted to testify if the mortgagee released him on the bond because he is no longer interested in the event.

Ordinarily, the surrogate will not stop interested witnesses from testifying in violation of the statute. But, on occasion, where he sees an imbalance of the quality of legal representation, he may aid a litigant's attorney (In re Honigman, 8 NY2d 244).

A distributee whose interest under the will is less than his distributive share can testify on behalf of the will (Harrington v Schiller, 231 N.Y. 278).

One's testimony regarding acts he performed and did not involve the decedent is permitted (In re Tremaine, [3rd Dept. 1989] 156 AD2d 862, 549 NYS2d 857).

In Jacobs v Stark, (83 Misc2d 605) the court held that the statute did not apply in a controversy dealing with an absentee because there was no determination of death, which is a prerequisite for the statute to apply.

In Matter of Wood (71 AD2d 287; 423 NYS2d 260) the Appellate Division Third Department held that when an executor produced evidence of opening of bank accounts and withdrawals he opened the door to permit testimony by respondents concerning what they did with the cash following withdrawals. It is evident that what partially influenced this determination is the fact that the executor was also a beneficiary but one could seriously question the determination by the court since the fiduciary did not, as would appear from the decision, offer any transaction or communication testimony with the decedent but merely offered into evidence bank records, which ordinarily would not open the door.

If the issue has to do with status only and not pecuniary rights such as in a divorce proceeding the statute does not apply (Tworkowsky v Tworkowski, 1999, 181 Misc2d 1038, 696 NYS2d 637 [Supreme Ct. Kings Co.]).

LOSS OF THE STATUTE'S PROTECTION:

The statute can be made inoperative in three ways – by failing to object, when the executor, administrator, survivor, committee or person deriving the title is examined in his own behalf on direct examination or when the testimony of the lunatic (mentally ill person) or the deceased person is given in evidence concerning the same transaction or communication.

Waiver as to one transaction does not extend to others. Accordingly, when the fiduciary takes the stand and testifies as to a transaction or communication with the decedent, there is an opening of the door for the barred party to now testify as to that same transaction or communication. The executor's calling an independent witness to testify does not open the door.

There is a waiver of the disqualification where a protected party calls an interested party or witness and examines him as to a particular part of a communication or transaction. The other party may then call out the whole of the communication or transaction. If the fiduciary takes the stand and does not testify as to personal transactions or communications with the decedent and there is subsequent cross-examination by the interested party of the representative dealing with personal transactions or communications with the decedent, this does not open the door to permit the interested party to testify since the fiduciary was not examined on his own behalf.

An exception to the statute also arises where sworn testimony given upon a former trial or hearing is admitted into evidence. But mere declarations of the deceased testified to by third parties which are received as admissions or declarations against interest or any other exception to the hearsay rule, does not open the door to the adverse party to testify concerning personal transactions with the decedent.

If a protected party fails to object to testimony properly and timely, the benefit of the statute will be waived. The failure to object at the earliest opportunity does not amount to an irrevocable waiver and the representative will receive the protection of the statute for any

subsequent testimony once the objection is properly interposed. That which has already been testified to and there was not a proper and timely objection will stay in the record.

Very often, the testimony is quite competent, relevant, and material. It is the witness who is incompetent. Accordingly, the objection must be directed against the competency of the witness and not the competency of the testimony. Therefore, the objection should be that a witness is incompetent because of CPLR 4519. (Critics of Matter of Berlin, [NYLJ, October 3, 1977, p. 32] contend that pedigree and the Dead Man's Statute are two different rules of evidence and one need not take precedence over the other. They are compatible. The pedigree rule in this case may very well permit the evidence since it is an exception to the hearsay rule and thus competent. However, the witness is incompetent under 4519 and should not be permitted to testify).

Once the door is opened, the other side can testify either by themselves or some interested witness. Where a witness on behalf of an estate testifies that an interested party or interested witness made an admission relating to a transaction with the decedent, the adverse party may take the stand and state whether or not the admission was made. Where an interested witness admits to the genuineness of the signature on an agreement with the decedent, the door is not open for him to testify concerning the entire transaction. He can only testify as to whether or not that is his signature. The same would apply if he were to be asked to identify the decedent's handwriting on a particular document. He can only state that he can either recognize it or cannot recognize it and may not give any further testimony regarding the transaction or communication evidenced by the writing (Matter of Walker, 177 Misc. 991).

If one were to ask an interested party the meaning of certain statements in a letter of his addressed to the decedent, this is calling for the operation of his mind and not for testimony relating to a transaction or communication with the decedent (Weston v Reich, 7 N.Y.S. 784, affd 130 N.Y. 659) but, if the witness were asked whether the statements in the letter are true, this is an inquiry as to the entire transaction as this is called the waiver of disqualification.

Where you have two respondents in a discovery proceeding, each claiming that the decedent made a gift of a different savings account to him, each one would be competent to testify on behalf of the other's claim as each is an independent transaction and the party testifying does not have an interest in the event as to that particular transaction. Once again, however, their testimony will be subject to the credibility test (Matter of Corse, 16 Misc2d 538).

Where a decedent executes a will naming a party as beneficiary and executes another will, leaving that party nothing, and then executes a third will, again leaving that party nothing and that party is a non-distributee, and all three instruments are filed in the surrogate's court, that party may testify since his interest is remote. If the will offered for probate is denied probate, that party would not take immediately as there is another will to be offered for probate. If he were to attempt to testify when that intermediate will was offered for probate, he would now be precluded from testifying (Matter of McCulloch, 163 N.Y. 408).

When an attorney who represents a claimant against the estate and has no definite agreement regarding compensation, he is competent to testify. But if he is working on a contingent retainer, he is barred (Matter of Kislyk, 164 Misc. 287).

Where only one of two protected parties objects to the competency of a witness, the objection must nevertheless be sustained even though one of them failed to object.

In an action brought against a bank by a person claiming to be a donee of the decedent's savings account and the estate is not a party, the bank may not interpose 4519 since it is merely a stakeholder and does not take from, through or under the decedent and is not an assignee or successor (Foley v N.Y. Savings Bank, 157 App. Div. 868).

While unpaid creditors are incompetent to testify in an accounting or a determination for the validity of their claim; if they have been paid, they may testify on behalf of the estate representative seeking justification of their prior payment in an accounting proceeding even though they may ultimately be compelled to make a refund if the claim is later rejected (Laka v Krystek, 261 N.Y. 126).

While the statute is strictly construed and limited to the protection intended, so too are the waiver provisions. Any waiver operates only on the trial when it occurs, and the protection of the statute can be reclaimed in a subsequent trial dispute, even on retrial as a result of an appeal (Matter of Cohen, 177 Misc. 304, affd 263 App. Div. 938). However, CPLR 4517 may be utilized. The waiver by the committee, therefore, is not binding on the representative of the estate (Dean v Halliburton, 241 N.Y. 354).

The introduction by the protected party of a promissory note, check, income tax return, or books of account does not open the door since the statute bars testimony not documentary evidence.

If you are overruled on a 4519 objection, you do not waive your right to the statute by subsequent cross-examination with regard to the testimony being admitted (Continental Diamond Mines Inc. v Kopp, 28 AD2d 518). If after an interested party is permitted to testify and then there is cross-examination with timely objections interposed by the representative to

the initial testimony and then the representative introduces waiver testimony of the decedent as to the particular transaction into the trial, this cures the defect and the representative then will not be permitted to complain that he was not afforded protection under 4519. If he wanted the protection of 4519, he should object, do his cross-examination, but not introduce testimony of the decedent.

Where a fiduciary in a discovery proceeding takes the stand and testifies to a transaction with the decedent and alleges that the decedent told him that she was turning over bank books to the respondent for convenience to pay her bills, this opened the door for the respondent to testify whether the conversation ever took place and actual substance of the conversation (Martin v Hillen, 142 N.Y. 140). However, the respondent could not go on to say that a couple of days later the decedent came to him and said she changed her mind and wanted her to have the account as a gift since this is a new transaction with the decedent.

It had been held that a barred party cannot read a decedent's testimony into evidence and then attempt to testify. The protected party had to first use it and then the adverse party was allowed to testify. However, the courts have recently ruled that the statute is to afford everyone protection. When an estate has information to protect it from any invalid claims against the estate, it should not use the statute as a sword. When information can be introduced to give the estate's version of a particular transaction, the adverse party should be permitted to testify. Therefore, if testimony is available of a decedent, the adverse party should be permitted to read the testimony in evidence and then testify. Perhaps even other documents from a decedent should be permitted in evidence by the adverse party so that he can then take the stand and testify (Foro v Doetsch, 66 Misc2d 288; Ward v Kovacs, 55 AD2d 391).

The Appellate Division Second Department in Siegel v Waldbaum, (59 AD2d 555) held that if "B" takes "A's" deposition and "B" then dies, "A" can circumvent the statute by offering his own deposition. While some have criticized that decision (see Professor McLaughlin, McKinney's Commentary to CPLR 4519) because it is contended that the statute is supposed to protect an estate, since the decedent had the opportunity to examine the party and that examination is available, the estate is protected, and the statute should not be used as a sword against the claimant.

APPENDIX

Exhibit A– Part 36, Rules of the Chief Judge; Forms for Appointment

Exhibit B– Sample Guardian Ad Litem Report–Probate Proceeding

Exhibit C– Sample Guardian Ad Litem Report– Administration Proceeding

Exhibit D-1– Sample Guardian Ad Litem Report– Accounting Proceeding

D-2– Typical Objections in an Accounting Proceeding

D-3– Accounting Decree and Audit Checklist

Exhibit E– Sample Guardian Ad Litem Report– Construction Proceeding

Exhibit F– Sample Guardian Ad Litem Report– Wrongful Death Proceeding

Exhibit G-1– Sample Guardian Ad Litem Report–Guardianship Proceeding–Withdraw Funds

G-2– Sample Guardian Ad Litem Report–Proceeding to Approve Supplemental Needs Trust

Exhibit H-1 – Outline on Kinship Proceedings

H-2 – Sample Guardian Ad Litem Report–Proceeding to Determine Kinship

EXHIBIT A

Part 36, Rules of the Chief Judge

[insert copy of Part 36]

EXHIBIT B

SAMPLE GUARDIAN AD LITEM REPORT

PROBATE PROCEEDING

STATE OF NEW YORK

SURROGATE'S COURT: SUFFOLK COUNTY

----------X

Probate Proceeding, Will of

Report and Recommendation

ANNA MEYER Of Guardian Ad Litem

Deceased. File No.

----------X

TO THE SURROGATE OF SUFFOLK COUNTY:

I, Paul Hens1ey, as Guardian Ad Litem herein do respectfully report as follows:

1. I was appointed Guardian Ad Litem by Order of this Court dated March 31,1997 and having duly filed my consent to act and having appeared for George Meyer's and Joan Meyers Panarelli, if living and if dead his/her heirs at law, next of kin and distributees whose names and places of residence are unknown and if he/she died subsequent to the decedents herein to his/her executors, administrators, legatees, devisees, assignees and successors in interest whose name and places of residence are unknown and all other heirs at law, next of kin and distributees of Anna Meyers whose names and places of residence are unknown.

2. Jurisdiction has been obtained over such person or persons as shown by proof filed. The Affidavit of Publication by Catherine L. Brendel of The Beacon, dated March 13,1997 states the citation

was published on February 20,1997; February 27, 1997; March 6, 1997 and March 13,1997. This publication is in compliance with the Court's order and Section 308 of the Surrogate's Court Proceaure Act.

3. This proceeding is for the probate of a will of decedent dated the 2nd day of February 1989 and each person for whom am Guardian Ad Litem is a necessary party to the proceeding because he or she is or may be a distributee of the testator.

4.The beneficial interest of the person or persons I represent under the will is (a)no interest.

5. I have examined the will offered for probate, the proof submitted in support of the will and have taken all steps deemed necessary to represent the interests of the person or persons I represent as Guardian Ad Litem. I spoke with the attorney draftsman of the will Gerald Glass. Mr. Glass indicated he went to Anna Meyers home in the evening. She was very coherent, knew the day of the week and who was

president. Mr. Glass was satisfied that Anna Meyers understood she was making a will, signed the will in his presence, declared the will to be her Last Will and Testament. After she read it, she asked the witnesses to be witnesses whereby they signed as witnesses. He further stated that there was no fraud involved or undue influence exercised upon decedent. He was satisfied that the propounded instrument complied with Section 3-2.1 of the Estate Powers and Trusts Law. I also spoke with Richard Haas, a witness to the will, who indicated that he was asked by decedent to witness the will and did so. He and his wife were family friends for many years. He was satisfied Anna Meyers was of sound mind, understood she was making a will, signed the will in his presence and he signed the will as a witness. Mr. Haas indicated Anna Meyers never discussed George Meyers nor her daughter Jean Meyers Panarelli. He was surprised to learn of the existence of Jean Meyers Panarelli as she was never mentioned in the many years he knew the Meyers. In my opinion the facts and circumstances shown indicate that decedent was

competent to make a will, was not under restraint and that the will is genuine and validly executed. With regard to George Meyers, it appears that my ward and decedent were married but that my ward abandoned the decedent many years prior to her death without a divorce or judicial separation and that my ward has not been seen or heard from since the abandonment. In my opinion, it appears from my search and the court papers filed in this proceeding that all reasonable avenues have been explored in order to locate my ward. He appears to be a husband who disappeared. It also appears that a continued search for my ward would prove to be fruitless and imprudent based upon the size of the estate. With regard to my wards Right of Election under Estate Powers and Trusts Law 5-1.1-A, I believe that Section 5-1.2 (5), disqualification of surviving spouse based on abandonment, applies. Sufficient proof has been filed to show my Ward abandoned Anna Meyers and such abandonment continued until the time of death.

In Matter of Byrnes, (51 Misc2d 567 [Kings County Surrogate's Court, September 21,1966]) nearly identical facts exist as in the present case. In that case, an abandonment by the decedent's husband occurred nearly thirty-three years before the decedent's death and the husband of the decedent could not be located nor could it be determined conclusively that the husband had died. The husband received notice of the Surrogate's Court proceeding via publication of the Citation. In this case as in the present case, there was no explanation for the absence of the husband and his failure to provide support to the decedent. As a result, the Court determined that the absentee husband was not entitled to a share in the decedents estate.

6. Upon information and belief the estimated value of decedent's gross testamentary estate is $26,468.63.

7. Submitted herewith is statement of Fees or Commissions pursuant to JL 35-a completed as to items 1 to 11.

8. I request the Court to fix and allow reasonable compensation for services rendered herein. I have spent approximately 8 hours in my preparation of this report which includes my time in reviewing

the Court file, the will of decedent, and telephone conferences. My usual hourly rate is $175.00, but I will accept payment in the amount the Court deems proper.

RECOMMENDATION

Upon the basis of my investigation and report, I recommend the will be admitted to probate.

Dated: _____

PAUL HENSLEY
Guardian Ad Litem

EXHIBIT C

SAMPLE GUARDIAN AD LITEM REPORT
ADMINISTRATION PROCEEDING

STATE OF NEW YORK
SURROGATE'S COURT: SUFFOLK COUNTY
----------X
Administration Proceeding, Estate of

Final Report
Of Guardian Ad Litem

Alleged Absentee.

File No.

----------X

TO THE SURROGATE OF SUFFOLK COUNTY:

I, JOAN E. McNICHOL, as Guardian Ad Litem herein, respectfully report to the Surrogate as follows:

1. I was appointed Guardian Ad Litem for the alleged absentee, on January 9, 1996, and have duly filed by Consent to Act and Notice of Appearance dated January 19, 1996.

2. I have no interest whatsoever in this proceeding, other than as Guardian Ad Litem, and I have never associated with or conducted any business with the attorney for the Petitioner.

NATURE OF PROCEEDING

3. On or about July 24, 1995, a petition was filed by _____, an alleged potential creditor of the estate of _____, requesting that Letters of Limited Administration be issued to _____ or to the Public Administrator, and for a judicial determination of the death of _____on March 3, 1993. Mrs. ____ seeks to commence service of process of a wrongful death action against the estate of _____pursuant to the Federal statute commonly referred to as the Jones Act. I respectfully submit that the ultimate success or failure of the intended claim under the circumstances presented and the applicable law is beyond the scope of my capacity herein.

JURISDICTION

4. I have examined the Court file in this Proceeding with respect to the attempts at personal service, substituted service and service by publication, and have spoken with_____who confirmed receipt of the Citation and Petition herein. I find that proper jurisdiction has been obtained over all necessary parties, and in particular, I conclude that this Court has jurisdiction over my ward, the alleged absentee, _____.

BACKGROUND INFORMATION

5. The evidence and testimony presented at a hearing in this matter, held on June 4, 1996, together with the information and documentation contained in this Court's file No. 93-A-1994 (Administration Proceeding for _____) establish the following:

A. On or about March 2, 1993, the alleged absentee Joseph _____, left on a fishing trip from Montauk, New York to waters off of Martha's Vineyard, with one mate on board, _____. The boat, known as the _____ was owned and operated by Joseph_____.

B. On or about March 3, 1993, a distress signal was received by other fishing vessels in the vicinity of the _____, from Joseph _____that the boat was sinking. The U.S. Coast Guard initiated an investigation and issued a report. A copy of said report was submitted as evidence to this Court at the hearing held June 4, 1996 as Petitioner's Exhibit "1".

C. The U.S. Coast Guard report indicates a determination that both Edmund _____and Joseph _____were presumed dead at sea on March 3, 1993, as a result of the sinking of the vessel known as the _____.

D. A close friend of Joseph _____, and fellow commercial fisherman, Peter_____ has not seen or heard from the alleged absentee or Edmund_____since March 3, 1993. _____ does not know of any other person, including Mrs. _____, who has seen or heard from Joseph_____ or Edmund ____ since that time.

6 .The alleged absentee, Joseph _____, is survived by his wife, Anne _____, and son, Joseph_____, who is approximately five (5) years of age. In furtherance of my duties, I attempted to communicate with Anne_____ at a telephone number listed in the Suffolk County directory. That number was changed to an unpublished number. I then wrote to _____ at her last known address, 206 Beach Plum Road, Montauk, New York. On March 11, 1996, Anne _____ telephoned my office. I was able to speak with her on March 12, 1996.

7. _____ informed me that she had received my letter, acknowledging that all mail is not timely received when a P.O. Box number is not on the envelope. _____informed me that she recently moved and can be located at P.O. Box 1435, 24 North Farragut Road, Montauk, New York 11954.

8. _____ informed me that she received Citation in this matter and a copy of the Petition. She has not had any communication from her husband, Joseph_____, or any other person on his behalf since the accident of March 3, 1993. _____ firmly believes that her husband died at sea on or about March 3, 1993 and stated that she is not opposed to a judicial determination that her husband is deceased. When I inquired as to her interest in having Letters of Administration issued to her in this proceeding, she indicated that she did not care one way or the other, was not sure as to what she would have to do, and that she was left with debt as a result of her husband's accident at sea and loss of income. She

indicated that it has been difficult for her and her son and that she is attempting to put her life together and go on.

9. _____ informed me that her husband, Joseph_____ and Edmund_____were friends since childhood and did not believe that either or both of them would be involved in any sort of underhanded scheme. The testimony of petitioner's witness, Peter_____, is consistent with the information provided to me by _____.

10. _____ has not received any further report from the U.S. Coast Guard to supplement or correct any information from their investigation or report.

11. In furtherance of my duties, I requested all relevant information from counsel for the Petitioner, including, but not limited to the Coast Guard report, and transcript from the October 4, 1994 hearing held in the Administration Proceeding of Edmund_____, File No. 93-A-1994. In addition, I thoroughly reviewed the Court's records on file in the instant proceeding as well as the Administration Proceeding for Edmund_____. Further, I attempted to contact by telephone, every person listed in the Suffolk County NYNEX directory under the name _____ in an effort to locate my ward or another possible relation of the alleged absentee. (See your affirmant's initial report to this Court, entered as Petitioner's Exhibit "2"). All attempts met with no response, although messages were left on all answering machines.

12. The sworn testimony of Peter_____ in this matter is consistent with his sworn testimony provided in the Administration Proceeding of Edmund_____ hereinbefore mentioned, and is consistent with the information provided to me by_____ in a telephone conversation prior to the hearing (See Guardian Ad Litem report entered as Petitioner's Exhibit "2").

CONCLUSIONS AND RECOMMENDATIONS

13. Based upon my independent inquiries and investigation, the evidence adduced at the hearing of this matter, and after considerable deliberation and thought, and taking into consideration the gravity of relief requested in the petition herein with the best interests of my ward, I respectfully conclude that my ward, Joseph_____, died at sea on March 3, 1993.

14. I would recommend that limited Letters of Administration be issued to the Public Administrator and that a judicial determination be made that Joseph_____ died a resident of Suffolk County on March 3, 1993; and that the Court grant such other and further relief as to this Court may seem just and proper.

15. I respectfully request that the Court fix a reasonable sum fee for the services rendered by your Guardian Ad Litem in this proceeding, in the amount of $750.00 as indicated by the time expended on this matter contained on the time sheet attached hereto.

Dated:

_____

JOAN E. McNICHOL, ESQ.
Guardian Ad Litem
4 Tiffany Lane
Smithtown, NY 11787
(516) 265-1355

EXHIBIT D-1

SAMPLE GUARDIAN AD LITEM REPORT
ACCOUNTING PROCEEDING

STATE OF NEW YORK

SURROGATE'S COURT COUNTY OF _____

_____
In the Matter of the Final Account of
_____, as Index No.
Executrix of the Estate of
_____,
Deceased.
_____

TO THE SURROGATE'S COURT, COUNTY OF _____:

By an Order of Honorable _____, Judge of the Surrogate's Court, dated _____, 20 __, I was appointed guardian ad Litem of _____, an infant over the age of fourteen years, and I am an interested party in this proceeding. By this writing, I submit my Report as Guardian ad Litem.

NATURE OF PROCEEDING AND JURISDICTION OF INTERESTED PARTIES

By Petition, dated and verified on _____, 20 __, _____, as executrix of the Estate of _____, sought judicial settlement of her Final Account as executrix and allowance of the fees of her attorneys, _____ in the amount of $ _____. It appeared from the Petition that the decedent had died on _____, 20___ , and that his Will, dated _____, 20 __, had been admitted to probate on _____, 20 __, by Decree of the Surrogate's Court of _____ County, at which time Letters Testamentary were issued to _____to act as executrix of the estate. It further

appeared from the Petition that the administration of the decedent's estate had been completed and that petitioner wished to render her Final Account and be discharged as executrix.

