Volume D

CHAPTER 1. PRE-DEATH CONSIDERATIONS

I. ETHICAL ISSUES

§ 1:1	In general
§ 1:2	Who is the client?
§ 1:3	—Joint spousal representations and joint
	representation generally
§ 1:4	—Consent prior to joint representation
§ 1:5	—Confidentiality of information in a joint
	representation
§ 1:6	—Multi-generational representation
§ 1:7	—Representation of executor in estate administration
§ 1:8	— —Conduct required if lawyer has not represented
	any beneficiaries
§ 1:9	——Conduct required if lawyer has represented in the
	past or currently represents the fiduciary and
	beneficiaries or other interested parties
§ 1:10	—Privity rule for malpractice purposes
§ 1:11	Attorney as fiduciary
§ 1:12	Attorney as beneficiary of client's estate
§ 1:13	—Ethics considerations
§ 1:14	—"Putnam" rule

II. INFORMATION REQUIRED TO DEVELOP ESTATE PLAN

§ 1:15	In general
§ 1:16	Personal information
§ 1:17	—Name and address
§ 1:18	—Dates of birth
§ 1:19	—Citizenship
§ 1:20	—Domicile and other residences
§ 1:21	—Family relationships
§ 1:22	—Special situations
§ 1:23	—Family history
§ 1:24	Assets and liabilities
§ 1:25	—Categories of assets

§ 1:26 ——Real property and cooperative apartments — — Valuation considerations § 1:27 § 1:28 — Location of property § 1:29 — — Tangible personal property § 1:30 — — Valuation considerations § 1:31 — Location of property § 1:32 ——Business interests — — Valuation considerations § 1:33 — Other information § 1:34 § 1:35 — — Publicly listed stocks and bonds § 1:36 — —Location of property § 1:37 — —Ownership ——Basis information § 1:38 § 1:39 — Bank accounts — —Beneficiary § 1:40 § 1:41 — — Uniform Transfers to Minors Act ("UTMA") accounts § 1:42 ——Additional information § 1:43 ——Pension and retirement accounts § 1:44 — —Life insurance — Other types of assets § 1:45 § 1:46 —Categories of liabilities § 1:47 Client's annual income § 1:48 Other matters affecting disposition at death § 1:49 —Legal documents that may affect disposition of estate § 1:50 ——Contracts to make a will § 1:51 —Identity of probate and non-probate assets § 1:52 —Asset liquidity § 1:53 Lifetime transfers § 1:54 -Spousal gifts § 1:55 —Annual exclusion gifts § 1:56 —Outright gifts in excess of the annual exclusion amount § 1:57 —Gifts in trust § 1:58 —Direct payment of tuition and medical expenses § 1:59 -Indirect gifts § 1:60 Documentation § 1:61 —Financial information —Tax returns § 1:62 § 1:63 —Prior wills and family trust agreements § 1:64 Development of the estate plan § 1:65 —Ascertain the client's intentions § 1:66 —Considerations regarding estate distributions § 1:67 ——Identify intended beneficiaries

§ 1:68 ——Spouse § 1:69 — — Children § 1:70 ——Parents § 1:71 — Other individuals § 1:72 — — Charity § 1:73 — Identify amount and type of disposition § 1:74 ——In terrorem clause — —Tax provisions § 1:75 **Fiduciaries** § 1:76 § 1:77 —Duties of an executor § 1:78 —Duties of a trustee —Statutory powers § 1:79 —Who will act as an executor or a trustee? § 1:80 § 1:81 —Guardians ——Standby guardian § 1:82 § 1:83 —Side letters to fiduciaries § 1:84 Capacity of client § 1:85 —Who can make a will § 1:86 ——Definition of testamentary capacity § 1:87 — —Time capacity is determined — —Language disabilities § 1:88 § 1:89 ——Capacity required for revocable trusts -Undue influence § 1:90 § 1:91 —Presumption of competency § 1:92 —Record of testator's mental and physical state

III. LIFETIME PLANNING

§ 1:93 Non-probate assets § 1:94 —Categories of non-probate assets § 1:95 — Employer provided pension plans — Individual retirement accounts and 401(k) § 1:96 ("IRA") accounts — —Life insurance § 1:97 — Totten trust account § 1:98 § 1:99 — Jointly held property § 1:100 — —Gifts to minors (UTMA accounts) § 1:101 —Advantages of effecting estate plans through nonprobate assets § 1:102 —Disadvantages of effecting estate plans through non-probate assets Lifetime gifts and other transfers § 1:103 § 1:104 —Definition of gift § 1:105 —Completion of gift § 1:106 —Benefits of making a gift

Trusts and Estates Practice in New York

```
—Imposition of gift tax
§ 1:107
§ 1:108
         — —Liability for tax
§ 1:109
         --- Reporting of gift and paying of gift tax
§ 1:110
         — Effect of prior lifetime taxable gifts
§ 1:111
         — —Annual gift tax exclusion
§ 1:112
         ——Crummey powers
§ 1:113
         ——Section 2503(c) trusts
§ 1:114
         —Spousal gift splitting
         --- Marriage requirement
§ 1:115
§ 1:116
         — — Non-citizen or non-resident spouse for part of
          year
§ 1:117
         ——Deceased spouse
         — —Liability for split gifts
§ 1:118
         -Exception for certain payments for tuition and
§ 1:119
          medical expenses
§ 1:120
         —Applicable exclusion amount
§ 1:121
         —Generation-skipping transfer tax exemption
§ 1:122
         — Use of GST exemption during life
§ 1:123
         ——Spousal splitting of GST transfers for gift tax
          purposes
§ 1:124
         — Reverse QTIP election
§ 1:125
         ——GST inflation adjustment
         —Transfers within three years of death
§ 1:126
§ 1:127
         —Gifts in trust
§ 1:128
         —Sales in contemplation of death
§ 1:129
         ——Bargain sales
§ 1:130
         ——Sale of depreciated assets to recognize loss
§ 1:131
         —Basis of transferred property
§ 1:132
         ——Property received by gift
§ 1:133
         — Property received at death
§ 1:134
         — —Income in respect of decedent
§ 1:135
         ——Certain joint property
§ 1:136
         —Valuation issues
§ 1:137
         — — Appraisals
         - Discounts
§ 1:138
         — —Premiums
§ 1:139
§ 1:140
         -Loan guarantee as gift
§ 1:141
         -Interest-free or below market interest loans
§ 1:142
         —Private annuity
         ——Advantages of a private annuity
§ 1:143
         ——Special considerations
§ 1:144
§ 1:145
         -Net gifts
         —"Kiddie tax" issues
§ 1:146
§ 1:147
         -Noncitizen spouse
§ 1:148
         —Nonresident alien donor
```

§ 1:149	Divertment of aggets for Medicaid qualifying
§ 1.149	1 0 0
0 1 1 5 0	purposes
§ 1:150	——Medicaid nursing home eligibility rules
§ 1:151	— — Medicaid transfer rules
§ 1:152	— —Look-back period
§ 1:153	— —Ineligibility period
§ 1:154	 —Exceptions to ineligibility and criminal offense
§ 1:155	— — Medicaid estate recovery rules: federal law
§ 1:156	— — Medicaid estate recovery rules: New York law
§ 1:157	——Estate recovery
§ 1:158	——Liens
§ 1:159	— Timing and amount of divestment
§ 1:160	— — Divestment alternatives
§ 1:161	— Outright transfers to third parties (e.g., children)
§ 1:162	— —Trusts
§ 1:163	——Self-cancelling installment sale of assets to third
	party
§ 1:164	— —Family limited partnerships
§ 1:165	——Annuities

IV. PLANNING FOR INCAPACITY

§ 1:166 Power of attorney -New York law § 1:167 § 1:168 ——Principal § 1:169 ——Capacity of principal § 1:170 — —Agent ——Capacity of agent § 1:171 § 1:172 — — Multiple agents § 1:173 — Effective date § 1:174 — —Duration § 1:175 ——Construction and interpretation § 1:176 —Types of powers of attorney § 1:177 Statutory short form power of attorney —Acceptance of statutory form [GOL § 5-1504] § 1:178 —Durable power of attorney § 1:179 —Springing power of attorney § 1:180 § 1:181 -Form § 1:182 Powers encompassed by New York statute —Real estate transactions [GOL § 5-1502A] § 1:183 § 1:184 —Chattel and goods transactions [GOL § 5-1502B] -Bond, share and commodity transactions [GOL § 1:185 § 5-1502C] —Banking transactions [GOL § 5-1502D] § 1:186 § 1:187 —Business operating transactions [GOL § 5-1502E]

```
—Insurance transactions [GOL § 5-1502F]
§ 1:188
§ 1:189
         —Estate transactions [GOL § 5-1502G]
§ 1:190
         —Claims and litigation [GOL § 5-1502H]
         —Personal and family maintenance [GOL § 5-1502I]
§ 1:191
§ 1:192
         —Benefits from governmental programs or civil or
          military service [GOL § 5-1502J]
§ 1:193
         —Matters related to health care [GOL § 5-1502K]
§ 1:194
         —Retirement benefit transactions [GOL § 5-1502L]
§ 1:195
         —Gift transactions
§ 1:196
         —Tax matters [GOL § 5-1502M]
§ 1:197
         —All other matters [GOL § 5-1502N]
§ 1:198
         —Additional authority given to agent
         -Powers not specifically covered by New York statute
§ 1:199
§ 1:200
         ——Additional powers and authority
§ 1:201
         — — More expansive power to make gifts
§ 1:202
         ——Power to act with respect to revocable trusts
         --- Power to make statutory disclaimers and
§ 1:203
          elections
§ 1:204
         — Power with respect to buy-sell agreements
§ 1:205
         ——Power to nominate a guardian
§ 1:206
         ——Power with respect to government benefits
§ 1:207
         ——Power concerning the personal care of principal
§ 1:208
         —Powers that cannot be delegated to an agent under
          a power of attorney
§ 1:209
         —General principles
         -Execution of statutory short form general power of
§ 1:210
          attorney
§ 1:211
         -Revocation
§ 1:212
         — —Death
§ 1:213
         — — Military
§ 1:214
         — —Power coupled with interest
         --- Non-durable power
§ 1:215
         ——Marital status
§ 1:216
         ——Appointment of adult guardian
§ 1:217
         —Use of power by attorney-in-fact
§ 1:218
§ 1:219
         —Effectiveness of powers of attorney executed prior
          to changes in the law: September 12, 2010 & June
          13, 2021
§ 1:220
         Health care decision-making
§ 1:221
         —Law
§ 1:222
         ——State laws differ
§ 1:223
         -Federal law
§ 1:224
         --- New York law
         ——Common law
§ 1:225
         ——Statute
§ 1:226
```

§ 1:	227	——New York case law
§ 1:	228	—Living wills
	229	——Statute
	230	——Contents of living will
	231	——Execution
	232	——Periodic review
	233	— —Revocation
	234	— —Limitations of living wills
	235	——Practical considerations
	236	—Health care proxy
	237	——Statute
	238	— —Who can appoint a health care agent
	239	— — Who can act as a health care agent
	240	——Contents of health care proxy
	241	——Form of health care proxy
	242	——Execution
§ 1:	243	— —Commencement of agent's authority
	244	——Duration of agent's authority
	245	——Revocation of a health care proxy
§ 1:	246	——Health care proxy executed in other states
§ 1:	247	——Relationship between a living will and a health
		care proxy
§ 1:	248	Do Not Resuscitate ("DNR") Orders and withholding and withdrawal of life-sustaining treatment
§ 1:	249	Scope and applicability of Family Health Care Decisions Act
§ 1:	250	Health care decision-making—Do Not Resuscitate ("DNR") Orders—Definitions
§ 1:	251	Determining whether a person lacks capacity
§ 1:	252	Obligations of the attending physician
§ 1:	253	Health care decisions for adult patients by surrogates
§ 1:	254	Health care decision-making—Do Not Resuscitate ("DNR") Orders—Decision-making on behalf of a minor patient
§ 1:	255	Revocation of consent to withhold or withdraw life- sustaining treatment
§ 1:	256	Physician review of decision to withhold or withdraw life-sustaining treatment
§ 1:	257	Ethics review committee
§ 1:	258	Conscience objections
_	259	Health care decision-making—Nonhospital orders not
		to resuscitate
§ 1:	260	——Statute
	261	— — Ways in which provisions for nonhospital DNR Orders differ from DNR Orders

```
——Physician review
§ 1:262
         — Written record of nonhospital DNR Order
§ 1:263
§ 1:264
         — Refusal to comply with the nonhospital DNR
          Order
         ——Conversion to DNR Order on admission to
§ 1:265
          hospital
         — Revocation of nonhospital DNR Order
§ 1:266
§ 1:267
         — —Liability
§ 1:268
         —Organ donation
         ——Statute
§ 1:269
§ 1:270
         — — Definitions
§ 1:271
         ——Persons who can execute an anatomical gift
          (Section 4301)
§ 1:272
         ——Permissible donees and purposes
         -- Manner of executing anatomical gifts
§ 1:273
§ 1:274
         ——Delivery of document
         ---Revocation of gift
§ 1:275
§ 1:276
         — Other statutory provisions relating to organ
          donation
§ 1:277
         — —Organ donation forms
§ 1:278
         Adult guardian
         —Statute
§ 1:279
§ 1:280
         —Definitions
§ 1:281
         —Jurisdiction and venue
§ 1:282
         -Standard for appointment of adult guardians
§ 1:283
         —General authority of adult guardians
§ 1:284
         --- Powers of adult guardian for personal needs
         ——Powers of adult guardian for property
§ 1:285
          management
§ 1:286
         —Proceeding for appointment of adult guardian
§ 1:287
         — Who may commence a proceeding for the
          appointment of an adult guardian?
§ 1:288
         ——Documents that must be filed
         — Order to show cause
§ 1:289
         ——Petition
§ 1:290
         ——Service
§ 1:291
§ 1:292
         — —Court evaluator
§ 1:293
         — —Who can act as the court evaluator
§ 1:294
         — — Duties of the court evaluator
§ 1:295
         ——Fees payable to court evaluator
         — —Counsel in lieu of court evaluator
§ 1:296
§ 1:297
         ——Counsel
         ——Hearing
§ 1:298
§ 1:299
         — Burden of proof
§ 1:300
        ——Record of the proceedings
```

§ 1:301	——Timing
§ 1:302	— —Findings
§ 1:303	——Commission
§ 1:304	—Eligibility to act as guardian
§ 1:305	——Factors to be considered by the court in selecting
	a guardian
§ 1:306	— —Who may not serve as guardian
§ 1:307	Requirements before acting
§ 1:308	—Duties of the guardian
§ 1:309	—Court approval for transfers to benefit others
§ 1:310	— —Application
§ 1:311	——Notice
§ 1:312	— —Factors considered
§ 1:313	— —Findings
§ 1:314	—Provisional remedies
§ 1:315	—Effect of the appointment on the incapacitated
0 1 0 1 0	person
§ 1:316	—Compensation of the guardian
§ 1:317	—Reports required to be filed by the guardian
§ 1:318	— —Initial report
§ 1:319	— —Annual report
§ 1:320	— —Intermediate report
§ 1:321	——Final report
§ 1:322	——Examination of the reports
§ 1:323	—Change in guardian's status
v. Fo	ORMS .
§ 1:324	Deed appointing guardian
§ 1:325	Designation of standby guardian
§ 1:326	Durable general power of attorney New York
	statutory short form
§ 1:327	Living will
§ 1:328	Health care proxy
§ 1:329	DNR order
§ 1:330	Organ donor information
§ 1:331	Uniform donor card
§ 1:332	Anatomical gift: general form
§ 1:333	Anatomical gift: by next of kin or other authorized person
§ 1:334	Nomination of adult guardian

Appendix 1-1. State statutes regarding health care and medical treatment decisions

CHAPTER 2. ALTERNATIVES TO PROBATE

I. SMALL ESTATES

e	0 1	T / 1	
Q	2:1	Introd	uction

- § 2:2 Procedure
- § 2:3 —No waiting period
- § 2:4 —Appointment or renunciation of a voluntary administrator
- § 2:5 —Requirements and duties of the voluntary administrator
- § 2:6 —Powers of the voluntary administrator
- § 2:7 Small estate affidavit program

II. TOTTEN TRUST ACCOUNTS

- § 2:8 Introduction
- § 2:9 Subsequent litigation
- § 2:10 Statutory scheme
- § 2:11 —Definition
- § 2:12 —Interest of the beneficiary
- § 2:13 —Revocation
- § 2:14 —Vesting in beneficiary
- § 2:15 —Death of beneficiary prior to death of depositor
- § 2:16 Distinguished from joint and survivor accounts
- § 2:17 Importance of signature/ledger cards
- § 2:18 —Evidence of change
- § 2:19 Federal income tax consequences
- § 2:20 Estate tax consequences
- § 2:21 The tax waiver dilemma
- § 2:22 Effect on elective share
- § 2:23 Creditors' rights
- § 2:24 —Exceptions
- § 2:25 —Summary

