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## Essential Terms and Definitions Utilized in Surrogate's Court Practice

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### CHAPTER OUTLOOK

As in all our affairs, definitions play an important part in the field of trusts and estates. As evidence of this fact, both the Surrogate's Court Procedure Act (SCPA) and the Estates, Powers and Trusts Law (EPTL) have sections defining terms routinely utilized in this area of practice. By necessity, the paralegal, like the lawyer, must understand these terms in order to competently fulfill his/her responsibilities to counsel and the client.

The aim of this chapter is to familiarize the paralegal with some of the terms defined in the SCPA and the EPTL, and to buttress those definitions by way of examples and practice exercises. Further, reference to these terms will be made throughout the text in order to enhance comprehension and practical use of the language.

It should be borne in mind that the list of terms in this chapter is not comprehensive. Rather the terms selected are designed to highlight those words that are most frequently utilized by estate practitioners.

### Terms and Definitions

#### *1. Abatement*

A proportional diminution or reduction of pecuniary legacies when the funds or assets out of which such legacies are payable are not sufficient to pay them in full.

## 2. *Administrator*

An administrator is a person appointed to administer the estate of a decedent who dies without a will. Evidence of an administrator's authority to act is in the form of Letters of Administration. *See* SCPA Sec. 103(2); *see* SCPA Sec. 1001. The term administrator connotes the male gender; the term administratrix connotes the female gender.

## 3. *Administrator c.t.a.*

When a named executor in a will fails to qualify, or when the office of executor is vacant, an administrator c.t.a. is appointed by the court. The provisions of SCPA Sec. 1418 govern the appointment of an administrator c.t.a. *See* SCPA Sec. 103(3).

## 4. *Administrator d.b.n.*

When the office of administrator becomes vacant for any reason, the court may appoint a successor administrator to complete the administration of the decedent's estate. This person is known as an administrator d.b.n. *See* SCPA Sec. 103(4). The provisions of SCPA Sec. 1007 govern the appointment of an administrator d.b.n.

## 5. *Ancillary Administrator*

Ancillary means auxiliary. An ancillary administration is thus auxiliary to the domiciliary administration. Ancillary administration of an estate is required in the case where a decedent left assets in a state other than the state of his domicile. Therefore, where an ancillary administrator is appointed in New York, it connotes that the decedent died, without a will, a domiciliary of another state, but left assets in New York that require administration. *See* SCPA Article 16.

## 6. *Ancillary Executor or Administrator c.t.a.*

As in the case of an ancillary administrator, an ancillary executor or administrator c.t.a. is appointed in New York where the decedent died with a will, a domiciliary of another State, but left assets in New York that require administration. *See* SCPA Article 16.

## 7. *Bequest*

A transfer of personal property by will. The term bequest is synonymous with the term legacy. *See* SCPA Sec. 103(9).

**EXAMPLE:** "I bequeath my gold watch to my son, John." The gold watch is a bequest.

## 8. *Codicil*

A supplement to a will, either adding to, taking from, or altering its provisions, or confirming it in whole or in part by republication, but not totally revoking such will. *See* EPTL Sec. 1-2.1.

### ***9. Demonstrative Disposition***

A testamentary disposition of property to be taken out of a specified or identified property. *See* EPTL Sec. 1-2.3.

**EXAMPLE:** “I bequeath the sum of \$10,000 currently on deposit in my Long Island Savings Bank Account, to my son, John.”

### ***10. Devise***

A testamentary disposition of real property. *See* SCPA Sec. 103(12).

**EXAMPLE:** “I devise my home in Great Neck to my daughter, Sue.”

### ***11. Devisee***

Any person to whom real property is transferred by will. *See* SCPA Sec. 103(13).

### ***12. Distributee***

Any person entitled to take or share in the property of a decedent under the statutes governing descent and distribution.

### ***13. Executor***

An executor is a person named in a will to administer an estate. For example, a provision of a will may state “I nominate and appoint my husband, John, as the executor of my estate.” The term “executor” connotes the male gender; the term “executrix” connotes the female gender. Evidence of an executor’s authority to act is in the form of letters testamentary. Accordingly, when an executor under a will is appointed to administer the estate of the decedent, he will receive letters testamentary. The decree of the court admitting the will of a decedent to probate will generally direct that letters testamentary issue to the named executor.

#### **Renunciation of Nominated Executor**

**Voluntarily.** Pursuant to the provisions of SCPA Sec. 1417(1), an executor may renounce his right to letters testamentary by an acknowledged instrument filed with the court.

**By Statute.** An executor must qualify within 15 days after the decree of probate unless the time is extended by the court. If a nominated executor fails to timely qualify, the court may direct him to do so pursuant to the provisions of SCPA Sec. 1416. If the executor fails to qualify or renounce within the time specified by the court, he will be deemed to have renounced his appointment as executor.

**EXAMPLE:** The will of *Mr. T* appoints Mr. Smith as executor. A probate petition is filed by a beneficiary under the will seeking its probate. Mr. Smith does not file his Oath, Designation, and Verification (i.e., qualify per SCPA Sec. 708) with the court within 15 days after the will is admitted to probate. The beneficiary petitions

the court for an order directing Mr. Smith to qualify. The court issues such an order directing Mr. Smith to qualify within 30 days. If Mr. Smith defaults, i.e., fails to timely qualify, he shall be deemed to have renounced his appointment.