Thereafter, a Citation was issued by the Clerk of this Court on _____, 20 __, returnable on _____, 20 __. The Citation was issued to my ward and to the remaindered of the residuary trust under the decedent's Will, all of whom were also infants. On the same day that the Citation was issued, an Order was granted by Honorable _____, Judge of the Surrogate's Court, directing service by mail on all ___ beneficiaries. It appears from the Affidavit of _____ _____, sworn to on _____, 20 __, that all of the persons named in the Citation have been served with copies thereof , by mail, pursuant to the Order, sufficiently in advance of the return date of the Citation in order to comply with the provisions of §308 of the Surrogate's Court Procedure Act.

The matter came on before this Court on _____, 20 __, and was marked for Decree, subject to the Reports of Guardians ad Litem to be appointed for the infant parties to the proceeding, the allowance of commissions, and the fixation of attorney's fees. No objection to the relief requested in the Petition was then or has since been filed by any interested party.

By order, dated _____, 20 __, signed by Honorable _____, Judge of the Surrogate's Court, _____, Esq., was appointed Guardian ad Litem for __ _____ and _____, Esq. , for _____, an infant over the age of fourteen years; and I, thereafter, qualified as such Guardian ad Litem by signing my consent to serve in that capacity on _____, 20 __.

By examining proofs of service upon the interested parties and the Orders appointing Guardians ad Litem as aforesaid, I have established to my satisfaction that jurisdiction of all necessary parties to

this proceeding has been acquired by the Court in the manner required by the Order of Mailing, dated _____, 20 __, as well as by the pertinent statutory provisions.

TESTAMENTARY INTEREST OF WARD

My ward, _____, is a grandson of the decedent. Under the decedent's Will, dated _____, 20 __, the decedent's entire estate, after the payment of debts, funeral, administration expenses and taxes, is to be held in trust by the petitioner, _____,as trustee, for the life of my ward. During the terms of the trust, all trust income is to be applied for the support, maintenance, and education of my ward; and to the extent necessary in the discretion of the trustee, trust principal is to be applied for the same purposes. The trust is to continue for the life of my ward or until earlier terminated either by the exhaustion of the trust principal through invasions or, in the trustee's discretion upon the determination of the trustee to terminate the trust. If the trust terminates by reason of the death of my ward, the trust property is to be distributed to the decedent's then living grandchildren. The same may be true if the trust is terminated prior to my ward's death in the discretion of the trustee, although it is not clear from a reading of the Will what events would justify such a termination.

Therefore, my ward is the presumptive life income beneficiary of the trust, with the right to receive discretionary payments of principal, and _____ wards are the presumptive remaindermen of the trust property.

THE ACCOUNT AND THE SUPPLEMENTAL ACCOUNTS

The petitioner, _____, as executrix of the decedent's estate, has filed a Final Account of her proceedings as executrix from _____, 20__, the date of the decedent's death,

through _____, 20__. She has also filed a Supplemental Account, covering the period from _____, 20__, through _____, 20__, and a Second Supplemental Account, covering the period from _____, 20__, through _____, 20__, (collectively, the "Account").

In reviewing the aforementioned Account and Supplemental Accounts, I have discussed with _____, Esq., a member of the firm of _____, attorneys for the executrix, many items appearing in the Account. I have requested and received from _____ many exhibits, documents, copies of income tax returns, and other detailed proofs respecting the administration of this estate. I have also reviewed the Account in the context of the various provisions of the decedent's Will.

An analysis was made of each of the Schedules of the Account and of the items reported therein to check for mathematical accuracy, as well as consistency, with respect to the other Schedules of the Account. Each asset was traced from its collection by the executrix in the marshaling of the decedent's assets, or from the time of its acquisition by purchase, until its disposition by sale or other means. A verification was made of the proper carrying forward from one Schedule to another of the inventory value or cost of each such asset and of the accuracy of the various computations, such as those made to determine increases or decreases.

The summary statements of the Account were also checked and found to be mathematically correct and in accordance with the respective Schedules.

I have carefully examined the whole of the aforementioned Account, and the following is my Report with respect thereto:

SCHEDULE "A"

The executrix charges herself with assets consisting of real and personal property having an inventory value of _____. This property consists of stock, United States savings bonds, cash accounts, life insurance payable to the estate, a parcel of residential real property, and other miscellaneous assets.

I have compared the entries in this Schedule with the United States Estate Tax Return (Form 706) filed by the executrix and subsequently accepted by the Internal Revenue Service. I have also checked this Schedule against the decedent's ____ and ____ Federal Income Tax Returns, bank statements for the bank accounts set forth in this Schedule, the life insurance statement (Form 712) issued by _____ Life Insurance Company with respect to the insurance payable to the estate, the appraisal of the decedent's realty in _____, the appraisal of the decedent's _____ real estate, and the estate checking account registers to confirm that all assets property chargeable to the executrix are in fact reported on this Schedule.

I also discussed various entries of this Schedule with _____ Esq., attorney for the executrix, to obtain background with respect to the decedent's financial affairs, which was helpful to me in reviewing the Schedule and the balance of the Account.

I would note that the amounts set forth in this Schedule as being the balances on hand in the bank accounts maintained by the decedent include small amounts of interest earned following the decedent's death and posted to these accounts prior to their collection by the executrix. Technically, these amounts of interest should have been reported on Schedule "A-2" so that they would eventually become

payable to my ward as income beneficiary. However, the amounts are so small that any adverse effect upon my ward's economic interest is minimal.

Based upon my review as aforesaid, I am satisfied that this Schedule is complete and correct.

"SCHEDULE A-1"

One entry appears in Schedule "A-1." It reflects the sale of the decedent's property at _____. The property was sold on _____, 20__, (not _____, 20__, as would appear on this Schedule), for a total net consideration of $_____, resulting in a net gain of $_____ as reported in this Schedule. Exhibit "J" attached to the Schedule contains a computation of the net sales price which I have compared against the Closing Statement prepared by the attorney who handled the sale of the real estate. The property was sold for $_____, and the executrix paid a broker's commission and other closing costs totaling $_____, resulting in the net sales price of $_____ reported on this Schedule.

It should be noted that a mortgage on the property was satisfied by the payment of $_____ at the time of the closing (see Schedule of Mortgage Payments attached as an Exhibit to Schedule "J" of the Account). The satisfaction of this mortgage will be referred to in the portion of this Report dealing with the computation of executrix's commissions (Schedule "I").

I have also examined a copy of the Federal Income Tax Return filed by the executrix for ____ and have verified that a proper report of the gain realized on this sale has been made on that tax return.

I am satisfied that Schedule "A-1" accurately reflects the proceeds collected by the executrix upon the sale of the estate's real estate.

SCHEDULE "A-2"

This Schedule contains a statement of all income collected and shows the total of such income to have been $_____ during the period covered by the main portion of the Account. $_____ during the period covered by the Supplemental Account, and $_____ during the period covered by the Second Supplemental Account, making total of $_____. These income receipts consist of pension payments from the decedent's former employer (_____), stock dividends, cash payments for the sale of lumber on the decedent's _____ property, rents collected form tenants at the decedent's real estate in _____, and various receipts of interest income, including primarily interest on United States Treasury Bills and on a money market account in which the estate's cash was invested during its administration.

The pension payments received from _____ were payable only for a term certain. Therefore, the executrix has apportioned each payment between principal and income according to an annuity factor derived from tables prepared for this purpose. This eventually resulted in an amount equal to the entire estate tax value of the annuity being apportioned to principal and the balance of the receipts on the annuity being apportioned to income which would appear to be a fair method of apportionment under ETL 11-2.1 b)(1)(C), (b) (2)(G), (j). Because of some miscalculations, an excessive portion of the pension payments was allocated to income in the first few years of the estate's administration, resulting in the need for an adjustment in favor of principal in the Second Supplemental Account (*see* Supplemental Schedule "A-2").

The sales of lumber reported at the top of Page 3 of this Schedule reflect the cutting and sale of timber on the decedent's undeveloped real property in _____. I have been advised by _____ that all of the usable timber has now been removed from the property and that it is unlikely that the property will become productive again in the foreseeable future. In addition, it would appear that land use laws in _____ have essentially made the property unusable for any other purpose. The property was appraised at $_____ for estate tax purposes. Annual real estate taxes paid with respect to the property, as reflected on Page 1 of Schedule "C-2" of the Account and on Supplemental Schedule "C-2, are under $_____ per annum. It would appear that, for the time being, the executrix proposes to take no action to dispose of the estate's interest in this property and will instead maintain a "wait and see" attitude with respect thereto.

The rents shown as collected on Page 3 of this Schedule relate to the decedent's residential real property located in _____. The executrix's attorney has advised me that, in anticipation of a sale of the property, no new tenant was sought after the existing tenant vacated in late_____. This would appear to have been a prudent action on the part of the executrix, since the property was sold in _____, 20__.

Although the net income to the estate resulting from the rentals collected on the _____ realty after reduction for the expenses of maintaining the realty reported on Schedule "C-2" is relatively small, it would appear that no under-productive property adjustment need be made to the income account form the proceeds of the sale of the realty. This adjustment is required under ETL 11-2.1(k)(1) where the average net income is less than one percent per annum with respect

to a particular item of estate property for a period of at least one year. If that is the case, an amount equivalent to five percent per annum simple interest is allocated to the income account from the proceeds of sale. In this estate, the _____ realty was unproductive from _____, 20__, until it was sold on _____, 20__, a period of less than one year. During prior periods, it would appear that net rental income realized from the property was between two percent and three percent. For example, from _____, 20__, through _____, 20__, a total of $_____ in rental income was collected by the executrix (Schedule "A-2" at p.3). During the sale period, the executrix paid $_____ in real property taxes (Schedule "C-2" at p.1), $_____ in mortgage interest payments (Schedule of Mortgage Payments attached to Schedule "J"), and $_____ in insurance payments (Schedule "C-2" at p.2), for a total of $_____ in costs attributable to maintaining the property. This resulted in a net income from the _____ realty of $_____. Compared to the inventory value of the property of $_____ (Schedule "A" at p. 1), this constitutes a return of 2.8 percent. Since this return exceeds one percent per annum, no under productive property adjustment is required under ETL 11-2.1(dk)(l). Also, it should be pointed out that the charging of real estate taxes, interest, insurance, and similar expenses to the income account is proper under ETL 11-2.1(l)(l).

Based upon my review as aforesaid, I am satisfied that Schedule "A-2, Supplemental Schedule "A-2," and Second Supplemental Schedule "A-2" are complete and correct.

SCHEDULE "B"

This Schedule contains a statement of decreases and collections, redemptions, or other transfers at no gain or loss. No decreases are reported.

SCHEDULE "C"

This statement contains a statement of funeral and administration expenses chargeable to principal. The total of such expenses is $_____, which primarily includes funeral expenses, estate taxes, and miscellaneous disbursements. By reviewing the Federal Estate Tax Return filed by the executrix, the estate checking account records, and the final receipt for the payment of New York estate taxes, I have satisfied myself that the items shown on this Schedule were in fact paid and were reasonable estate expenses.

The Second Supplemental Account also contains a Schedule "C" in which payments of federal and state income taxes made for years _____ through _____ are charged in part to principal. This was done at my request, pursuant to ETL 11-2.1(l)(4)(C), because most of the pension payments were credited to the principal account.

SCHEDULE "C-1"

This Schedule shows unpaid administration expenses of $_____ in legal fees of which the executrix seeks Court approval in this proceeding. In this connection, I have reviewed the Affidavit of _____, Esq., previously filed herein, which described the services rendered by his firm. The services so rendered include all of those normally associated with the administration of an estate oaf this size, and the amount sought is approximately four percent of the total principal charges reported on Schedule "A" of the executrix's Account. I am satisfied that this fee is reasonable in amount and should be approved by the Court.

SCHEDULE "C-2"

This Schedule lists all administration expenses paid by the executrix which have been charged to income. It includes primarily the expenses of maintaining the decedent's real property in _____, which have been commented upon previously in this Report, fiduciary income taxes, and real estate taxes on the _____ property, which have also been commented upon earlier. Supplemental Schedule "C-2" reports additional payment in these categories, primarily fiduciary income taxes.

Second Supplemental Schedule "C-2" reports further payments of fiduciary income taxes and contains the offsets against these taxes resulting from adjustments in favor of income required by ETL 11-2.1(l)(4)©) and discussed previously in this Report.

With respect to the fiduciary income taxes, certain observations should be made. The $_____ in New York State income taxes paid by the executrix on _____, 20__, (Schedule "D"), were deducted on the estate's Federal Estate Tax Return (Form 706, Schedule K, Item 11). However, it would appear that these taxes could also have been deducted on the _____ Federal Fiduciary Income Tax Return filed by the estate, but this was not done, apparently through an oversight. Also, the executrix deducted $_____ in administration expenses on the Federal Estate Tax Return (Form 706, Schedule J, Part B., Items 1, 2, and 3), despite the fact that the funeral expenses and debts available to the estate as estate tax deductions were already sufficient to reduce the taxable estate to a point well below that which any federal estate tax would have been payable. If these expenses had not been deducted on the Federal Estate Tax Return, they would have been available for deduction on the estate's Federal Fiduciary Income Tax Returns during the years in which they were paid. When combined with the $_____ New York State income taxes mentioned above, the total

of such items which could have been used as deductions on the estate's Federal Fiduciary Income Tax Returns, but which were not, exceeds $_____. Deductions in this amount, if available for use on the estate's Federal Fiduciary Income Tax Returns, could have yielded substantial federal income tax savings. Since there was no concomitant benefit obtained for the estate by the executrix's action, or inaction, it would appear that the executrix was remiss in failing to deduct the _____ New York State income taxes on the _____ Federal Fiduciary Income Tax Returns and in electing to deduct administration expenses on the Federal Estate Tax Returns.

My concerns in this regard were communicated to the executrix through her attorney. After discussion, it was agreed that the loss which the estate had sustained would be computed and then applied to reduce the commissions payable to the executrix. This computation is contained in Second Supplemental Schedule "I" and will be commented on later in this report.

A similar concern should be mentioned regarding the method used by the executrix the depreciate the _____ Real estate on the Fiduciary Income Tax Returns filed for periods prior to the sale of the real property. The executrix continued to use the lifetime basis of $_____ for depreciation of the house rather than the estate tax value of $_____. However, given the fact that the property was sold during the administration of the estate, the negative effects of failing to take larger depreciation deductions were not significant, particularly n view of the fact that any tax savings would have been at least partially offset by the higher capital gains tax that would have been payable. I am, therefore, satisfied that no adjustment is required in this connection.

SCHEDULE "D"

A total of $ _____ In claims against the estate were paid by the executrix. All but about $_____ Of these claims consisted of the decedent's federal and state income tax liabilities and the date of death balance of the mortgage on the _____ real property. Payment of thee claims has been verified by inspection fo the estate checkbook, the Income Tax Returns themselves, and the Federal Estate Tax Return field by the executrix. I am satisfied that this Schedule is complete and correct.

SCHEDULE "E"

This Schedule indicates that no distribution of principal has been made during the period covered by the Account.

Schedule "E-1"

This schedule shows distributions of income made to or on behalf of my ward totaling $_____ __. Supplemental Schedule "E-1" shows that an additional $_____ was distributed to or on behalf of my ward during the period covered by the Supplemental Account. Second Supplemental Schedule "E-1" shows that an additional $_____ Was distributed to or no behalf of my ward during the period covered by the Second Supplemental Account. I have compared these Schedules to entries in the estate checking account register and to the distribution deductions taken on the estate's Fiduciary Income Tax Returns, and I am satisfied that all of the distributions reported in these Schedules were in fact made to or on my behalf of my ward. For the Court's information, it would appear that the payments made to _____ were made for the educational expenses of my ward at a private school and that the other payments shown were made to my ward's parents for various purchases to be made on his behalf, including the purchase of a

home computer. During the period covered by the Account, my ward resided in Europe with his father who is a member of the United States Armed Forces. I understand that he will shortly be returning to the United States since his father has been transferred to duty in this Country.

SCHEDULE "F"

____Schedule "F" contains a statement of new investments made by the executrix during the administration of the estate. All of such investments were in short-term United States Treasury Bill which are appropriate and prudent investments for an executrix pending determination of a long-term investment plan by the executrix. Although it does not appear in this Schedule, it would appear that the executrix also deposited significant amounts of available estate cash in a money market account with _____ Bank.

SCHEDULE "G"

Second Supplemental Schedule "G" shows that $ _____ remains on hand in the estate's principal account. This consists of cash in the estate money market account and the two securities which have been retained in the estate.

The values attributed to the two stocks remaining on hand are the inventory values of those stocks rather than their market value on the closing date of the Account. Although this is necessary in order for the Account to balance, it is customary practice to revalue such securities as of the closing date of the Account for commission purposes (*see*, In re Williams' Estate, 71 Misc 2d 243; 335 NYS2d 950, 954 [Surr Ct, NY County 1972] [Myotonic, S.]). The difference in commissions would not be significant, however; so the executrix's method of treating these items is not objectionable.

I have been furnished with bank statements, and I have inspected certificates for the securities held by the executrix. I am satisfied that such account and such certificates are properly registered in the name of the estate in accordance with the provisions of the Estates, Powers, and Trusts Law.

SCHEDULE "G-1"

Supplemental Schedule "G-1" shows a balance of $ _____ remaining on hand in the income account on _____, 20__. The Supplemental Account shows $_____ remaining on hand at the end of the period covered by the Supplemental Account (*see*, Supplemental Account, Summary Statement), and the Second Supplemental Schedule "G-1" shows $_____ remaining on hand at the end of the period covered by the Second Supplemental Account. These amounts have been verified as being correct by comparisons with the prior income schedules of the Account, the Supplemental Account, and the Second Supplemental Account.

SCHEDULE "H"

This Schedule contains a statement of interested parties and correctly sets forth the names, addresses, and interests of the various beneficiaries of the estate, including my ward.

SCHEDULE "I"

This Schedule contains a computation of the commissions claimed by the executrix. My review of the Schedule indicated that certain adjustments should be made to this computation:

1. The $ _____ paid upon the closing of the sale of _____ real estate in satisfaction of the existing mortgage on that property should have been netted off against the proceeds of sale of

the real estate before commissions are computed. This would have reduced principal receiving and paying commissions by $_____.

2. The executrix's tax treatment of accrued liabilities for New York State income taxes and her election to deduct administration expenses on the Federal Estate Tax Returns caused the estate to pay excessive income taxes (s*ee* discussion on Schedule "C-2", *supra*, at pp. 13-16). The net cost to the estate in this regard has been computed to be $_____.

Following a discussion with _____, Esq., the attorney for the executrix, it was agreed that adjustments should be made to the executrix's commissions to compensate for these items. Those adjustments are set forth in Second Supplemental Schedule "I" and result in a reduction of total commissions to $_____.

It should be noted that the payment of management commissions at five percent of gross rents, in addition to full income commissions on such gross rents (as opposed to net rents), is appropriate (*see,* In re Ritzheimer's Estate, 25 Misc 2d 515; 204 NYS2d 301, 305 [Surr Ct Suffolk County 1960]; *see also*, SCPA 2307[6]).

With the adjustments mentioned above, I have no objection to the allowance of executrix's commissions as so computed. Since the adjustments were required to compensate for unnecessary charges to estate income, and since the total adjustments exceeded income and management commissions payable, I would request that all of the remaining commissions be charged to estate principal.

SCHEDULE "J"

The statement of other pertinent facts contained in this Schedule describes the dispositive provisions of the decedent's Will and the present circumstances of my ward, _____. In addition, this Schedule contains a cash reconciliation which has been compared to the various Schedules of the Account and is determined to be correct.

Attached to this Schedule is a Schedule of Mortgage Payments made with respect to the _____ _____ real property. Where appropriate, portions of the Schedule of Mortgage Payments have been commented upon in other sections of my Report.

SCHEDULE "K"

This Schedule sets forth information regarding estate taxes paid by the executrix. It shows that no federal estate taxes were paid and that a net New York State estate tax, after receipt of a refund by the executrix of $_____ was paid. These figures have been verified by inspection of the federal estate tax closing letter and the final receipt for payment of New York State estate tax.

CONCLUSIONS

From my examination and review of the executrix's Account and of the various documents and other proofs which have been displayed to me by the executrix's attorney, as well as the papers on file in this proceeding in this Court, I am of the opinion that the estate of the decedent has been administered by the executrix in the best interests of my ward and of the other estate beneficiaries. I would note that the executrix's Account has been prepared in an unusually sophisticated and professional manner for an estate of this size, and the firm of attorneys representing the executrix should be complimented in this regard. I have verified that the executrix has collected all of the

assets with which she is chargeable, and she appears to have paid or provided for all of the claims, taxes, and expenses payable by the estate.

I am satisfied that the legal fees requested by the executrix's attorneys are reasonable and should be allowed in the amount requested. I am also satisfied that, with the adjustments described in this portion of this Report commenting upon Schedule "I" of the executrix's Account, the executrix should be allowed commissions at statutory rates and that the ent commissions so payable should be charged in their entirety to principal.

In all other respects, I am satisfied that the estate has been properly administered in the best interests of my ward.

RECOMMENDATIONS

I, therefore, recommend that the executrix's Account be judicially settled, that the fees of her attorney be allowed in the amount requested, and that she be allowed commissions at statutory rates, adjusted as aforesaid and chargeable entirely to principal.

DATED: _____, New York

_____, 20__

Respectfully submitted,

_____
Guardian ad Litem
Telephone: _____

EXHIBIT D-2
TYPICAL OBJECTIONS IN AN ACCOUNTING PROCEEDING

A fiduciary is a person who acts for the benefit of another. For example, decedents' estates have administrators or executors; children and disabled adults have guardians; trusts have trustees; and many people have an attorney-in-fact operating under a power of attorney. Whatever the form, the fiduciary's relationship to his or her charge defines one of the highest standards of conduct recognized by the law. The definition of this duty has occasioned some of the most eloquent expressions found in the Common Law. The formulation of a fiduciary's duty by Benjamin Cardozo remains as cogent today as when it was first penned in 1928:

> A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion of particular exceptions."[5]

The practical effect of this judicial eloquence should not be lost on the fiduciary and his or her attorney. This standard of conduct is the lens through which the court will examine the affairs of a fiduciary. The court takes these responsibilities very seriously and will expect and demand a corresponding display of scrupulous good faith from the fiduciary. When the fiduciary stands in violation of this rigorous code of conduct, the court will respond severely. It can revoke the fiduciary's letters, it can hold the fiduciary personally liable and surcharge him or her for any damage to the estate, or it can deny the commissions.[6] There have even been instances when a fiduciary has found himself behind bars for failing to heed the orders of the Surrogate.[7]

The accounting process has a two-fold function. It operates to give the beneficiary an opportunity to review the fiduciary's performance and it serves to discharge the fiduciary from personal liability when the account is submitted to the court and approved in a decree.