III. SURVIVORSHIP ESTATES

- § 2:26 Introduction
- § 2:27 Creation of joint tenancies requires specific wording
- § 2:28 —Joint fiduciaries are exception
- § 2:29 —No straw man rule
- § 2:30 —Severance
- § 2:31 —For descent and distribution, will inoperative
- § 2:32 —Insolvency as exception
- § 2:33 Tenancies by the entirety
- § 2:34 —Limitation: real property

§ 2:35	—Exception: shares in cooperative apartment
§ 2:36	Severance of joint tenancies during marriage requires
	mutual consent
$\S~2:37$	—Examples
§ 2:38	—End of marriage
$\S 2:39$	—Conveyance to third party
$\S 2:40$	—Encumbrance
$\S 2:41$	—Descent and distribution
$\S 2:42$	—Creditors' rights at death
$\S 2:43$	Joint bank accounts
$\S 2:44$	—Accounts in statutory form; general presumption of
	joint tenancy
$\S 2:45$	—Rebutting the presumption
$\S 2:46$	—Effect of fiduciary relationship on the burden of
	proof
$\S~2:47$	—Joint accounts vs. convenience accounts
$\S 2:48$	—Banking Law Section 678
$\S~2:49$	—Disclosure requirements
$\S~2:50$	—Accounts not in statutory form
$\S~2:51$	—Joint tenancy at common law
$\S~2:52$	—Tax waiver dilemma
$\S 2:53$	—No presumption for transfer tax purposes
$\S~2:54$	—Liability of funds to creditors' claims
$\S~2:55$	Income tax consequences
$\S 2:56$	Effect on elective share

IV. QUALIFIED PLAN BENEFITS

- § 2:57 Introduction
- § 2:58 Income tax consequences
- § 2:59 Effect on elective share
- § 2:60 Creditors' rights

V. PAY-ON-DEATH ARRANGEMENTS ("PODS")

§ 2:61 In general

VI. LIFE INSURANCE

- § 2:62 Introduction
- § 2:64 Giving up incidents of ownership; life insurance trusts
- § 2:65 Payment of premiums; Crummey withdrawal powers
- § 2:66 Effect on elective share and creditors' rights

VII. THE PROCESS OF INTESTACY

§ 2:67 Introduction

§ 2:68	Appointment of administrator
§ 2:69	—Identity of the administrator
§ 2:70	——Priority
§ 2:71	— — Other persons
§ 2:72	——All distributees incapacitated
§ 2:73	——Persons not interested in estate
§ 2:74	— — Public administrator
§ 2:75	—Petitioning for appointment of administrator
§ 2:76	——Contents of petition
§ 2:77	——Service on distributees
§ 2:78	—Service on persons with priority for administration [SCPA § 1003(1)]
§ 2:79	——Petitioner as creditor
§ 2:80	— — Public administrator as petitioner [SCPA § 1003(2)]
§ 2:81	—Dispensing with service
§ 2:82	Notice and decree
§ 2:83	—Contents of notice [SCPA § 1005(1)]
§ 2:84	—Successor administrators; "administration <i>de bonis</i> non"
$\S 2:85$	Bonding requirements
§ 2:86	Dispensing with or lowering the bond
§ 2:87	Powers and duties of the administrator
§ 2:88	—Permissive payment before expiration of notice period
§ 2:89	—Where notice is not published
§ 2:90	—Accountings voluntary
$\S 2:91$	—Timing of accountings
§ 2:92	—Form of accounting
§ 2:93	—To whom process is issued
§ 2:94	—Dispensing with service
§ 2:95	Proving a right to an intestate share
§ 2:96	—Form of proof
§ 2:97	— —One distributee
VIII.	REVOCABLE TRUSTS
§ 2:98	In general
§ 2:99	Greater privacy
§ 2:100	Transition of management
§ 2:101	Centralization of management
§ 2:102	Taking title as trustee
§ 2:103	—Practical aspects and problems of trust funding
§ 2:104	—Taxpayer numbers generally; New York EINs
§ 2:105	—Title insurers

§ 2:106	—Change in New York law for self-trusteed trusts
§ 2:107	Audition of corporate co-trustee during lifetime
§ 2:108	Probate issues; delay in opening probate
§ 2:109	—Protection afforded by court proceeding
§ 2:110	—Creditors' rights
§ 2:111	Creation of the revocable trust
§ 2:112	—Declaration of trust vs. deed of trust
§ 2:113	—Deathbed uses
§ 2:114	—Requirements for valid trust
§ 2:115	—Formalities required
§ 2:116	—Choice of governing law
§ 2:117	Operating the revocable trust during lifetime
§ 2:118	—Funding the trust
§ 2:119	—Taking title in the name of the trustee
§ 2:120	—Funding requirements
§ 2:121	—Funded trust
§ 2:122	——Examples
§ 2:123	—Nominally funded, or unfunded, trust
§ 2:124	——Examples
§ 2:125	Lack of "de minimis" probate under New York law
§ 2:126	Condominium interests
§ 2:127	Cooperative apartment interests
§ 2:128	Income tax consequences of funding the revocable trust
§ 2:129	—Mortgage transfer tax
§ 2:130	—Gains tax
§ 2:131	—Traps with respect to unrecognized income tax
§ 2:132	—New York law effective June 25, 1997
§ 2:133	Revocable trust as beneficiary under the grantor's will
§ 2:134	—Pourover capability
§ 2:135	—History of pouring over
§ 2:136	— —Trusts included
§ 2:137	——Pourover vehicles approved by statute
§ 2:138	— Formalities of execution required
§ 2:139	——Common law rules overridden
§ 2:140	——Pourovers to third-party revocable trusts
§ 2:141	——Reverse pourovers, or "pourups"
§ 2:142	—Problems in pouring over; when revocable trusts
	can fail
§ 2:143	——Change to New York law for trusts created on or after June 25, 1997
§ 2:144	——Funding
§ 2:145	——Identification of trust and the doctrine of
	incorporation by reference

Trusts and Estates Practice in New York

§ 2:146	—Preventive measures and post-death remedies for
0.0145	the failed pourover
§ 2:147	——Follow the common law doctrine modifying the
8 0.140	strict anti-incorporation rule
§ 2:148	— — Grandfathering
§ 2:149	— — Where trust fails by lack of proper
8 9,150	acknowledgment or by invalidity of trust
§ 2:150 § 2:151	— Estate of O'Brien: pourover valid
§ 2:151 § 2:152	— Matter of Will of Sackler: pourover valid
-	— — Will of Dickstein: pourover invalid
§ 2:153	Administering the revocable trust post-death
§ 2:154	—Joint trusts; income tax planning at the first death
§ 2:155	——Step-up in basis
§ 2:156	— —Income taxation of non-pro-rata allocation; effect of authorization to allocate
\$ 0.157	
§ 2:157	— Effect of Rev. Proc. 64-19
§ 2:158	— Effect on QTIP election and disclaimer
§ 2:159	——Allocation of particular assets to survivor's
\$ 0.160	share; tax elections by individuals
§ 2:160	—Transfer taxation of the decedent's share
§ 2:161	— Non-pro-rata exchange
§ 2:162	— —Property included as Section 2035 property transfer
§ 2:163	VI GAILETET
§ 2.163 § 2:164	 ——Service's position prior to enactment ——Jalkut
§ 2.164 § 2:165	— — Section 2053 deduction for debts and expenses
§ 2.166	——Expenses; election to pay debts from trust assets
§ 2:160	——Expenses of administration of trust
§ 2:168	— Expenses of administration of trust — Effect of trust ownership on estate tax payments
§ 2.100	and deferrals
§ 2:169	
-	— — A Itarnata valliation
	— —Alternate valuation —Post-death reversable trust administration after
§ 2:170	—Post-death revocable trust administration after
	—Post-death revocable trust administration after Taxpayer Relief Act of 1997
§ 2:171	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — —Qualifying trust
§ 2:171 § 2:172	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election
§ 2:171 § 2:172 § 2:173	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — —Qualifying trust — —Election — —Period of tax treatment
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election — Period of tax treatment — Effect of estate income tax election
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174 \$ 2:175	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election — Period of tax treatment — Effect of estate income tax election — Election where no probate
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174 \$ 2:175 \$ 2:176	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election — Period of tax treatment — Effect of estate income tax election — Election where no probate — GST provisions
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174 \$ 2:175	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election — Period of tax treatment — Effect of estate income tax election — Election where no probate — GST provisions — Pre-act post-mortem income taxation of
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174 \$ 2:175 \$ 2:176 \$ 2:177	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 —Qualifying trust —Election —Period of tax treatment —Effect of estate income tax election —Election where no probate —GST provisions —Pre-act post-mortem income taxation of revocable trusts
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174 \$ 2:175 \$ 2:176 \$ 2:177 \$ 2:178	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election — Period of tax treatment — Effect of estate income tax election — Election where no probate — GST provisions — Pre-act post-mortem income taxation of revocable trusts — Treatment of trust as terminated
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174 \$ 2:175 \$ 2:176 \$ 2:177 \$ 2:178 \$ 2:179	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election — Period of tax treatment — Effect of estate income tax election — Election where no probate — GST provisions — Pre-act post-mortem income taxation of revocable trusts — Treatment of trust as terminated — Treatment of trust as new administrative trust
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174 \$ 2:175 \$ 2:176 \$ 2:177 \$ 2:178 \$ 2:179 \$ 2:180	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election — Period of tax treatment — Effect of estate income tax election — Election where no probate — GST provisions — Pre-act post-mortem income taxation of revocable trusts — Treatment of trust as terminated — Treatment of trust as new administrative trust — Separate entity
\$ 2:171 \$ 2:172 \$ 2:173 \$ 2:174 \$ 2:175 \$ 2:176 \$ 2:177 \$ 2:178 \$ 2:179	 —Post-death revocable trust administration after Taxpayer Relief Act of 1997 — Qualifying trust — Election — Period of tax treatment — Effect of estate income tax election — Election where no probate — GST provisions — Pre-act post-mortem income taxation of revocable trusts — Treatment of trust as terminated — Treatment of trust as new administrative trust

TABLE OF CONTENTS

§ 2:182	— —Authorization to make election; explicit or
	implicit
§ 2:183	— —Justification under state law
§ 2:184	 —Comparative advantages of separate taxpayer
	status for period of administration; avoidance of
	phantom income
§ 2:185	——Conformity with administration
§ 2:186	——Preservation of decedent's tax planning
§ 2:187	—Comparative advantages of treating trust as
	terminated at death; pass-through of income and
	deductions
§ 2:188	——Passive activity items
§ 2:189	——NOLs
§ 2:190	——Loss of tax savings reduced
§ 2:191	—Election and reporting of separate taxpayer status
§ 2:192	—Estate tax impact of establishment of
	administrative trust
§ 2:193	——Continuing administration
§ 2:194	——Allocation vs. distribution
§ 2:195	——Probable rule
§ 2:196	—Income taxation of administrative trusts
§ 2:197	——Construing the trust instrument and purpose to
	determine the type of separate trust for income tax
0.100	purposes of administration
§ 2:198	——Duty to distribute income
§ 2:199	— — Effect of New York law
§ 2:200	——New York statutory authority
§ 2:201	——New York case authority
§ 2:202	——Compare requirement to distribute
§ 2:203	——Documenting the selection
§ 2:204	—Distributing the administrative trust
§ 2:205	——Controlling income taxation through
8 0 000	distributions carrying out DNI
§ 2:206	——Burden of tax on residue
§ 2:207	——Effect of separate share rule on DNI allocations
§ 2:208	——Excess deductions and losses on termination
§ 2:209	——Succeeding beneficiaries
§ 2:210	——Excess deductions
§ 2:211	-
§ 2:212	——Planning for maximum use of deductions and
0.0.010	NOLs
§ 2:213	——Comparison to treatment of trust as terminated
§ 2:214	Selected post-mortem problems in administering the
00015	revocable trust
§ 2:215	—Income tax problems of disclaimers

Trusts and Estates Practice in New York

§ 2:216	—Effect of establishment of separate administrative
	trust
§ 2:217	—Administrative trust administered as accumulating
	trust
§ 2:218	—Treatment of trust as terminated at death
§ 2:219	
§ 2:220	——Terms of instrument
§ 2:221	1 0
§ 2:222	——Effect of establishment of separate
	administrative trust
§ 2:223	
§ 2:224	
§ 2:225	
§ 2:226	——Where trust is treated as terminated at death
§ 2:227	1 0
	held in trust
§ 2:228	
§ 2:229	
§ 2:230	· · · · · · · · · · · · · · · · · · ·
§ 2:231	
§ 2:232	•
§ 2:233	——Effect of establishment of separate
0.004	administrative trust after death
§ 2:234	——Shareholder for income tax purposes; deemed
6 0 005	owner
§ 2:235	
§ 2:236	
§ 2:237	-
§ 2:238	——Qualification of administrative trust as QSST for
0.000	individual beneficiary
§ 2:239	——Distribution
§ 2:240	——Proration of income
§ 2:241	—Where trust treated as terminated at death
§ 2:242	—Lump-sum distribution to trust
§ 2:243	—Rollovers of benefits from trust to IRA
§ 2:244	—Partnership interests
§ 2:245	——Time when income is realized
§ 2:246	——Nature of income
§ 2:247	
	administrative trust; avoidance of mismatching of
	income and deductions
§ 2:248	——Avoidance of premature mismatching upon
0.0011	distribution
§ 2:249	——Treatment of trust as terminated at death;
	avoidance of mismatching of income and deductions

TABLE OF CONTENTS

§ 2:250	——Avoidance of acceleration of IRD element upon
60051	distribution
§ 2:251	——Further discussion
§ 2:252	Fiduciary obligations and problems; duties of loyalty and impartiality
§ 2:253	—Problems of the trustee/beneficiary
§ 2:254	— — Taxation of trustee/beneficiary
§ 2:255	— Estate tax exposure
§ 2:256	——Income taxation where separate administrative
ş 2.200	trust is used
§ 2:257	—Trust-only administration; the trustee as statutory
5 2.201	executor
§ 2:258	— —Transfer tax elections and liabilities
§ 2:259	— —Liability for failure to pay United States
§ 2:260	— — Discharge from personal liability
§ 2:261	——Allocation of generation-skipping exemption
§ 2:262	——————————————————————————————————————
	· · · · · · · · · · · · · · · · · · ·
§ 2:263	— —Income tax elections; election to join in final joint return with surviving spouse
§ 2:264	——Election to deduct expenses from income tax
8 2.204	return
§ 2:265	—Problems of the trust-only administration
§ 2:266	——————————————————————————————————————
§ 2:267	——Direction to pay tax on QTIP property
§ 2:268	——Powers of appointment
§ 2:269	——Disclaimer of property of decedent
§ 2:270	——Election to split gift with surviving spouse
§ 2:271	——Election to deduct expenses from income tax
	return
§ 2:272	——Probate of will
§ 2:273	——Problems of multiple post-mortem trusts; the
	surviving spouse trust
§ 2:274	——Multiple trusts created by the same grantor
$\S 2:275$	——Special problems of generation-skipping exempt
	trusts
§ 2:276	—Coordination of probate and trust administrations
§ 2:277	— —Income tax advantages of the probate estate
	reduced
$\S 2:278$	——Selection of fiscal year
§ 2:279	——Recognition of losses on distribution
§ 2:280	——Deduction for charitable set-aside
§ 2:281	— —Throwback rule eliminated
§ 2:282	——Advantages of simultaneous probate and trust
5	administration
§ 2:283	——Deciding to hold assets in decedent's name or in
5	trust

§ 2:284	——Problems of simultaneous administration;
§ 2:285	funding of formula bequests ——Preservation of losses and deductions for
3 2.200	individuals
§ 2:286	——Allocation of debts and expenses
§ 2:287	——Fiduciary obligations in simultaneous
6 0 000	administration
§ 2:288	——Priority of executor for estate tax-related duties
§ 2:289 § 2:290	— Transferee liability— Allocation of generation-skipping tax exemption
§ 2.290 § 2:291	——Anocation of generation-skipping tax exemption ——Joint filing election
§ 2:292	——Election to take deductions on estate or income
3	tax return
§ 2:293	——S corporation income tax liability
§ 2:294	——Drafting solutions
VIIIA.	TRANSFER ON DEATH SECURITY
V 11177.	REGISTRATION
§ 2:295	
§ 2:295 § 2:296	Introduction Registration in beneficiary form; sole or joint tenancy
8 2.290	ownership
§ 2:297	Applicable law
§ 2:298	Origination of registration
§ 2:299	Form of registration
§ 2:300	Effect of registration
§ 2:301	Ownership on death of owner
§ 2:302	Protection of registering entity
§ 2:303	Nontestamentary transfer on death
§ 2:304	Terms, conditions and forms
IX. FO	ORMS
§ 2:305	Form 2-1: Renunciation of voluntary administration
§ 2:306	Form 2-2.2: Affidavit in relation to settlement of
, =	estate under Article 13, SCPA—Where decedent died
	on or after January 1, 2009
§ 2:307	Form 2-2.3: Affidavit in relation to settlement of
	estate under Article 13, SCPA—Where decedent died
	on or after January 1, 2009—Amended affidavit
§ 2:308	Form 2-3: Report and account in settlement of estate pursuant to Article 13, SCPA
§ 2:309	Form 2-4: Petition for letters of administration,
გ 4.00შ	limited administration, administration with
	limitations or temporary administration
§ 2:310	Form 2-4.1: Petition for ancillary letters of
	administration

