

# CONTENTS

---

<i>Preface</i>	<i>xxv</i>
<i>Acknowledgments</i>	<i>xxvii</i>
<b>1. Essential Terms and Definitions Utilized in Surrogate's Court Practice</b>	<b>1</b>
<b>Chapter Outlook</b>	<b>1</b>
<b>Terms and Definitions</b>	<b>1</b>
Abatement	1
Administrator	2
Administrator c.t.a.	2
Administrator d.b.n.	2
Ancillary Administrator	2
Ancillary Executor or Administrator c.t.a.	2
Bequest	2
Codicil	2
Demonstrative Disposition	3
Devise	3
Devisee	3
Distributee	3
Executor	3
Renunciation of Nominated Executor	3
Fiduciary	4
Confidential Relationship	4
Letters	5
Qualification of a Fiduciary	6
General Disposition	8
Guardian	8
Insolvent Estate	8
Intestacy	8
Legatee	8
Limited Letters of Administration	8
Marital Disposition	8
Person Interested	9
Person Under a Disability	9
Preliminary Executor	9
Public Administrator	9

Residuary Disposition	9
Specific Disposition	10
Temporary Administrator	10
Testacy	10
Voluntary Administrator	10
Will	10
Nuncupative Will	10
Holographic Will	11
<i>Practice Exercises</i>	11
<i>Questions to Consider</i>	12
<b>2. Intestate Administration</b>	<b>13</b>
<b>Chapter Outlook</b>	<b>13</b>
<b>The Laws of Intestacy</b>	<b>13</b>
Family Relationships and the Laws of Intestacy	15
Ascendant or Ancestor	15
Lineal Ascendant	15
Descendant	15
Lineal Descendant	16
Collateral Heirs	16
Consanguinity	16
Issue	17
Distributees	17
The Passage of Property by Intestacy: Per Stirpes, By Representation, Per Capita	18
Property Subject to the Laws of Intestacy	24
The Statutory Formula for Intestate Distribution	25
Application of the Statutory Formula for Intestate Distribution	25
<b>Petitioning for the Appointment of an Administrator</b>	<b>28</b>
Instituting a Proceeding for Administration	29
The Administration Petition	29
Necessary Parties to the Proceeding	30
Notice of a Proceeding for Letters of Administration	30
Who May Serve as the Administrator	30
Temporary Administrators	31
Bond Requirements	32
<i>Terminology</i>	32
<i>Practice Exercises</i>	32
<i>Questions to Consider</i>	33

<b>3. Status</b>	<b>35</b>
<b>Chapter Outlook</b>	<b>35</b>
<b>Status Under New York Law</b>	<b>35</b>
Status as a Surviving Spouse—Establishing Spousal Rights	37
Proof of Marriage in New York	37
Proof of Common Law Marriage in New York	38
The Laws of Sister States	38
Disqualification as a Surviving Spouse	42
Voluntary Waiver of Spousal Rights	42
Involuntary Waiver of Spousal Rights	44
Revocatory Effect of Divorce on Spousal Rights	46
Inheritance Rights of Adopted Children	47
Inheritance by Intestacy	47
Inheritance by Will	49
Inheritance Rights of Posthumous Children	50
Intestate Rights of Posthumous Children	50
Rights of Posthumous Child to Inherit as Members of a Class	51
Pretermitted or After-Born Children	51
Inheritance Rights of Non-Marital Children	53
Rights in Intestacy of a Non-Marital Child	55
Rights of a Non-Marital Child Under the Will	
of a Deceased Parent	55
Disqualification of a Parent	56
Failure to Support	56
Abandonment	57
Resumption of Parental Duties	58
Forfeiture as a Basis for Disqualification	58
The Rule of Forfeiture	58
<i>Terminology</i>	59
<i>Practice Exercises</i>	59
<i>Questions to Consider</i>	59
<b>4. The Elective Share Statute</b>	<b>61</b>
<b>Chapter Outlook</b>	<b>61</b>
<b>The New York Elective Share Statute</b>	<b>62</b>
Historical Background	62
The Elective Share Pursuant to the Provisions of EPTL	
Sec. 5-1.1-A	64
Estates Subject to the Elective Share	64
Property Subject to the Elective Share	64
Persons Who May Exercise a Right of Election	64
Procedure for Exercising the Right of Election	65