It would not be too cautious to advise the fiduciary that the accounting process begins with the administration of the estate itself. A contemporaneous attention to record-keeping during the course of a fiduciary's management of the estate will save many anxious moments when the account has to be prepared and objections may be expected. The scope of this presentation is limited to the typical

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[5] *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928).

[6] *Matter of Bozzi*, Sur Ct, Nassau County, NYLJ, Mar. 31, 1999, p 36, col 6.

[7] *Matter of Fox*, Sur Ct, Nassau County, NYLJ, Feb. 4, 1997, p 30, col 3; July 8, 1996, p 29, col 5.

objections in an accounting proceeding. Nevertheless, an ounce of prevention is worth a pound of cure. So, along with considering typical objections, some space should be devoted to the practical considerations in preparing the account.

1. <u>Practical Considerations in Preparing the Account</u>

1. **Continuing Obligations**. One of the goals of the accounting fiduciary is to be discharged from personal liability in administering the estate. It must be kept in mind that such a discharge, by itself, does not revoke the letters issued to the fiduciary. The letters remain in full force and effect even after the decree and the subsequent distribution, unless the accounting decree specifically revokes them. Nonetheless, the fiduciary has continuing authority to act and collect additional assets when they are discovered.[8] If it is a final accounting, then the petition should include a prayer for relief that the letters be terminated as well.

N.B. The fiduciary is not discharged with the decree itself, but only when the receipts for the payments directed in the decree are filed with the court. This is a rule more frequently honored in the breach than in the practice, but it is a rule nevertheless.

2. **Date of Death Values**. As a starting point, the values listed in the schedules of the account should conform to the values of the estate assets listed in the estate tax return or the estate inventory forms. Care should be taken by the fiduciary in this regard because the accounting period may differ from the estate tax return if the fiduciary makes an election of an alternate date of valuation of estate property. In other words, the date of death value may differ from the alternate valuation date value used for tax purposes. The fiduciary is accounting for the former, not the latter.[9]

3. **Are all interested parties cited?** It is important to remember that the decree is conclusive and binding only upon all parties who have been served with process or who have appeared and only with respect to those matters embraced in the accounting. Refer to SCPA 2210 for the list of interested persons to be cited. Keep in mind that a surety is a necessary party to the accounting.[10] The citation to a bonding company may prove useful in the event the bonded fiduciary is surcharged and is judgment-proof.

Schedule H requires a list of interested parties. But it also requires that a "search statement" be included with the account. This statement certifies that a diligent search has been made for powers of attorney, assignments, and any encumbrances that have been filed with the court.

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[8] *See*, *Krimsky v Lombardi*, 78 Misc 2d 685, 357 NYS2d 671 (Sup Ct, Albany Co., 1974), *aff'd* 51 AD2d 600, 377 NYS2d 785 (3d Dept, 1976)

[9] *See, e.g.*, *Matter of Hoff*, 186 Misc 684, 65 NYS2d 234 (Sur Ct, N.Y. Co., 1945), *aff'd* 270 AD 891 62 NYS2d 574 (1st Dept, 1946), *aff'd* 296 NY 650, 69 NE2d 814 (1946).

[10] SCPA 2210(2).

4. **Complete all the schedules**. The account filed with the court should include all schedules that are part of the approved set of forms. If there is nothing to report in a schedule, then the fiduciary should mark that schedule "none." An example of this is Schedule D that lists claims against the estate. This schedule has five (5) subdivisions and each must be completed, if only to state "none."

5. **A complete prayer for relief.** Make sure the prayer for relief in the petition and the citation to settle the account is complete. Generally, the court is without the authority to grant relief beyond that which is demanded. Such an omission may be corrected, but it may delay the proceedings by requiring the issuance of supplemental citations encompassing the amendment.

6. **Items the Court will examine closely.** Aspects of the account that are statutorily prescribed will be subject to close scrutiny by the court. In this category are: the computation of commissions;[11] the apportionment of estate taxes;[12] the calculation of an elective share;[13] accounting adjustments.[14]

7. **A copy of the will**. The account of an executor or of a trustee of a testamentary trust must include a copy of the will.

8. **Commissions**. The commission schedules are broken down as follows: one-half of the statutory commission for receiving and one-half for paying. Normally, it does not matter if you don't give a breakdown, but if you are paying out less than you received (*e.g.*, if there are Schedule B losses), the you must have the appropriate paying-receiving breakdown on the commissions. Consult 22 NYCRR 207.40 (e) for other computations relevant to the computation of commissions.

9. **Virtual Representation**. If you are seeking to dispense with service of process because of virtual representation (SCPA 315), then be sure to consult SCPA 315 (7) and 22 NYCRR §207.18 for the appropriate procedure. The rule requires affidavits of the representor and the attorney if the request is made for horizontal virtual representation.[15] However, always consult with the court's Accounting Department to see if these same affidavits will be required of applications for vertical virtual representation. The court will frequently proceed cautiously in this area and order explanatory affidavits not otherwise required by the rules.

10. **Unsold Real Property**. Schedule A of the account should not include unsold real property (this only serves to inflate the commission base). If property is sold by the fiduciary, then only the net

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[11] SCPA 2307

[12] by terms of the will or by EPTL 2-1.8

[13] EPTL 5-1.1 or 5-1.1-A

[14] *See, e.g., Matter of Warms*, 140 NYS2d 169 (Sur Ct, NY Co., 1955); EPTL 11-1.2 (a)

[15]SCPA 315 (5)

proceeds from the sale should be included in Schedule A because only that portion of the sales price is subject to commissions. A copy of the closing statement should be annexed to the account.

11. **SCPA 2209 affidavit**. Each account filed in the court must include an affidavit of the accounting party attesting to the completeness of the account.

12. **Tax considerations**. Generally, an executor or administrator is required to account to estate beneficiaries only for probate property in the estate that is subject to his or her control. However, non-probate property is generally part of the decedent's gross estate for federal and state estate tax purposes[16] and will affect the account in a variety of ways that should be reflected in Schedules I and K (*e.g.* proper apportionment of estate taxes, proper calculation of a right of election, etc.).

13. **Claims by the fiduciary**. If the accounting fiduciary is also a creditor of the estate, then he or she must seek approval of the court for payment of the claim in the accounting proceeding and must submit a separate affidavit in support of the claim.[17]

14. **Other Reliefs**. The accounting proceeding is also authorized to be the process by which a host of other miscellaneous issues may be resolved by the court. These include:

a) hearing on a disputed claim (SCPA 1808);
b) construction of a will (SCPA 1420);
c) apportionment of estate taxes (EPTL 2-1.8);
d) calculating the elective share of the surviving spouse (SCPA 1421);
e) directing the disposition of real property (SCPA 1904, 1907);
f) turning over exempt property to decedent's spouse or child (SCPA 2101 [b], 2102 [2]);
g) directing the payment of reasonable funeral expenses (SCPA 2101 [b], 2102 [3]);
h) determining legal fees (SCPA 2101 [b], 2110); or
i) determining kinship (whether absent distributee is dead) (SCPA 2222 - 2225).

2. <u>Typical Objections in Accounting Proceedings</u>

The title is something of a misnomer if it is taken to mean that routine "boiler plate" objections may be served by the respondent. The fiduciary has the right to specificity in the objections and vexatious or "boiler plate" objections will not be tolerated by the court. "A surcharge will not be predicated upon a ground neither alleged nor proved."[18]

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[16] IRC § 2031

[17] SCPA 1805

[18] *Matter of Schaiach*, 55 AD2d, 914, 915, 391 NYS2d 135 (2d Dept, 1977); *see, also, Matter of Gil*, 67 AD2d 779, 412 NYS2d 682 (3d Dept, 1979).

However, there are objections that are routinely litigated in the court, arising from the fiduciary's duty to marshal the assets, to preserve and augment those assets, to pay claims and expenses, to accurately account, and to distribute the net assets as appropriate.

Any party to whom process has been issued pursuant to SCPA 2210 may file objections to the account. Once objections have been filed, the attorney for the fiduciary should determine who has the burden of proof on the objections.[19]

Generally, the accounting fiduciary has the burden of proving that he or she has fully accounted for all the assets of the estate.[20] However, the account itself and supporting affidavits are sufficient to make a *prima facie* showing of accuracy and completeness. The objectant then bears the burden of coming forward with evidence to establish that the account is inaccurate or incomplete. After the objectant has met his or her burden of coming forward, the burden of coming forward shifts back to the accounting party to show by a preponderance of the evidence that the account is accurate and complete.[21]

Where the objectant alleges investment imprudence on the part of the fiduciary, then the objectant bears the affirmative burden of proof.[22]

Typical Objections:

1. <u>Investment Imprudence</u>

The investment decisions of the fiduciary, most especially the trustee, stand at the center of a storm of conflicts and second-guessing. It is almost inevitable that the investment practices of a fiduciary are among the most common and substantial objections found in accountings. The trustee is required to exercise prudence in preserving and augmenting the monies entrusted to him or her. The trustee has a duty of impartiality between the income beneficiary and the remainder interests. An investment portfolio heavily weighted toward growth investments will be favorable received by the remainder beneficiaries while detrimental to the present income needs of the income beneficiary. Likewise, the portfolio weighted toward income will spawn objections from the remaindermen. Indeed, this distinction between principal and income, long enshrined in trusts and estates law, is increasingly viewed as outmoded. The day is coming when the fiduciary will be accountable for the total return received from a diversified investment portfolio with set percentages paid to income interests. But until that day arrives, we must continue to muddle along with the law's sharp distinction between principal and income.

The fiduciary will suffer the consequences of failing to prudently manage investments. The law has recently redefined the duty of the fiduciary. All investments made or held by a trustee (or any fiduciary

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[19] *Matter of Pollack*, NYLJ, Sep. 17, 1998, p 24, col 4 (Sur. Ct., Nassau County).

[20] *Matter of Schnare*, 191 AD2d 859; 594 NYS2d 827 (3d Dept, 1993); *app den* 82 NY2d 653, 601 NYS2d 582 (1993).

[21] *Matter of Shulsky*, 34 AD2d 545; 309 NYS2d 84 (2d Dept, 1970), *appeal dismissed*; 27 NY2d 743; 314 NYS2d 993 (1970).

[22] *Matter of Newhoff*, 107 Misc 2d 589, 435 NYS2d 632 (Sur Ct, Nassau Co, 1980).

for that matter) after January 1, 1995 are governed by the Prudent Investor Act.[23] All investments prior to that date are governed by the Prudent Person Rule. [24] It is beyond the scope of this presentation to discuss the differences between the statutes in depth. Suffice it to say, the new law seeks to modernize the treatment of estate assets to reflect the modern investment theory, portfolio management, and new investment vehicles. There is less difference between the laws *vis a vis* the general duties owed by the fiduciary and the resulting damages for breach of that duty. Along these lines, the Court of Appeals analysis in *Matter of Janes* (90 NY2d 41, 659 NYS2d 165) is essential to read.

In a nutshell, the fiduciary is duty-bound to exercise prudence in managing investments.[25] The fiduciary should refer back to the governing instrument for initial guidance on investments, keeping in mind the court's refusal to honor clauses in the governing instrument that exonerates the fiduciary from exercising prudence.[26]

The fiduciary's management of investments will be judged by conduct, not performance.[27] A fiduciary who is also a professional investment advisor, bank, or trust company will be held to a higher standard than a "civilian" fiduciary.[28]

2. Failure to Collect All Assets

A fiduciary will be surcharged if he or she fails to act prudently in marshaling the assets of the estate. Of course, the account itself and supporting affidavit will establish a *prima facie* showing that the fiduciary has met this burden. The object will be required to come forward with some evidence of negligence in failing to collect the assets of the estate. The following illustrations of failure to discharge this duty are taken from Castelluccio, Barnosky, Groppe, Filing the Accounting, NYSBA Publication - Fall 1997 "Estate Litigation."

- *Matter of Gandy*, 14 Misc 2d 472, 166 NYS2d 529 (Sur Ct, Nassau Co, 1957)
    - failure to collect rent to real estate held by the estate
- *Matter of Kitzes*, 109 NYS2d 673 (Sur Ct, Queens Co, 1951)
    - failure to take possession of decedent's business
- *Matter of Kessler*, 173 Misc 716, 18 NYS2d 772 (Sur Ct, NY Co, 1940
    - uncollected debt
- *Matter of Lechie*, 54 AD2d 205, 388 NYS2d 858 (4th Dept, 1976)
    - failure to collect trust proceeds over which the testator had power

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[23] EPTL 11-2.3

[24] EPTL 11-2.2

[25] EPTL 11-2.2 (a) (1); 11-2.3 (b)

[26] EPTL 11-.3(a), 11-1.7; *Matter of Hubbel*, 302 NY 246, 97 NE2d 808 (1950)

[27] *Matter of Bank of New York*, 35 NY2d 512, 364 NYS2d 164 (1974)

[28] EPTL 11-2.2 (a) (1); 11-2.3 (b) (5)

- *Matter of Koch*, 184 Misc 1, 52 NYS2d 435 (Sur CT, Bronx Co, 1944)
    - failure to collect bank accounts (see below)

It should be noted that the duty to marshal and preserve estate assets may arise before letters are issued to the fiduciary.[29]

3. Self-Dealing

Judge Cardozo was not the first to remind us that one cannot serve two masters. In New York, the concept of undivided loyalty goes back to at least *Meinhard v Salmon*[30] , where Judge Cardozo held that it is impossible to do just that. The fiduciary's conduct that benefits himself or herself is subject to the closest scrutiny. In this regard, *Matter of Rothko*[31] is an important decision in a number of respects. It should be distinguished from *Matter of Janes.*[32] In *Janes* the measure of damages for investment imprudence was a "lost capital" measure. Whereas in *Rothko*, the court approved a "lost profits" measure of damages because the fiduciary's misconduct consisted of deliberate self-dealing and faithless transfers of trust property. The former measure of damages is usually less than the latter, at least in a bull market.

4. Failure to Keep Proper Records

The compensation received by a fiduciary by way of commission is intended, *inter alia*, to compensate him or her for maintaining records of the estate. The failure to keep proper records forms the basis of an objection that has many implications. One can imagine that the failure to keep proper records does not, by itself, cause damage to the estate. Nevertheless, if the conduct of a fiduciary is challenged on another basis, the failure to keep proper records will result in the court resolving the issue against the fiduciary[33]

5. Failure to Properly Compute Commissions

The fiduciary is responsible for all properties that come within his or her control. The computation of the commission will be based upon those assets under the fiduciary's control. Consequently, assets that pass directly to a beneficiary may not be used as the basis to calculate commissions under SCPA 2307, 2308, and 2309. The salient example of this is real estate. Generally, there are no commissions on

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[29]See, Matter of Skelly, NYLJ, June 11, 2001, at p. 30 (2d Dept. 2001); Matter of Yarm, 119 AD2d 754, 501 NYS2d 163 (2d Dept. 1986).

[30] 249 NY 458, 164 NE 545 (1928)

[31] *Matter of Rothko*, 43 NY2d 305, 401 NYS2d 449 (1977)

[32] 90 NY2d 41, 659 NYS2d 165 (1997)

[33] *Matter of Shulsky*, 34 AD2d 545, 309 NYS2d 84 (2d Dept 1970), *app den*, 27 NY2d 743, 314 NYS2d 993 (1970)

real estate unless it has been sold, and then the commission is based on the net equity realized on the sale (sales price less closing costs less mortgage balance.[34] Other examples of non-commissionable assets are specific legacies[35] and uncollectibles.[36]

6. Improper Handling of Estate Tax and Estate Income Taxes

The fiduciary is usually responsible for penalties assessed against the estate for the late filing of estate tax or estate income tax returns. The fiduciary will be surcharged for both interest and penalty caused by the late filing.[37] The various tax elections made by a fiduciary are also subject to challenge and surcharge if made imprudently.[38] Those tax elections, in turn, may require principal and income adjustments and the failure to accomplish this may result in a surcharge.[39]

7. Payment of Excessive or Unnecessary Charges

a) generally. A fiduciary is obliged to assert all defenses against a claim on the estate (Statute of Frauds, for example) and will be surcharged for paying various administration expenses the court finds unreasonable (funeral expenses, accounting fees, attorneys' fees).[40]

b) executorial services. An additional exposure to surcharge arises when the estate's attorney performs work that is executorial in nature and bills it to the estate as legal services. The executor, not the attorney, receives a commission for services that are executorial in nature.

c) accountants. It is the rule that accounting services in preparing the account, preparing the estate tax, or the estate income tax are to be performed by the fiduciary or the attorney and are not subject to separate compensation to an outside accountant. There is a difference of opinion in the Surrogates' Courts as to whether any payment of routine professional accountant fees should be borne by the fiduciary's commission or by the attorney's fee.

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[34] *See, e.g., Matter of Ostem,* 11 Misc 2d 179, 177 NYS2d 990 (Sur Ct, Richmond Co, 1958)

[35] *Matter of Steinberg,* 208 Misc 135, 143 NYS2d 341 Sur Ct, Kings Co, 1955)

[36] *Matter of Ryan,* 201 Misc 632, 107 NYS2d 641(Sur CT, NY Co, 1951), *modified by* 280 AD 410, 114 NYS2d 1 (1st Dept 1952)

[37] *Matter of Newhoff,* 107 Misc2d 589, 435 NYS2d 632 (Sur Ct, Nassau Co, 1983)

[38] *Matter of Rappaport,* 121 Misc 2d 447, 467 NYS2d 814 (Sur Ct, Nassau Co, 1983)

[39] *Matter of Warms,* 140 NYS2d 169 (Sur Ct, NY Co, 1955)

[40] As to attorneys' fees, see *Matter of Potts,* 123 Misc 346; 205 NYS 797, (Sur Ct, Columbia Co, 1924), *aff'd* 213 AD 59, 209 NYS 655 (4th Dept, 1925), *app dism* 241 NY 510, *aff'd* 241 NY 593 (1925).

8. Failure to Earn Reasonable Income on Uninvested Cash

Cash on hand is not meant to be idle. Like investments, the fiduciary is expected to act with prudence in managing estate assets. Therefore, uninvested cash balances should be held in interest bearing accounts.[41] The failure to do this may result in a surcharge for the lost interest.

9. Failure to Distribute Estate Assets in a Timely Manner

A fiduciary need not wait until the accounting in order to make distributions to beneficiaries. In a solvent estate, there may be circumstances after the expiration of seven months from the issuance of letters when the fiduciary should make distributions to beneficiaries. Indeed, the aggrieved beneficiary (or creditor for that matter) has recourse to EPTL 11-1.5 (SCPA 2102 [4] for the creditor) to compel payment. The fiduciary may be liable for interest on those unpaid distributions.

10. Failure to Act Against the Misconduct of Another Fiduciary

Again, we must refer to *Matter of Rothko*[42] to illustrate the liability of a fiduciary for the flagrant misconduct of a co-fiduciary. The law will impose a duty of a fiduciary not to stand by idly while a co-fiduciary misbehaves. Remember, sins of omission can be as surchargeable as sins of commission.

11. Advance Payment of Commissions

Commissions are generally payable at the accounting. The fiduciary may apply to the court for advance payments. A trustee may withhold yearly commissions but only if that fiduciary has made adequate disclosure to the beneficiary, usually in the form of annual financial statements.[43]

12. Attorney-Fiduciary

Contrary to popular opinion, SCPA 2307-a does not prohibit an attorney who drafts the will from being designated its executor. The section does, however, impose strict disclosure requirements in this regard and an economic sanction for its violation (halving the statutory commission). Nevertheless, keep in mind that SCPA 2307-a does not preclude an attack on the validity of the appointment of the attorney as fiduciary at the accounting, based on allegations of fraud, overreaching, or undue influence. One very prominent trusts and estates attorney relates how he will include a prayer for relief in the probate

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[41] *See, Matter of Buck*, 184 Misc 29; 52 NYS2d 294 (Sur Ct, Westchester Co, 1944)

[42] 43 NY2d 305, 401 NYS2d 449 (1977)

[43] *See, Matter of Pollock*, NYLJ, Sep. 17, 1998, p 24, col 4 (Sur. Ct., Nassau County). *See also* SCPA 2310, 2311 for methods of obtaining payments on account of commissions.

proceeding validating his appointment as executor. He will then cite all the beneficiaries along with the distributees. This resolves the issue earlier rather than later.

13. Bank Accounts

The problems created by various types of bank accounts are many. A traditional joint account, created under Banking Law § 675, gives rise to a presumption that making such an account displays the intention of the depositors to create a joint tenancy with right of survivorship. The burden of proof is upon the party challenging the title of the survivor. In *Matter of Camarda*[44] the objectant at the accounting charged that the executrix had failed to include in the accounting funds from bank accounts that had been held by the decedent and the executrix in accounts that complied with all the formalities of creating a right of survivorship. However, the court held that the objectant met her burden of proving by clear and convincing evidence that the account was created as a matter of convenience for the decedent.

The law now recognizes accounts for the convenience of the depositor (Banking Law § 678). Effective January 6, 1991, a depositor may allow another person to have withdrawal rights in the account for his or her convenience without giving rise to any presumption of joint ownership or right of survivorship.

See also EPTL 6-2.2 and its requirements for creating a joint tenancy in dispositions of personal property to two or more people.

N.B. The accounting proceeding may well see an objection to the survivorship of the joint account and of the Totten Trust account by allegations of fraud or undue influence. Also, see *Matter of Weinberg*[45] for an interesting set of facts on the use of Totten Trusts to defeat the claims of creditors *post mortem.*

14. Improper Inclusions and Other Technical Defects

a] Following up on the discussion above, one should be aware that the improper inclusion of various assets in Schedule A will have the effect of inflating the fiduciary's commission. You will note that the major defects found in Schedule A are the inclusion of these types of assets as estate assets: joint accounts, trust accounts, IRA account, insurance benefits.

b] A common error in the account is the inclusion on Schedule A-1 of the disposition of assets that did not result in an increase upon disposition. Such a disposition is properly placed in Schedule B, if only to show the loss as "$ 0.00."

c] Any disposition of securities, whether in Schedule A-1 or in Schedule B must include the number of shares involved and the dates of acquisition and disposal.

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[44] 63 AD2d 837, 406 NYS2d 193

[45] 162 Misc 867, 296 NYS7 (Sur Ct, Kings County 1937)

d] A general category in Schedule C that lists disbursements in the aggregate is improper. Each disbursement must be separately itemized.

e] A common error is to account for the sale of real property all across the schedules, with the gross sales price reflected at Schedule A, expenses associated with the sale stated at Schedule C, etc. This is improper. The sale of real property should be accounted for as follows: Schedule A shows the net amount realized on the sale (sales price less fees and expenses) and Schedule J shows the actual reconciliation path from gross sales price to net amount received. In addition, a copy of the closing statement should also be attached to the account.

f] Occasionally, the account will show the unpaid commissions at Schedule C-1. This is an error. Schedule I is the proper to calculate commissions. As to commissions, see Uniform Rule § 207.40 (e) (22 NYCRR § 207.40 [e]).