- § 2:311 Form 2-4.2: Petition for letters of administration d.b.n
 § 2:312 Form 2-7: Waiver of citation, renunciation and consent to appointment of administrator (individual)
 § 2:313 Form 2-8: Decree appointing administrator
- § 2:314 Form 2-9: Account of executors and administrators

CHAPTER 3. PROBATE PROCEEDINGS

I. OVERVIEW

—Small estates

§ 3:13

- § 3:1 Historical background and development of the law § 3:2 —Purpose of probate § 3:3 — —Wills of decedents --- Wills of individuals alleged to be deceased § 3:4 § 3:5 -Solemn versus common probate § 3:6 Statutory framework § 3:7 -Prior law § 3:8 —Current law § 3:9 —A note on the uniform rules for surrogate's courts § 3:10 When probate may not be necessary -All of decedent's assets pass outside the will § 3:11 § 3:12 —All beneficiaries and fiduciaries predeceased
- II. JURISDICTION, VENUE AND PROCEDURE IN PROBATE PROCEEDINGS
- § 3:14 Jurisdiction § 3:15 —Supreme court § 3:16 —Surrogate's court § 3:17 ——Subject matter jurisdiction § 3:18 --Probate ————Probate jurisdiction of nondomiciliary where § 3:19 original probate has not been obtained in the domicile jurisdiction § 3:20 ————Probate jurisdiction of nondomiciliary where original probate has already been obtained in the domicile jurisdiction § 3:21 — — — Compare ———Matters other than probate § 3:22 ——Personal jurisdiction § 3:23 § 3:24 — — Forms of jurisdiction ———Obtaining personal jurisdiction § 3:25 § 3:26 Venue —Definition of "domicile" § 3:27

§ 3:28	—New York State decedents
§ 3:29	— —County of domicile changed shortly prior to time
	of death
§ 3:30	— — Multiple domiciles
§ 3:31	
§ 3:32	——Improper venue; how to correct
§ 3:33	—Non-New York State decedents
§ 3:34	
	domicile of debt or wrongful death defendant
§ 3:35	Surrogate's court procedure: in general
III.	PROBATE: PETITION AND PROCEDURE
§ 3:36	Preliminary matters
§ 3.30	· · · · · · · · · · · · · · · · · · ·
§ 3:38	_
8 0.00	court and other sources
§ 3:39	
§ 3:40	
§ 3:41	
§ 3:42	
§ 3:43	
3 0.10	preservation of assets
§ 3:44	_
3	letters, etc., will be needed
§ 3:45	Probate petition
§ 3:46	
§ 3:47	· -
§ 3:48	
§ 3:49	
§ 3:50	
§ 3:51	
§ 3:52	
§ 3:53	
§ 3:54	
§ 3:55	
3 0.00	entitled to receive citation
§ 3:56	
§ 3:57	————Others entitled to citation
§ 3:58	
, 5.50	notice of probate
§ 3:59	-
§ 3:60	
§ 3:61	———Probate vs. non-probate assets
§ 3:62	

§ 3:63	— — — Filing fees
§ 3:64	———Cause of action
§ 3:65	————Inventory of assets
§ 3:66	—Additional requirements of the Probate Petition
§ 3:67	— Will, copies thereof, and copies of any other wills
	affected
§ 3:68	——Death certificates
§ 3:69	— — Attorney-fiduciaries
§ 3:70	— — —Incorporation in the will
§ 3:71	— — — Consequences of noncompliance
§ 3:72	———Effective date of Section 2307-a
§ 3:73	——"Putnam" affidavits
§ 3:74	— —Extraordinary circumstances
§ 3:75	—Citation, waiver, and consent
§ 3:76	——Contents of citation
§ 3:77	— — Illustrations of sufficiency of citation
§ 3:78	— —To whom citation must issue
§ 3:79	— — — Distributees
§ 3:80	——Primary nominated executors
§ 3:81	———Parties adversely affected by a later
0	instrument or by another will on file in the court
§ 3:82	————Codicils
§ 3:83	————Later wills
§ 3:84	————Powers of appointment: service required
§ 3:85	— — — Joint will conundrum
§ 3:86	— — —Alleged decedent
§ 3:87	———New York State Tax Commission
§ 3:88	— — — Attorney General
§ 3:89	———Compare: persons entitled to object to will
§ 3:90	———Compare: creditors
§ 3:91	— —Timing of determination of necessary parties
§ 3:92	— — Citation of parties under a disability
§ 3:93	— — — Virtual representation
§ 3:94	————General rule for virtual representation
§ 3:95	————Classes of individuals eligible for virtual
	representation
§ 3:96	——————————————————————————————————————
	representation
§ 3:97	————Caveats regarding virtual representation
§ 3:98	— — —Guardians ad litem
§ 3:99	——Waiver and consent
§ 3:100	——Withdrawal of waiver and consent
§ 3:101	—Notice of Probate
§ 3:102	——Purpose is informational; not necessary to obtain
J	jurisdiction
	-

```
———Timing of giving of Notice
§ 3:103
§ 3:104
         — — Effect of Notice of Probate
§ 3:105
         — Contents of Notice; parties to whom notice must
          be given
         ———Legatees and secondary fiduciaries
§ 3:106
§ 3:107
         ———Missing parties
§ 3:108
         — — — Virtual representation in Notice of Probate
          proceedings (or "virtual" virtual representation)
§ 3:109
         ———Requirements of notice upon subsequent
          discovery of assets
         "Proving" the will
§ 3:110
§ 3:111
         —Burden of proof
§ 3:112
         —Due execution
§ 3:113
         — —Location of testator's signature
         ———Testator cannot sign
§ 3:114
§ 3:115
         ———Meaning of "the end"
         ———Timing of signature; alterations
§ 3:116
         — — Presence of witnesses
§ 3:117
§ 3:118
         — — Declaration and publication
§ 3:119
         ——Signature of witnesses
         — — —Timing
§ 3:120
§ 3:121
         — — — Placement
§ 3:122
         — —Compare: attestation clause
§ 3:123
         —Attestation of witnesses
§ 3:124
         — Proof by written affidavit
         ———Contents of 1406 affidavit
§ 3:125
§ 3:126
         ————Affidavit prepared at time of execution
§ 3:127
         ———Affidavit prepared subsequent to execution of
          will
§ 3:128
         ———Exceptions
§ 3:129
         ——Proof by examination of witness
§ 3:130
         — —When witness' testimony may be dispensed with
§ 3:131
         ———Reasons for dispensing with witness'
          testimony
§ 3:132
         — — Probate under Section 1405
§ 3:133
         ———One witness available; one witness missing
§ 3:134
         ————All witnesses missing
         ———Witnesses available, but forgetful or
§ 3:135
          conflicting
§ 3:136
         ————Situations not addressed by statute
§ 3:137
         — —Interested witnesses
§ 3:138
         Decree
§ 3:139
         —Requirements for decree
§ 3:140
         —Denial of decree
         —Simple decrees vs. "special" or "modified" decrees
§ 3:141
```

§ 3:142	— —Will construction
§ 3:143	——Probate of partial will or codicils
§ 3:144	— — Determine whether will was revoked
§ 3:145	——Alleged decedent
§ 3:146	Probate of lost, oral, and ancient wills and other
	extraordinary probate situations
$\S 3:147$	—Missing or destroyed wills
§ 3:148	— —Wills legitimately lost or destroyed
§ 3:149	———Original will has not been revoked
§ 3:150	———Original will was duly executed
§ 3:151	———Contents of the original will can be clearly
	and distinctly proven
§ 3:152	— —Wills "suspected" to be lost-proceedings to
_	compel production of a will
§ 3:153	— — — Who may petition
§ 3:154	— — — Who may be summoned
§ 3:155	———Scope of inquiry
§ 3:156	———Result of 1401 proceeding
§ 3:157	— — Wills existing but unavailable
§ 3:158	———Possible limitation on need for Section 1404(2)
§ 3:159	———Decree in missing will proceedings
§ 3:160	—Nuncupative and holographic wills
§ 3:161	——When allowed
§ 3:162	——Probate requirements
§ 3:163	—"Ancient" wills
§ 3:164	— —Illustrations
§ 3:165	—Probate of multiple original wills
§ 3:166	—Probate of will of person alleged to be deceased
§ 3:167	—Irrevocable mutual or joint wills
§ 3:168	In terrorem clauses and probate proceedings
§ 3:169	—Forged or revoked will
§ 3:170	—Infant or incompetent objectant
§ 3:171	—Jurisdiction of court
§ 3:172	—Information relevant to probate
§ 3:173	—Nonconsent to probate
$\S 3:174$	—Preliminary examinations
$\S 3:175$	—Will construction proceeding

IV. CONTESTED PROBATE AND CONSTRUCTION PROCEEDINGS

§ 3:176 Contested probate and construction proceedings

V. LETTERS

§ 3:177 Letters in general

Letters testamentary § 3:178 -Nomination under the will § 3:179 § 3:180 — — Compare: nomination outside of the will § 3:181 —Appearance § 3:182 —Eligibility § 3:183 ——"Exclusive" nature of statute — —Classes of ineligibility § 3:184 § 3:185 —Qualification § 3:186 --- Process of qualifying — Court intervention in the case of the dilatory § 3:187 petitioner § 3:188 —Renunciation of right to letters § 3:189 — — Voluntary renunciation § 3:190 — Renunciation by default ——Appointment of alternate fiduciary § 3:191 § 3:192 — Retraction of renunciation § 3:193 Supplementary letters and letters of administration, § 3:194 —Supplementary letters — Procedure § 3:195 § 3:196 ——Effect on existing letters § 3:197 —Letters of administration, c.t.a § 3:198 — Procedure § 3:199 ———Who may apply for letters ———Citation in administration, c.t.a. proceedings § 3:200 § 3:201 Preliminary letters testamentary § 3:202 —Authority and duties of a preliminary executor § 3:203 ——Prohibited powers —Procedure for obtaining preliminary letters § 3:204 —Term of preliminary executor's authority § 3:205 — —Termination for cause § 3:206

VI. ANCILLARY PROBATE

§ 3:207 Ancillary probate

VII. FORMS

§ 3:208 Form 3-1: Petition for probate (Official Form P-1)
 § 3:209 Form 3-2: Application for preliminary letters testamentary (Official Form P-2)
 § 3:210 Form 3-2.1: Petition for letters of administration c.t.a. after probate
 § 3:211 Form 3-3: Affidavit of attesting witness (Official Form P-3)

§ 3:212	Form	3-4: Waiver of process; consent to probate
	(Office	cial Form P-4)
§ 3:213	Form	3-5: Citation (Official Form P-5)
§ 3:214	Form	3-6: Notice of probate (Official Form P-6)
§ 3:215	Form	3-7: Affidavit of service of citation (Official n P-7)
§ 3:216		3-8: Application and order for dispensing with mony of attesting witness (Official Form P-8)
§ 3:217	Form	3-9: Affidavit proving handwriting (Official n P-9)
§ 3:218		3-10: Renunciation of nominated executor or trustee (Official Form P-10)
§ 3:219		3-11: Renunciation of letters of administration and waiver of process (Official Form P-11)
§ 3:220	Form	3-12: Affidavit of no debt (Official Form P-12)
§ 3:221	Form P-13	3-13: Affidavit of comparison (Official Form
§ 3:222	Form	3-14: Family tree (Official Form FT-1)
§ 3:223		3-15: Suggestions for conducting a diligent
§ 3:224	searc	3-15.1: Suggestions for conducting a diligent ch—Attachment A: sample letter request to master for change of address
§ 3:225	Form	3-16: Acknowledgment of Disclosure (Pursuant CPA Section 2307-a)
§ 3:226	Form	3-17: Putnam affidavit
§ 3:227	Form	3-18: SCPA Section 1406 affidavit
Appendix	3-1.	Filing Fees
Appendix	3-2.	Surrogate's Court Checklists

CHAPTER 4. ADMINISTRATION OF THE NON-CONTESTED ESTATE

I. MARSHALLING AND HOLDING ESTATE ASSETS

§ 4:1	Generally
_	· ·
$\S 4:2$	Determination of estate principal and income at the
	decedent's death
§ 4:3	—Timing of entitlement to an income interest
§ 4:4	-Property received by estate from decedent through
	will
\$4:5	——Specific bequests
§ 4:6	——Pecuniary bequests in trust
§ 4:7	——Assets distributed in kind
§ 4:8	——Pecuniary bequests not in trust

§ 4:9 --- Residue outright § 4:10 ——Residue passing to testamentary trust § 4:11 — —Estates vs. irrevocable trusts § 4:12 — —Estates vs. revocable trusts § 4:13 Equitable adjustments between income and principal § 4:14 -Warms case and its progeny § 4:15 ——Expansion of Warms? § 4:16 —Statutory provision § 4:17 Executor's obligations regarding the investment of estate assets § 4:18 —Duty to keep estate assets separate § 4:19 —Duty to invest assets § 4:20 ——History of general rule § 4:21 —Old prudent man statute § 4:22 ——Prudent Investor Rule § 4:23 — Not a guarantee of performance § 4:24 — — Required investment strategy § 4:25 ——Factors to be considered in selecting an investment § 4:26 — — Diversification requirement § 4:27 — Retention of assets § 4:28 — Types of permissible investments § 4:29 — —Other considerations § 4:30 ——Delegation of investment responsibility § 4:31 ——Special investment skills — —Overriding provision in will § 4:32 § 4:33 ——Special assets and considerations § 4:34 ——Marshalling of particular types of assets — —Handling of "special" assets § 4:35 § 4:36 ——Power to adjust § 4:37 Inventory of assets § 4:38 —Contents of inventory § 4:39 —Due date of inventory § 4:40 —Request for inventory § 4:41 —Payment of additional filing fee § 4:42 —Failure to file inventory

II. ACTIONS BY/AGAINST EXECUTORS AND ESTATES

§ 4:43 Generally

III. COORDINATION WITH NONPROBATE ASSETS

§ 4:44 General principles

211111111111111111111111111111111111111	
§ 4:45	—Recovery generally
§ 4:46	—Identifying sources and establishing contact
§ 4:47	—Executor must include an inventory
§ 4:48	—Demand for payment
§ 4:49	—Apportionment
§ 4:50	Revocable trust; pourover will
§ 4:51	—Other revocable trusts
§ 4:52	——Diligence to discover trusts
§ 4:53	——Significance of trusts during administration
§ 4:54	QTIP trust established by predeceased spouse
§ 4:55	—Estate tax valuation and payment
§ 4:56	—Administration
§ 4:57	—Tax allocation
§ 4:58	QTIP trust qualified for the GST exemption
$\S 4:59$	—Estate tax payment
§ 4:60	—Source of tax payment
§ 4:61	—Reverse QTIP election
§ 4:62	—Advising beneficiaries
§ 4:63	Retained life estate
§ 4:64	—Generally
§ 4:65	——Grantor dies before end of term
§ 4:66	——Grantor dies after end of term
§ 4:67	——Estate tax recovery
§ 4:68	—Particular vehicles; GRAT
§ 4:69	—Particular vehicles; QPRT
§ 4:70	Insurance generally
§ 4:71	Life insurance trusts
§ 4:72	Charitable remainder unitrusts
§ 4:73	Lifetime agreements restricting the executor
§ 4:74	Property subject to power of appointment
§ 4:75	—Whether property enters probate estate for
	administration
§ 4:76	—Administration concerns; special power
§ 4:77	——General power
§ 4:78	——Right of recovery
§ 4:79	Property passing to a non-citizen spouse
§ 4:80	—Surviving spouse's strategies
§ 4:81	——Spouse to acquire U.S. citizenship
§ 4:82	——QDOT trust to be established
§ 4:83	—Gift to spouse passes outright and spouse to fund
	QDOT
§ 4:84	——Importance of nine-month period
§ 4:85	——Reformation of invalid QDOT
§ 4:86	——Executor's tax planning
§ 4:87	Property passing from non-citizen decedent

IV. PRIORITIES

§ 4:88 Generally

V. NOTICE

§ 4:89 Generally

VI. INTERIM DISTRIBUTIONS TO ESTATE BENEFICIARIES

§ 4:90	Interim distributions to estate beneficiaries, generally
§ 4:91	Other factors in determining when to distribute estate assets
§ 4:92	—Duty of impartiality
§ 4:93	—Estate tax and other obligations
§ 4:94	—Alternate valuation election
§ 4:95	—Income tax considerations
§ 4:96	— Income in respect of a decedent
§ 4:97	——Distributable net income
§ 4:98	——Pecuniary bequests
§ 4:99	——Advancements
§ 4:100	 —Spousal rights and exempt property
§ 4:101	— Right to a share of estate income or statutory
	interest
§ 4:102	——Estate income