Voluntary Waiver of Elective Share	70
Disqualification from Exercising Right of Election	70
Computation of the Elective Share	72
<i>Terminology</i>	82
<i>Practice Exercises</i>	82
<i>Questions to Consider</i>	83
<b>5. Probate of Wills</b>	<b>85</b>
<b>Chapter Outlook</b>	<b>85</b>
<b>Why Have a Will?</b>	<b>85</b>
<b>The Requirements of Due Execution</b>	<b>87</b>
A Written Will	87
Signature of the Testator at the End of the Instrument	87
In the Presence of Attesting Witnesses	90
Testator Must Declare the Instrument to Be His Will	91
<b>The Nuncupative and the Holographic Will</b>	<b>91</b>
The Requirements of EPTL Section 3-2.2	92
<b>Issues Involved in the Execution of Wills</b>	<b>93</b>
Additions to Will Subsequent to Execution	93
Material Following the Testator's Signature	93
Material Preceding the Testator's Signature	94
Attesting Witnesses	95
Attesting Witness Affidavits	95
Examination of the Attesting Witnesses	96
Dispensing with the Testimony of Attesting Witnesses	97
Attesting Witnesses as Beneficiaries	99
Mistake	101
<b>Ancient Wills</b>	<b>102</b>
<b>Petitioning for the Probate of a Decedent's Will</b>	<b>102</b>
Compelling Production of a Will	102
Instituting a Probate Proceeding	103
The Probate Petition	103
Necessary Parties to the Proceeding	105
Notice of Probate	106
<b>The Appointment of an Executor</b>	<b>106</b>
Who May Serve as an Executor	106
Renunciation of Appointment	107
Preliminary Executors	107

<b>Table of Contents</b>	<b>xv</b>
Temporary Executors	108
Bond Requirements	109
<b>The Probate Decree</b>	<b>109</b>
<i>Terminology</i>	109
<i>Questions to Consider</i>	109
<b>6. Contested Probate Proceedings</b>	<b>111</b>
<b>Chapter Outlook</b>	<b>111</b>
<b>Overview of a Contested Probate Proceeding</b>	<b>112</b>
Filing of Petition/Issuance of Citation	112
Request for Examinations Pursuant to SCPA Sec. 1404	112
The Filing of Objections to Probate	113
Citation Pursuant to SCPA Sec. 1411	113
Pretrial Discovery and Trial	114
<b>Objections to Probate</b>	<b>114</b>
Who May File Objections to Probate	116
Standard Objections to Probate	117
No Contest or In Terrorem Clause	118
<b>Burden of Proof/Quantum of Proof</b>	<b>121</b>
<b>Proof of Due Execution</b>	<b>121</b>
<b>Proof of Testamentary Capacity</b>	<b>122</b>
Elements of Testamentary Capacity	122
Persons Who Can Testify as to Testamentary Capacity	125
<b>Proof of Undue Influence</b>	<b>126</b>
Elements of Undue Influence	126
Circumstantial Evidence of Undue Influence	126
The Existence of a Confidential Relationship	128
The Definition of Confidential Relationship	128
Confidential Relationships and Undue Influence	128
Application of the Rule	129
<b>Proof of Fraud</b>	<b>130</b>
Elements of Fraud	130
Quantum of Proof	131
<i>Terminology</i>	131
<i>Questions to Consider</i>	132

<b>7. Revocation of Wills</b>	<b>133</b>
<b>Chapter Outlook</b>	<b>133</b>
<b>Statutory Requirements for the Revocation of Wills</b>	<b>133</b>
Revocation or Alteration by Written Instrument	134
Revocation by Physical Act	134
Revocation or Alteration by Nuncupative or Holographic Declaration	134
<b>Capacity to Revoke a Will</b>	<b>135</b>
<b>Intention to Revoke a Will</b>	<b>135</b>
Presumption of Revocation	136
Dependent Relative Revocation	137
<b>Revocation of Will by Subsequent Writing</b>	<b>138</b>
Revocation by Another Will	139
Revocation by a Writing	140
<b>Revocation of Will by Physical Act</b>	<b>140</b>
Statutory Requirements	142
Revocation by the Testator	142
Revocation by a Third Person at the Testator's Request	142
Sufficiency of the Physical Act	142
<b>Revocation of Will—Effect upon Codicil</b>	<b>143</b>
<b>Revocation of Codicil—Effect upon Will</b>	<b>143</b>
<b>Revival and Republication of a Revoked Will</b>	<b>143</b>
Statutory Requirements	144
Application of the Statute	144
<i>Terminology</i>	<i>145</i>
<i>Questions to Consider</i>	<i>145</i>
<b>8. Joint Wills and Mutual Wills</b>	<b>147</b>
<b>Chapter Outlook</b>	<b>147</b>
<b>Joint Wills/Mutual Wills Defined</b>	<b>147</b>
Joint Wills Defined	147
Definition of a Mutual Will	148