In conclusion, the practitioner should keep in mind that the accounting of a fiduciary involves more than accounting, it involves accountability.

EXHIBIT D-3
ACCOUNTING DECREE AND AUDIT CHECKLIST

Outline:

I. File Review
II. Decree Review
III. Review of Individual Schedules

I. File Review

Is the case ready to proceed to decree?....._____

A. Is jurisdiction complete[46]?....._____

B. Re jurisdiction, is a surety a necessary party, and has it been cited?....._____

C. Is there a guardian ad litem? If so, then does the file contain the report and recommendation? An affidavit of services?....._____

D. Is there an OCA 830 form for the guardian ad litem on file?..... _____

E. Have objections been filed?....._____

F. Has there been a trial, hearing, or stipulation?....._____

G. Are there decisions or stipulations in the file that affect the petition/decree?....._____

H. Was a summary statement served with the citation, recited in the waivers and consents?....._____

I. Is the petition verified?....._____

J. Does the account include the proper schedules?[47]....._____

K. Does the account include a SCPA 2309 affidavit?....._____

L. Is one of the distributees or beneficiaries in jail?[48]....._____

II. Decree Review

A. Fact recitations in the decree:

1. Names of all interested parties and methods of appearance....._____
2. Pleadings filed....._____
3. Appointment of guardian ad litem (report). (Fee set in decree)....._____

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[46]See SCPA 2210 for necessary parties. *N.B.*, the surety of a fiduciary's bond is an interested party. Jurisdiction is incomplete if the citation fails to give proper notice of the reliefs requested (see fn. 18 regarding attorney's fees).

[47] See 22 NYCRR§202.40 (c). See Surrogate's Court Forms JA-4 (trust accounting) and JA-7 (non-trust accounting).

[48] See SCPA 2222-a and Part II, Section U below

4. Hearings and trials conducted....._____

5. If decisions were rendered, date of decisions and matters decided....._____

6. Tax clause, representing payment or exemption(in executor's accounting)[49]....._____

7. Expiration of time to make claims against the estate[50]....._____

B. Review relief requested in petition and citation (as amended, if applicable).

1. Compare with directions in decisions or terms of a stipulation of settlement and harmonize them with the decretal paragraphs in the proposed decree....._____

2. Does Sch D list claims rejected and reasons for same? Then, the relief of rejecting them must be in the citation and petition.[51]....._____

3 . What is the total fee of the attorney. If the decree directs additional payment to the attorney, make sure the request for such relief is contained in the citation, petition, or waiver of citation and petition[52]....._____

D. The petition should contain a copy of the governing instrument.[53] The distributions and investments contained in the accounting should comport with the terms of the instrument....._____

E. For an account by an administrator or executor:

1. Check distribution against the petition (Refer to will or EPTL 4-1.1)....._____

2. Make sure that partial distributions or other advance payments have been included in calculations....._____

3. Check that the distribution reflects the apportionment of all estate taxes,

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[49] If a tax discharge letter is not on file, then look for an appearance or waiver from the Department of Taxation (see § 44, Uniform Rules for the Surrogate's Court, 22 NYCRR § 207.44).

[50] The seven month period exonerating the fiduciary from personal liability runs from the issuance of letters to the initial fiduciary. See SCPA 2208(1)(a). There are othe time considerations as to when to account. See SCPA 2208.

[51] See SCPA 1806, 1808

[52] It is this court's policy to require citation for unpaid attorney's fees. The reason is that any fees listed as unpaid in Sch C-1 will not be readily apparent from a review of the summary statement that is served with the citation (22 NYCRR §202.40[e]). An entry at Schedule C-1 showing an "unknown" amount of additional fees or fees "to be determined by the Court is unacceptable and will need a supp. Cite when those fees are determined (*Matter of Dellaratta*, 315121 [Dec. # 892, 2002]). See also 2 New York Estates: Probate, Administration, and Litigation [Harris 5th Ed.] § 17:43.

[53] 22 NYCRR §207.40(b).

if not exonerated in the will[54]....._____

4. In a P.A. accounting, attention must be given to the requested attorney's fees....._____

5. In a P.A. accounting, care should be given to the claims procedure. Did the counsel reject a claim and give notice in writing to the claimant? The Schedule D entry must state the reason for rejecting the claim. Was the claimant cited?[55]....._____
6. Occasionally there will be a report of worthless assets (penny stocks that have no value, for example). These reports should be listed at Schedule B with a full explanation of how the executor arrived at this conclusion at Schedule J[56]....._____

F. For an intermediate trust accounting:

1. Make sure that the trustee is directed to retain the balance of principal and income on hand and to administer the same pursuant to the terms of the trust instrument....._____

OR

2. If the accounting marks the shift from an outgoing trustee to a successor trustee, then the decree should provide for transfer of the assets upon the successor qualifying....._____

G. Final trust accounting:

1. Make sure that the proposed distribution of the remainder agrees with the terms of the trust instrument....._____

2. Make sure there is an appropriate allocation of expenses between principal and income[57]....._____

H. Distributions to unknowns:

1. Make sure that payment is directed to the appropriate fiscal officer ....._____

I. Summary Statement:

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[54] See EPTL 2-1.8

[55]See SCPA 1806, 1808.

[56] See New York Estates, Probate Administration and Litigation (Harris 5th ed.), § 17A, p. 15 2002 Supplement. Some sources show worthless property at Sch A (Warren's Heaton, § 96.09). Other authorities show the entry at Sch. B with an explanation at Sch. J (Warren's Heaton §§ 96.12[1] and 96.21[1], respectively.

[57]See EPTL 11-2.1(a) and (l)

1. It must agree with the account or the supplemental account[58]....._____

J. Commissions:

1. The provision for commissions must agree with the computation....._____
2. Were commissions paid without court order?[59]....._____
3. Does real property form a part of the commission base, and, if so, does Schedule A reflect the net proceeds of the sale?[60]....._____
4. Occasionally there will be appreciation in assets reflected in Sch. A that does not form part of the receiving commission (for example, when shares of stock are distributed in kind the appreciation will be reflected in A-1, but this should not be part of the receiving commission)....._____
5. The schedule that computes the commission must also explicitly state whether an asset of personal property was pledged as collateral and the equity in it[61]....._____
6. Statutory commissions are not allowed on the value of specific legacies, Check the schedules to see if such are listed in the commission base[62]....._____
7. Commissions are to be paid two-thirds from principal and one-third from income, unless the governing instrument provides otherwise[63]....._____

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[58]*N.B.* In order to account for interest earned after the closing date (provided it is of a small amount and a short duration) the decretal paragraph regarding distributions may contain a provision allowing any accrued interest to be paid to the beneficiaries as appropriately pro rated.

[59]See SCPA 2310, 2311. Matter of Crippen, 32 Misc.2d 1019; Matter of Newhoff, 107 Misc.2d 589.

[60]Generally, only real property sold by the fiduciary is commissionable. *Matter of Schaich*, 55AD2d 914). Therefore, real property that is specifically devised is not part of the commission base (likewise with personal property that is specifically devised). This is true even when the fiduciary executes a deed to the devisee. Even if the property is sold, but at the instructions of the devisee, the sale may not give rise to a commission. *Matter of Moody*, 125 AD2d 673). However, if real property is added to the residuary and administered by the fiduciary, then it may be commissionable. SCPA 2301(1). See *Matter of Borrometi*, 238 AD2d 416, and *Matter of Zahoudanis*, 205 AD2d 547. See also, Turano and Radigan, §15.06[a] and [b].

[61] 22 NYCRR §207.40 (d). *N.B.* This is rarely done.

[62] See SCPA 2307(2) and Warren's Heaton 7-103.02[6][I]. There is an exception to this rule: where the specific bequest must be divided among several parties (*Matter of Fisher*, 93 AppDiv 186).

[63] See SCPA 2309(3). Prior to 1993, commissions were ½ from principal and ½ from income. N.B. that a trustee waives his or her right to annual commissions if he or she fails to retain adequate income to satisfy that yearly commission in that year. *Matter of Rosof*, NYLJ,

K. Principal and Income (in a trust accounting or in an executor's accounting where a testamentary trust is involved):

1. Make sure that the allocation of charges allowed in the decree is appropriate between principal and income....._____

2. Is there an accurate identification of assets as principal or income (i.e., stock splits, renewable resources, etc.)[64]....._____

3. If the executor has elected to use estate deductions to offset the income of the estate, then most resulting increases (possibly excluded, capital gains that inure to the benefit of principal) in the estate tax must be reimbursed to the principal account from the income account (Sch J, K, usually)[65]....._____

L. Final Accountings:

1. There must be a statement discharging the fiduciary from further liability....._____

2. If applicable, a discharge of the surety....._____

3. If the surety is obliged to pay on the bond, make sure payment is made to the estate and not to creditors directly.[66]....._____

4. Does the decree require subsequent report of compliance before discharge?....._____

M. Settlement:

1. Is the decree settled on notice to all parties who appeared?....._____

N. Guardian ad litem (a doublecheck):

1. Is there an OCA 830 in the file?....._____

2. Is the fee reported as an unpaid administration expense at Sch C-1....._____

3. Is there a decision on file for a fee in excess of $2,500?....._____

O. Re attorney's fees

1/9/01, p.33, col.1). Said annual commission can be paid in out years, but only upon a showing that the account still contains accumulated income from that year.(SCPA 2309(4)(a)).

[64] EPTL 11-2.1(b).

[65] This is the *Warms* adjustment, after *Matter of Warms*, 140 N.Y.S.2d 169. See also, EPTL 11-2.1(A), 11-2.1(1)(4).

[66] See, *Matter of Gokaj* (268934).

1. what is the total fee of the attorney. If the decree directs additional payment to the attorney, make sure the request for such relief is contained in the citation, petition, or waiver of citation and petition[67]....._____

P. If there is a distribution to an infant, then make sure the payments are not being made directly to the infant[68]....._____

Q. *Pro Tanto* Liability: Is there a surcharge and should that surcharge be applied *pro tanto*? (Usually, the *pro tanto* rule applies to surcharges that disallow a credit and not to surcharges based on failure to collect an asset, for obvious reasons.)[69]....._____

R. In accountings of common trust funds,[70]

1. the statements of increases and decreases must show gains and losses realized on disposition of assets based on fair market value at beginning of acct. of assets held at the beginning of the acct, and inventory values of all other assets ....._____

2. the statement of assets on hand at acct close must show the increase or decrease in fair market value of assets at close of the acct in relation to the fair market value of the beginning of the acct of those assets which were held at the beginning of the acct and in relation to the inventory value of the remainder of the assets....._____

S. Tax Apportionment.

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[67] It is this court's policy to require citation for unpaid attorney's fees. The reason is that any fees listed as unpaid in Sch C-1 will not be readily apparent from a review of the summary statement that is served with the citation (22 NYCRR §202.40[e]). An entry at Schedule C-1 showing an "unknown" amount of additional fees or fees "to be determined by the Court is unacceptable and will need a supp. Cite when those fees are determined (*Matter of Dellaratta*, 315121 [Dec. # 892, 2002]). See also 2 New York Estates: Probate, Administration, and Litigation [Harris 5th Ed.] § 17:43.

[68] *N.B.* 1] The decree must provide for the distribution to the guardian of the property of the infant and if that is not accomplished within six months, then the moneys be paid into the Court (SCPA 2223).

2] An infant's parent and natural guardian may receive up to $10,000 in their representative capacity as parent and natural guardian. Only a duly appointed guardian of the property may receive funds in excess of $10,000. See SCPA 2220, EPTL 11-1.1(b)(19).

[69] *See, Matter of Fuller,* 10 AD2d 938*; Matter of Zelaznick,* 90 Misc.2d 113.

[70] 22 NYCRR §207.40 (c)(1) and (2).

1. Look to the will for instructions on apportionment before applying EPTL 2-1.8....._____

2. If the decree reflects a tax apportionment between several beneficiaries, then the estate tax is not reported as an administration expense at Schedule C, but as an adjustment of distribution to beneficiaries at Schedule E[71] as calculated in Schedule K....._____

3. If the decree apportions estate tax, then the petition and citation must reflect that request....._____

T. Reserves[72]

1. If the decree seeks to reserve monies from distribution in order to protect the interests of legatees, distributees, or creditors whose whereabouts are unknown, then the decree should provide for the moneys withheld to be paid into court if not distributed within six months of the decree....._____

U. Incarcerated Beneficiary or Distributee[73]

1. If one of the beneficiaries or distributees is to receive funds under the decree and that person is incarcerated, then the Court must give prompt written notice to the state crime victims board,....._____

and

2. The decree must provide that no payment will be made to that person Within thirty (30) days of the decree....._____

V. Claims

1. The account should be accompanied by copies of the notices of rejection of any claim rejected in Schedule D of the account, together with proof of service.[74]....._____

2. If the account is submitted for settlement, then the citation and petition must refer to the claims (D-2 through D-5) and specifically request their rejection or acceptance....._____

3. The accounting decree should show an allowance for the payment of claims presented but not yet paid, the resolution of rejected claims, possible reserves for contingent claims, and the resolution of any

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[71] *See*, *Matter of Tucker* (304054).

[72] See, SCPA 2223

[73] See, SCPA 2222-a

[74] See SCPA 1806, 1808.

personal claims by the fiduciary....._____

4. If the estate is insolvent, the preference allowed to various claims should be set forth and in the order of their priority[75]....._____
5. If any one of the five parts of Schedule D is irrelevant, then the account must state "none"....._____

W. Wrongful Death Decrees

1. The decree must reflect the modification of limited letters allowing the settlement....._____

III. Review of the Individual Schedules

As part of the auditing process, it is necessary to review the separate schedules for accuracy and completeness. The schedules below come from the forms promulgated by the Uniform Rules for the Surrogate's Court. Some of the entries are from the Accounting Checklist prepared by the Fourth Department.

N.B. Form JA-4 is relevant to an accounting that involves a trust. Form JA-7 is used for accountings that do not involve a trust. References are to the official forms promulgated by OCA and available on its website.

Schedule A. Principal Received [JA-4 and JA-7]

- There must be an itemized statement of all moneys and personal property constituting principal assets received, together with the dates of acquisition.
- If real property was sold, then the net proceeds of sale of real property are put in Schedule A and a copy of the closing statement is included with the account (Schedule J).
- The schedule may not contain the total amount of principal assets exchanged during the administration of the estate. This would incorrectly inflate gross account total (such as stocks sold to buy other stocks, bank accounts transferred to other banks or alternate types of accounts, etc. - these are reported under Schedule B (if no loss/gain) or Schedule F.

Schedule A-1. Realized Increases [JA-4 and JA-7]

- The schedule must show the actual increases due to sales, liquidation or distribution of principal assets.
- Realized increases on new investments or exchanges.
- Detail the dates increases were realized and identify the property from which increase was derived.

Schedule A-2 Income Collected [JA-4 and JA-7]

[75] SCPA 1811, Turano and Radigan, New York Estate Administration §5.08. N.B. Claims of equal priority will abate ratably. See *Matter of Rubin*, 74 Misc.2d 503.

- Reports all interest, dividends, rents, etc.
- Each receipt must be separately accounted for and identified except where a security has been held for an entire year, then interest or ordinary dividends may be reported on a calendar year basis.

Schedule B Realized Decreases [JA-4 and JA-7]

- This schedule must show a complete statement of all realized decreases on principal assets whether due to sale, liquidation, collection or distribution, or any other reason.
- It must also show decreases on new investments or exchanges.
- **N.B**. It must also show sales, liquidations or distributions that result in neither gain nor loss.
- The schedule must show the date of realization of each decrease and identify property from which decrease
  was incurred.
- **N.B**. If the fiduciary intends to abandon any estate property as worthless, then it must be listed here and accompanied by a full statement of the reasons for abandoning it.

Schedule C Funeral and Administration Expenses and Taxes Actually Paid [JA-7]
Funeral and Administration Expenses and Taxes Charged to Principal [JA-4]

- This schedule contains an itemized statement of all moneys chargeable (to principal) and paid for funeral, administration and other necessary expenses, together with date and reason for each expenditure.
- For a trust account, are all expenses of a type that is appropriate to be charged against principal?
- It should consolidate similar expenditures (funeral expenses, taxes, accountant fees, legal fees, filing fees, commissions, other)
- **N.B.** Where the will directs all inheritance and death taxes are to be paid out of the estate, credit for payment of the same should be taken in this schedule.
- An allocation schedule should be attached to this schedule, showing apportionment of taxes if the will did not indicate that taxes be paid out of the residuary estate.
- Do the estate taxes listed in the account agree with any tax return filed, if the file contains the return.

Schedule C-1 Unpaid Administration Expenses [JA-4 and JA-7]

- This is an itemized statement of all unpaid claims for administration and other necessary expenses
- The list should include a statement as to the basis of each claim.

Schedule C-2 Administration Expenses Chargeable to Income [JA-4]

- This is an itemized statement of all moneys chargeable to income and paid for administration, maintenance and other expenses, together with date and reason for each such expenditure.

Schedule D Creditors' Claims [JA-4 and JA-7, but does not apply to trustee's account]

- D-1: List claims presented, allowed, paid and credited and appearing in the summary statement together with the date of payment.
- D-2: List claims presented and allowed but not paid.
- D-3: List claims presented but rejected and the date of and reason for such rejection.
- D-4: List contingent and possible claims
- D-5: List personal claims requiring approval by the court pursuant to SCPA §1805.
- Each sub-section must be completed, if only to state, "not-applicable."
- **N.B**. If the estate is insolvent - preference of claims should be stated with the order of their priority (SCPA 1811).

Schedule E **Distributions of Principal [JA-4]; or, Distributions Made [JA-7]**

- An itemized statement of all moneys paid and all property delivered (from principal) to beneficiaries, legatees, trustees, surviving spouse or distributees of the deceased, date of payment or delivery and name of the person to whom payment or delivery was actually made.
- **N.B**. If estate taxes were required to be apportioned and payments have been made on account of the taxes, the amounts apportioned in Schedule K against beneficiaries of the estate shall be charged against the respective individuals share.

- Are the estate taxes listed correctly as either a charge against the estate or as a distribution (check will)?

Schedule E-1 **Distributions of Income [JA-4]**

- An itemized statement of all moneys paid and of property delivered out of income to the beneficiaries, the date of payment or delivery and the name of the person to whom payment or delivery was made.
- Distributions of income to any one beneficiary may be reported by the calendar year.
- The distributions of income must comply with the terms of the will or the rules of intestacy.

Schedule F **New Investments, Exchanges, and Stock Distributions [JA-4 and JA-7]**

- Itemized statement of all new investments with date of acquisition and cost of all property purchased
- Itemized statement of all exchanges made, specifying dates and items received and items surrendered
- Itemized statement of all stock dividends, stock splits, rights and warrants received, showing securities to which each relates and their allocation as between principal and income.
- Do all the new investments conform to the types of investments fiduciaries are empowered to make?

Schedule G **Principal Remaining on Hand [JA-4]; Personal Property Remaining on Hand [JA-7]**

- An itemized statement showing all property constituting principal remaining on hand.

- Statement of all uncollected receivables and property rights due the estate.
- The schedule must show date and cost of all such property acquired by purchase, exchange or transfers made or received, together with date of acquisition and cost - indicate such sums in appropriate lines of the summary schedule.
- Show all unrealized increases and decreases relating to assets on hand and report the same in the appropriate places in the summary schedule.

Schedule G-1 Income remaining on hand [JA-4]

- Statement showing all undistributed income.

Schedule H Interested parties [JA-4]
Interested Parties and Proposed Distribution [JA-7]

- List names of all persons/parties entitled as beneficiary, legatee, devisee, trustee, surviving spouse, distributee, unpaid creditor or otherwise to a share of the estate or fund with their post office addresses and the degree of relationship if any of each to the deceased and a statement showing the nature of the value or approximate value of the interest of each person/party
- There must be a statement that court records have been searched for powers of attorney and assignments and encumbrances made and executed by any of the persons interested in or entitled to a share of the estate
- If applicable, include a list detailing each power of attorney, assignment and incumbrance, disclosed by such search, with the date of its recording and the name and address of each attorney in fact of each assignee and of each person beneficially interested under the encumbrance referred to in the respective instruments
- Enclose statement as to whether accounting party has any knowledge of the execution of any such power of attorney or assignment not so filed and recorded.

Schedule I Computation of Commissions [JA-4 and JA-7]

- Compute the amount of commissions due upon this account pursuant to SCPA §2307.
- Specifically bequeathed property or very specific legacies can not be included in commission computations.
- For multiple commissions, check the governing instrument and compare to CPLR 2313.
- Check compliance with SCPA 2307-a. If attorney has not complied with statute, then the commission must be halved.

Schedule J Other Pertinent Facts and Cash Reconciliation [JA-4 and JA-7]

- State all other pertinent facts affecting the administration of the estate and the rights of those interested therein.

- Include statement of any real property left by the decedent that it is not necessary to include as an estate asset to be accounted for, a brief description thereof, its gross value, and the amount of mortgages or liens thereon at the date of death of the deceased
- Include a cash reconciliation in this schedule so that verification with bank statements and cash on hand may be readily made.
- Any miscellaneous information that is necessary to give a full accounting of the estate.

Schedule K **Estate Taxes Paid and Allocation of Estate Taxes [JA-4 and JA-7]**

- State all estate taxes assessed and paid with respect to any property required to be included in the gross estate under the provisions of the Tax Law or under the laws of the United States
- Include a computation setting forth the proposed allocation of taxes paid and to be paid and the amounts due the estate from each person in whose behalf a tax payment has been made, and also the proportionate amount of the tax paid by each of the named persons interested in this estate or charged against their
  respective interest, as provided in EPTL §2-1.8.
- Where an allocation of taxes is required, the method of computing the allocation of said taxes must be shown in this schedule.

Additional Resources: **- Chapters 96 and 102 in Warren's Heaton on Surrogate's Court Practice**
- NYSBA Coursebook, Probate and Administration of Estates, Checklist For Examination of Executor's Account.
- 2 New York Estates: Probate, Administration, and Litigation [Harris 5th Ed.] revised: March 17, 2003 C:\Documents and Settings\kchristi\Desktop\galtrainingmanual.wpd

EXHIBIT E
SAMPLE GUARDIAN AD LITEM REPORT
CONSTRUCTION PROCEEDING

SURROGATE'S COURT: STATE OF NEW YORK
COUNTY OF SUFFOLK
X----------X
Proceeding for Construction of the
Last Will of REPORT OF GUARDIAN AD LITEM

GLORIA F. SANDSTROM,

File No. 2299 P 1998

Deceased,
X----------X

TO THE SURROGATE'S COURT OF THE COUNTY OF SUFFOLK:

By an Order of Honorable Gary J. Weber, Acting Judge of the Surrogate's Court, dated April 20, 1999, I was appointed Guardian ad Litem for Brian Felicetta, Robert Felicetta, Michael Felicetta, Gregory Mannix and Cielle Pappalardo, Infants. Since that time, Brian Felicetta has attained the age of eighteen years and is no longer an infant. By this writing, I submit my report as such Guardian ad Litem.