VII. SALES OF ASSETS

§ 4:103 ——Statutory interest

- § 4:104 Sales of assets, generally § 4:105 Prudent investor rule
- § 4:106 Factors and guidelines imposed by rule
- § 4:107 Conflict of interest
- § 4:108 Tax consequences
- § 4:109 Alternate valuation election

VIII. PRACTICE IN THE SURROGATE'S COURT IN UNCONTESTED ESTATES

- § 4:110 Uncontested proceedings
- § 4:111 —Governing statutes
- § 4:112 —Uniform Rules and forms
- § 4:113 —Court structure
- § 4:114 —Role of estate attorney generally
- § 4:115 —Form of filing
- § 4:116 —Substantive pleading requirements

§ 4:117	——New signature requirement
§ 4:118	——Compare: verification
§ 4:119	— —New form of attestation applicable to documents acknowledged on or after September 1, 1999
§ 4:120	—Calendaring uncontested proceedings
§ 4:121	—Reviewing the court file
§ 4:122	——Form 706
§ 4:123	——Copying or removing the court file
§ 4:124	Appearances
§ 4:125	Notices
§ 4:126	Executor's business judgment: the limits of court petitions
§ 4:127	Continuation of a business
§ 4:128	Dealing with court personnel in uncontested matters; role of the court
§ 4:129	—Role of the law assistant
§ 4:130	Conferences
§ 4:131	—Correspondence with court personnel
§ 4:132	—Gauging the progress of the decision in chambers
§ 4:133	—Role of the New York Law Journal
§ 4:134	—Role of the paralegal
§ 4:135	—Hearings without contest
§ 4:136	—Surrogate's discretion and preference
§ 4:137	—Use of Uniform Rules
§ 4:138	—Use of the telephone in communicating with court staff
§ 4:139	—Organization of court staff
§ 4:140	—Interaction with practitioners
§ 4:141	Fiduciary fees in probate
§ 4:142	—Application
§ 4:143	—Commission base generally
§ 4:144	— —Items not commissionable; specific bequests
§ 4:145	— —Time of valuation of assets for common purposes
§ 4:146	—Calculation of dollar value
§ 4:147	——Corpus
§ 4:148	——Income
§ 4:149	—Receiving vs. paying out commissions
§ 4:150	—Successor fiduciary
§ 4:151	Valuation for commission purposes; gross value
§ 4:152	—Time of calculation of gross value
§ 4:153	—Multiple commissions limitation; estates
§ 4:154	——Gross estate limitation; estates of \$300,000 or
~	more
§ 4:155	——Estates below \$300,000

— — Multiple fiduciaries acting on or after September § 4:156 1, 1993 § 4:157 —Special addition to commissions § 4:158 —Time of payment of commissions — — With court approval § 4:159 — — Without court approval § 4:160 § 4:161 — —Bond on court approval -Rates; bifurcation § 4:162 § 4:163 — Current law ——Summary § 4:164 § 4:165 — Exception; corporate fiduciaries —What commissions do not cover § 4:166 — —What the fiduciary must absorb § 4:167 § 4:168 — Ordinary travel expenses § 4:169 — Extraordinary travel — Ordinary travel anticipated by testator § 4:170 § 4:171 —Shipping costs Attorney's fees in probate § 4:172

IX. ROLE OF GUARDIAN AD LITEM IN UNCONTESTED ESTATES

§ 4:173 When appointment of guardian *ad litem* is necessary or advisable

X. DRAFTSMAN AS BENEFICIARY OR FIDUCIARY

§ 4:174 Generally § 4:175 Ethical issues § 4:176 -Bequests § 4:177 -Sanctions § 4:178 Putnam rule § 4:179 -More recent cases § 4:180 —Question on probate petition § 4:181 Attorney as fiduciary § 4:182 —Undue influence in naming the attorney —Attorney's fees and commissions § 4:183 § 4:184 — New statutory rule (SCPA § 2307-a) § 4:185 ——Application of statute to pre-1996 wills

XI. SPECIFIC ASSETS

- § 4:186 Copyright vs. rights of publicity§ 4:187 Collections§ 4:188 Auctions
- § 4:189 Dealing with ordinary tangibles

§ 4:190	Required diligence; boxes, papers, and junk
§ 4:191	Listing real estate for sale
§ 4:192	Exclusive vs. non-exclusive listing
§ 4:193	Memorial gifts
§ 4:194	Life insurance on the life of another
§ 4:195	Administering large blocks of stock; investment
	counsel
§ 4:196	—Blockage discount
§ 4:197	—Retention
§ 4:198	-Identity of decedent: SEC administration and
	reporting requirements
§ 4:199	—Identity of executor
§ 4:200	Administering S corporation stock

XII. CLOSING THE ESTATE

- § 4:201 Generally
- § 4:202 Setting aside reserves
- § 4:203 —Contingent or unliquidated claims
- § 4:204 —Estate taxes
- § 4:205 —Accountings
- § 4:206 —Informal accountings with receipt and release agreements
- § 4:207 ——Beneficiaries under a disability
- § 4:208 ——Enforceability of receipt and release agreements
- § 4:209 —Court approval of informal account
- § 4:210 —Judicial accounting
- § 4:211 —Role of Attorney General

XIII. ADMINISTRATION CHECKLIST

§ 4:212 Generally

XIV. FORMS

- § 4:213 Form 4-1: List of assets: inventory (Rule Section 207.20(a))
- § 4:214 Form 4-2: Notice of appearance and authorization

Appendix 4-1. Estate administration time table

CHAPTER 5. MISCELLANEOUS PROCEEDINGS

I. COURT PROCEEDINGS UNDER THE DEED OF GUARDIANSHIP

§ 5:1 Introduction

	TRUSTS AND ESTATES TRACTICE IN THEW TO
§ 5:2	Execution and recordation
§ 5:3	Recordation after death of parent
§ 5:4	—Place of recordation
§ 5:5	—Three-month deadline for recordation
§ 5:6	—Qualification after recordation
§ 5:7	——Petition required
§ 5:8	——Renunciation
§ 5:9	Effect of deed during parent's life
§ 5:10	Appointment of third party as guardian
§ 5:11	Appointment of surviving parent
§ 5:12	—Where presumption fails
§ 5:13	—Weight of deed naming surviving parent
§ 5:14	Court involvement implementing the appointment
II. P	ERMANENT GUARDIANSHIPS FOR MINORS
§ 5:15	Introduction
§ 5:16	Jurisdiction
§ 5:17	While parents are living
§ 5:18	By petition
§ 5:19	—Petitioner
•	—Service
	—Temporary letters
§ 5:22	Necessary documents
§ 5:23	When hearing is required
§ 5:24	Relationship to the deed of guardianship
III. I	HEALTH CARE PROXIES
§ 5:25	Introduction
§ 5:26	Living will
§ 5:27	Health care proxy
§ 5:28	—Objection to commencement of agency
§ 5:29	—When agency terminates
§ 5:30	Special proceedings involving health care proxies
§ 5:31	—Grounds for removing an agent
§ 5:32	—Grounds for overriding an agent's decision
§ 5:33	—Who may bring proceeding
IV. T	TRUST REFORMATION AND REVOCATION
§ 5:34	Introduction
§ 5:35	Reformation during the grantor's life
§ 5:36	—Consent rights of beneficiaries cannot be delegated
§ 5:37	—Termination
§ 5:38	Reformation after the grantor's death

§ 5:39 —Who may bring proceeding § 5:40 —Intent of grantor § 5:41 -Governing law § 5:42 —Termination § 5:43 Reformation of charitable trusts § 5:44 —Who may seek —Conditions for applying doctrine of cy pres § 5:45 § 5:46 —Termination

V. STANDBY GUARDIANSHIPS

- § 5:47 Introduction
- § 5:48 How to appoint a standby guardian
- § 5:49 —Appointment by petition
- § 5:50 —Separate petition for each child
- § 5:51 —Contents of petition
- § 5:52 Designation of standby guardian (SCPA § 1726(4))
- § 5:53 —Authorizes standby guardian to petition
- § 5:54 —States effective date of standby guardian's authority
- § 5:55 Notice provisions
- § 5:56 Requirements
- § 5:57 Court approval of standby guardian
- § 5:58 —Child abuse check
- § 5:59 —To receive letters of guardianship
- § 5:60 Commencing authority of standby guardian
- § 5:61 —Decree issued upon petition
- § 5:62 —Documents to be filed with court
- § 5:63 No divestiture of rights
- § 5:64 SCPA Article 17

VI. APPOINTMENT OF AND ROLE OF THE GUARDIAN AD LITEM

- § 5:65 Introduction
- § 5:66 Qualification
- § 5:67 Need
- § 5:68 Appointment of guardian ad litem
- § 5:69 —Court has the authority to appoint a guardian *ad* litem
- § 5:70 —Actual appointment of the guardian *ad litem* can occur in two ways
- § 5:71 ——By nomination
- § 5:72 ——Attorney typically nominated
- § 5:73 ——Conflict of interest
- § 5:74 —Petition for infant over the age of fourteen

Trusts and Estates Practice in New York

	TROUBLE TRUE TO THE TOTAL TOTA
§ 5:75	—Instances when a person under a disability does not need a guardian <i>ad litem</i>
§ 5:76	Service of process
§ 5:77	Duties of the guardian <i>ad litem</i>
§ 5:78	—In a probate proceeding
§ 5:79	—Hiring medical expert
§ 5:80	—In an accounting proceeding
§ 5:81	—If the disabled person is the decedent's spouse
§ 5:82	—If the ward's property is to be sold
§ 5:83	—If the ward is an afterborn child
§ 5:84	—If the ward is a prisoner
§ 5:85	Role of guardian ad litem as officer of the court
§ 5:86	Compensation of guardian ad litem
§ 5:87	—Factors
§ 5:88	—Allocation of fees
§ 5:89	Failure to appoint guardian ad litem
§ 5:90	Removal of a guardian ad litem
§ 5:91	Compare guardian appointed pursuant to CPLR
VII.	GUARDIANSHIPS AND CONSERVATORSHIPS
	COMPARED
§ 5:92	Actions in conservatorship Article 81 proceedings
§ 5:93	SCPA Article 17A
§ 5:94	Determining whether a guardian is necessary
§ 5:95	—Additional considerations
§ 5:96	Determination of incapacity
VIII.	CLAIMING THE ELECTIVE SHARE
§ 5:97	Introduction
§ 5:98	Making the election; notice
§ 5:99	Petition
§ 5:100	Jurisdiction
§ 5:101	
§ 5:102	Waiver or release of right to elective share
IX. I	REOPENING AND VACATING PROBATE
§ 5:103	Introduction
§ 5:104	General requirements
§ 5:105	Court's power
§ 5:106	Bringing forward subsequent wills
$\S 5:107$	—Laches
§ 5:108	—Example: In re Cohen's Estate

Change in law

Vacating probate on the basis of fraud, overreaching, misrepresentation, misconduct, newly-discovered evidence or other sufficient cause

X. STANDING OF BENEFICIARY TO SUE FOR MALPRACTICE

§ 5:110 Introduction § 5:111 Lack of privity § 5:112 Other grounds EPTL survival of decedent's personal claim required § 5:113 § 5:114

XI. **ACTIONS IN CONSERVATORSHIP ARTICLE 81 PROCEEDINGS**

§ 5:115 Introduction § 5:116 Appointment of guardian; "a.i.p." defined § 5:117 —Determining whether to appoint a guardian § 5:118 —Once a person is determined to be incapacitated § 5:119 Jurisdiction: MHL § 81.04 § 5:120 Petitions § 5:121 -Who may petition —Specific information required § 5:122 § 5:123 —Physician's affidavits —Petitioner has burden of proof § 5:124 § 5:125 Notice § 5:126 Court evaluator § 5:127 —Duties of the court evaluator § 5:128 —Authority of the court evaluator § 5:129 Appointment of counsel to represent a.i.p § 5:130 —A.i.p.'s right to counsel § 5:131 —Duties of the a.i.p.'s counsel § 5:132 —Legal fees § 5:133 —Counsel as alternative to court evaluator § 5:134 Hearing § 5:135 Appointment of guardian —Court-appointed guardian § 5:136 —Conflicts of interest § 5:137 § 5:138 Authority of guardian § 5:139 —Medical/psychiatric treatment § 5:140 —Additional powers § 5:141 —Powers exercisable under revocable trust § 5:142 —Proceedings upon death of incapacitated person § 5:143 SCPA Article 17A

XII. MOVING TRUSTS

- § 5:144 Judicial discretion
- § 5:145 —Transfer to a different jurisdiction
- § 5:146 —Transfer to another state
- § 5:147 ——Ascertaining intent of donor
- § 5:148 ——Importance of beneficiary location
- § 5:149 Prohibiting transfer of situs
- § 5:150 Out-of-state fiduciary: New York law applicable
- § 5:151 Reciprocity
- § 5:152 Foreign jurisdiction
- § 5:153 Court order from transfer state
- § 5:154 Transfer by invasion of trust principal

XIII. GENERAL APPLICABILITY OF THE CPLR

- § 5:155 Introduction
- § 5:156 Example of SCPA given priority
- § 5:157 Examples of CPLR given priority

XIV. SUITS BY AND AGAINST EXECUTORS AND OTHER FIDUCIARIES

- § 5:158 Introduction
- § 5:159 —Venue
- § 5:160 —Subject matter jurisdiction
- § 5:161 —Personal jurisdiction
- § 5:162 —Procedure
- § 5:163 Suits by executors and other fiduciaries
- § 5:164 —Hearing stage
- § 5:165 —Claims against a co-fiduciary
- § 5:166 —Burden of proof
- § 5:167 Actions that survive a decedent
- § 5:168 —Suits in tort
- § 5:169 —Stockholder derivative suits
- § 5:170 —Actions to preserve the estate
- § 5:171 —Malpractice
- § 5:172 Suits against executors and other fiduciaries
- § 5:173 —Claims by creditors
- § 5:174 —Claims by legatees and beneficiaries
- § 5:175 —Fiduciary's liability
- § 5:176 Accounting procedures
- § 5:177 —Statute of limitations
- § 5:178 ——Illustrations
- § 5:179 —Imprudent investing
- § 5:180 —Breach of fiduciary duty

- § 5:181 —Damages relating to lack of diversification § 5:182 Relief against a fiduciary
- § 5:183 —Who may sue
- § 5:184 —Standing requirements
- § 5:185 —Specific proceedings for relief
- § 5:186 —Early distribution favored

XV. STANDING TO PETITION

- § 5:187 Petitions for compulsory accounting
- § 5:188 Creditor
- § 5:189 Person interested
- § 5:190 —Illustrations
- § 5:191 Guardian
- § 5:192 Co-fiduciary
- § 5:193 Voluntary account

XVI. WILL CONTESTS: FILING OBJECTIONS TO PROBATE

- § 5:194 Introduction
- § 5:195 —Pecuniary interest
- § 5:196 —Interest in commission
- § 5:197 Filing
- § 5:198 —Timeliness of objection
- § 5:199 Notice
- § 5:200 —Failure to give notice
- § 5:201 —Change from notice to citation for contests filed on or after January 1, 1998
- § 5:202 Grounds for contesting a will
- § 5:203 —Lack of testamentary capacity
- § 5:204 ——Burden of proof
- § 5:205 —Effect of standard of capacity on availability of jury trial in contest
- § 5:206 —Undue influence and constructive fraud
- § 5:207 ——Sufficiency of evidence
- § 5:208 —Due execution
- § 5:209 —Physical revocation
- § 5:210 Summary judgment
- § 5:211 No-contest clauses
- § 5:212 Weakening of no-contest clauses
- § 5:213 Will contests generally
- § 5:214 Section 1404 of SCPA
- § 5:215 —Will lacks a no-contest clause
- § 5:216 ——Five-year window

Trusts and Estates Practice in New York

§ 5:217	——Illustrations of special circumstances
§ 5:218	——Notice
§ 5:219	— —Witnesses not signatories
§ 5:220	—Will has a no-contest clause
§ 5:221	—Presence of third parties at examination; conflict in authority
§ 5:222	Importance of solemn form of probate
§ 5:223	Effect of valid revocation
§ 5:224	Invalid revocation
XVIII.	ACTIONS UNDER DURABLE POWERS OF ATTORNEY
§ 5:225	Introduction
§ 5:226	Incapacity at the time of creation of power; statutory authority
S F.007	Walid marrow of attacks are inhousest marrow

- Valid power of attorney: inherent power § 5:227
- § 5:228 —Court's power to revoke power of attorney
- § 5:229 —Court may appoint guardian chosen by alleged incapacitated person

XIX. HOW TO KNOW WHAT'S HAPPENING IF YOU ARE NOT THE FIDUCIARY; FORCING **NOTICES**

How to know what's happening if you are not the fiduciary; forcing notices

XX. STATUS REPORT

§ 5:231 Rule 207.42 status report

XXI. FORMS

§ 5:232	Form 5-1: Deed of surviving parent appointing
	guardian for child
§ 5:233	Form 5-2: Health care proxy
§ 5:234	Form 5-3: Petition for termination of testamentary
	charitable trust under \$100,000 because
	uneconomical (EPTL Sections 7-1.9, 8-1.1)
§ 5:235	Form 5-4: Designation of standby guardian
§ 5:236	Form 5-5: Notice of election by surviving spouse
§ 5:237	Form 5-6: Petition—Appointment of guardian
§ 5:238	Form 5-6.1: Petition—Person only
§ 5:239	Form 5-7: Petition—Property only
§ 5:240	Form 5-8: Petition—Standby guardianship
§ 5:241	Form 5-9: Petition—Appointment/Confirmation
	standby guardianship