<b>Contracts to Make a Will</b>	<b>149</b>
General Principles	149
Proof of Contracts to Make a Will	149
Burden of Proof/Quantum of Proof	149
Requirements of a Contract to Make a Will	149
The Provisions of EPTL Sec. 13-2.1	150
Application to Mutual Wills	150
Application to Joint Wills	151
<b>Breach of Contract</b>	<b>152</b>
Subsequent Will as Breach of Contract	152
Lifetime Gifts as Breach of Contract	152
Remedies for Breach of Contract	153
<i>Terminology</i>	<i>154</i>
<i>Questions to Consider</i>	<i>154</i>
<b>9. Trusts</b>	<b>157</b>
<b>Chapter Outlook</b>	<b>157</b>
<b>Terminology Associated with Trusts</b>	<b>158</b>
<b>Essential Elements of an Express Trust</b>	<b>158</b>
The Settlor or Grantor	159
Lifetime Trusts	159
Testamentary Trusts	159
Intent to Create a Trust	160
Present Intent to Create a Trust	160
Capacity to Create a Trust	161
Trust Res or Corpus	161
Lifetime Trusts	161
Testamentary Trusts	161
Trustee	162
Eligibility of Trustee	162
Appointment of Trustee	164
Beneficiary	165
Use and Delivery of Trust Property	166
<b>Interests in Trust</b>	<b>167</b>
Present Interests	167
Future Interests	168
<b>Types of Trusts</b>	<b>169</b>
Testamentary Trust	169
Inter Vivos Trust	169

Revocable Trust	169
Pour-Over Trusts	169
Grantor Trusts	170
Passive Trusts	170
Life Insurance Trust	171
Totten Trusts	171
Spendthrift Trusts	172
Charitable Trusts	172
Constructive Trusts	174
Resulting Trusts	175
<b>Amendment and Termination of Trusts</b>	<b>176</b>
Inter Vivos Trusts	176
Testamentary Trusts	177
The Provisions of EPTL Sec. 11-11.11	178
<i>Terminology</i>	178
<i>Questions to Consider</i>	179
<b>10. Gift Transactions</b>	<b>181</b>
<b>Chapter Outlook</b>	<b>181</b>
<b>Elements of a Gift</b>	<b>182</b>
Burden of Proof	182
<b>Donative Intent</b>	<b>182</b>
Presumption of Donative Intent	182
Presumption of Competence	183
Essentials of Donative Intent	183
Voluntariness of Transaction	183
Present Transfer of Ownership	184
<b>Delivery</b>	<b>186</b>
Time of Delivery	186
Physical Delivery	186
Constructive or Symbolic Delivery	187
Joint Control and Delivery	189
<b>Acceptance</b>	<b>189</b>
<b>Gifts Causa Mortis</b>	<b>190</b>
Elements of a Gift Causa Mortis	190
<i>Terminology</i>	191
<i>Questions to Consider</i>	191

<b>11. Jurisdiction and Power of the Surrogate's Court</b>	<b>193</b>
<b>Chapter Outlook</b>	<b>193</b>
<b>Subject Matter Jurisdiction of the Surrogate's Court</b>	<b>194</b>
General Subject Matter Jurisdiction of the Surrogate's Court	194
Sources of the Court's Subject Matter Jurisdiction	194
Judicial Interpretation of the Court's Subject Matter Jurisdiction	196
Jurisdiction over the Estates of Domiciliary Decedents	199
Jurisdiction over Estates of Non-Domiciliary Decedents	200
Jurisdiction over Lifetime Trusts	202
<b>Personal Jurisdiction in the Surrogate's Court</b>	<b>202</b>
Long Arm Jurisdiction over a Non-Domiciliary	203
Means of Obtaining In Personam Jurisdiction	204
Citation	204
Appearance of a Party	205
Appearance for Infant, Incompetent, Conservatee, or Person Under a Disability	206
Service of Process/When Service of Process Complete	208
<b>Power of the Surrogate's Court</b>	<b>210</b>
<i>Terminology</i>	210
<i>Questions to Consider</i>	210
<b>12. Venue of Surrogate's Court Proceedings</b>	<b>213</b>
<b>Chapter Outlook</b>	<b>213</b>
<b>A Question of Venue</b>	<b>213</b>
Estates of Domiciliary Decedents	214
Domicile Defined	214
Change of Domicile	215
Estates of Non-Domiciliary Decedents	217
Venue in More than One County	218
Situs Rules for Assets of Non-Domiciliaries	218
Lifetime Trusts	218
Transfer of Venue	220
<i>Terminology</i>	220
<i>Questions to Consider</i>	220