Following my appointment, I executed my consent to serve at the Office of the Surrogate's Court and I reviewed the file in this matter. I examined the Petition, dated March 23, 1999, of Gloriann Felicetta, as Executrix of the Will of Gloria F. Sandstrom, Deceased ("decedent"), setting forth the information relative to the terms of the Will sought to be construed and the persons interested in the estate as legatees or as trust beneficiaries. It appears that decedent died a resident of Suffolk County, New York on November 7, 1998 and that she left surviving her three daughters and seven grandchildren.

I also examined the Will of the decedent, dated March 16, 1993, which Will was duly admitted to probate in this Court on January 8, 1999.

I reviewed the Citation dated April 1, 1999, returnable April 27, 1999 to Patricia Mannix, Brian Felicetta, Cielle Pappalardo, Barbara Sandstrom, Robert Felicetta, Erin Mannix, Michael Felicetta, Christopher Felicetta and Gregory Mannix.

I reviewed Waivers and Consents of Erin M. Mannix, dated April 19, 1999 and of Christopher Felicetta, dated April 14, 1999. I reviewed the Affidavit of Service of David P. Fallon dated April 15, 1999 upon Patricia Mannix and Barbara Sandstrom on April 6, 1999. I reviewed the Affidavit of Service of David P. Fallon, dated April 15, 1999 upon Michael Felicetta, an infant under the age of fourteen years on April 6, 1999 by service upon his mother, Gloriann Felicetta, upon Brian Felicetta, an infant over the age of fourteen years, and upon Robert Felicetta, an infant over the age of fourteen years on April 6, 1999 by service upon said infants and upon Gloriann Felicetta, their mother. I reviewed the Affidavit of Service of David P. Fallon

dated April 15, 1999 upon Cielle Pappalardo, an infant under the age of fourteen years on April 6, 1999 by service upon her mother, Patricia Mannix, and upon Gregory Mannix, an infant over the age of fourteen years, on April 6, 1999 by service upon said infant and upon his mother, Patricia Mannix. I reviewed the order appointing Warren J. Klein as Guardian Ad Litem for unborns and the Notice of Appearance and Consent to act of Warren J. Klein.

Based upon the foregoing, I am satisfied that jurisdiction of all interested parties has been obtained.

The Petition alleges that Article Fourth (E) of the Will contains an ambiguity and requires construction. Article Fourth (E) provides as follows:

> "My house I direct to be sold and the proceeds to be deposited into a trust along with my IRA'S whereby the funds are to be equally shared between all of my grandchildren surviving at the time of my death. It is anticipated that any afterborn grandchildren are to be included. The sole purpose of this Trust is that the Trustee, BARBARA A. SANDSTROM can distribute the pro-rata share due to each grandchild at the age of 25. Should BARBARA A. SANDSTROM die or be unable to act as Trustee, then I appoint GLORIA ANNE FELICETTA as alternate Trustee."

The ambiguity alleged is that the first sentence provides for a trust to be shared by "all of my grandchildren surviving at my death" and the second sentence provides that it is anticipated "that any after-born grandchildren are to be included".

Petitioner is concerned that the term "after-born" contemplates grandchildren born after her death, whenever born, and, if so, this may create a violation of the rule against perpetuities. It would also prevent distribution to a grandchild of his or her share upon attaining the age of 25 years because the class of beneficiaries would not be closed and the pro rata share could not yet then be determined.

Reference to the meaning of the term "after-born" as used in the New York Estates Powers and Trust Law would indicate that the term refers to a child born after the execution of the will, not to a child born after the decedent's death. The term "after-born" is used in EPTL 5-3.2 which provides that where a testator has a child "born after the execution of a last will" and dies leaving the after-born child unprovided for by any

settlement or by the will, such child succeeds to a portion of the testator's estate depending on whether the testator had one or more children living when he executed his last will or whether he had no children living when he executed his will.

EPTL 5-3.4 also uses the term "after-born". It provides that an after-born child may enforce its rights in an action in the Supreme Court if the administration of the estate in the Surrogate's Court has been completed.

(A) Other sections of the EPTL refer to children "born after". (1) EPTL 4-1.1 provides that distributees of a decedent, conceived before but "born after" the decedent's death take as if born during decedent's lifetime. (1) EPTL 2-1.3(2) also deals with children conceived before but "born after", in this case after the disposition becomes effective. It includes as "issue" or "descendants" children conceived before but born after such disposition becomes effective.

(2) EPTL 6-5.7 provides that where a future estate is limited to children, distributees, heirs or issue, post humous children are entitled to take in the same manner as if living at the death of their ancestors.

None of these statutes embraces a child conceived after the disposition becomes effective.

This would lead to the conclusion that there is no ambiguity in the Will and no construction by this Court is required. The term "after-born" in its ordinary sense, as it appears in the New York Estates Powers and Trust Law means born after the execution of the Will and before decedent's death, not born after the decedent's death, particularly if not conceived before the decedent's death.

This is consistent with the position expressed by the attorney draftsperson of the Will, William J. Porter, in his letter dated February 2, 1999.

If no construction issue exists by reason of the ordinary meaning of the term "after born", no related Rule against Perpetuities problem exists.

The Petition also alleges a dilemma that has occurred as a result of the fact that the decedent's Individual Retirement Accounts were made payable to her estate instead of directly to her intended beneficiaries. Under Article Fourth (E) of the Will, the decedent's house and her IRA's are to be deposited into trust for the benefit of grandchildren, the sole purpose of which is that the trustee distribute the pro-rata share due to each grandchild at the age of 25. The trust contains no provision for current distribution of income or principal. This creates onerous income tax consequences, described in the petition, if the estate or the trust must pay the income tax on the proceeds of the IRA at fiduciary income tax rates which reach the level of 39.6% at approximately $8,000 worth of income, as opposed to ordinary individual income tax rates.

Had the decedent made the proceeds payable to her grandchildren as designated beneficiaries, instead of to her estate, it may have been possible for the grandchildren to defer the income tax by taking minimum required distributions over their life expectancies or over the life expectancy of the oldest grandchild.

If they had been named designated beneficiaries and taken their pro rata shares as a lump sum, their individual income tax brackets would presumably have been lower than those of the estate or trust.

Prior to commencing this construction proceeding, the Executrix of the Estate collected the proceeds of decedent's IRA's and deposited them in an estate account. I have reviewed the beneficiary designation forms which name the estate as the beneficiary and the evidence of collection.

Presumably decedent would have wanted to minimize any taxes payable by her estate or by her grandchildren.

I have proposed, in the nature of a compromise of a controvery, consistent with testator's presumed intention to minimize taxes while providing some form of fiduciary protection for her grandchildren, that Barbara A. Sandstrom, the trustee of the Article Fourth (E) trust, be appointed Custodian Under the Uniform Gifts to Minors Act for each of the grandchildren under the age of twenty-one years to receive such grandchild's pro-rata share of the proceeds of the IRA. Those grandchildren who have attained the age of twenty-one would receive their pro-rata share outright. Gloria Ann Felicetta, named in the Will as alternate

Trustee, would be successor Custodian. As to the proceeds of the sale of the house, those would remain in trust with each grandchild's pro rata share to be distributed to him or her at age twenty-five.

This would result in the distribution of the proceeds of the IRA, if distributed in the same fiscal year as collected, being taxed at individual income tax rates instead of at fiduciary tax rates.

It is respectfully submitted that such a compromise would better fulfill the testator's intentions with respect to providing for her grandchildren.

Based upon the foregoing, it is respectfully submitted (1) that the Court determine that there is no ambiguity between the first two sentences of Article Fourth (E) requiring construction and that the term after-born be given its ordinary meaning, that is, born after the execution of the will but not after the death of the decedent, and (2) that a compromise be effectuated with respect to the distribution of the proceeds of the IRA and that such proceeds be distributed to a Custodian Under the Uniform transfers to Minors Act for grandchildren under age twenty-one and to those grandchildren who have attained the age of twenty-one.

It is respectfully requested upon executing the Decree in these proceedings that the Court fix and determine the fair and reasonable value of the services of the Guardian ad Litem rendered and to be rendered. In that regard, it is respectfully submitted that time records through the date hereof establish that in excess of upwards of approximately 10 hours of time have been expended by and on behalf of the Guardian ad Litem.

Guardian ad Litem is a graduate of St. John's University School of Law. She has been a member of the Bar of the State of New York since 1971, a period of twenty-eight years and has been practicing in the field of trusts and estates since 1977. Deponent is a member of the law firm of Cullen and Dykman with offices at 100 Quentin Roosevelt Blvd., Garden City, New York. Deponent is a Fellow of the American College of Trust and Estates Counsel, a Fellow of the New York Bar Foundation, a member of the EPTL-SCPA Legislative Advisory Committee, a liaison of the EPTL-SCPA Legislative Advisory Committee to the Executive Committee of the Trust and Estates Law Section of the New York State Bar Association, having

served on that Committee since 1987, the former Chair of the Life Insurance and Employee Benefits Committee of the Trust and Estates Law Section, a past President of the New York Women's Bar Association and a founding Director of the Women's Bar Association of the State of New York. Deponent has chaired numerous programs and lectured frequently on trust and estates matters for the New York State Bar Association, the Nassau County Bar Association, the Women's Bar Association of the State of New York, the Estate Planning Council of Nassau County and the Continuing Legal Education Program of Hofstra University School of Law.

Dated: Garden City, New York
October , 1999

Respectfully Submitted,

_____
Andrea Hyde

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

ANDREA HYDE, an attorney-at-law, affirms under penalties of perjury that I am the above mentioned Guardian ad Litem; there has been made a complete investigation of the interests of my Wards herein; I have represented my Wards herein and acted for them in every respect to the best of my knowledge and ability; I have in every way conserved my Ward's interests; the foregoing report is true in every respect; and, the services performed herein were in every respect necessary to properly conserve the interests of my Wards.

Dated: October , 1999

_____
Andrea Hyde
Guardian ad Litem

EXHIBIT F
SAMPLE GUARDIAN AD LITEM REPORT–WRONGFUL DEATH PROCEEDING

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X File No. 285917

In the Matter of the Application of ROSANNA D'ABREAU, as Administratrix of the Goods, Chattels and Credits that were of

BARRY D'ABREAU,

deceased,

REPORT OF THE
GUARDIAN AD LITEM

For leave to settle the compromise of a certain cause of action for the wrongful death and conscious pain and suffering of the decedent, and to render and have judicially settled the Account of proceedings as such Administratix.

----------X

TO THE SURROGATE'S COURT, COUNTY OF NASSAU:

I, E. DAVID WOYCIK, the undersigned Guardian Ad Litem, appointed by this Court, respectfully reports as follows:

1. I am a member of the firm of SANDERS, SANDERS, BLOCK & WOYCIK, P.C., with offices at 100 Herricks Road, Mineola, New York, and I am an attorney, duly licensed to practice law in the courts of the State of New York.

2. By Order of the Hon. JOHN B. RIORDAN, Judge of the Surrogate's Court of the State of New York, County of Nassau, dated August 21, 2002, I was appointed Guardian Ad Litem to act on behalf of CHEYANNE ANDREANA MENDOZA-D'ABREAU, the decedent's infant daughter who is under the age of 14 years, and on behalf of NICHOLAS JUSTIN D'ABREAU-MENDOZA, decedent's infant son who is also under the age of 14 years, who, as distributees, are persons interested in the within Miscellaneous/Judicial Account Proceeding but cannot act on their own behalf.

3. By my appointment as Guardian Ad Litem of the infants, CHEYANNE ANDREANA MENDOZA-D'ABREAU and NICHOLAS JUSTIN D'ABREAU-MENDOZA, I was charged with the

duty of reviewing the settlement of the action for decedent's wrongful death and conscious pain and suffering which was commenced against defendants THE DOCTORS' OFFICE CENTER, BRYAN S. BLAUSTEIN, M.D., JOEL RAMOS, M.D. and AMOCO CHEMICAL CO.; and against third-party and second third-party defendant, RUCO POLYMER CORPORATION commenced, respectively, by third-party plaintiff, defendant BRYAN S. BLAUSTEIN, M.D. and by second third-party plaintiff, by defendant AMOCO CHEMICAL COMPANY, which actions were consolidated and are pending in the Supreme Court of the State of New York, County of Nassau, under Index #020773/95; and to review the Account of the settlement and proceedings filed in this estate by ROSANNA D'ABREAU, Administratrix.

4. I was also charged to review of the Petition for Advice and Direction with regard to the disposition of decedent's real property, which is the subject of a separate proceeding in this Court.

5. As such Guardian ad litem of the infants, CHEYANNE ANDREANA MENDOZA-D'ABREAU and NICHOLAS JUSTIN D'ABREAU-MENDOZA, I submit by this writing, my Final Report of my review of the Petition to Settle the Compromise of the actions for decedent's wrongful death and conscious pain and suffering, and the Account of said settlement. My Report on the Petition for Advice and Direction is a separate report and is not included herein.

6. I have no interest in the within proceeding adverse to the interests of my wards, nor am I connected in any way or in any business with the attorneys for any of the adverse parties in the action for decedent's wrongful death.

7. I have obtained a copy of the instruments on file in the Office of the Clerk of the Surrogate's Court of Nassau County, New York, which show:

(A) That on June 13, 1994, by Decree of the Hon. C. RAYMOND RADIGAN, then Judge of the Surrogate's Court of the State of New York, County of Nassau, granted Limited Letters of Administration of the Goods, Chattels and Credits that were of BARRY D'ABREAU, deceased, to

ROSANNA D'ABREAU under File No. 285917, for the purpose of commencing an action against any and all persons found to be responsible for decedent's wrongful death and conscious pain and suffering, which Limited Letters of Administration restrained ROSANNA D'ABREAU from compromising or collecting upon any cause of action for decedent's wrongful death and conscious pain and suffering without further order of this Court. It appears that said Limited Letters of Administration have not been revoked and still are in full force and effect; and

(B) That on November 9, 2002, by two separate Decrees, the Hon. JOHN B. RIORDAN, Judge of the Surrogate's Court of Nassau County, New York granted Letters of Guardianship of the Property of each of decedent's two children, CHEYANNE ANDREANA MENDOZA-D'ABREAU (under File No. 32809) and NICHOLAS JUSTIN D'ABREAU-MENDOZA, (under File No. 32808) decedent's two infant children, to ROSANNA D'ABREAU, their mother and natural guardian. It appears that said Letters of Guardianship of the infants' property have not been revoked and still are in full force and effect.

8. With regard to the within Miscellaneous/Judicial Account Proceeding, I have examined the Petition and the Account of ROSANNA D'ABREAU, both sworn to on July 17, 2002; the Attorney's Affirmation in Support, signed on July 12, 2002 by EDWARD P. MILSTEIN, ESQ., of the firm of DANKNER & MILSTEIN, P.C., with offices at 41 East 57th Street, New York, NY 10002, the attorneys retained by the Petitioner to commence an action for decedent's wrongful death; the Attorney's Affirmation signed on July 12, 2002 by LAURA ANNE GROSSMAN, ESQ., with offices at 515 E. 72nd Street, New York, NY, an attorney acting of-counsel to DANKER & MILSTEIN, P.C. to prepare, *inter alia*, the documents for the within Miscellaneous Proceeding; the Consent & Waiver of HERMAN YELLON, ESQ., with offices at 300 Rabro Drive, Suite 124, Hauppauge, NY 11788, NY, the attorney retained by Petitioner to process a Workers' Compensation Claim against decedent's employer, RUCO POLYMER CORPORATION; and the Consent & Waiver of LAWRENCE F.

KARAM, ESQ., with offices at 41 West 72nd Street, Suite 1-F, New York, NY 10023, a former associate of DANKNER & MILSTEIN, P.C., who participated in the prosecution of the wrongful death action.

Whereas all of the above-referenced Attorneys' Affirmations and Waivers & Consents are somewhat helpful, there is need for only one, comprehensive Attorney's Affidavit, executed by the plaintiff's lead attorney, to clearly set forth, *inter alia*, the facts and circumstances surrounding the death of the decedent; the issues of liability; the reasons why the attorneys believe the settlement is reasonable and acceptance is in the best interest of the estate and distributees; why allocation of the entire settlement should be to the cause of action for decedent's wrongful death and the action for his conscious pain and suffering should be discontinued; the legal services performed by the attorneys and the detailed list of the attorneys' disbursements; why the proposed percentage shares of pecuniary damages to be paid to each of the distributees is fair and reasonable and how the amounts were calculated; and the amount requested as fees for legal services rendered and for repayment of attorneys' disbursements.

9. Whereas the papers filed with the Court for the within proceeding contain a great deal of necessary information, my review of the Affirmation of EDWARD P. MILSTEIN, ESQ., and my discussions with LAWRENCE M. KARAM, ESQ., one of the the attorneys who prosecuted this case, served to answer my questions regarding the issues of liability and the reasonableness of the settlement.

10. I requested that LAURA GROSSMAN, ESQ., who prepared the papers filed with the Court for the within proceeding, correct certain typographical errors and inconsistences and omissions contained in the papers, and that she supply additional supporting documents as well as more detailed explanation and/or clarification of certain points which were I felt were needed to reach a well-founded conclusion and file a Final Report. MS. GROSSMAN has cooperated by forwarding, via facsimile, certain additional supporting documents in the form of letters.

To supplement the papers filed in this proceeding and the papers forwarded by

MS. GROSSMAN, I felt it was necessary to speak with LAWRENCE F. KARAM, ESQ., who assisted in prosecuting the case, and with Petitioner, ROSANNA D'ABREAU.

JURISDICTION

11. On August 27, 2002, within ten days following notification of my appointment as Guardian ad Litem for the infants, CHEYANNE ANDREANA MENDOZA-D'ABREAU and NICHOLAS JUSTIN D'ABREAU-MENDOZA, I executed and filed in this Court my consent to act as Guardian ad Litem, and my qualifications as Guardian. I will file my Statement of Services as Guardian upon the submission to this Court of my Report in this matter.

NATURE OF PROCEEDING

12. This is a proceeding for leave to collect the proceeds of the settlement of the action for the wrongful death of the decedent, BARRY D'ABREAU, and to render and judicially settle the Account of the Administratrix relating to the collection and distribution of the proceeds of such settlement. In pages 16-21 of her Petition, dated and verified on the 17th day of July, 2002, ROSANNA D'ABREAU, as Administratrix, requests the following relief:

(1) Settle the claim and cause of action for wrongful death against defendants THE DOCTORS OFFICE CENTER, BRYAN S. BLAUSTEIN, M.D., AMOCO CHEMICAL CO., and third party and second third-party defendant, RUCO POLYMER CORP., and

(2) Approving the aggregate settlement made in the Supreme Court of the State of New York, County of Nassau, bearing Index Number 020773/95 for the total amount of $1,375,000; and

(3) Allocating the entire amount of such recovery to the cause of action for the wrongful death of the decedent; and

(4) Discontinuing with prejudice and without costs and disbursement of all other causes of action against the settling defendants, DOCTORS OFFICE CENTER, BRYAN S. BLAUSTEIN, AMOCO CHEMICAL CO., and RUCO POLYMER CORPORATION; and

(5) Discontinuing with prejudice and without costs and disbursements of all causes of action against the other defendant, JOEL RAMOS, M.D.; and

(6) Fixing and allowing the fee of DANKNER & MILSTEIN, P.C., Petitioner's attorneys, for legal services in connection with claims for the cause of action for negligence in the amount of $81,215.76 to be paid out of escrow proceeds held by DANKNER & MILSTEIN, P.C., held at Signature Bank, 71 Broadway, New York City, pursuant to Order of ROBERT ROBERTO, J.S.C., dated June 22, 2001; and

(7) fixing and allowing the fee of DANKNER & MILSTEIN, P.C., Petitioner's attorneys, for legal services in connection with claims for the cause of action for medical malpractice in the amount of $251,761.10, to be paid out of said escrow proceeds held by DANKNER & MILSTEIN, P.C.; and

(8) Fixing and allowing the expenses of DANKNER & MILSTEIN, P.C., Petitioner's attorneys, for disbursements incurred with such claims in the amount of $36,278.69, to be paid out of said escrow proceeds held by DANKNER & MILSTEIN, P.C.; and

(9) Fixing and allowing the fee of LAURA ANNE GROSSMAN, ESQ. for legal services rendered to the Estate in the amount of $11,122.50, of which there is a remaining balance of $7,885.00, to be paid out of said escrow proceeds held by DANKNER & MILSTEIN, P.C.; and

(10) That the claims of the prior attorneys, HERMAN YELLON, ESQ. and LAWRENCE M. KARAM, ESQ. be paid by DANKNER & MILSTEIN, ESQ., out of the attorneys' fees awarded to it pursuant to separate agreement among them; and

(11) That the tentative balance of the settlement proceeds, to wit, the sum of $997,859.45 plus accrued interest, totaling to date $16,877.22, with a total of $1,014,736.67, shall be distributed to those distributees having sustained a pecuniary loss as follows:

(a) 54.388% to ROSANNA D'ABREAU, widow of the decedent, or $551,900.42;and

(b) 21.363% to CHEYANNE ANDREANA MENDOZA-D'ABREAU, an infant under the age of 14 years, or $216,780.33, with $16,780.33 paid on her account to ROSANNA D'ABREAU, Guardian of the Property of CHEYANNE ANDREANA MENDOZA-D'ABREAU, by DANKNER & MILSTEIN, ESQ. out of said escrow proceeds; and

(c) 24.249% to NICHOLAS JUSTIN D'ABREAU MENDOZA, an infant under the age of 14 years, or $246,065.92, with $46,065.92 paid on his account to ROSANNA D'ABREAU, Guardian of the Property of NICHOLAS JUSTIN D'ABREAU-MENDOZA, by DANKNER & MILSTEIN, P.C., out of said escrow proceeds; and

(12) That the balance of the net settlement of funds plus accrued interest due to the infant distributees shall be paid as follows: defendant, DOCTORS OFFICE CENTER, or is insurance company, RELIANCE NATIONAL INSURANCE COMPANY, shall purchase annuities in the of $200,000.00 each for the benefit of the decedent's infant children under the age of 14, CHEYANNE ANDREANA MENDOZA-D'ABREAU and NICHOLAS JUSTIN D'ABREAU-MENDOZA, as follows: ALLSTATE LIFE INSURANCE COMPANY OF NEW YORK, with a rating of A+, Class VII from A.M. Best & Company, AA+ from Standard & Poor's, and Aa2 from Moody's, shall issue the annuity contracts, and the defendant DOCTORS OFFICE CENTER and/or its insurance company RELIANCE NATIONAL INSURANCE COMPANY, shall assign the obligation to make future periodic [payments of