- $\S 5:242$ Form 5-10: Decree appointing guardian
- § 5:243 Form 5-11: Verified objections to probate

CHAPTER 6. SPOUSAL RIGHTS

I. INTRODUCTION TO THE ELECTIVE SHARE LAW

- § 6:1 Governing law
- § 6:2 Brief history
- § 6:3 —First elective share law
- § 6:4 —Introduction of the concept of testamentary substitutes
- § 6:5 —Elective share law to be liberally construed
- § 6:6 —Use of trust to satisfy elective share
- § 6:7 —1992 Legislation
- § 6:8 —Application of the 1992 legislation

II. QUALIFICATION AS A SURVIVING SPOUSE

- § 6:9 Governing law
- § 6:10 Disqualification of a surviving spouse
- § 6:11 —Termination of marriage valid under New York law
- § 6:12 —Marriage was void
- § 6:13 —Termination of marriage not valid under New York law but procured by living spouse
- § 6:14 ——Compare
- § 6:15 —Separation valid under New York law
- § 6:16 —Abandonment by living spouse
- § 6:17 Other grounds for divorce do not disqualify spouse
- § 6:18 ——Elements of abandonment
- § 6:19 ——Compare
- § 6:20 ——Constructive abandonment
- § 6:21 —Failure to support spouse
- § 6:22 Application to the estates of certain non-domiciliary decedents
- § 6:23 —Elective share law may not be used to deprive spouse of rights
- § 6:24 —New York domiciliary may not defeat elective share rights by electing probate in another state
- § 6:25 —New York elective share law does not apply to former New York domiciliary
- § 6:26 No rights to survivor of common law marriage

III. POST-1992 RIGHT OF ELECTION

§ 6:27 Effective date

§ 6:28 Right of election is personal to surviving spouse § 6:29 —Persons authorized to elect on behalf of surviving § 6:30 —Persons not authorized to elect on behalf of a surviving spouse § 6:31 —Elective share amount -Minimum elective share amount § 6:32 § 6:33 — — Decedent's issue irrelevant ——Resources of survivor irrelevant § 6:34 —Meaning of pecuniary amount § 6:35 § 6:36 —Computation of elective share § 6:37 — — Determination of decedent's estate § 6:38 ——Compare: gross estate § 6:39 — —Compare: exempt property § 6:40 ——Determination of net estate § 6:41 — — Determination of elective share ——Determination of net elective share § 6:42 § 6:43 —Intestate property included in net estate § 6:44 -Effect of exercise of right of election § 6:45 —Property located in jurisdictions outside of New York § 6:46 —Examples of computation of net estate

IV. TESTAMENTARY SUBSTITUTES

§ 6:47 Definition § 6:48 Timing of transactions that are testamentary substitutes § 6:49 Categories of testamentary substitutes § 6:50 —Gifts causa mortis § 6:51 —Gifts within one year of death § 6:52 —Totten trusts § 6:53 —Joint bank accounts with right of survivorship — —Burden of proof § 6:54 § 6:55 — —Timing of deposits to joint accounts --- Revocability of deposits in joint bank accounts § 6:56 — —Convenience accounts § 6:57 — Tenancies by the entirety and joint tenancies with § 6:58 right of survivorship § 6:59 —Transfers in which decedent retained certain specified powers — —Life insurance § 6:60 - Shareholders' agreements § 6:61 § 6:62 —Pension-type assets § 6:63 —Presently exercisable general power of appointment § 6:64 —Transfer of a security

V. WAIVER OF RIGHT OF ELECTION

- § 6:65 In general
- § 6:66 Waiver must be signed and acknowledged
- § 6:67 Effectiveness of waiver
- § 6:68 —Waiver valid if executed before or after marriage
- § 6:69 —Waiver valid regardless of date of execution
- § 6:70 —Waiver valid whether executed by one or both spouses
- § 6:71 —Waiver valid regardless of consideration
- § 6:72 —Waiver valid whether absolute or conditional
- § 6:73 —Pension waivers recognized as valid

VI. CONTRIBUTIONS FROM THIRD PARTIES

§ 6:74 In General

VII. FUNDING OF THE ELECTIVE SHARE

§ 6:75 In General

VIII. PROCEDURE FOR EXERCISE OF RIGHT OF ELECTION

- § 6:76 Time period within which notice of an election must be made
- § 6:77 Service of notice
- § 6:78 Form of notice
- § 6:79 Relief from default in timely filing

IX. COMPETING RIGHTS OF FORMER SPOUSE AND CURRENT SPOUSE

- § 6:80 Generally
- § 6:81 Case law
- § 6:82 —Joint wills
- § 6:83 —Separation agreements
- § 6:84 Reconciling the cases
- § 6:85 —Joint wills
- § 6:86 —Separation agreements
- § 6:87 Protection of first spouse
- § 6:88 —Life insurance
- § 6:89 —QDROs
- § 6:90 Protection against a surviving spouse's future spouses

X. RIGHTS OF SURVIVING SPOUSES IN ADDITION TO RIGHT OF ELECTION

§ 6:91 Rights in intestacy

- § 6:92 Exemption for benefit of family§ 6:93 Miscellaneous other rights
- § 6:94 —Voluntary administrator
- § 6:95 —Wrongful death award
- § 6:96 —Homestead exemption

XI. LEGAL REPRESENTATION OF SPOUSES: TAX PLANNING AND ETHICAL CONSIDERATIONS

- § 6:97 Planning for the elective share
- § 6:98 —QTIP and QDOT trusts
- § 6:99 ——Marital deduction
- $\S 6:100$ ——QTIP trusts
- $\S 6:101$ ——QDOT trusts
- § 6:102 ——Advantage of trusts
- § 6:103 ——Interplay between trusts and the elective share
- § 6:104 —Current law; use of waivers to provide for trusts
- § 6:105 ——Terms of waiver
- § 6:106 ——Enforceability of waiver
- § 6:107 ——Possible need for separate counsel
- § 6:108 —Impact of elective share on use of credit shelter
- § 6:109 —Planning to minimize the elective share
- § 6:110 ——Allocation of taxes
- § 6:111 ——Premarital transfers
- § 6:112 ——Life insurance
- § 6:113 ——Beneficiary designation on pension plans
- § 6:114 ——Lifetime gifts
- § 6:115 ——Protection of closely held business interests
- § 6:116 —Use of trust with waiver
- § 6:117 ——Buy-sell agreements
- § 6:118 ——Voting trusts
- $\S 6:119$ ——Limited partnerships
- § 6:120 ——Agreement to have marital waivers
- § 6:121 Ethical issues in representing spouses
- § 6:122 —Estate planning generally
- § 6:123 —Planning for the elective share
- § 6:124 —Ethical guidance
- § 6:125 Joint representation generally
- § 6:126 ——Consultation and consent
- § 6:127 ——Confidentiality
- § 6:128 —Engagement letter
- § 6:129 —Attorney-client fee dispute resolution program

XII. FORMS

§ 6:130 Form 6-1: Notice of election by surviving spouse

- § 6:131 Form 6-2: Qualified domestic relations order
- § 6:132 Form 6-3: Mutual waiver of right to share of estate
- § 6:133 Form 6-4: Mutual waiver of right to outright share of estate
- § 6:134 Form 6-5: Engagement letter

CHAPTER 7. INTESTACY

I. INTRODUCTION TO INTESTACY

A. DEFINITIONS

- § 7:1 Intestate
- § 7:2 —Illustrations
- § 7:3 Distributee

B. GOVERNING LAW

§ 7:4 Sections 4-1.1 to 4-1.6 of the EPTL

C. ADMINISTRATION OF AN INTESTATE ESTATE-RELATED LAWS

- § 7:5 Appointment of an administrator
- § 7:6 Ancillary administration

D. BRIEF HISTORY

- § 7:7 Derivation of current law
- § 7:8 1992 legislation
- § 7:9 Application of the 1992 legislation

E. PROPERTY NOT SUBJECT TO THE INTESTACY RULES

- § 7:10 Non-probate property
- § 7:11 —Ineffective disposition of non-probate assets
- § 7:12 ——Totten trusts
- § 7:13 ——Ineffective beneficiary designation
- § 7:14 Family exemption

F. CALCULATION OF THE INTESTATE ESTATE

- § 7:15 In general
- § 7:16 Family exemption
- § 7:17 Deduction of debts, administration expenses and funeral expenses
- § 7:18 Estate taxes

§ 7:19 Advancements

II. INTESTATE DESCENT AND DISTRIBUTION

A. DEFINITIONS

§ 7:20	Issue "by representation"	
§ 7:21	"Issue"	
§ 7:22	Issue take <i>per capita</i> at each generation	
§ 7:23	Compare: per stirpes	
\$ 7.91	Illustrations	

§ 7:25 Effect of disclaimer on distribution

B. DISTRIBUTIVE SCHEME UNDER SECTION 4-1 1 OF THE EPTL.

	4-1.1 OF THE EPIL
§ 7:26	In general
§ 7:27	Decedent is survived by a spouse and issue
§ 7:28	Compare: distribution to the surviving spouse differs from pre-1992 rules
§ 7:29	Decedent is survived by a spouse and no issue
§ 7:30	Compare: distribution differs from pre-1992 rules
§ 7:31	Decedent is survived by issue but no spouse
§ 7:32	Decedent is survived by either or both parents and no spouse or issue
§ 7:33	Decedent is survived by the issue of his parents and no spouse, issue or parents
§ 7:34	Decedent is survived by at least one grandparent or a child or grandchild of a grandparent and no spouse, issue, parents or issue of parents
§ 7:35	Decedent is survived by at least one great-grandchild of grandparents and no spouse, issue, parents, issue of parents, grandparents or children or grandchildren of grandparents
§ 7:36	Escheat
§ 7:37	Property located in New York never benefits another state or a foreign jurisdiction

III. ELIGIBLE DISTRIBUTEES

§ 7:38	In general
§ 7:39	Date upon which distributees are determined
§ 7:40	Posthumous distributees
§ 7:41	Half-blood relatives
§ 7:42	Adopted distributees
§ 7:43	-Adopted-out child inherits from his adoptive parent
	and not his natural parents

- § 7:44 —Adopted-out child's right of inheritance extends to his distributees
 § 7:45 —Special rules apply when a child is adopted by the
 - spouse of a natural or adoptive parent
- § 7:46 —Special rules apply when a child is adopted by a family member
- § 7:47 —Adult adoption
- § 7:48 Non-marital children
- § 7:49 —Non-marital child is always a distributee of his natural mother
- § 7:50 —Subsequent marriage by parents of a non-marital child
- § 7:51 —Inheritance rights of a non-marital child with respect to his natural father or non-gestating intended parent
- § 7:52 ——Order of filiation or parentage
- § 7:53 ——Acknowledgment of parentage pursuant to Public Health Law
- § 7:54 ——Execution of formal instrument acknowledging parentage
- § 7:55 —Inheritance rights of a non-marital child with respect to his natural father—Clear and convincing evidence of paternity and acknowledgment of child by father
- § 7:56 ——Blood genetic marker test
- § 7:57 ——Existence of a child support agreement does not make a non-marital child a distributee of his natural father
- § 7:58 Missing distributees

IV. DISQUALIFICATION OF DISTRIBUTEES

- § 7:59 In general
- § 7:60 Disqualification of a parent to take an intestate share
- $\S~7:61$ —Abandonment of or failure to support child under age 21
- § 7:62 ——Failure to support
- § 7:63 ——Abandonment
- § 7:64 ——Fraudulent adoption
- § 7:65 ——Resumption of parental duties
- § 7:66 ——Implementation of intestate distribution scheme when Section 4-1.4 applies
- § 7:67 No effect on child's right to inherit
- § 7:68 —Subject to Social Services Law § 384-b proceeding
- § 7:69 Disqualification of spouse to take an intestate share
- § 7:70 —Invalid marriage

§ 7:71	—Valid divorce or annulment
§ 7:72	—Surviving spouse obtained invalid divorce or
	annulment
§ 7:73	—Valid decree of separation
§ 7:74	—Abandonment of deceased spouse
§ 7:75	—Spouse failed or refused to support deceased spouse
§ 7:76	Killer of the decedent
§ 7:77	—Intentional vs. unintentional homicides
§ 7:78	—Absence of criminal charges
§ 7:79	—Special statutory provision for joint tenants in bank
	accounts
§ 7:80	Waiver of an intestate share
§ 7:81	Disclaimer of an intestate share
§ 7:82	—Post-mortem tax planning

V. INTRA-FAMILY SETTLEMENTS

Ş	7:83	In	general
2	1.00	111	Scholar

§ 1:83 In gen	erai
Appendix 7-1.	Former EPTL Section 4-1.1
Appendix 7-2.	Diagrams illustrating the operation of EPTL Section 4-1.1
Appendix 7-3.	Diagram illustrating the effect of disclaimer on intestate distribution
Appendix 7-4.	Diagram illustrating final eligible distributees
Appendix 7-5.	Diagram illustrating the effect of unborn children on intestate distribution

Volume E

CHAPTER 8. CLAIMS

I. DUTY TO PAY CLAIMS

§ 8:1	Fiduciary's obligation
§ 8:2	—Statutory regulation
§ 8:3	—Types of claims
§ 8:4	——Identifying claims
§ 8:5	 —Claims exempt from fiduciary liability
§ 8:6	Fiduciary's safe harbor against personal liability
§ 8:7	—Claims period
§ 8:8	—Limits to safe harbor
§ 8:9	—Notice by publication
§ 8:10	—Effect of running out claims period

II. PROCEDURE FOR PRESENTING CLAIMS

§ 8:11 § 8:12 Form for filing claims under Article 18 § 8:13 Exception § 8:14 Service § 8:15 Tolling Statute of Limitations § 8:16 Proving claims —Third-party objections to claims § 8:17 § 8:18 —Fiduciary liability for handling of claims § 8:19 Personal claims by fiduciary § 8:20 Action upon claims § 8:21 —Claims allowed § 8:22 —Claims rejected § 8:23 —Establishing the validity of claims rejected § 8:24 —Amending claims —Contingent or unliquidated claims § 8:25 —Compromising claims § 8:26 § 8:27 —Declaratory relief

III. PRIORITIES

—Limitations

—Order of surrender

—Exception: federal transfer tax

§ 8:48 § 8:49

§ 8:50

§ 8:28 In general § 8:29 No bankruptcy protection Priority of debts § 8:30 § 8:31 —Administration expenses § 8:32 —Funeral expenses § 8:33 —Federal and state debts § 8:34 —Property taxes assessed prior to the decedent's death § 8:35 —Judgments and decrees § 8:36 —All secured claims § 8:37 —All other debts, claims and demands § 8:38 Spousal elective share § 8:39 —Net estate: computing the elective share § 8:40 -Exempt property § 8:41 —Establishing status as surviving spouse § 8:42 —Objections to elective share § 8:43 —Effect of election on other bequests § 8:44 Medicaid estate claims § 8:45 Priority of assets used to pay estate obligations § 8:46 Insolvent estates: interests abated Refunds by transferees on behalf of late claimants § 8:47

IV. EXEMPTING A DECEDENT'S PROPERTY FROM CLAIMS

§ 8:51 In general § 8:52 Family property exemptions Life insurance § 8:53 § 8:54 —Irrevocable trust § 8:55 Pensions and annuities § 8:56 —Totten trust accounts § 8:57 —Joint accounts § 8:58 —Article 18 limitation § 8:59 —Revocable administrative trust as plan beneficiary § 8:60 — —EPTL exemption ——CPLR exemption § 8:61 —Qualified state tuition programs § 8:62

V. CLAIMS BY INFANTS AND DOMESTIC PARTNERS

§ 8:65 Claims by infants

— —Operation

§ 8:66 Claims by domestic partners

§ 8:64 ——Exemption from creditors

VI. FORMS

§ 8:63

- § 8:67 Form 8-1 Notice of claim against the estate § 8:68 Form 8-2: Claimant's affidavit
- § 8:69 Form 8-3: Petition for compulsory accounting
- § 8:70 Form 8-4: Citation for compulsory accounting
- § 8:71 Form 8-5: Order for compulsory accounting
- § 8:72 Form 8-6: Petition by fiduciary under SCPA § 1809 to determine validity of claim
- § 8:73 Form 8-7: Notice of election by surviving spouse

CHAPTER 9. FEDERAL ESTATE TAX

I. FEDERAL ESTATE TAX FRAMEWORK

- § 9:1 Historical overview
- § 9:2 —Pre-1977 system
- § 9:3 —Post-1976 system
- § 9:4 Unified system
- § 9:5 Rate schedule
- § 9:6 —Annual exclusion of \$18,000
- § 9:7 —Filing of federal estate tax return