#### 14. *Fiduciary*

In the field of trusts and estates, an understanding of the term fiduciary is essential. As will be discussed, the term fiduciary is indicative of a broad spectrum of relationships. However, before discussing these relationships and the distinctive roles that they play in estates practice, it is important to understand the premise behind all fiduciary relationships—that is, trust and confidence between the parties. This is apparent from the definition of the term fiduciary, which is a person in whom one reposes trust and confidence. *See* Black’s Law Dictionary 753 (4th ed. 1968). A fiduciary relationship is thus indicative of a confidential relationship between one party and another.

**Confidential Relationship.** A confidential relationship between two parties is defined as one in which one of the parties is obligated to act for the benefit of the other and can take no advantage to himself relating to the interests of the other. It results from a relationship of trust reposed by one party in the other resulting from the disability or weakness of one party, and the superiority or mastering influence of the other.

Examples of confidential relationships in the context of daily living include the relation between the attorney and the client, the physician and the patient, and the priest and the parishioner. These are all relationships that, as a “matter of law,” i.e., by their very nature, are deemed confidential.

There are also confidential relationships that exist as a “matter of fact,” i.e., the factual circumstances surrounding the relationship between the parties will determine whether it rises to the level of a confidential relation. For example, the relationship between parent and child is not confidential as a “matter of law,” but rather, is dependent upon the facts underlying the relationship—the age, dependence, reliance, and trust of one party in the other. *See Matter of Evanchuk*, 145 A.D.2d 559 (2d Dept. 1988).

Practice in the area of trusts and estates may require consideration of the foregoing confidential relationships depending upon the circumstances of a particular case. For example, in a contested probate proceeding, the existence of a confidential relationship may give rise to a presumption of undue influence. (*See infra*.)

In addition to the confidential relationships that may exist in a social context, certain legal relationships between parties may also be considered “confidential” in nature. These relationships may be found within the definition of the terms “fiduciary” and “personal representative” set forth in the SCPA and the EPTL.

***The Definition of Fiduciary.*** The SCPA Sec. 103(21) and EPTL Sec. 1-2.7 define the term fiduciary by way of a series of legal relationships between parties which are deemed confidential as a matter of law:

##### ***SCPA 103(21)***

Fiduciary. An administrator, administrator c.t.a., administrator d.b.n., ancillary administrator, ancillary administrator c.t.a., ancillary executor, ancillary guardian, executor, guardian, preliminary executor, temporary administrator, testamentary trustee, to any of whom letters have been issued, and also the donee of a power during minority and a voluntary administrator, and a public administrator acting as administrator or a public administrator or county treasurer to whom letters have been issued, and a lifetime trustee.

***EPTL 1-2.7***

A fiduciary is a person who meets the description, in this part, of a “personal representative” or who is designated by the creator or by the court to act as an assignee for the benefit of creditors, or a committee, conservator, curator, custodian, guardian, trustee, or donee of a power during minority.

**S I D E B A R**

The term fiduciary is redefined for purposes of the provisions of EPTL Sec. 11-1.1 as follows:

EPTL 11-1.1(a)(3): The term “fiduciary” means administrators, executors, preliminary executors, administrators d.b.n., administrators c.t.a., ancillary executors, ancillary administrators, ancillary administrators c.t.a., and trustees of express trusts, including a corporate as well as a natural person acting as fiduciary, and a successor or a substitute fiduciary, whether designated in a trust instrument or otherwise.

***The Definition of Personal Representative.*** A personal representative is defined in EPTL Sec. 1-2.13 as “a person who has received letters to administer the estate of a decedent. The term does not include an assignee for the benefit of creditors, or a committee, conservator, curator, custodian, guardian, trustee, or donee of a power during minority.” The term personal representative is not as broad as the term “fiduciary” in that it encompasses fewer kinds of confidential relationships. Both terms, however, tend to be utilized interchangeably to the extent they refer to the person who is issued letters for the purpose of administering the estate of a decedent.

**Letters.** Letters are evidence of a fiduciary’s or a personal representative’s authority to act. *See* SCPA Sec. 703. Examples of the types of letters that the court may issue are Letters Testamentary, Letters of Administration, Temporary Letters of Administration, and Letters of Trusteeship. Only the court that issues letters to a fiduciary or personal representative has the authority to revoke them, modify them, or suspend them. *See* SCPA Sec. 701(3).

***Eligibility to Receive Letters.*** Only those persons who are “eligible” are entitled to receive letters and to serve as a fiduciary or personal representative. The SCPA defines those who are “eligible” by setting forth those persons who are ineligible, thus suggesting that any natural person, or entity authorized by law, is entitled to receive letters.

The exceptions, as set forth in SCPA Sec. 707, include (a) an infant; (b) an incompetent; (c) a non-domiciliary alien, except one who is a foreign guardian, or one who is appointed to serve with a co-fiduciary who is a resident of the state; (d) a felon; and (e) one who does not possess the requisite qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office. It should be noted that this latter provision is a catchall provision, providing the court with broad discretion in assessing the eligibility of a person seeking appointment as a fiduciary.

In addition to the foregoing, SCPA Sec. 707(2) provides that the court, in its discretion, may declare a person ineligible to act as fiduciary if he/she is unable to read and write the English language.