ALLSTATE ASSIGNMENT COMPANY, with a rating of A+, Class XV from A.M. Best & Company, AA+ from Standard & Poor's and Aa2 from Moody's, and that the said ALLSTATE LIFE INSURANCE COMPANY OF NEW YORK shall guarantee the obligations assumed by ALLSTATE ASSIGNMENT COMPANY; and

(13) That the annuity to be funded for the benefit of CHEYANNE ANDREANA MENDOZA-D'ABREAU'S benefit shall be as follows:

Annuity certain, continuing for 12 years only, providing $1,700.00 per month level income, first payment commencing on 10/11/09, with a total payout of $244,800.00 and the following lump sum payments:

$40,000.00 on 10/11/09	$40,000.00
$40,000.00 on 10/11/10	$40,000.00
$40,000.00 on 10/11/11	$40,000.00
$40,000.00 on 10/11/12	$40,000.00
$50,000.00 on 10/11/21	$50,000.00

with total annuity proceeds to be paid of $454,800.00; and

(14) That the annuity to be funded for the benefit of NICHOLAS JUSTIN D'ABREAU-MENDOZA'S benefit shall as follows:

Annuity certain, continuing for 12 years only, providing $1,825.00 per month level income, first payment commencing on 3/11/20012, with a total payout of $244,800.00 and the following lump sum payments:

$50,000.00 on 3/11/12	$50,000.00
$50,000.00 on 3/11/13	$50,000.00
$50,000.00 on 3/11/14	$50,000.00
$50,000.00 on 3/11/15	$50,000.00
$80,000.00 on 3/11/24	$80,000.00

with total annuity proceeds to be paid of $542,800.00; and

(15) That any assignment made of the payment obligation shall be a "qualified assignment" under the Internal Revenue Code, and all payments shall be guaranteed by the annuity issuer, by bond or corporate guarantee, and in the event of the premature death of an annuity recipient, the balance of payments therein shall be paid to the estate of such recipient; and the annuity payer shall be provided with a current address; and

(16) Appointing a Guardian ad Litem to represent the interests of the decedent's children, CHEYANNE ANDREANA MENDOZA-D'ABREAU and NICHOLAS JUSTIN D'ABREAU-MENDOZA, infants under the age of 14 years, and awarding said Guardian reasonable compensation for his/her services, to be paid by DANKNER & MILSTEIN, P.C., out of said escrow proceeds; and

(17) Dispensing with the filing of a bond; and

(18) Removing any restrictions in the Limited Letters of Administration issued to your Petitioner as Administratrix to the extent necessary to carry out the provisions of such settlement; and

(19) That upon payments hereinbefore mentioned by the defendants and/or their insurance companies and/or DANKNER & MILSTEIN, P.C. out of said escrow proceeds, ROSANNA D'ABREAU., Petitioner, as Administratrix of the Estate of BARRY D'ABREAU, deceased, is authorized to execute and deliver to the said defendants, and/or their representatives and/or said DANKNER & MILSTEIN, P.C., a full, final and complete release of the claim against them arising out of the aforementioned causes of action together with any other papers necessary to effectuate said compromise; and

(20) That the said account of ROSANNA D'ABREAU, Petitioner, as Administratrix, be judicially settled and allowed; and

(21) That upon compliance with the terms of said Decree, said ROSANNA D'ABREAU, as Administratrix, be and hereby is discharged and released as to all other matters embraced in her Account and determined by this Court; and

(22) That this Court grant such other and further relief as may be just and proper."

13. In her Petition, ROSANNA D'ABREAU, states that her husband, BARRY D'ABREAU, died on March 27, 1994 as a direct result of the severe asthma attack he sustained while working at his place of employment, RUCO POLYMER CORPORATION, where, two days before, he had cleaned up a spill of the toxic chemical, trimellitic anhydride (also referred to as TMA); that TMA was manufactured by AMOCO CHEMICAL CO; and that from September, 1992 through March 27, 1994, her husband had been treated at THE DOCTORS OFFICE CENTER for respiratory conditions which included severe allergies, breathing difficulties and asthma.

14. The petitioner, ROSANNA D'ABREAU, also states that she first retained HERMAN YELLON, ESQ., 300 Rabro Drive, Suite 124, Hauppauge, NY 11788, to prosecute a Workers' Compensation claim against RUCO POLYMER CORP., and that the claim resulted in a settlement from which she received a net amount of $42,500, plus payment in full for the decedent's medical bills and funeral expenses.

15. Thereafter, in May, 1995, ROSANNA D'ABREAU retained the firm of DANKNER & MILSTEIN, P.C. to commence an action for BARRY D'ABREAU'S wrongful death. She signed two standard retainers, copies of which have been filed as exhibits. I have examined them and find them to be in good order.

With regard to the first Retainer: ROSANNA D'ABREAU agreed to a standard one-third attorney's fee after reimbursement of disbursements, to be paid out of the gross amount of recovery from the claims of ordinary negligence and/or products liability. With regard to the second Retainer: she agreed to the a standard sliding scale of attorneys' fees after repayment of disbursements, to be paid out of the gross amount of recovery from the claim of medical malpractice.

ROSANNA D'ABREAU also states that she is fully aware that all legal fees and disbursements are to be paid directly to DANKNER & MILSTEIN, P.C., and that DANKNER & MILSTEIN, P.C. will share the single lump sum allowable, as and for attorneys fees inclusive of disbursements, with LAWRENCE M. KARAM, ESQ. and HERMAN YELLON, ESQ., pursuant to the separate agreement among them.

16. A combined action for decedent's wrongful death and conscious pain and suffering was commenced in the Supreme Court of the State of New York, County of Nassau, Index #020773/95, against defendants THE DOCTORS OFFICE CENTER and two of its staff physicians, DR. BRYAN S. BLAUSTEIN and DR. JOEL RAMOS, charging them with
medical malpractice and negligence; and against defendant AMOCO CHEMICAL CO., manufacturer of the toxic chemical TMA, charging them with negligence and products liability. The defendants filed third-party actions which were consolidated with plaintiff's action under Index # 020773/95.

17. Petitioner states that all of the above-referenced actions "...were strongly opposed by the multiple defendants, and there were depositions taken of approximately 20 parties and non-party witnesses, multiple motions for summary judgment and appeals...." Her wrongful death action was finally settled on the eve of trial before the HON. ROBERT ROBERTO, J.S.C. and she accepted the settlement.

The Petitioner states that she accepted the settlement because she and her attorneys felt that "...it was not worth taking the chance of a lower jury verdict, to face the further possibility of the Court's further reducing a verdict and the certainty that the settling defendants would have appealed such verdict...." Although this a valid reason for accepting a settlement, it is a conclusion which should be based on the facts, circumstances and problematic issues of liability which have been come to light during the process of discovery. The Petition does not clearly indicate that ROSANNA D'ABREAU accepted the settlement with an understanding as to why her attorneys had reached this conclusion.

18. A transcript of the June 5, 2001 hearing in open court to memorialize the settlement before JUSTICE ROBERTO, and a copy of his Order have been provided as supporting documents. However, neither document contain details of the issues of liability.

19. A more comprehensive description of the attorneys' investigation of the facts and circumstances surrounding decedent's death, the underlying issues of liability in the case, the complex litigation, and the legal services rendered in the case is contained in the Attorney's Affirmation in Support filed by EDWARD P. MILSTEIN, ESQ. It appears from MR. MILSTEIN'S Affirmation:

> (A) That plaintiff's attorneys conducted an extremely thorough investigation of the matter by, *inter alia*, obtaining copies of all relevant personal and medical records of the decedent and having them them reviewed by a licensed physician; by consulting with medical experts who found that there was a meritorious cause of action for medical malpractice against THE DOCTORS OFFICE CENTER, DR. BRYAN S. BLAUSTEIN and DR. JOEL RAMOS; and researching extremely voluminous technical literature on the nature of the chemical, TMA, and retaining chemical engineers as expert witnesses;
>
> (B) That the defendants not only vigorously denied liability, defendant DR. BRYAN S. BLAUSTEIN, commenced a third-party action against third-party defendant, RUCO POLYMER CORPORATION, decedent's employer; and defendant AMOCO CHEMICAL COMPANY'S second third-party action against RUCO POLYMER CORPORATION. The ensuing litigation which began in 1995, was extremely complex by virtue of numerous motions to compel discovery, for summary judgment, and by appeals of court decisions;
>
> (C) That plaintiff's attorneys, *inter alia*, prepared and filed all necessary pleadings; responded to all of the defendants' demands; completed discovery; attended and/or conducted a total of 25 depositions; attended a Preliminary Conference; filed extremely lengthy, complex, and technical papers in opposition to defendants motions' for summary judgement which were based on questions of law as well as fact; filed various motions to compel discovery, as well as a motion to quash a subpoena; perfected an appeal to the Appellate Division, Second Department from a joint trial order; and various motions to consolidate several related actions as well as a declaratory action concerning a life insurance policy that was unrelated to the wrongful death action herein; retained expert witnesses; consulted an economic expert to assess the economic loss caused by decedent's death; filed various motions to compel discovery; prepared the case for trial; negotiated the within total $1,375,000 settlement on the eve of trial and appeared before the HON. ROBERT ROBERTO, J.S.C. in the Supreme Court of Nassau County to sign a Stipulation of Settlement with the representatives of all of the defendants.

20. I spoke with LAWRENCE M. KARAM, ESQ., a former associate of the firm of DANKNER & MILSTEIN, P.C., who worked at length on the prosecution of this case. From my conversation with him, and my review of MR. MILSTEIN'S Affirmation, I gathered sufficient information on the background and complexity of this case, as well as the difficult issues of liability, so that in the interest of my wards, I could arrive at an informed opinion as to the sufficiency of the $1,375,000 settlement and the reasonableness of the requested attorneys' fees and disbursements.

SUFFICIENCY OF THE SETTLEMENT

21. The decedent, BARRY D'ABREAU, was 27 years old when he died on March 27, 1994, as a direct result of the severe asthma attack he sustained while working at RUCO POLYMER CORP. where he had cleaned up a toxic chemical spill only two days before. Toxic chemicals, such as TMA, were routinely handled by employees at RUCO. AMOCO CHEMCIAL CO. manufactured TMA. The decedent, who suffered from respiratory problems, was a patient at THE DOCTORS OFFICE CENTER, where his co-workers were also regular patients.

22. At the time of his death on March 27, 1994, the decedent was survived by his wife, ROSANNA D'ABREAU, who was then 22 years of age, and his two infant children, my wards, CHEYANNE ANDREANA MENDOZA D'ABREAU who was only 2½ years old, having been born on October 11, 1991, and NICHOLAS JUSTIN D'ABREAU, who was only 2 weeks of age, having been born on March 11, 1994.

23. At the time of his death, BARRY D'ABREAU was was gainfully employed, earning approximately $25,000 per year as an employee of the RUCO POLYMER CORPORATION where several toxic chemicals were used and routinely handled by employees.

24. Between September 1992 and his death on March 27, 1994, BARRY D'ABREAU had been treated at THE DOCTORS OFFICE ENTER for his respiratory conditions which included severe allergies, breathing difficulties and asthma. While at his job at RUCO POLYMER CORP., he suffered a

severe asthma attack and died en route to the hospital. It was ascertained that two days before, he had cleaned up a spill of the toxic chemical timellitic anhydride which is commonly referred to as TMA, manufactured by AMOCO CHEMICAL CO. General negligence and products liability claims were lodged against AMOCO CHEMICAL CO., and medical malpractice and negligence claims against THE DOCTORS OFFICE CENTER in failing to timely diagnose and treat the respiratory symptoms caused by the decedent's exposure to TMA and to advise him to take appropriate actions to reduce his exposure to the chemical.

25. Plaintiff's attorneys clearly expended enormous time, energy and disbursements to gather the technical evidence needed to show the dangers of TMA because the case involved not only questions of law, but complex questions of fact. The third and second-third party actions actions created extremely difficult and complicated litigation that continued for a number of years.

26. According to the plaintiff's attorneys, although they had confidence in the claims of medical malpractice, negligence and product liability, during the litigation, evidence was presented by the defendants which showed that the decedent might have been partly responsible for his untimely death.

THE DOCTORS OFFICE CENTER produced evidence which showed that the decedent had failed in his duty as a patient by not advising the medical professionals that his job responsibilities included routinely working with chemical substances that triggered and/or aggravated his serious respiratory problems.

The complaint of negligence and products liability against defendant AMOCO was also weakened when the defendants produced evidence that the decedent had been working with several chemicals known to be toxic, and therefore it could not be absolutely proven that TMA was the specific chemical that triggered his fatal asthma attack. Further, AMOCO charged that their product, TMA, had either been misused or misapplied.

BARRY D'ABREAU'S employer, defendant RUCO POLYMER CORPORATION, alleged that he had never informed them of his respiratory conditions which included severe allergies, breathing difficulties and asthma.

27. After extensive discovery and countless depositions, the plaintiff's attorneys concluded that if the matter had proceeded to trial, there was no guarantee that the jury would have found in favor of the plaintiff, or would have awarded damages equal to the total $1,375,000 settlement so offered by defendants THE DOCTORS OFFICE CENTER, DR. BRYAN S. BLAUSTEIN, AMOCO and RUCO POLYMER CORP.

28. I believe that it was in the best interest of the estate and the distributees to settle the case rather than to have the action concluded by means of a trial by jury. I also believe that it was wise to memorialize the settlement before the HON. ROBERT ROBERTO, J.S.C., of the Supreme Court of Nassau County, and for the attorneys to place a Stipulation of Settlement on the court record.

29. I am also satisfied that in consideration of the facts, circumstances and problematic liability issues, it was in the best interest of the estate and the distributees to have accepted the settlement amounts from each of the defendants as follows: $975,000 from defendants THE DOCTORS OFFICE CENTER, $400,000 of which was paid by THE RELIANCE NATIONAL INSURANCE COMPANY, INC., and $575,000 of which was paid by LLOYDS OF LONDON; $150,000 from defendant BRYAN S. BLAUSTEIN, M.D. which was paid by THE FRONTIER INSURANCE COMPANY; $150,000 from defendant AMOCO CHEMICAL COMPANY which was paid directly by them.; and $100,000 from the third-party and second third-party defendant, RUCO POLYMER CORPORATION, decedent's employer.

30. I agree that given the precarious financial situation of THE RELIANCE NATIONAL INSURANCE COMPANY, INC., one of the two insurers of THE DOCTORS OFFICE CENTER, it was in the best interest of the estate and the distributees to make an emergency application to the Supreme Court of Nassau County for an Order directing all of the defendants to immediately pay their share of the

total $1,375,000 settlement, and to have the monies held in escrow pending the completion of the within Miscellaneous proceeding. Not only was the entire settlement secured, it has earned considerable interest which is payable to the distributees.

31. As stated in ¶18, the Petition does not indicate that ROSANNA D'ABREAU had a clear understanding of the actual problems with the case even though she accepted the settlement and requested payment of attorneys' fees and disbursements.

I spoke ROSANNA D'ABREAU and found that she was aware of the problems with the case, and that in view of the facts, circumstances, and extremely difficult litigation, she is also satisfied with the work her attorneys' did on behalf of the estate and her family. I am satisfied that she accepted the $1,375,000 settlement based on knowledge and understanding of the situation, and that she believes that that the attorneys' fees and disbursements requested are deserved.

ALLOCATION OF THE PROCEEDS

32. The request to allocate 100% of the $1,375,000 total settlement to the cause of action for decedent's wrongful death, and to discontinue the action for his conscious pain and suffering because BARRY D'ABREAU died in transit to The Nassau County Medical Center as a direct result of the extremely violent asthma attack, without regaining consciousness.

Pursuant to EPTL §5-4.4, the damages recovered are exclusively for the benefit of the decedent's widow and children, to be paid to them as pecuniary damages resulting from the wrongful death of the decedent. The proceeds are to be paid to them in percentage shares which have been computed in accordance with the years of dependency each of them could look forward to but for the death of the decedent.

33. In his Order dated June 22, 2001, JUSTICE ROBERTO (1) directed all of the defendants to pay their shares of the $1,375,000 settlement package to DANKNER & MILSTEIN, P.C., as escrow

agents for ROSANNA D'ABREAU; (2) directed DANKNER & MILSTEIN, P.C. to deposit the monies into an interest bearing account at the Signature Bank, 71 Broadway, New York, New York 10006, Attention John Miller; (3) directed that $400,000 was be used to fund two annuities for the benefit of each of BARRY D'ABREAU'S two minor children and specified the criteria and guarantees to be incorporated in the annuity policies; and (4) directed that the monies deposited in the escrow account were to be invested as follows: $100,000 in a 3-month certificate of deposit yielding the highest return, and the balance of $1,275,000 to be invested in United States of America Treasury bills for a 3-month duration and then to be rolled over until the Surrogate's Court allocates the percentage shares of the settlement proceeds to each of the distributees.

34. As Guardian Ad Litem of CHEYANNE ANDREANA MENDOZA and NICHOLAS JUSTIN D'ABREAU, my primary concern is the provision for my wards' support as contained within the terms of the settlement reached in the action for the wrongful death of their father, BARRY D'ABREAU.

The Annuities:

35. With regard to the annuities to be purchased for each of my wards, JUSTICE ROBERTO directed defendants THE DOCTORS OFFICE CENTER, or their insurer, THE RELIANCE NATIONAL INSURANCE COMPANY, to use their $400,000 portion of the settlement package to fund two annuities at $200,000 each. He further directed that both annuities be purchased from ALLSTATE NEW YORK LIFE INSURANCE COMPANY with a rating of A+ from A.M. Best & Company; that the annuities provide payouts over a minimum period of twenty (20) years; that any assignments made of the payment obligations be a "qualified assignment" under the IR Code; that all payments be guaranteed by the annuity issued, by bond or corporate guarantee; and that if either recipient should die before all payments are completed, the balance be paid to the estate of such recipient; and that the annuity payer shall be provided with a current address.

36. While the Petition contains a description of each annuity contract, upon my request. LAURA GROSSMAN, ESQ. faxed to my office, *inter alia,* a copy of the Single Premium Immediate Certain Annuity contract, the Uniform Qualified Assignment, the Schedule of Payments, and the Structured Settlement Cash Settlement Benefit Rider for each proposed annuity.

37. I have examined the aforementioned papers associated with the proposed annuities and I find them to be in order. However, I would prefer that the "Uniform Qualified Assignment" and the "Addendum No. 1: Description of Periodic Payments" attached to each annuity bear the individual recipient's name and payout schedule only, and not the names and payout schedules of both siblings, since each child is to have his/her own separate annuity.

38. The proposed schedule of each annuity provides for the following payouts:

1. FOR: CHEYANNE ANDREANA MENDOZA, decedent's daughter, born on 10/11/91:
Guaranteed payments continuing for twelve (12) years only, providing $1,700 per month, level income, with the first payment commencing on 10/11/09, plus:

Guaranteed Lump Sum Payments as follows: $40,000 on 10/11/09;
$40,000 on 10/11/10;
$40,000 on 10/11/11;
$40,000 on 10/11/12;
$50,000 on 10/11/21.

(B) FOR: NICHOLAS JUSTIN D'ABREAU, decedent's son, born on 3/11/94:
Guaranteed payments continuing for twelve (12) years only, providing $1,825 per month, level income, with the first payment commencing on 3/11/12, plus:

Guaranteed Lump Sum Payments as follows: $50,000 on 3/11/12;
$50,000 on 3/11/13;
$50,000 on 3/11/14;
$50,000 on 3/11/15;
$80,000 on 3/11/24.

I believe that the scheduled payout for each child is fair and appropriate in that each annuity maintains a corpus until the child reaches the age of 30 years, yet provides for his/her support in preceding years.

Percentage shares of the net distributable proceeds of the settlement, calculated according to the "Kaiser Formula":

39. I have spoken with ROSANNA D'ABREAU who confirmed that neither of her two children are under a disability. Therefore, no variation of the normal percentage shares of the cash being held in escrow appears to be called for because there does not appear to be any disability affecting either of my wards which would cause either of them to be dependent on others for their support after the age of twenty-one years.

40. I have reviewed the Petition and Accounting of the Administratrix and find that the the stated percentage shares of the net settlement to be paid to each of my wards has been appropriately computed in accordance with the "Kaiser Formula."

41. Based on the years of dependancy of ROSANNA D'ABREAU, the widow, and each of my wards, CHEYANNE ADREANA D'ABREAU-MENDOZA and NICHOLAS JUSTIN D'ABREAU, the percentage shares of each distributee is as follows: 54.33% to ROSANNA D'ABREAU, the widow; 21.45% to CHEYANNE ADREANA D'ABREAU; and 24.22% to NICHOLAS JUSTIN D'ABREAU.

42. As directed by the HON. ROBERT ROBERTO, J.S.C., $400,000 of the total $1,375,00 settlement was used to fund two annuities at $200,000 each for my wards, CHEYANNE ANDREANA D'ABREAU MENDOZA and NICHOLAS JUSTIN D'ABREAU. The balance of $975,000, which is being held in escrow, has earned $16,877.22 in interest, all of which is to be paid to the distributees, plus any additional amount earned by the time the escrow monies are released.

43. Out of the total $1,375,000, after payment of $369,255.55 to DANKNER & MILSTEIN, P.C., as and for attorneys' fees inclusive of disbursements, plus $7,885 to LAURA GROSSMAN, ESQ., as and for the balance of her attorney's fees, there remains a net distributable amount of $997,859.45 to be distributed to decedent's three survivors in accordance with each of their percentage shares.

44. Since $400,000 of the $1,375,000 settlement was used to fund the annuities for my two wards, at $200,000 each, $975,000 was deposited into escrow accounts, to which $16,877.22 has been added as interest earned as of the time the compromise papers were prepared, bringing the amount of cash in escrow to $1,014,736.67. After payment of $369,255.55 to DANKNER & MILSTEIN, P.C., plus $7,885 to LAURA GROSSMAN, ESQ., there remains a balance of $637,596.12 in cash to be distributed to the three distributees. Added to the $400,000 which was used to fund the two annuities, to date, the total amount of $1,037,596.12 is payable to the distributees.

45. In keeping with the Kaiser Formula, of the $1,037,596.12, the percentage share payable to each distributee is as follows: 54.33%, which is $563,725.93 to ROSANNA D'ABREAU; 21.45%, which is $222,564.36 to my ward, CHEYANNE ANDREANA D'ABREAU-MENDOZA; 24.22%, which is $251,305.77 to my ward, NICHOLAS JUSTIN D'ABREAU.