211111111111111111111111111111111111111	
§ 9:8	Payment of tax
§ 9:9	Determine gross estate
§ 9:10	—Calculate taxable estate
§ 9:11	—Apply unified tax rates
§ 9:12	——Adjusted taxable gifts
§ 9:13	——Revaluation of lifetime gifts
§ 9:14	——Similar provision for gifts subject to valuation
0	rules of Chapter 14 of the Code
§ 9:15	——IRS provision prior to enactment
§ 9:16	—Calculate net estate tax
§ 9:17	Gross estate
§ 9:18	—Broad definition of property owned
§ 9:19	—Role of federal and state laws
§ 9:20	—Property passing by dower or curtesy (Section
	2034)
§ 9:21	—Transfers within three years of death (Section
	2035)
§ 9:22	— —Inclusion of certain retained interests
§ 9:23	——Inclusion of certain gift taxes
§ 9:24	— —Effect of retained interest rule
§ 9:25	——Revocable trust distributions
§ 9:26	——Impact of three-year rule on certain special Code
0 0 0 -	provisions
§ 9:27	—Transfers with retained life estate (Section 2036)
§ 9:28	— —Voting of controlled corporation's stock
§ 9:29	——Length of retained term
§ 9:30	— —Use for decedent's legal obligation or benefit
§ 9:31	——Right to designate possession or enjoyment
§ 9:32	——Trustee removal power
§ 9:33	——Special valuation rules
§ 9:34	—Transfers taking effect at death (Section 2037)
§ 9:35	— — Definition of reversionary interest
§ 9:36	— — Valuation of reversionary interest
§ 9:37	——Power of disposition
§ 9:38	——Pre-October 8, 1949 transfers
§ 9:39	— — Where survival of decedent is not required
§ 9:40	——Examples
§ 9:41	—Revocable transfers (Section 2038)
§ 9:42	——Requirement of notice or expiration of term
§ 9:43	——Power requiring consent of interested parties
§ 9:44	——Powers held by other persons
§ 9:45	——Certain features of power are irrelevant
§ 9:46	— —Transfers to minors
§ 9:47	——Relinquishment of power
§ 9:48	— Pre-June 22, 1936 transfers

```
§ 9:49
         —Annuities (Section 2039)
§ 9:50
         — Definition of annuity or other payment
§ 9:51
         — —When deemed "payable" to decedent
         § 9:52
§ 9:53
         — —Insurance proceeds
         -Repeal of Section 4980A tax
§ 9:54
         —Joint interests (Section 2040)
§ 9:55
§ 9:56
         —Amount includible
         —Presumption of full inclusion
§ 9:57
§ 9:58
         —Qualified joint interest with spouse
         Powers of appointment (Section 2041)
§ 9:59
§ 9:60
         —Requirement of notice, expiration of term or
          occurrence of event
§ 9:61
         —Exercise of power to create another power
§ 9:62
         —Power to dispose of property
         —Definition of general power of appointment
§ 9:63
§ 9:64
         —Exceptions
         —Substantial interest
§ 9:65
§ 9:66
         —Adverse interest
§ 9:67
         —Broad interpretation of "power"
§ 9:68
         —Powers exercisable to pay liabilities or discharge
          obligations of decedent
§ 9:69
         -Powers limited by an ascertainable standard
§ 9:70
         —Power to remove trustee
         —Comparison
§ 9:71
§ 9:72
         —Exercised or released power
§ 9:73
         —Disclaimed power of appointment
§ 9:74
         —Lapse may be deemed to be release
§ 9:75
         —When power is exercised
§ 9:76
         —Power over certain assets or property interests
§ 9:77
         —When power is deemed created
§ 9:78
         Proceeds of life insurance (Section 2042)
         —Definition of insurance
§ 9:79
§ 9:80
         —Includible proceeds
§ 9:81
         —Incidents of ownership
§ 9:82
         —Insurance held in trust
§ 9:83
         —Insurance for certain corporations
         —Reversionary interests
§ 9:84
         —Amount includible
§ 9:85
         —Transfer within three years
§ 9:86
         Transfers for insufficient consideration (Section 2043)
§ 9:87
§ 9:88
         —Relinquishment of statutory marital rights
§ 9:89
         —Section 2526(1) transfers
§ 9:90
         Certain property for which marital deduction was
          previously allowed (Section 2044)
```

TABLE OF CONTENTS

§ 9:91	—Rebuttable presumption of full inclusion
§ 9:92	—Amount includible
§ 9:93	—Gift tax exclusion amount
§ 9:94	—Severed QTIP trust
§ 9:95	Taxable estate
§ 9:96	—Expenses, indebtedness, and taxes (Section 2053)
§ 9:97	— —Funeral expenses
§ 9:98	— —Administration expenses
§ 9:99	— Executors' commissions
§ 9:100	——Attorney's fees
§ 9:101	——Special circumstances
§ 9:102	— Reasonableness of attorney's fees under New
	York law
§ 9:103	 — Miscellaneous administration expenses
§ 9:104	——Expenses of sale
§ 9:105	——Interest on funds borrowed to pay estate taxes
§ 9:106	——Interest when time to pay tax is extended
§ 9:107	——Interest on tax deficiency or late payment of tax
§ 9:108	—Claims against estate
§ 9:109	——Contingent or uncertain claims
§ 9:110	 — Deduction founded upon promise or agreement
§ 9:111	— — Medical expenses
§ 9:112	——Taxes
§ 9:113	——Property taxes
§ 9:114	—Estate taxes
§ 9:115	——Gift taxes
§ 9:116	— —Income taxes
§ 9:117	——Claims relating to Section 2044 property
§ 9:118	— — Mortgage or other indebtedness
§ 9:119	——Expenses of administering property not subject
	to claims
§ 9:120	——Limitation on deduction to amount allowed by
	local law
§ 9:121	——Deduction based upon estimates
§ 9:122	—Losses (Section 2054)
§ 9:123	—Transfers for public, charitable and religious uses
0.0.10.1	(Section 2055)
§ 9:124	——Conditional bequests
§ 9:125	——Charitable bequests by reason of disclaimers
§ 9:126	——Termination or non-exercise of power to
0.0.4.0=	appropriate property for non-charitable use
§ 9:127	——Charitable transfers of certain partial interests
§ 9:128	— — Charitable split-interest trusts
§ 9:129	——Remainder interests
§ 9:130	——Guaranteed annuity interest

§ 9:131	— —Unitrust interests
§ 9:132	— No charitable deduction allowed for other
	interests that are not absolute and outright
§ 9:133	——Reformation of non-qualifying interests
§ 9:134	——General power of appointment property
§ 9:135	——Payment of death taxes from charitable bequest
§ 9:136	——Reduction for administration expenses and post-
° 0 107	death interest
§ 9:137	 — Charitable bequests pursuant to settlement of estate litigation
§ 9:138	— —Transfer of art or copyright on art
§ 9:139	—Bequests to surviving spouse (who is a United
8 9.109	States citizen) (Section 2056)
§ 9:140	——Property must pass from decedent to spouse
§ 9:141	— —Outright interests
§ 9:142	— —Terminable interests in property
§ 9:143	——Limitation on deduction for terminable interests
§ 9:144	——Spousal bequests that may be satisfied with non-
, 0,111	deductible property
§ 9:145	——Survivorship requirement
§ 9:146	——Deductible terminable interests
§ 9:147	——A "general power of appointment" trust
§ 9:148	——Interests in portion of property
§ 9:149	——Partial interest in property
§ 9:150	——Separate consideration of each interest
§ 9:151	——Local law controls
§ 9:152	——Rights to income from trust
§ 9:153	——Power of appointment requirements
§ 9:154	— —Life insurance, endowment or annuity contract
§ 9:155	——Rules on specific portions and powers of
	appointment
§ 9:156	——Contract need not confer "power" using that
	term
§ 9:157	——"Qualified terminable interest property" (or
0 0 4 2 0	QTIP) trust
§ 9:158	——Definition of qualifying income interest
§ 9:159	——Rights to income
§ 9:160	——Power to distribute trust principal to spouse
§ 9:161	——Annuities
§ 9:162	— —"Estate" trust
§ 9:163	
§ 9:164	— — Value of deductible interest
§ 9:165	— — Material limitations
§ 9:166	——Special use election
§ 9:167	——Reduction for death taxes and debts payable
	from marital bequest

TABLE OF CONTENTS

§ 9:168	— Reduction for administration expenses and post-
	death interest
§ 9:169	——Remainder interests
§ 9:170	— No double deduction allowed under Section 2053
	and Section 2056
§ 9:171	— No double deduction allowed under Section 2054
	and Section 2056
§ 9:172	— —Transitional rule
§ 9:173	—Bequests to surviving spouse (who is not a United
0.0154	States citizen)
§ 9:174	——Spouse who becomes U.S. citizen after decedent's
0.175	death
§ 9:175	——Definition of QDOT
§ 9:176	— —Trust requirements
§ 9:177	——Additional requirements to ensure tax collection
§ 9:178	——Non-assignable annuities and plans
§ 9:179	——Domestic corporation
§ 9:180	——Annual statement by U.S. Trustee
§ 9:181	——Estate tax upon distribution from QDOT
§ 9:182	——Calculation of tax
§ 9:183	——Exemption for hardship distributions
§ 9:184	——Other exempt distributions
§ 9:185	——Tax upon termination of QDOT status
§ 9:186	— —Due date for payment of tax
§ 9:187	— —Liability of trustees for tax
§ 9:188	— —Estate tax lien
§ 9:189	— Tax credits, deductions and elections available at
	surviving spouse's death
§ 9:190	——QDOT election
§ 9:191	——Protective QDOT election
§ 9:192	——Spousal transfer or assignment to QDOT
§ 9:193	— — Treatment of transferred or assigned property
§ 9:194	— —Time for transfer of property to QDOT
§ 9:195	——Protective assignment to QDOT
§ 9:196	— —Joint property
§ 9:197	— — Multiple QDOTs; Designated filer rules
§ 9:198	——Reformation proceedings
§ 9:199	— —Form 706-QDT
§ 9:200	Credits against estate tax
§ 9:201	—Credit against estate tax (Section 2010)
§ 9:202	—Credit for state death taxes (Section 2011)
0	
§ 9:203	—Credit for gift tax (Section 2012)
§ 9:204	——Maximum credit
§ 9:205	
§ 9:206	——Calculation of gift tax paid

Trusts and Estates Practice in New York

```
——Credit for tax on prior transfers (Section 2013)
§ 9:207
§ 9:208
         ——Percentage credit
§ 9:209
         — Requirements for qualification for credit
§ 9:210
         ——Limitation on credit
§ 9:211
         --- Effect of charitable deduction
§ 9:212
         — — Multiple transferors
         -Valuation of property transferred
§ 9:213
§ 9:214
         —Credit for foreign death taxes (Section 2014)
§ 9:215
         ——Limitation on credit
         --- Maximum credit
§ 9:216
§ 9:217
         ---Proof of foreign taxes paid
§ 9:218
         — — Timing of payment of foreign taxes
         --- No credit allowed for taxes deducted under
§ 9:219
          Section 2053
§ 9:220
         — Resident alien decedents
         — —Treaties
§ 9:221
§ 9:222
         Estates of nonresident aliens
§ 9:223
         Valuation of assets
§ 9:224
         —Fair market valuation
§ 9:225
         —Need for accurate valuation
§ 9:226
         —Step-up in basis
§ 9:227
         —Discounts and premiums
§ 9:228
         — — Minority interests
         — —Lack of marketability
§ 9:229
§ 9:230
         — —Blockage
§ 9:231
         ——Control premium
§ 9:232
         —Valuation of specific types of property
§ 9:233
         ——Stocks and bonds
         ——Securities traded on multiple exchanges
§ 9:234
§ 9:235
         ——Bonds traded on an exchange
         ——Sales prices unavailable within reasonable
§ 9:236
          period
         — Bid and asked prices also unavailable either
§ 9:237
          before or after valuation date
§ 9:238
         — — Valuation not reflective of fair market value
§ 9:239
         — —Bid and asked prices also completely unavailable
§ 9:240
         --- Securities pledged or bought on margin
§ 9:241
         ——Securities subject to option or contract to
          purchase
§ 9:242
         — Ex-dividends
         — —Flower bonds
§ 9:243
         ——Business interests
§ 9:244
         — — Valuation factors
§ 9:245
§ 9:246
         — —Goodwill
§ 9:247
         — Buy-sell agreements, options, etc.
```

```
§ 9:248
         ---Substantiation of valuation
§ 9:249
         — Real Property
§ 9:250
         — Notes
         ——Cash
§ 9:251
§ 9:252
         --- Household and personal effects
         ——Itemization of property
§ 9:253
         ——Appraisal required for certain valuable property
§ 9:254
§ 9:255
         ——Selection of appraiser
         — Private Annuities, life estates, terms for years,
§ 9:256
          remainders and reversions
§ 9:257
         ——Annuities, insurance and mutual funds
§ 9:258
         — —Remainder interest in CRT
§ 9:259
         — —Life or term interest in CRT
§ 9:260
         — —Pooled income fund
         ——Dependent interests
§ 9:261
§ 9:262
         —Alternate valuation method; date of death
§ 9:263
         --- Election must decrease gross estate and taxes
          imposed
§ 9:264
         ——Election applies to all property
         ——Disposition of assets within six months
§ 9:265
§ 9:266
         — Earnings or accruals within six-month period
§ 9:267
         --- Interest accrued or principal paid on bonds or
          notes after death
§ 9:268
         — —Non-interest bearing obligations sold at discount
         — —Dividends
§ 9:269
§ 9:270
         — Effect of Section 2032 election on deductions
§ 9:271
         —Special use valuation
§ 9:272
         — —Qualified real property
         — — Material participation requirement
§ 9:273
§ 9:274
         ——Indirectly owned or leased property
§ 9:275
         ——Residential property
§ 9:276
         ——Definition of qualified use
§ 9:277
         ——Cash lease
         — — Definition of adjusted value
§ 9:278
         ——Definition of qualified heir
§ 9:279
§ 9:280
         — — Definition of member of family
§ 9:281
         — — Definition of farm
         ——Definition of farming purposes
§ 9:282
§ 9:283
         — — Valuation methods
         — — Valuation discounts on special use property
§ 9:284
         — —Election
§ 9:285
         — —Partial election
§ 9:286
§ 9:287
         — Protective election
§ 9:288
         ——Agreement of interested persons
```

— Estate tax upon disposition or cessation of § 9:289 qualified use ——Amount of tax § 9:290 § 9:291 ——Due date of tax § 9:292 — —Liability of qualified heir for tax § 9:293 ——Cessation of qualified use — Exception for qualified use commencing within § 9:294 two years § 9:295 ——Basis of qualified use property ——Section 2044 property § 9:296 -Section 2057: Family owned business deduction § 9:297

II. GENERATION-SKIPPING TRANSFER TAX PURPOSE AND HISTORY OF GST TAX

§ 9:298	Purpose
§ 9:299	History of GST tax
§ 9:300	Effective date of current GST tax system
§ 9:301	—Exemption for certain irrevocable trusts
§ 9:302	—Exemption for certain wills and revocable trusts
§ 9:303	Generation-skipping transfer tax system
§ 9:304	—Generation-skipping transfer
§ 9:305	—Transferor
§ 9:306	—Split gifts
§ 9:307	—Reverse QTIP elections
§ 9:308	—Generation determination
§ 9:309	—Direct skips
§ 9:310	—Indirect Skips
§ 9:311	—Predeceased child exception
§ 9:312	—Addition to predeceased child exception
§ 9:313	—Trust transfers as direct skips
§ 9:314	—\$2 million exclusion for certain transfers before
	1990
§ 9:315	—Taxable terminations
§ 9:316	—Predeceased child exception may apply
§ 9:317	—Taxable distributions
§ 9:318	—Predeceased child exception may apply
§ 9:319	—Skip persons
§ 9:320	—Trusts
§ 9:321	—GST Trust
§ 9:322	—Interests in property held in trust
§ 9:323	—Taxable amount
§ 9:324	——Tax on taxable distributions
§ 9:325	——Tax on taxable terminations
§ 9:326	——Tax on direct skips