<b>13. Fiduciary Duties in Administering an Estate</b>	<b>223</b>
<b>Chapter Outlook</b>	<b>223</b>
<b>Duties of an Executor Prior to Probate—Securing     and Preserving Estate Assets</b>	<b>224</b>
Scope of EPTL Sec. 11-1.3	224
Preservation of Estate Assets	224
Duty to Prevent Loss	224
<b>The Duties of the Appointed Fiduciary</b>	<b>225</b>
Marshaling Estate Assets	226
Ascertaining Decedent’s Assets for Collection Purposes	227
Opening an Estate Account/Maintaining Estate Records	228
Methods of Collection	228
Appraisal and Valuation of Estate Assets	230
Bank Accounts or Deposits	230
Registered Securities	231
United States Savings Bonds	231
Real Property	231
Tangible Personal Property	231
Investment of Estate Property	231
Payment of Debts and Expenses	232
Estate Claims	232
Estate Debts and Administration Expenses	233
Payment of Taxes	236
Decedent’s Final Income Tax Return	236
The Federal Estate Tax	237
The New York State Estate Tax	242
The Fiduciary Income Tax	242
Fiduciary Income Tax Generally	243
Terms Associated with Fiduciary Income Taxation	243
Filing the Return	244
Terminating Year of Estate	244
The Estate Inventory	244
The Fiduciary Report	245
Satisfaction of Legacies and Bequests	245
Ademption	246
Advancement	246
Delay in Distribution	246
The Duty to Account	248
Generally	248
Methods of Accounting—Formal and Informal	249

<b>Table of Contents</b>	<b>xxi</b>
<b>Fiduciary Commissions</b>	<b>253</b>
Computation of Commissions Pursuant to SCPA Sec. 2307	253
Advance Payment of Commissions	254
<b>Surcharge</b>	<b>255</b>
<b>Legal Fees of Counsel for the Estate</b>	<b>256</b>
Presenting the Issue of Legal Fees to the Court	256
By the Court, on the Court's Own Motion	256
In an Accounting Proceeding	256
Proceeding Pursuant to SCPA Sec. 2110	257
Uniform Court Rule 207.52	257
Criteria Utilized in the Fixation of Legal Fees	257
Case Law	257
Court Rule	257
Other Considerations in the Fixation of Legal Fees	257
Multiple Estate Attorneys	258
Disbursements	258
<i>Terminology</i>	258
<i>Questions to Consider</i>	258
<b>14. Ethical Issues Confronting the Paralegal</b>	<b>261</b>
<b>Chapter Outlook</b>	<b>261</b>
<b>Ethical Standards for Paralegals</b>	<b>262</b>
Definition of a Paralegal	263
The NALA Code of Ethics and Professional Responsibility	264
The NFPA Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement	266
<b>The Unauthorized Practice of Law</b>	<b>270</b>
Defining the Unauthorized Practice of Law: Ethical Codes and Guidelines for the Lawyer	270
Ethical Codes and Guidelines for the Paralegal	272
<b>Preserving Client Confidences</b>	<b>276</b>
The Attorney-Client Privilege	277
The General Rule	277
Scope of the Attorney-Client Privilege	277
Invoking the Attorney-Client Privilege	277
Waiver of the Attorney-Client Privilege	277
Waiver of the Attorney-Client Privilege as Affected by the Death or Disability of the Client	278
The Fiduciary Exception to the Attorney-Client Privilege	278

Attorney Work Product/Material Prepared in Anticipation of Litigation	279
Attorney Work Product	279
Material Prepared in Anticipation of Litigation	279
<b>The Attorney-Draftsman as Beneficiary/the Attorney-Fiduciary</b>	<b>279</b>
The Attorney-Draftsman as Beneficiary	280
Ethical Considerations	280
Judicial Standards	280
The Attorney-Draftsman as Fiduciary	281
Ethical Considerations	281
Judicial Standards	281
Local Court Rules	281
Statutory Directives—The Provisions of SCPA Sec. 2307-a	282
<b>The Attorney as Trial Witness</b>	<b>283</b>
<i>Terminology</i>	284
<i>Questions to Consider</i>	284
<b>15. Resources for the Practicing Paralegal</b>	<b>287</b>
<b>Chapter Outlook</b>	<b>287</b>
<b>Statute Books, Treatises, Journals, and Form Books</b>	<b>287</b>
Statute Books	287
Treatises	288
Journals	289
Form Books	289
<b>Local Surrogate's Courts and Bar Associations</b>	<b>290</b>
Local Surrogate's Courts	290
Bar Associations	290
<b>National Association of Legal Assistants/National Federation of     Paralegal Associations</b>	<b>290</b>
<b>Computer Software Programs and Internet Sites</b>	<b>290</b>
Computer Programs and Databases	290
Internet Sites	291
<i>Appendix A. Forms</i>	293
<i>Appendix B. Ethics Codes</i>	357

**Table of Contents**

**xxiii**

<i>Appendix C. Surrogate's Courts Throughout the State</i>	367
<i>Appendix D. Uniform Rules for Surrogate's Court</i>	373
<i>Glossary</i>	405
<i>Table of Cases</i>	413
<i>Table of Codes, Rules, and Statutes</i>	423
<i>Index</i>	429