46. Since $200,000 was used to fund each child's annuity, each child effectively has already received $200,000. Therefore, out of the $637,596.12 in cash being held in escrow which is to be distributed to the three distributees, CHEYANNE ANDREANA D'ABREAU-MENDOZA should receive $22,564.36 and NICHOLAS JUSTIN D'ABREAU should receive $51,305.77.

47. At the time of payment to the distributees, the additional interest accrued on the monies being held in escrow should be added to the amount of pecuniary damages to be paid to each of the distributees in accordance with their percentage shares.

48. The cash for each of my wards should be made payable to ROSANNA D'ABREAU jointly with the Guardianship Clerk of the Surrogate's Court of Nassau County and deposited into accounts at the direction of this Court.

ATTORNEYS' FEES

49. I have reviewed the request for attorneys' fees for services rendered, plus repayment of disbursements, which appears in the Petition, the Accounting, and all of the Affirmations submitted by all of the attorneys.

50. The attorneys' fees and disbursements should be paid to DANKNER & MILSTEIN, P.C., the attorneys who prosecuted the wrongful death action. The distribution of the attorneys' compensatiuon should be made to the other attorneys by DANKNER & MILTSTEIN, P.C., in accordance to the agreements made between them.

51. Out of the total settlement of $1,375,000, the total compensation requested, inclusive of disbursements, is $369,255.55 of which $36,278.69 is for repayment of disbursements; and the sum of $332,976.86 is for fees for legal services rendered: $81,215.76 for the negligence and products liability actions; and $251,761.10 for the medical malpractice action.

52. The amounts requested as fees for legal services are based on the two standard Retainers signed by ROSANNA D'ABREAU: one Retainer for the negligence action which allows for 33 1/3% of the net amount of the settlement after repayment of disbursements, and the other Retainer for the medical malpractice action which allows for a sliding scale of attorneys' fees after repayment of disbursements.

53. Of the total $1,375,000 settlement package, 81.8% ,or $1,125,000, is in settlement of the medical malpractice claim against defendants THE DOCTORS OFFICE CENTER, whose share is $975,000, and against DR. BRYAN S. BLAUSTEIN, whose share is $150,000. The remaining 18.2% or $250,000 is in settlement of the general negligence and products liability claims which have been paid by AMOCO CHEMICAL COMPANY in the amount of $150,000 and by RUCO POLYMER CORPORATION in the amount of $100,000.

54. I believe that it is fair and reasonable to repay the amount of $36,278.69 to DANKNER & MILSTEIN, P.C., as reimbursement of their attorneys' expenses which were necessary to prosecute this case. In light of the work required to prepare this type of case against multiple defendants in Supreme

Court; the complexity of the litigation which involved third and second third-party actions; and the extensive investigation, research, discovery, and innumerable depositions that were held, I find that the expenses listed in the Petition as attorneys' disbursements are customary and appropriate for the prosecution and eventual settlement of this particular case.

55. After first deducting the disbursements in the amount of $36,278.69 from the $1,375,000 settlement leaving a net balance of $1,338,721.31, the attorneys request $251,761.10 as their fee for settling the medical malpractice claim. Since 81.8% of the net $1,338,721.31 is $1,095,074.03, the request for $251,761.10 is appropriate and in accordance with the standard sliding scale fees, based on the net proceeds after repayment of disbursements, as set forth in retainers for medical malpractice cases.

The attorneys request the amount of $81,215.76 as their fee for settling the general negligence and products liability claims. Since 18.2% of the net $1,338,721.31 is $243,647.28, $81,215.76 is appropriate and in accordance with the standard 33 1/3% of the net proceeds after repayment of disbursements, as set forth in retainers for general negligence and products liability cases.

In view of the results achieved and in light of the difficult issues of liability, I believe that the attorneys' fees for services rendered are appropriate and reasonable in amount.

56. With regard to the separate fee of $11,122.50 requested by LAURA ANNE GROSSMAN, ESQ., as and for legal services she rendered to the Estate: usually only one amount is allowed as and for total attorneys' fees for legal services rendered, inclusive of disbursements. The distribution of attorneys' fees between all attorneys involved in the case is a matter between them. Further, preparation of the compromise papers and all other work associated with and required for the effectuation of the settlement, as well as preparation and filing of the guardianship petitions is usually considered part of the attorneys' responsibility to the client.

As indicated in the Petition and in the Affirmation of LAURA GROSSMAN, ESQ., it appears that by a separate agreement, ROSANNA D'ABREAU retained LAURA GROSSMAN, ESQ., to

perform special services for the estate. MS. GROSSMAN'S request for attorney's in the total amount of $11,122.50 should be considered in view of her work which resulted in the Order from JUSTICE ROBERTO directing that all defendants immediately pay their shares of the $1,375,00 settlement and the accrual of interest which has been held in escrow by DANKNER & MILSTEIN, P.C. Because all of the interest is to be added to the distributees' percentage shares of the settlement, and since my wards' percentage shares will be maximized by virtue of the total payouts from their annuities, I find that MS. GROSSMAN'S request for a separate legal fee is reasonable. MS. GROSSMAN states that because she has already received an advance payment of $3,237.50 from DANKNER & MILSTEIN, P.C., which amount is included in the their attorneys' disbursements, she would be due the balance of her total requested fee of $11,122.50, which is $7,885.00.

CONCLUSION

I respectfully report to this Court that there is no valid objection to the Petition and judicial settlement of this Account. On behalf of my wards, CHEYANNE ANDREANA D'ABREAU-MENDOZA and NICHOLAS JUSTIN D'ABREAU, I consent to their percentage shares of pecuniary damages.

My conclusion is based on my investigation and examination of the papers in this proceeding that are on file in the Surrogate's Court of Nassau County, as well as my conversations with LAWRENCE F. KARAM, ESQ., LAURA GROSSMAN, ESQ., and ROSANNA D'ABREAU. I am satisfied that the proposed settlement in the wrongful death action is fair and reasonable and should be approved; that the request to allocate 100% of the proceeds of the settlement to the action for wrongful death and to discontinue the action for conscious pain and suffering is appropriate; that the amounts payable to DANKNER & MILSTEIN, P.C., as and for their fees, inclusive of disbursements, should be fixed as requested; that the separate fees to LAURA GROSSMAN, ESQ., should be fixed in the amount requested, subject to the Court's discretion as to whether a separate attorneys' fee is allowable; that the

payment of pecuniary damages to the distributees should be made in the percentage shares as requested and that the amount of each percentage share should be adjusted according to additional accrued interest earned on the balance of the escrow account; that the proposed annuities for each of decedent's children, CHEYANNE ADREANA D'ABREAU-MENDOZA and NICHOLAS JUSTIN D'ABREAU should be approved; that the Decree should authorize the Petitioner to execute and deliver to DANKNER & MILSTEIN, P.C., as the escrow agent, a release and such other documents as may be required to effectuate the distribution; and

that the Court dispense with the requirements for the filing of a surety bond.

Dated: Mineola, New York

_____

E. DAVID WOYCIK
Guardian Ad Litem
SANDERS, SANDERS, BLOCK & WOYCIK
100 Herricks Road
Mineola, New York 11501 516-741-5252

EXHIBIT G-1
SAMPLE GUARDIAN AD LITEM REPORT
GUARDIANSHIP PROCEEDING – WITHDRAW INFANT'S FUNDS

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------X
In the Matter of the Petition of IRIS _____ and
MARK _____, Guardians of

RICHARD _____,
A Mentally Retarded Person,
For leave to sell residence and Purchase
new residence

REPORT OF THE
GUARDIAN AD LITEM

File. No. 265734
----------X

Ellen Pober Rittberg, an attorney licensed to practice law in the State of New York affirms the following facts under penalty of perjury:

1) That I am the guardian ad litem appointed by the Hon. Surrogate John Riordan, on February 14, 2003 to represent the interest of Richard _____ regarding the proposed purchase of a two-unit residence in Pennsylvania, and the sale of his current residence, the title of which is held in guardianship for Richard by his parents.

BACKGROUND OF THE INSTANT MATTER

2) Richard is a 32 year old mentally retarded adult who resides in a two family house with his parents. His I.Q. is in the educable range, approximately 75.

3) I met with Richard and his parents in his current family residence. Richard is a genial and sociable young man who despite appreciable intellectual limitations, manages to hold down a job in a local Shop Rite supermarket as a bagger. He has worked at this job for the past several years. Among Richard's limitations is that he cannot tell time on a regular clock and cannot comprehend amounts of time such as a 30-minute lunch break. He relies on others to tell him when he must leave work and take lunch breaks. He also cannot read very well and his math skills are very limited.

4) Notwithstanding the above, Richard is a valued employee and he seems happy in his relative independence.

5) Richard does not like to be alone at night in his home. It is clear that Richard could not live altogether on his own due to his developmental and intellectual limitations.

6) Living with his parents in a two-family dwelling where he has relative independence in relation to his disability appears to be the optimal arrangement for Richard. It is how he has lived in his adulthood and it is how he wishes to live into the future.

7) Richard's parents wish to move to an area where there would be more support systems for Richard in the event that they travel or must be out of town. Mark will soon be retiring as a schoolteacher and they own a mobile home, which they enjoy travelling in. Richard does not enjoy travelling in the mobile home, as it breaks up his routine and would interfere with his employment, which is important to him.

8) According to Mr. _____, currently, there does not exist any facilities in Plainview or locally where there are respite and support organizations for when Mr. and Mrs. _____ are away. They also searched for an area with public transportation so Richard could have an easy commute to his job.

9) In the area where they propose to purchase two units of housing, Macungie, Pennsylvania, the parents found an agency that gives "Big Brother" respite care for parents of persons such as Richard. They have met with a social worker to ascertain the services available, and have attended several national conferences to find a state where the services for Richard were extensive. They found Pennsylvania to be that state.

THE PROPOSED HOUSES

10) The proposed units are adjacent attached housing units in an existing development. (Their units will be built in a Stage Two area.) One unit purchase price is $232,463.00. The other unit purchase price is $230,058.00. The proposed contract signing date is April 15, 2003 and upon signing the contract, each unit's down payment is $22,250.00 and $22,010.00, respectively. The guardians have already put down a $1,000.00 reservation fee per unit on December 14, 2002. The remaining purchase price will be paid at final settlement. There will not be any mortgage. The planned unit will be modified from the

existing plan so that there will be a connecting door between their residence and Richard's. It will also be modified to accommodate the mobile home.

11) In Richard's current dwelling, a living area with a kitchen and den attached to, and accessible to his parent's dwelling, Richard feels secure and he has a modicum of independence. The proposed household has a similar layout and affords him that same level of independence. Richard currently has a cell phone to reach his parents. The support network in Pennsylvania will include a beeper/cell system that allows his parents to contact him and the respite caregiver 24 hours a day.

12) The parents have gone into contract on the current house in Plainview, where they and Richard live. The purchase price is $734,500.00 A $73,450.00 down payment was paid to them at contract signing, and is held in escrow by their attorney, Jack Posner, Esq. The house's sale price exceeds its appraised value of 625,000.00 (date of appraisal: October 9, 2002.)

13) The undersigned has reviewed the contracts of sale for both the sale and the purchases proposed on all of the premises in the instant case as well as the floor plan and a list of all the amenities. It would seem to be suitable for Richard and financially within the resources, given that their current home sale price exceeds the price of the two units they wish to purchase.

14) In addition to reviewing the contracts and the appraisal of the parents' current residence, I have also reviewed a summary statement of assets and receipts and disbursements for Richard's Guardianship Investment Management. The current value of the account is $621,468.73.

THE PROPOSED HOUSE PURCHASE

15) The sales contract for the two units in Pennsylvania provides that the Realtor agent for the seller holds the purchase price down payment in escrow "pending settlement and final termination and cites to Pennsylvania statutes and remedies in the event of a dispute. Part of the contract denominated the "Broker's Addendum to Agreement of Sale" states that the purchaser waives any conflict of interest or representation of the Paragon Realtor group who may have represented the buyer or seller in past or

future transactions. The Paragon Realtor group is the agent for the builders, Chesapeake Homes Ltd. It also provides that if there is a dispute over entitlement to the purchase price deposit, the Broker must maintain same in an escrow account until a resolution of the dispute by agreement or final order of court. The Broker's addendum is appended herewith, Exhibit "A."

RECOMMENDATIONS

16) It is the guardian ad litem's recommendation that the court approve the sale of Richard's current residence and the purchase of Richard's proposed residence and that any documents relating to the purchases and sale of same contain the words "Guardians for Richard."

17) It appears that in Pennsylvania realtors hold escrow funds unlike in New York, where the practice is for attorneys to escrow funds. While it would be preferable for petitioners' attorney Jack Posner, Esq., to escrow the money for the builder's unit being purchased, it would appear that Pennsylvania has statutes and remedies to permit the Realtor as escrowee and contains remedies in the event of a dispute. Perhaps the clause that states that in the event of a dispute, the escrowed funds could not be released by court order, rather than by agreement or court order.

Respectfully, submitted,

_____

ELLEN POBER RITTBERG
Ellen Pober Rittberg Esq. PC
998 C Old Country Road # 285
Plainview, NY 11803
(516) 822-7222

Dated: Plainview, New York
March 24, 2003

EXHIBIT G-2
SAMPLE GUARDIAN AD LITEM REPORT
GUARDIANSHIP PROCEEDING–APPROVE SUPPLEMENTAL NEEDS TRUST

STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF
_____:
Matter of Petition of **Report of Guardian Ad Litem**
for the Creation of the **For**
Supplemental Needs Trust File No.
_____:

TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK

, Guardian ad Litem for , also known

, a mentally retarded and developmentally disabled person, respectfully renders her report as follows:

NATURE OF THIS PROCEEDING

1. Petitioner , a brother of the ward, was appointed by order of this Court dated February 20, 1997 as guardian of the person and property of the ward ("Guardian"). Said order dispensed with a bond, directed the Guardian to collect and receive the moneys and property belonging to the ward jointly with the Guardian Clerk of this Court and to deposit all monies in the Fleet Bank in the name of the Guardian subject to the order of the Surrogate, and appointed the ward's other brother, as standby guardian ("Standby Guardian").

2. In this Miscellaneous Proceeding, as Guardian and proposed Trustee, seeks a decree: (1) approving the creation by the Guardian of the proposed Supplemental Needs Trust, a copy of which is annexed to the Petition, naming the Guardian as Trustee; (2) directing the transfer of funds from the Estate of into the Supplemental Needs Trust; (3) waiving the requirement of a bond for the Trustee for the trust as long as it is under $100,000 unless required by law or otherwise; (4) ordering that neither the corpus nor the income of the

Supplemental Needs trust shall be considered as income or resources or a transfer of resources for the purposes of determining Medicaid eligibility; (5) approving the attorney's fees of For the original SCPA Article 17A proceeding, for the establishment of the Trust and the bringing of this Petition and directing payment thereof; and granting such other and further relief as this Court may deem just and proper.

JURISDICTION

On September 5, 1997, this Court duly issued a Citation returnable on the 17th day of October 1997 to:

1. New York State Dept. of Social Services

2. New York Attorney General

3. New York City Dept. of Social Services/HRA

4. New York City Corporation Counsel

5. Dr.

6. Dr.

7.

8. Fred Feibusch, Director, Young Adult Institute

9. Marvin Bernstein, Director, Mental Hygiene Legal Services

By duly acknowledged instrument dated September 30, 1997, Dr. the ward's mother, waived the issuance and service of a citation and consented to the relief requested therein. An affidavit of attesting to service of the Citation by certified mail, return receipt requested, on of , Affidavits of attesting to personal service of the Citation on New York State Department of Social Services, New York Attorney General, New York City Department of Social Services/HRA, New York City Corporation Counsel, Affidavits of Andre Meisel

attesting to personal service of the Citation on and Marvin Bernstein, Director of Mental Hygiene Legal Service, and Affidavit of Byron Robusky attesting to personal service of the Citation on Fred Feibusch, director of Young Adult Institute, have been filed with the records of this Court.

I am satisfied that jurisdiction has been obtained over all persons interested in this proceeding.

APPEARANCES

There are no appearances herein other than Petitioner, Mental Hygiene Legal Services, and as Guardian ad Litem for .

THE SUPPLEMENTAL NEEDS TRUST

A Supplemental needs trust established in conformity with section 7-1.12 of the Estates, Powers and Trusts Law ("EPTL"), the requirements of section 366(2)(b)(iii) of the New York Social Services Law and the regulations thereto, and the provisions of 42 U.S.C.s.1396p(d)(4)(A) will enable the ward's assets to be used to supplement, not supplant, government benefits or assistance provided by any federal, state, county, city or other governmental entity for the support, maintenance or health care of the ward. Accordingly, I strongly recommend that this court approve the creation of the proposed Supplemental Needs Trust ("proposed Trust").

I have compared the provisions of the proposed Trust to EPTL 7-1.12 and find that all of the criteria set forth in paragraph (a)(5) will be met and recommend its creation, subject to the following instructions and modifications of the Trust Agreement:

a. Paragraph A of Article TWO recites that "The Grantor has delivered and irrevocably transferred to the Trustee the property set forth in Schedule A. . ." Schedule A should be completed. In addition, the Guardian, as Grantor, should be instructed to transfer the assets into the name of the Trust in accordance with the provisions of EPTL 7-1.18.

b. Paragraph F of Article THREE states in part that ". . . the Trustee shall not be held accountable to any court or to any person for the exercise or non-exercise of this completely discretionary power." A trustee should be held accountable to this Court. Accordingly, the phrase "to any court" should be deleted, and the phrase "to any government or agency thereof" should be substituted therefor.

c. Insert at the beginning of Paragraph G of Article THREE the following sentence: "This Trust shall terminate upon the death of ." [the incapacitated person]

d. Delete the phrase "prior to the actual receipt by the beneficiary" from paragraph H of Article THREE.

e. Add a new paragraph I to Article THREE to adopt exactly the language required by EPTL 2-1.12(a)(5)(iii) which reads: "The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from the trust."

f. Reletter the second paragraph "A." of paragraph FOUR as "B.", change "B." to "C." and add a new paragraph "D" to read as follows: "A Trustee who is not domiciled in the State of New York shall file with the Surrogate's Court, County of New York an Oath and Designation of the Clerk of said Court, and his/her successor in office, as a person on whom service of any process, issuing from such Surrogate's Court may be made in like manner and with like effect as if it were served personally upon said Trustee, whenever he cannot be found and served within the State of New York after due diligence is used." Both the Guardian, a resident of Massachusetts and the original Trustee, and the Standby Guardian, a resident of New Jersey, if he should qualify as successor Trustee, should file an Oath and Designation with this Court.

g. Delete the second sentence of Paragraph B of Article SIX, and substitute therefor: "Any such investments may be deposited with a bank, trust company ("bank") or broker-dealer registered with the Securities and Exchange Commission and the department of law of the State of New York ("broker") in a

custody account with a direction that such bank or broker-dealer may hold the securities in the name of a nominee or in such form as to pass by delivery without indicating the fiduciary relationship and to pay the usual fees of such bank or broker-dealer from income or principal as the Trustee may determine."

h. In Paragraph C of Article SIX insert the word "reasonable" before the phrase "time or times."

i. In Paragraph D of Article SIX delete the phrase "without limitation as to duration or amount" and substitute "insured by the FDIC."

j. Delete the provisions at the end of Paragraph G of Article SIX that read "to deposit with them any property of any trust created hereunder, and to delegate to any of them, discretionary and other powers and authority" and substitute the following language: "and to delegate investment and management functions to a bank, trust company or investment counsel having special investment skills in accordance with the provisions of EPTL 11-2.3(b)(4)(C) and (c) and pay them reasonable compensation . . ."

k. While the decree dated February 20, 1997 appointing Guardian dispensed with the filing of a bond, the Guardian was directed to collect and receive the property of the ward "jointly with the Guardian Clerk of this Court and to deposit all monies in the Fleet Bank in the name of the guardian, subject to the order of the Surrogate." Paragraph A of Article NINE of the proposed Trust provides that the Trustee shall not be required to give a bond as long as the principal of the Trust is less than $100,000. Inasmuch as the Petition alleges that the proposed Trust will receive approximately $30,000 from the estate of the ward's paternal grandfather, the Estate of in Puerto Rico, it is foreseeable that no bond will be required under said Paragraph A of the proposed Trust Agreement. I have been advised that the annual cost of a bond with $30,000 of coverage will be approximately $135 a year. The Guardian/Trustee is a resident of Massachusetts.

Upon the basis of additional information furnished to me at my request, I have concluded that my ward's brothers, and Dr. , are qualified to act respectively as Trustee and Successor Trustee of the proposed Trust. Their educational and occupational curriculum vitae are described in the letter of Granfort of Goldfarb & Abrant, attorneys for Petitioner, dated December 17, 1997, a copy of which is attached hereto as Appendix A and made a part hereof ("Granfort Letter"). She states that visits his brother whom the Supplemental Needs Trust is being established, five or more times a year, and that does not intend to charge the Trust for his personal travel expenses from Massachusetts (where he resides) to New York.

If this Court in its wisdom should nevertheless decide that a bond should be required even during such times as the trust principal is less than $100,000, Paragraph A of Article NINE should be deleted and the following paragraph substituted ("Substitute Bond Provision"):

"A. The Trustee and any Successor Trustee shall be required to give bond or other security or, alternatively, the Trust Property may be held jointly with the Guardian Clerk of the Court or in such other custodial arrangement as will provide protection to the trust estate. In the case of either joint control or a custodial arrangement, no withdrawals shall be made by the Trustee without the prior approval of the Court."

l. Delete Paragraph B of Article NINE and reletter Paragraph "C." as Paragraph "B." Although the proposed Trust is a living trust created by the Guardian for a person under an incapacity, rather than a testamentary trust, it may be inappropriate and against public policy under EPTL s. 11-1.7 for this Court to approve a provision exonerating the Trustee from liability for failure to exercise reasonable care, diligence and prudence.

m. Insert in Paragraph B of Article ELEVEN the language set forth in the Supplemental Petition: "with a copy to the NYC Department of Social Services."

n. Add at the end of the first sentence of Article FOURTEEN the following phrase: "except that the trust may be amended or modified with the approval of the Surrogate's Court, County of New York for the sole purpose of maintaining the beneficiary's eligibility for and receipt of benefits or assistance of any federal, state, county, city or other governmental entity.

Upon incorporation of the above revisions to the proposed Trust Agreement, I recommend that this Court: (1) authorize the creation of the Supplemental Needs Trust to be known as the ' Trust'; (2) direct the transfer of funds from the Estate of into said Supplemental Needs Trust; (3) approve Paragraph A of Article NINE of the proposed Revised Trust Agreement providing that the Trustee shall not be required to give a bond as long as the principal of the Trust is less than $100,000 or, alternatively, direct the substitution of Paragraph A of Article NINE as set forth in paragraph k. of this Report ("Substitute Bond Provision") and direct the filing of a bond in the amount of $30,000, unless the trust estate will be held jointly with the Guardian Clerk of this Court or in another protective custodial arrangement; and (4) order that neither the corpus nor the income of said Trust shall be considered as income or resources or a transfer of resources for the purposes of determining Medicaid eligibility.