TABLE OF CONTENTS

§ 9:327	
§ 9:328	——Direct skip property included in transferor's
	estate
§ 9:329	——Taxable terminations on death may elect
	alternate valuation
§ 9:330	—GST exemption
§ 9:331	——Lifetime deemed allocations to direct skips and
0.000	indirect skips
§ 9:332	——Avoiding automatic allocation
§ 9:333	——Irrevocability of allocations
§ 9:334	— — Lifetime allocations to other transfers
§ 9:335	——Effective date of allocation
§ 9:336	——Extension of time to allocate GST exemption and
0.005	to elect out of deemed allocation rules
§ 9:337	——Substantial compliance with allocation rules
§ 9:338	——Retroactive allocation of GST exemption
8 0.220	permitted for unnatural order of death
§ 9:339	——Exception for property subject to an ETIP
§ 9:340	— Allocations after death— Calculation of GST tax
§ 9:341	— Calculation of GS1 tax — — Taxable amount
§ 9:342	
§ 9:343	— Applicable rate— Maximum federal estate tax rate
§ 9:344	
§ 9:345	— —Inclusion ratio
§ 9:346	— Applicable fraction— Zero denominator
§ 9:347	— —Zero denominator — —ETIP
§ 9:348	
§ 9:349	——CLAT property after October 13, 1987
§ 9:350	— Redetermination of applicable fraction— Valuation rules
§ 9:351	
§ 9:352	—Special election for QTIPs
§ 9:353	—Taxation of multiple skips
§ 9:354	—Separate trust rules
§ 9:355 § 9:356	— — Multiple transferors
8 9:220	——Separate and independent shares of multiple beneficiaries
§ 9:357	——Severance into separate trusts
§ 9:358	—GST tax filing requirements
§ 9.356 § 9:359	— Taxable distributions
-	— Taxable terminations
§ 9:360	
§ 9:361	——Direct skips
§ 9:362	—Liability for payment of GST tax
§ 9:363	— — Taxable distributions
§ 9:364	— — Taxable terminations
§ 9:365	——Direct skips

§ 9:366 ——Burden for payment of GST tax § 9:367 — Executor's right of recovery § 9:368 ——Payment by trustee — Trustee's liability for increase in GST tax § 9:369 § 9:370 —Time and manner of filing § 9:371 —Liens § 9:372 Nonresident aliens § 9:373 —Scope of GST tax § 9:374 —GST exemption

III. FEDERAL ESTATE TAX RETURN

Introduction § 9:375 § 9:376 —Filing requirement for certain smaller estates § 9:377 -Possible adjustment in value of post-1976 gifts § 9:378 -Non-resident aliens § 9:379 Filing of Form 706 § 9:380 -Retain evidence of timely mailing —Calculation of proper due date § 9:381 § 9:382 -Extension of time to file Form 706 § 9:383 —Supplemental filings § 9:384 -Extension to file does not affect time to pay tax § 9:385 —Late filing § 9:386 —All executors should sign Form 706 § 9:387 —Place of filing § 9:388 —Use of current form § 9:389 —Parts of Form 706 to be completed by all estates § 9:390 -Attachments to Form 706 -Rounding of values to nearest dollar § 9:391 § 9:392 —Listing of entries on schedules § 9:393 —Continuation schedules § 9:394 —Alternate valuation entries § 9:395 —Likelihood of audit § 9:396 Schedule A: real estate § 9:397 —Description of real property § 9:398 —What constitutes an interest in real property § 9:399 —Indebtedness -Valuation § 9:400 § 9:401 — Section 2032A election --- Reductions in value § 9:402 § 9:403 — — Discounts for minority interest and lack of marketability § 9:404 — Reduction for anticipated costs of sale § 9:405 —Attachments

—Selection of appraiser

§ 9:406

TABLE OF	CONTENTS
§ 9:407	Schedule A-1-Section 2032A valuation
§ 9:408	-Election must be made for both estate tax and GST
	tax purposes
§ 9:409	—Protective election
§ 9:410	—Calculation of additional GST tax upon disposition
§ 9:411	—List persons who receive an interest in special use
	property
§ 9:412	—Written agreement by persons with an interest in
	special use property
§ 9:413	—Requirements for valid election
§ 9:414	Schedule B: stocks and bonds
§ 9:415	—Jointly owned securities
§ 9:416	—Securities held in trust
§ 9:417	—Types of interest included on Schedule B
§ 9:418	—Securities subject to foreign death taxes
§ 9:419	—Description of securities
§ 9:420	—Dividends and interest
§ 9:421	—Worthless securities
§ 9:422	—Securities traded on an exchange
§ 9:423	—Common trust funds
§ 9:424	——Flower bonds
§ 9:425	— — Mutual funds
§ 9:426	— —U.S. bonds
§ 9:427	——Cooperative apartments
§ 9:428	——Business interests
§ 9:429	——Discounts in valuation
§ 9:430	——Premiums in valuation
§ 9:431	—Dividends and interest
§ 9:432	Attachments
§ 9:433	Schedule C: mortgages, notes and cash
§ 9:434	—Types of assets included on Schedule C
§ 9:435	—Valuation
§ 9:436	—Descriptions
§ 9:437	—Discounts in valuation
§ 9:438	—Checks drawn shortly before death
§ 9:439	——Intention to make a gift
§ 9:440	——Checks drawn by attorney-in-fact
§ 9:441	Schedule D: insurance on the decedent's life
§ 9:442	—Includible proceeds under Section 2042
§ 9:443	—Description
§ 9:444	—Attachment
§ 9:445	—Valuation
§ 9:446	—Non-includible proceeds
§ 9:447	—Interest paid on insurance proceeds
§ 9:448	—Insurance owned by a corporation

```
§ 9:449
         Schedule E: jointly owned property
§ 9:450
         —Qualified joint interests
§ 9:451
         — —Pre-1977 joint property
§ 9:452
         — —Non-citizen spouses
§ 9:453
         —Other joint property
         -Attachments
§ 9:454
§ 9:455
         —Joint property held with a non-spouse
§ 9:456
         Schedule F: other miscellaneous property not
          reportable under any other schedule
§ 9:457
         —Types of assets included on Schedule F
§ 9:458
         —Safe deposit boxes
§ 9:459
         —Valuation
         — — Household contents valued at $100 or less
§ 9:460
§ 9:461
         — —Items of artistic or intrinsic value
         — Coin and currency collections
§ 9:462
         --- Mineral royalties
§ 9:463
§ 9:464
         ——Patents
         ——Remainder interests
§ 9:465
         ——Discounts in valuation
§ 9:466
§ 9:467
         ——Appraisals
§ 9:468
         Attachments
§ 9:469
         Schedule G: transfers during decedent's life
§ 9:470
         —Federal gift taxes for gifts within three years of
          death
§ 9:471
         —Other transfers within three years of death
§ 9:472
         —Transfers under Section 2036
         —Transfers under Section 2037
§ 9:473
§ 9:474
         —Transfers under Section 2038
§ 9:475
         —Section 2701 et seq
         —Decedent as custodian of a Gifts to Minors account
§ 9:476
         —Valuation
§ 9:477
§ 9:478
         —Attachments
§ 9:479
         — Lifetime transfers not includible in decedent's
§ 9:480
         Schedule H: powers of appointment
§ 9:481
         —Status as trustee, or power to remove and replace
          trustee
         -Valuation
§ 9:482
§ 9:483
         —Attachments
§ 9:484
         Schedule I: annuities
         —Annuities reported on Schedule I
§ 9:485
         —Joint and survivor annuities
§ 9:486
§ 9:487
         Valuation
§ 9:488
         —Attachments
```

§ 9:489	Schedule J: funeral expenses and expenses incurred in administering property subject to claims
§ 9:490	—Funeral expenses
§ 9:491	—Administration expenses
§ 9:492	— —Executors' commissions
§ 9:493	——Attorney's fees
§ 9:494	——Interest on estate taxes
§ 9:495	——Expenses of sale
§ 9:496	——Penalties
§ 9:497	——Executors' expenses
§ 9:498	— —Trustees' commissions
§ 9:499	—Declaration of executors' commissions and attorney's fees
§ 9:500	Schedule K: debts of the decedent, and mortgages and liens
§ 9:501	—Types of debts included on Schedule K
§ 9:502	—Calculation of accrued income tax liability
§ 9:503	—Alimony and support obligations
§ 9:504	—Creditors who have not filed a claim against the estate
§ 9:505	—Protective claims for unpaid debts
§ 9:506	—Settlement of will contest
§ 9:507	—Guarantee of another's debt
§ 9:508	—Mortgage or lien
§ 9:509	Schedule L: net losses during administration and expenses incurred in administering property not subject to claims
§ 9:510	—Administration expenses relating to property not subject to claims
§ 9:511	Schedule M: bequests, etc., to surviving spouse
§ 9:512	—Property subject to indebtedness or payment of estate taxes
§ 9:513	—QTIP election
§ 9:514	——Terminable interests generally
§ 9:515	——QTIP election
§ 9:516	——Partial QTIP election
§ 9:517	——Reasons for partial QTIP elections
§ 9:518	——Protective QTIP elections
§ 9:519	— — Joint and survivor annuities
§ 9:520	—Non-citizen spouses
§ 9:521	—Residuary bequest
§ 9:522	—Property rights vesting in spouse at decedent's
	death
§ 9:523	—Will contests or other litigations
§ 9:524	—Disclaimers

```
§ 9:525
         —Listing of marital deduction property
         Schedule O: charitable, public, and similar gifts and
§ 9:526
          bequests
§ 9:527
         —Partial or trust interests
§ 9:528
         — — Charitable remainder trusts
§ 9:529
              -Surviving spouse as sole non-charitable
          beneficiary of property ultimately passing to charity
         ——Art and copyrights on art
§ 9:530
§ 9:531
         —Reduction for estate taxes payable from charity
§ 9:532
         —Disclaimers to charity
         —Attachments
§ 9:533
§ 9:534
         —Warms adjustment
         —Charitable pledges unpaid at death
§ 9:535
         Schedule P: credit for foreign death taxes
§ 9:536
§ 9:537
         —Amount of credit
§ 9:538
         — Use of treaty between U.S. and foreign country
§ 9:539
         — —Current treaties
         -Certification of payment of foreign death tax
§ 9:540
         -Foreign death taxes not yet paid
§ 9:541
§ 9:542
         —Refund of foreign death taxes
§ 9:543
         Schedule Q: credit for tax on prior transfers
         —Decedent who predeceased transferor
§ 9:544
         —Calculation of credit
§ 9:545
         -Amount of credit
§ 9:546
         —Definition of property
§ 9:547
§ 9:548
         — — Unified credit trusts
§ 9:549
         — —Life estates
§ 9:550
         —Property in successive estates
§ 9:551
         —Special use property
§ 9:552
         —Effect of Section 6166 deferral by transferor's
          estate
         Schedules R and R-1: generation-skipping transfer
§ 9:553
         -Calculation of GST tax on Form 706
§ 9:554
§ 9:555
         —Direct skips
         — — Marital deduction trusts
§ 9:556
§ 9:557
         — —Insurance or annuities
§ 9:558
         —Charitable bequests
§ 9:559
         -Allocation of GST exemption
§ 9:560
         —Allocation of exemption to trust property
§ 9:561
         —Reverse QTIP election
         -Schedule R-1 acts as notice to trustee of GST tax
§ 9:562
          due
         —Valuation for GST tax purposes
§ 9:563
§ 9:564
         —Pecuniary bequests
```

§ 9:595 § 9:596

§ 9:597

§ 9:598§ 9:599

§ 9:600

——Election

— —Protective election

——Acceleration of deferred tax

previously made

§ 9:565	State death tax credit and deduction
§ 9:566	State death tax deduction
§ 9:567	—Certification of state death taxes
§ 9:568	Other Form 706 Considerations: Alternate valuation election
§ 9:569	—Special use valuation
§ 9:570	—Section 6166 election to defer certain taxes
§ 9:571	Deferral of taxes on reversionary or remainder interest
§ 9:572	Recapitulation on Form 706
§ 9:573	Schedule F must be completed
§ 9:574	Tax computation on Form 706
§ 9:575	—Authorization of others to act on behalf of estate
IV. P	AYMENT OF ESTATE TAX
§ 9:576	Due date and method of payment
§ 9:577	Prior payments
§ 9:578	Method of payment
§ 9:579	Method of payment (including use of flower bonds)— Extensions generally (Section 6161)
§ 9:580	— —Further extensions
§ 9:581	— Extension to pay tax deficiency
§ 9:582	——Request for extension
§ 9:583	——Due date of tax extended
§ 9:584	——Bond requirement
§ 9:585	—Extensions on tax attributable to reversionary or remainder interests (Section 6163)
§ 9:586	— —Further extensions
§ 9:587	— —What taxes may be extended
§ 9:588	——Request for extension
§ 9:589	——Bond requirement
§ 9:590	—Deferral of taxes attributable to certain closely held business interests (Section 6166)
§ 9:591	——Consequences of Section 6166 election
§ 9:592	— —Interest payable on tax deferred
§ 9:593	— No deduction for interest payments
§ 9:594	——Declaratory relief on tax value

——Definitions and rules under Section 6166

— —Election upon assessment of tax deficiency

——Payment of tax deficiency when election was

§ 9:601	——Exception for stock redemptions, stock sales, etc.
§ 9:602	——Certain sales excluded
§ 9:603	——Changes in form
§ 9:604	——Payment of deferred tax where estate has
\$ 0.001	undistributed net income
§ 9:605	——Acceleration of deferred tax upon failure to pay
	installment when due
§ 9:606	——Deferral of GST tax on direct skips
§ 9:607	——Lien imposed on Section 6166 property
§ 9:608	——Extension to pay Section 6166 tax
§ 9:609	—Written agreement to pay tax in installments (Section 6159)
§ 9:610	Liability of executor and other fiduciary
§ 9:611	—Liability of person in possession of decedent's
	property if no executor is acting
§ 9:612	—Personal liability by reason of paying debts before estate taxes
§ 9:613	—Application by executor for discharge from liability
§ 9:614	—Application by other fiduciary for discharge from
-	liability
§ 9:615	—Discharge for liability based upon decedent's
	lifetime gifts
§ 9:616	—Liability of persons other than executors
§ 9:617	—Right to contribution by others
§ 9:618	—Recovery from insurance proceeds in decedent's
	estate
§ 9:619	—Recovery from general power of appointment
	property in decedent's estate
§ 9:620	—Recovery from marital deduction property in
	decedent's estate
§ 9:621	——Gift may result if recovery is not pursued
§ 9:622	— —Trust property
§ 9:623	——Recovery from Section 2036 property
§ 9:624	— —Transferee liability
§ 9:625	——Statute of Limitations
§ 9:626	——Exceptions whereby no limitations period exists
§ 9:627	 — Written agreement to extend limitations period
§ 9:628	——Rule for estate tax attributable to refund of state
	or foreign death taxes
§ 9:629	——Rule where certain property in decedent's estate
	is omitted from Form 706
§ 9:630	——Time for collection of tax
§ 9:631	——Suspension of limitations period for assets in
0.000	court's control
§ 9:632	— —Time to claim credit or refund of overpayment

§ 9:633 —Estate tax liens § 9:634 — —Term of lien § 9:635 ——Property excluded from lien § 9:636 ——Release of or discharge from lien § 9:637 ——Special lien for deferred estate tax § 9:638 ———Election for special lien § 9:639 — — Property subject to special lien § 9:640 ———Term of special lien ———Release from or discharge of special lien § 9:641 § 9:642 ———Priority of lien § 9:643 ——Special lien for special use property § 9:644 — Term of lien — Priority of lien § 9:645 § 9:646 Interests and penalties —Interest payable on tax deferred under Section § 9:647 6166 § 9:648 —Interest received on overpayments —Late filing of return § 9:649 § 9:650 —Late payment of tax § 9:651 —Failure to pay upon notice and demand —Substantial or gross valuation understatement § 9:652 § 9:653 —Underpayment due to fraud § 9:654 -Penalties imposed upon the preparer § 9:655 -Refund of state death taxes

CHAPTER 10. NEW YORK STATE ESTATE TAX

I. OVERVIEW OF THE NEW YORK STATE ESTATE TAX

§ 10:1 Description of the tax § 10:2 Resident and nonresident decedents § 10:3 —Comparison to gift tax and to federal law § 10:4 —Determining residence § 10:5 —Case law examples § 10:6 —Proving nonresidence § 10:7 Federal tax treatment of same-sex spouses § 10:8 Rate of the tax

II. CALCULATION OF THE TAX

- § 10:9 Formula for residents dying prior to October 1, 1998 § 10:10 Formula for residents dying on or after October 1,
 - 1998 until January 31, 2000

Sop tax for residents dying on or after February 1, 2000
Sop tax for residents dying on or after January 1, 2002
Taxation of estates of residents dying in 2010
Taxation of estates of residents dying in 2014
Formula for nonresidents
Definition of "gross estate" for residents
Definition of "gross estate" for residents— Adjustments to the gross estate due to certain limited powers of appointment
Definition of "gross estate" for nonresidents
Separate QTIP election required
Elimination of gift tax January 1, 2000
Income or estate tax deductions
Uniform Principal and Income Act
AYING THE TAX
Estate tax power of attorney
Notice requirement for decedents dying prior to
February 1, 2000
—Exceptions to the notice requirement
 Waivers of the notice requirement; procedure for obtaining waivers
——Form ET-30
——Form ET-85
——Form ET-99
No notice requirement for decedents dying on or after February 1, 2000
Estate tax liens
—Prior mortgages on real property
—Release of liens/certificates of discharge
—Applying for a release of lien
——Form ET-30
——Form ET-85
——Form ET-117
— —Fee
Estate tax return (Form ET-90)
Estate tax returns: Form ET-90—Residents dying on or after February 1, 2000
—Nonresidents—Nonresidents dying on or after February 1, 2000
Payment of tax
Penalties for nonpayment
Simultaneous filing with the Surrogate's Court