As stated in the Granfort Letter , has no objections to the proposed changes to the Trust, has changed the reference to NY Social Service Law Section 366 from subsection (2)(b)(ii) to (2)(b)(iii), and has incorporated all of my recommended changes (other than the Substitute Bond Provision) in the Revised Trust Agreement, a copy of which is attached hereto as Appendix B and made a part hereof.

ATTORNEYS' FEES OF

I have reviewed the Affirmations of Services of , an expert in the rights of the elderly and disabled and the author of numerous articles on these topics, and recommend that the fee of in the amount of $7,500 and expenses of $78.20 be approved. The $7,500 for time

charges for services rendered in connection with the original SCPA Article 17A proceeding, for the establishment of the proposed Trust, bringing of this Petition and through completion of this Proceeding, represents a 25% reduction of the time charges recorded through July 3, 1997 of more than $10,500. Significant additional time has undoubtedly been spent since early July. In addition, has been very responsive to my questions, requests for additional information and recommendations, including the preparation of the Revised Trust Agreement. I therefore recommend that attorneys' fees of in the amount of $7,500 and expenses of $78.20 be approved and that the Guardian and Trustee, , be directed to make payment of the approved attorneys' fees and expenses to from the estate of the ward or from the principal of the Supplemental Needs Trust.

CONCLUSIONS AND RECOMMENDATIONS

In accordance with the foregoing, I recommend that this Court grant Petitioner a decree:

(1) Approving the provisions of the Revised Trust Agreement attached hereto as Appendix B and authorizing Petitioner, Guardian, and Trustee to create the Supplemental Needs Trust by executing the Revised Trust Agreement.

(2) Directing the transfer of funds from the Estate of into the Supplemental Needs Trust.

(3) Waiving the requirement of a bond for the Trustee as long as the principal of the Trust is under $100,000, or if, on the other hand, this Court should determine that a bond should be filed, directing that the Revised Trust Agreement incorporate the Substitute Bond Provision set forth in paragraph k. of this Report and directing the filing of a bond in the amount of $30,000 unless the Trust's property will be held jointly with the Guardian Clerk of this Court or in a protective custodial arrangement;

(4) ordering that neither the corpus nor the income of the Supplemental Needs Trust be considered as income or resources or a transfer of resources for the purpose of determining Medicaid eligibility;

(5) approving the attorney's fees of for the original SCPA Article 17A proceeding, for the establishment of the Trust and the bringing of this Proceeding through completion in the amount of $7,578.20;

(6) directing the Guardian and Trustee, , to pay the aforesaid attorneys' fees from the estate of the ward or from the principal of the Supplemental Needs Trust; and

(7) granting such other and further relief as this Court may deem just and proper.

Respectfully submitted,

_____

Guardian ad Litem for

Dated:

EXHIBIT H-1
OUTLINE ON KINSHIP PROCEEDINGS AND OTHER STATUS HEARINGS

KINSHIP AND OTHER STATUS HEARINGS
I. Introduction

A) Kinship Hearings

1) When Kinship Hearings Occur

a) Accounting Proceedings - most frequently in the final accounting of the Public Administrator, who routinely raises the issue of kinship in the citation.

b) Withdrawal Proceedings - a miscellaneous proceeding instituted by kinship claimants who seek distribution of funds held by the Comptroller of the State of New York (or the Finance Administrator of the City of New York) for the benefit of distributees whose names or whereabouts are unknown.

c) Administration Proceedings - occasionally when a distributee claims priority over the Public Administrator to act as Administrator of the estate.

2) Kinship Hearings are held before the Surrogate or a Referee, appointed by the Court pursuant to SCPA 506 upon consent of all the parties.

a) A Referee is a member of the Surrogate's Law Department.

b) It is common practice for kinship hearings to be conducted by a Referee.

3) How long to prove kinship?

a) In accounting proceedings, one (1)year from the date fixed for a hearing or the date of referral (see, Surrogate's Court Rule § 207.25[a]).

b) In administration and withdrawal proceedings, six (6) months from date fixed for a hearing or date of referral (see, Surrogate's Court Rule, § 207.25[b]).

B) Status Hearings

1) Status hearings are preliminary hearings held within the context of Surrogate's Court proceedings when it is necessary to determine if a party has "standing."

2) No right to trial by jury in status hearings.

3) Examples of status hearings:

a) To determine if an alleged spouse or non-marital child in a contested administration or probate proceeding is a distributee;

b) Right of Election proceedings, when the fiduciary challenges the marital status of the surviving spouse; and

c) wrongful death compromise proceeding when the status of distributee is challenged.

4) Kinship hearings are also status hearings, i.e. to determine if a kinship claimant is a distributee within the context of a pending administration or accounting proceeding.

C) Burden of Proof

1. The kinship claimant has the burden of proving status as a distributee in accordance with EPTL 4-1.1. (N.B.: Note changes to EPTL 4-1.1 after 9/92 - in old law cases the results may differ significantly.)

2. Elements of Proof:

1. Kinship claimant(s) and decedent share a common ancestor;

2. There are no other distributees who survived the decedent with a closer degree of kinship; and

III. "Close the Class," i.e.establish there are no other distributees with an equal right to inherit.

3) Example - in a "cousins case" the kinship claimant(s) must establish that:

a) The claimant(s) and decedent had the same maternal or paternal grandparents, as the case may be;

d) The decedent was <u>not</u> survived by spouse, issue, parents, grandparents, brothers and sisters, or issue of brothers and sisters; and

e) There are no cousins other than the claimant(s) that survived the decedent.

<u>Note</u>: In a cousins case, the child or children of predeceased first cousins ("first cousins once removed") are <u>not</u> distributees unless all first cousins have predeceased (see, EPTL 4-1.1).

D) How to Prove Kinship

1) Family Tree

a) Need a family tree diagram, preferably keyed to the documents.

b) Prior to the hearing provide copies for the Referee and all attorneys involved.

c) The family tree is not evidence but will be “the road map” for all the testimony and documentary evidence to follow.

II. Oral Testimony

d) Generally speaking, oral testimony is required at the hearing to establish the existence of family members on the family tree, their respective deaths, and marriages where needed (e.g.,as evidence of themarried names of women and to assist in understanding other documents in case where family members have similar names).

2) Documentary Evidence

a) Documents are required to corroborate oral testimony.

b) Primary documents: births, death and marriage certificates, church baptismal or marriage certificates.

c) Alternate documents: U.S. Census Records, family Bible, cemetery and funeral home records, tombstone inscriptions, and naturalization and armed services records.

2. Oral Testimony

A) Pedigree Testimony

1) Witnesses can testify to family relationship, since pedigree declarations are exceptions to the hearsay rule (see, Richardson on Evidence,§ 8-901 §8-910).

2) Elements:

a) Declarant must be dead;

b) Declaration made *ante litem motam*; and

c) Declarant related by blood or marriage to the family of the decedent.

3) Pedigree Declarations are inadmissible unless corroborating evidence that the declarant is related to decedent’s family (see, Aaholm v. People, 211 NY 406 [this is why documents in addition to oral testimony are required at a kinship hearing]).

4)Pedigree declarations can be in writing. Examples are:

a) entry in family bible;
b) bank records;
c) greeting cards; or
d) other correspondence.

5) Example - A kinship claimant testifies to the identity of family members set forth on the family tree based upon conversations that the claimant had with his mother, who is related to the decedent.

a) If the claimant's mother is dead or otherwise unavailable the testimony is admissible.
b) If the claimant's mother is available the testimony is inadmissible as hearsay.

B) CPLR §4519 (Deadman's Statute)

1) A person who is interested in the outcome of a hearing cannot testify to a personal transaction communication with the decedent.

2) A Kinship claimant, a party who claims to be a distributee and as such claims a share of the decedent's estate, is "interested" in the outcome of the hearing and cannot testify to a personal transaction or communication with the decedent.

3)A person who is not "interested" is not barred from testifying to conversations or transactions with the decedent. Thus, a spouse or children of a kinship claimant could testify. For example, the decedent has told a distributee in the presence of the claimant's spouse on many occasions that he never married. The claimant's testimony to that conversation would be barred, but the spouse could testify to the decedent's statements.

Note: CPLR § 4519 only bars testimony if it is specifically raised by an adversary. If the adversary fails to specifically raise CPLR § 4519 as an objection to the testimony, the adversary is deemed to have waived the provisions of the Deadman's Statute.

C) How Oral Testimony is Presented to the Court

1)Preferably oral testimony is given by the witnesses at the time of the kinship hearing at the Surrogate's Court.

2)If a witness is not available, on account of age, infirmity, distance, or it is too costly to arrange for the witness' appearance, consider the following alternatives:

a) Interrogatories - Closed Commission (CPLR § 3108)

i) Use with cooperative witnesses.

ii) On motion to all parties

iii) Attach the proposed interrogatories to the motion.

iv) Adversaries will have an opportunity to propose cross interrogatories.

b) Letters Rogatory - Open Commission (CPLR § 3108)

I) Rather than the witness traveling to the court, the court travels to the witness.

ii)To obtain an open commission the alleged distributee must present a petition which contains the following:

i. Grounds for such an open commission;

ii. Name and address of proposed witnesses;

iii. Extent and relevancy of the proposed testimony;

iv. Unavailability of the proof from local sources;

v. Why the witness cannot travel to the Court e.g. age, infirmity;

vi. The costs of the commission are necessary to complete the case and are reasonable in relation to the size of the estate; and

vii. If advances from the estate of fund are requested, the amount requested.

3. Documentary Evidence

A) Public Records, e.g. birth, marriage and death certificates.

1) Documents or records of office or court of state, territory or jurisdiction of the U.S. requires certification (CPLR § 4540).

2) Documents or records of offices or courts outside the U.S. also require authentication, as set forth in CPLR §4542 and Real Property Law §301-A.

3)"Apostille" in lieu of Authentication

a) Apostille avoids authentication of public document per CPLR §4542.

b) Applies only to countries which are signatories to the "Convention for Abolishing the Requirement of Legalization for Foreign Public Documents"

B)On church records e.g baptismal and marriage certificates, certification by a church official is usually sufficient.

C)Private Documents, e.g. inscriptions in family Bible, letters, inscriptions on photographs, etc.

1) Private documents admissible as written pedigree declarations.
2) Private documents must be authenticated.
a) By testimony of witness present hen the document was created, admission by adversary, proof of handwriting, or circumstantial evidence (See Richardson on Evidence,§9-103).
b) No authentication required if Ancient Document Rule applies, i.e., if writing is more than 30 years old, found in a natural place of custody, and is unsuspicious in nature (see, Richardson on Evidence §3-124)

D) Foreign Language Documents

1) Must be translated into English; and

2) An affidavit of the translator stating his or her qualifications and that the translation is correct(CPLR § 2102[b]).

4. Presumptions

A) Important presumptions in kinship and status hearings:

1) Presumption of legitimacy;

2) Presumption of legality of marriage;

3) Presumption that a person who would have been over 100 years old, if living at the time of the decedent's death, will be presumed to have Predeceased the decedent in determining the decedent's distributees;

4) Presumption that a male who died under the age of 14 and a female who died under age 12 died without issue (EPTL 9-1.3[e]);

5) The court may determine a person is presumed dead and predeceased the decedent without issue if the criteria of SCPA 2225 are met.

B) Requirements of SCPA 2225

1) Three years have elapsed since the decedent's death; and

2) Diligent search must have been made to discover the existence of other distributees.

3) The size of the estate and the degree of the relationship are factors in determining how much cost and effort are required to constitute a diligent search.

4) If alleging kinship as an objection in an accounting proceeding, set forth SCPA 2225 allegations in the objections.

5) In a withdrawal proceeding, the SCPA 2225 allegations will be contained in the withdrawal petition.

EXHIBIT H-2
SAMPLE GUARDIAN AD LITEM REPORT
PROCEEDING TO DETERMINE KINSHIP

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------X
In the Matter of the Judicial Settlement
of the Account Proceedings of
MICHELE LIPPA GARTNER
Public Administrator, as Administrator
of the Estate of

JOHN J. BOLES,
Deceased.
----------X

REPORT OF GUARDIAN AD LITEM

Index No.: 310772

TO THE SURROGATE'S COURT OF THE COUNTY OF NASSAU:

The report of Barbara Levitan respectfully shows:

I am a member of Greenfield Stein & Senior, LLP, with offices at 600 Third Avenue, New York New York 10016. On or about June 29, 2001, I was appointed guardian *ad litem* for unknowns in this proceeding to settle the account of the Public Administrator as administrator of the estate of John J. Boles, deceased (the "decedent"). On July 9, 2001, I executed my Consent to serve as guardian *ad litem*, filed a Notice of Appointment pursuant to 22 NYCRR Part 36, and on July 10, 2001, I served a Notice of Appearance on all counsel of record.

This is a proceeding to judicially settle the account of the Public Administrator as administrator of the estate of John J. Boles. Incident thereto, the Court is asked to determine the distributees entitled to share in the estate.

THE ACCOUNTING

The decedent died intestate on August 1, 1999, residing at 42 Homecrest Court, Oceanside, Nassau County, New York, and on September 24, 1999, the Public Administrator of the County of Nassau ("Petitioner") was granted letters of administration by the Surrogate's Court, Nassau County. By petition verified December 18, 2000, Petitioner sought the judicial settlement of the account.

Citation duly issued returnable February 14, 2001, directed to Clancy & Clancy Brokerage (the surety on the administrator's bond), the Attorney General of the State of New York, and any and all unknown distributees, heirs-at-law and next-of-kin of the decedent. The Citation was published in The Independent Voice on four consecutive weeks, to wit, January 18 and 25 and February 1 and 8, 2001, and the Court file contains an affidavit of publication thereof. The Citation with summary was thereafter served upon Michael Fitzgerald, Peggy O'Shea, Maura Murphy, Kitty Landers, Gertie Lynch, Eileen Corry, John Down and Anne Down by mail, and personally upon Maureen Gallagher, John Fitzgerald, Patrick Boles, Francis M. Fitzgerald, Roseann Feeney and the Attorney General of the State of New York by Juan Gonzalez, and the Court file contains proof of such service.

Supplemental citation thereafter issued returnable June 13, 2001. Lapp & Lapp appeared on behalf of Thomas Boles, John C. Boles, Patrick J. Boles, Margaret Boles Haggerty, Frances Lattka, Joseph Boles, Francis Fitzgerald, John Fitzgerald, Maureen Fitzgerald Gallagher, Sister Teresa Fitzgerald, Mary Connelly, Hugh Lunney, Kathleen McNally, Bernadette King, Mary Cooper, Thomas Francis Boles, Anne Kathleen Boles, Eileen Dowdall, John Charles Boles, Terence Boles, Mary Kate (a/k/a Kathleen) Beattie, Philomena McGoldrick, Sean Boles and Marian Boles Emery, and Randazzo & Randazzo, LLP appeared on behalf of Bridgete Long, Michael Fitzgerald, Mary Agnes Murphy, John Gerard O'Dowd and Anne Kennedy. I am satisfied that jurisdiction was obtained over all necessary parties.

The account shows total principal receipts of $420,181.08. Primary among these receipts were the proceeds of accounts at Astoria Federal Savings, and investments with Fidelity, the Cornerstone NY Municipal Fund, and the decedent's home at 42 Homecrest Court, Oceanside. The home was sold at public auction for $164,000.00 to Paul Tucci, and the Public Administrator's file reflects receipt of a series of checks totaling that amount. The file also contains documentation of the value and liquidation of the bank accounts and other investments owned by the decedent, and the value of his jewelry and automobile which were also sold at public auction. I have no objection to Schedule A of the account.

Schedule A-2 reflects interest earned on the estate accounts maintained at EAB, Chase Bank, and HSBC. Funds were maintained in several accounts including certificates of deposit with staggered terms. I have no objection to Schedule A-2.

Schedule C of the account reflects funeral and administration expenses incurred during the accounting period. I compared the items set forth in the account with the documentation contained in the Public Administrator's files and find it to be in order. Several payments were made to Mahon, Mahon & Mahon for legal fees during the accounting period; I reviewed the supporting documentation and find the affidavit of legal services to be vague with respect to the specific services performed and the time expended. It is hard to determine which services were legal and which were executorial in nature. Accordingly, I respectfully recommend that the Court fix and determine the appropriate legal fee for the Mahon firm upon submission of a detailed affidavit of services.

Schedule C-1 shows the following unpaid administration expenses: commissions of the Public Administrator - $17,051.42; fees to the Public Administrator - $4,350.57; and Mahon, Mahon & Mahon, balance of legal fees - $8,000.00. I have reviewed the commissions and fees due the Public Administrator and find the amounts to be correct. The Mahon firm was replaced by the firm of Brosnan & Hegler, LLP. It appears that the item for balance of legal fees was the Mahon's firm anticipated fee in connection with completion of the accounting proceeding through decree. Again, I respectfully recommend that the Court obtain a full and complete statement of services for which the Mahon firm seeks compensation and fix and determine the appropriate fee.

1. There are no creditors' claims set forth on Schedule D.

2. Pursuant to Schedule E, there were no distributions made.

3. I have compared the amount shown on hand on Schedule F with the underlying documentation in the Public Administrator's file and find Schedule F to be correct as of the closing date of the account.

4. As set forth herein, I have no objection to the account which is complete through November 16, 2000, and is subject to amendment to be brought down to date, subject to submission of a detailed affidavit of legal services performed by the Mahon firm.

KINSHIP MATTERS

On March 22, 2002 and May 15, 2002 hearings were held before Lawrence P. Murphy, Court Attorney/Referee, to give evidence concerning the decedent's maternal and paternal family trees.

Testimony was given by Margaret Boles, who is married to a cousin of the decedent; Eileen O'Duill, a genealogist hired by objectants; Maureen Gallagher, a maternal first cousin of the decedent, and Roseanne Feeney, a paternal first cousin of the decedent. The testimony and documentary evidence adduced the following:

A. <u>Paternal Line</u>

The decedent's paternal grandfather was John Boles, whose wife was Mary Hevey. John and Mary had nine children: Kate, Peter, Anne, Thomas J., Francis, Mary, Terence, Patrick, and John. The decedent's paternal grandparents and eight of their nine children predeceased the decedent. Only Anne Boles Lattka survived the decedent; she post-deceased on November 4, 2000.

Kate Boles married Patrick Lunney. They had five children: Ellen, Mary, Hugh, Bridget, and Kathleen. All but Bridget survived the decedent; Ellen post-deceased on July 13, 2001.

Peter Boles married Lena Lane, with whom he had one child, John, and Helen McHale, with whom he had seven children: Peter F., Patrick J., Joseph, Margaret, Roseanne, Edward, and Joseph R. John predeceased the decedent; Peter F. predeceased; Patrick J. survived; Joseph predeceased in infancy; Margaret survived; Roseanne survived; Edward predeceased, and Joseph R. survived.

Thomas J. Boles married Margaret Donohue. They had two children, Thomas and John, both of whom survived the decedent.

Francis married Mary McEvoy. They had eight children, all of whom survived the decedent: Bernadette R., Mary Margaret, Thomas Francis, Annie Kathleen, Eileen, John Charles, Terence, and Martin Desmond.

Mary Boles married John Charles Brophy a/k/a Brough. They had two children, both of whom survived the decedent: Mary Kate and Philomena.

Terence predeceased the decedent without issue.

Patrick married Rosaleen Owens. They had two children, both of whom survived the decedent: Mary Bridget (Marion) and John Bernard.

John married Catherine a/k/a Katie Fitzgerald. The decedent, John J. Boles, was their only child.

B. <u>Maternal Line</u>

The decedent's maternal grandfather, John Fitzgerald, married Ellen Fitzgerald. They had seven children: Catherine (Katie), Margaret, Michael, Mary, Johanna (Anna), Ellen (Helen), and John. The decedent's maternal grandparents and all seven of their children predeceased the decedent.

Catherine (Katie) married John Boles on August 10, 1941. The decedent, John J. Boles, was their only child.

Margaret married Patrick Fitzgerald. They had seven children: Hannah, Mary, Bridget, Ellen (Eileen)(Elizabeth), Catherine (Kathleen), Teresa, and John Martin. Hannah predeceased, Mary predeceased, Bridget survived, Ellen predeceased, Catherine survived, Teresa post-deceased, and John Martin predeceased the decedent.

Michael Fitzgerald married Ellen (Nellie) Walsh. They had seven children: John, Kathleen, Hannah (Anna), Eileen, Mary (Maureen), Michael, and Margaret (Peggy). All but John survived the decedent.

Mary died as a young child. She had no issue.

Johanna (Anna) married Arthur Dalton. She predeceased the decedent without issue.

Ellen (Helen) married John O'Dowd. They had seven children: Mary Agnes (Maura), Catherine (Kitty), Gertrude (Gertie), Thomas J., John G., Ellen F. (Eileen), and Hannah Mary (Anne), all of whom survived the decedent except Thomas J.

John married Catherine McGettezen. They had four children, all of whom survived the decedent: John Joseph, Francis Michael, Maureen, and Sr. Theresa.

Counsel for the alleged distributees has submitted documentary evidence including certified copies of birth, baptismal, marriage, death and census records establishing that the foregoing family tree of the decedent, as set forth on objectants' exhibits A and B for identification, is true and complete.

CONCLUSION

Pursuant to EPTL §4-1.1(a)(6), where a decedent is survived by the issue of grandparents and no spouse, issue, parents or issue of parents, one-half of the decedent's intestate property passes to the issue of paternal grandparents, by representation, and one-half to the issue of maternal grandparents, by representation. "By representation" means that the property so passing is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue.

Thus, on the paternal side, the decedent's grandparents were survived by one person in the second generation, Anne Boles Lattka, who post-deceased the decedent on November 4, 2000, and the surviving issue of six members of the same generation as Anne Boles Lattka. On the maternal side, no children of the decedent's grandparents survived, but four members of that generation who predeceased the decedent left issue surviving him. The paternal and maternal issue of the decedent's grandparents, identified by the number of generations removed from the grandparents, are set forth on Exhibits 1 and 2, respectively.

I am satisfied that due diligence has been exercised and that all distributees of the decedent have been identified and accounted for as set forth on Exhibits A and B for identification, and I respectfully recommend that the issues of kinship be determined by the Surrogate in accordance therewith.

Dated: New York, New York
July 3, 2002

Respectfully submitted,

_____

Barbara Levitan
Guardian ad litem for unknown distributees