§ 10:46

Privacy of the New York returns

IV. TAX APPORTIONMENT Liability for the tax

- § 10:47 Rules of apportionment § 10:48 —Special rule for temporary interests § 10:49 —Pro-rata apportionment § 10:50 —Exemptions or deductions based on relationship to decedent, life insurance proceeds, or charitable gifts § 10:51 —Taxed property § 10:52 -Interest
- § 10:53 —Discounts for prepayment
- § 10:54 —Decedent's directives regarding apportionment
- § 10:55 — Effect of a subsequent testamentary direction
- § 10:56 — Effects of a subsequent non-testamentary direction
- § 10:57 — —Limits on exoneration from non-testamentary direction
- § 10:58 ——Broad direction to pay all taxes

THE NEW YORK GENERATION-SKIPPING TRANSFER TAX

§ 10:59 In general

VI. FORMS

- § 10:60 Form 10-1: New York State estate tax domicile affidavit (Form ET-141)
- § 10:61 Form 10-2: Stipulation reserving domicile
- § 10:62 Form 10-3: Estate tax power of attorney (Form
- § 10:63 Form 10-4: Notice of payment of death benefit under employees' pension or profit-sharing plan
- Form 10-5: Application for estate tax waivers/release § 10:64 of estate tax lien (Form ET-30)
- Form 10-6: New York State estate tax certification § 10:65 (Form ET-85)
- Form 10-7: Estate tax waiver notice (Form ET-99) § 10:66
- § 10:67 Form 10-8: Release of estate tax lien (Form ET-117)
- § 10:68 Form 10-9: New York State estate tax return (Form ET-90)
- § 10:69 Form 10-10: Tentative payment of estate tax (Form ET-130)
- § 10:70 Form 10-11: Application for extension of time to file and/or pay estate tax (Form ET-133)

§ 10:71 Form 10-12: List of assets/inventory

VII. TABLES

§ 10:72 Table 10-2: Federal credit for state death taxes

CHAPTER 11. POST-MORTEM PLANNING AND INCOME TAX CONSIDERATIONS

I. POST-MORTEM PLANNING

§ 11:1	Introduction
§ 11:2	Disclaimers
§ 11:3	—Unused applicable exclusion amount
§ 11:4	—Avoid gift and estate taxes
§ 11:5	— —Illustrations
§ 11:6	—Defer taxes through marital deduction
§ 11:7	— —Another scenario
§ 11:8	—Charitable split interest trust
§ 11:9	—Qualified real property
§ 11:10	—Trusts
§ 11:11	Interests in property that may be disclaimed
§ 11:12	Federal requirements
§ 11:13	—Disclaimer is in writing
§ 11:14	—Delivery and timing
§ 11:15	— —Method of delivery
§ 11:16	— —Mailing
§ 11:17	——Date of creation of interest in property
§ 11:18	—No acceptance
§ 11:19	——Evidence of acceptance
§ 11:20	 — Insufficient evidence of acceptance
§ 11:21	—Property passes without direction
§ 11:22	——Requirement violated
§ 11:23	— —Void or voided disclaimer
§ 11:24	——Surviving spouse as trust beneficiary
§ 11:25	——Surviving spouse; no power of appointment
§ 11:26	 — Disclaimer of power of appointment
§ 11:27	— —Non-binding language on disposition
§ 11:28	—Who may disclaim; individual who holds interest
§ 11:29	—Fiduciary who holds power
§ 11:30	—Parents of minor child
§ 11:31	—Executor of deceased person
§ 11:32	—Court-appointed guardian
§ 11:33	—Donor of joint property
§ 11:34	—Beneficiary of life insurance policy

```
§ 11:35
          Partial disclaimers
§ 11:36
          —Trust interests
§ 11:37
          —Powers of appointment
§ 11:38
          —Pecuniary amounts
§ 11:39
          —Severable property
          Property interests created before January 1, 1977
§ 11:40
§ 11:41
          Form 706
§ 11:42
          New York State rules and requirements
          —What interests may be renounced
§ 11:43
§ 11:44
          —When an interest is created
§ 11:45
          — Creation by will or other means at death
§ 11:46
          — — Creation by trust agreement or other means
           during lifetime
§ 11:47
          — — Default rule
§ 11:48
          ——Special rules for future interests
§ 11:49
          —No acceptance rule
§ 11:50
          —Manner of disclaiming
§ 11:51
          — — Affidavit
§ 11:52
          — —Notice
          --- When to file and serve
§ 11:53
          -Effect of disclaimer
§ 11:54
§ 11:55
          —Partial disclaimers
§ 11:56
          —Disclaimer on another's behalf
          — —Infant
§ 11:57
          — —Incompetent or conservatee
§ 11:58
§ 11:59
          — —Decedent
§ 11:60
          Planning in estates with surviving spouses
§ 11:61
          -QTIP election: Manner and timing of election
§ 11:62
          —Protective election
§ 11:63
          —Partial election
          —Reverse QTIP election
§ 11:64
§ 11:65
          -Reasons for election or non-election
§ 11:66
          —Lifetime gifts
§ 11:67
          —Reformation or disclaimer
§ 11:68
          —Non-citizen spouses
§ 11:69
          -- Manner and timing of election
          --- Additions to, or creation of, QDOT
§ 11:70
          ——Become U.S. citizen
§ 11:71
§ 11:72
          — Reformation or disclaimer
          — Protective election
§ 11:73
§ 11:74
          — Partial election
          — Reasons for election/non-election
§ 11:75
§ 11:76
          —Elective share or intestacy rights
§ 11:77
          —Pension benefits; rollover of lump sum by spouse
```

```
§ 11:78
          — —Advantage of roll-over
§ 11:79
          — Designation of charitable beneficiaries by
§ 11:80
          — — Make spousal IRA contribution
§ 11:81
          —Joint property
          — Proof of survivor's contribution
§ 11:82
§ 11:83
          ——Pre-1977 joint property
§ 11:84
          ---Non-citizen spouse
§ 11:85
          —Split gifts
          —File joint income tax returns
§ 11:86
§ 11:87
           —Waiver of commissions
§ 11:88
          Charitable bequests
§ 11:89
          -Release of a power to consume
§ 11:90
          —Disclaimers
§ 11:91
          -Reformation
          —Compromise
§ 11:92
§ 11:93
          Fiduciary commissions
§ 11:94
          —Surviving spouses
§ 11:95
          —Other beneficiaries
§ 11:96
          — —Tax-free estates
          — —Taxable estates
§ 11:97
§ 11:98
          Valuation of assets
§ 11:99
          —Alternate valuation
§ 11:100
          — —When election is available
          ——How election is made
§ 11:101
§ 11:102
          — —When to elect
§ 11:103
          —Special use valuation
§ 11:104
          — —When election is available
          --- How election is made
§ 11:105
§ 11:106
          — —When to elect
§ 11:107
          —Filing of federal estate tax return
§ 11:108
          -Extensions
§ 11:109
          Payment of federal estate tax
§ 11:110
          -Section 6161
          -Section 6163
§ 11:111
§ 11:112
          —Section 6166
§ 11:113
          — —Timing and manner of election
§ 11:114
          — —Consequences of election
§ 11:115
          — — Taxpayer Relief Act of 1997
          — Prior law
§ 11:116
§ 11:117
          -Redeem "flower" bonds
          —Section 303 stock redemption
§ 11:118
§ 11:119
          — —Eligibility
          - Shareholders who may use Section 303
§ 11:120
```

——Maximum redemption amount § 11:121 § 11:122 — —Timing of redemption § 11:123 —Avoidance of executor liability § 11:124 ——Discharge from personal liability § 11:125 ——Posting of bond — Lien on Section 6166 property § 11:126 § 11:127 — — Discharge as to income and gift tax liability § 11:128 — Request for prompt audit of income and gift tax returns —Collect tax § 11:129 § 11:130 —Use of deductions § 11:131 Filing of New York State estate tax return § 11:132 -Extension § 11:133 Payment of New York State estate tax § 11:134 -Extension § 11:135 Generation-skipping transfer tax matters § 11:136 —Use of disclaimers § 11:137 —Allocation of exemption § 11:138 — — Pre-death transfers § 11:139 — Testamentary transfers --- Method of allocation § 11:140 § 11:141 —Reverse QTIP election § 11:142 — Effect of reverse QTIP election § 11:143 ——Split QTIP trust to qualify for election § 11:144 — —How to elect —Splitting of trusts § 11:145 —Tuition and medical payments § 11:146 § 11:147 Distributions § 11:148 —S corporation stock § 11:149 —Pecuniary bequests § 11:150 —Estate income § 11:151 — —Lower bracket beneficiary § 11:152 — —Timing of inclusion § 11:153 — — Trapping distributions § 11:154 — — Distributions to charity § 11:155 — — Distributions of capital gain § 11:156 —Income in respect of decedent § 11:157 — — Distribution to charitable beneficiary § 11:158 ——Distribution to surviving spouse § 11:159 ——Acceleration of IRD

II. INCOME TAX CONSIDERATIONS

- § 11:160 Decedent's final income tax return
- § 11:161 —When to file and pay

```
§ 11:162
          -Who must file
§ 11:163
          —What is reported
§ 11:164
          — —Income
          — —Losses
§ 11:165
§ 11:166
          ——Passive losses
§ 11:167
          ——Partnership interests
§ 11:168
          ——S corporation interests
§ 11:169
          — —Interest on Series E or EE savings bonds
          ——Deductibility of medical expenses
§ 11:170
§ 11:171
          —Joint returns
§ 11:172
          —Election as to certain savings bonds
§ 11:173
          —Medical expenses
          Income in respect of a decedent ("IRD")
§ 11:174
§ 11:175
          —Definition of IRD
§ 11:176
          —Determination of IRD
§ 11:177
          —Recipient of IRD
§ 11:178
          ——Estate
§ 11:179
          — Estate beneficiary
§ 11:180
          ——Recipient by reason of decedent's death
§ 11:181
          — —Timing of taxation of IRD; receipt of IRD
§ 11:182
          — —Transfer of right to IRD
§ 11:183
          ——Satisfaction of pecuniary bequest
§ 11:184
          — Other estate distributions
§ 11:185
          — Extinguishment of IRD obligation
§ 11:186
          ——Exempt transfers
§ 11:187
          — —Installment obligations
          -Amount of IRD recognized
§ 11:188
§ 11:189
          —Character of IRD
§ 11:190
          —Deductions in respect of a decedent
§ 11:191
          —Timing and entitlement to DRD
§ 11:192
          —Deduction for federal estate tax
§ 11:193
          — — Ordinary income
          — Capital gain or lump sum benefit plan
§ 11:194
           distributions
          ——IRD from prior decedent
§ 11:195
§ 11:196
          ——Computation of deduction
§ 11:197
          ——Deduction for generation-skipping transfer tax
§ 11:198
          ——Allocation of deduction
§ 11:199
          ———Beguest satisfied with IRD items
          ———Estate or trust receives IRD
§ 11:200
§ 11:201
          Partnership elections
          —Section 754 election
§ 11:202
          —Section 732(d)
§ 11:203
§ 11:204
          Estate's income tax returns
```

```
—Selection of taxable year
§ 11:205
§ 11:206
          -First year
§ 11:207
          — —Last vear
          ——Compare revocable trusts
§ 11:208
§ 11:209
          ——Compare testamentary trusts
§ 11:210
          —Filing of income tax returns and payment of tax
§ 11:211
          —Taxable income
§ 11:212
          —Section 642 deductions and credits
§ 11:213
          —Foreign tax credit
§ 11:214
          ——Personal exemption
§ 11:215
          — — Charitable set-asides
§ 11:216
          — —Net operating losses
§ 11:217
          — Depreciation and depletion
§ 11:218
          — —Amortization
§ 11:219
          —Section 2053 and 2054 deductions
§ 11:220
          — Effect of 2% floor
§ 11:221
          —Distributable net income ("DNI")
§ 11:222
          — — Definition of DNI
§ 11:223
          — — No deduction
          ———Capital gains
§ 11:224
          — — — Capital losses excluded
§ 11:225
          --Tax-exempt interest
§ 11:226
          — — Extraordinary dividends and taxable stock
§ 11:227
           dividends
          — Effect of Section 663(a)(1)
§ 11:228
          — —Amount of deduction
§ 11:229
§ 11:230
          — —Amount includible by estate beneficiaries
§ 11:231
          ———Currently distributable income exceeds the
           estate's DNI
§ 11:232
          — — — Aggregate amount of currently distributable
           income exceeds the estate's DNI
          — — Different taxable years
§ 11:233
§ 11:234
          — — Character of income includible
§ 11:235
          Termination of estate
§ 11:236
          —Passing out of excess deductions
§ 11:237
          — Excess deductions used in beneficiary's taxable
           year in which the estate terminates
§ 11:238
          ——Section 67(a) 2% floor
          — —Distributions to trusts
§ 11:239
§ 11:240
          —Passing out of loss carryovers
          --- Excess loss may be carried forward
§ 11:241
          --- Determination of carry forward period
§ 11:242
```

III. FORMS

§ 11:243 Form 11-1: Renunciation of certain interests in estate pursuant to EPTL § 2-1.11

- § 11:244 Form 11-2: Affidavit with respect to renunciation of certain interests in estate pursuant to EPTL
 § 2-1.11
 § 11:245 Form 11-3: Notice of renunciation of certain interests in estate pursuant to EPTL § 2-1.11
- § 11:246 Form 11-4: Affidavit of service with respect to renunciation of certain interests in estate pursuant to EPTL § 2-1.11

CHAPTER 12. TRUST AND ESTATE ACCOUNTINGS

I. APPLICABLE LAW AND PURPOSE

- § 12:1 Applicable law
- § 12:2 Purpose
- § 12:3 Timing
- § 12:4 Limiting right of beneficiaries to compel accounting

II. JURISDICTION AND VENUE

- § 12:5 Supreme Court jurisdiction
- § 12:6 Surrogate's Court jurisdiction
- § 12:7 Venue

III. VOLUNTARY ACCOUNTING PROCEEDINGS-PERSONAL REPRESENTATIVES

- § 12:8 Time for voluntary accounting proceedings
- § 12:9 —Petitions for settlement of account: Surrogate must entertain
- § 12:10 —Petitions for settlement of account: Surrogate may entertain in his discretion
- § 12:11 ——Disposition of real property
- § 12:12 ——Disposition of real property to pay administration expenses
- § 12:13 ——Purposes for which disposition may be made
- § 12:14 ——One year since prior accounting
- § 12:15 Form and content of petition for voluntary accounting
- § 12:16 —Authority to present accounting for settlement
- § 12:17 ——Decedent information
- § 12:18 ——Personal representative information
- § 12:19 ——Section 2208(1) basis for petition
- § 12:20 —Persons and entities to be cited
- § 12:21 —Estate assets and prior fiduciary accountings
- § 12:22 —Statement regarding taxes and debts to governmental agencies

§ 12:23	—Attorney's fees and personal representative's
	commissions
§ 12:24	—Intermediate accountings
§ 12:25	—Affidavit
§ 12:26	Issuance of process for voluntary accountings
§ 12:27	—Persons to whom process must issue
§ 12:28	——Creditors
§ 12:29	——Surety
§ 12:30	— —Co-fiduciaries
§ 12:31	——Successor fiduciaries
§ 12:32	——Attorney general
§ 12:33	— Distributees, devisees, legatees, and beneficiaries
§ 12:34	— —Trustees
§ 12:35	——Accounting fiduciary acting in multiple
	capacities
§ 12:36	— —When process need not be issued
§ 12:37	——Protecting the interests of the beneficiaries
§ 12:38	——Death of person required to be cited
§ 12:39	—Exceptions to citation requirements
§ 12:40	—Joinder and representation requirements
§ 12:41	—Time and manner of issuance of process
§ 12:42	—Importance of issuance of process
§ 12:43	Proceedings on voluntary accounting
§ 12:44	—SCPA authority for examination of accounting
	personal representative
§ 12:45	——Purpose of SCPA examinations
§ 12:46	——Scope of SCPA examination
§ 12:47	——Alternatives to SCPA examinations
§ 12:48	—Accounting party's burden of proof
§ 12:49	——Amendments
§ 12:50	—Objections to personal representative's accounting
§ 12:51	——Timing for objections
§ 12:52	——Persons with standing to object to a personal
	representative's accounting
§ 12:53	— —Burden of proof
§ 12:54	——Accounting and construction
§ 12:55	—Proceedings where no objections or appearances for
	examination are made
§ 12:56	——Sua sponte review of personal representative's
	accounting
§ 12:57	——Initial rejection of Surrogate's sua sponte review
§ 12:58	— Reconfirmation in Matter of Stortecky v. Mazzone
§ 12:59	——Sua sponte review of attorney's fees
§ 12:60	———Exercise of that review

IV. ALTERNATIVES TO VOLUNTARY ACCOUNTING PROCEEDINGS

§ 12:61	Alternatives to voluntary accounting proceedings, in general
§ 12:62	Section 2202: informal settlement of accounting by recording or filing receipts and releases
§ 12:63	—Statutory authority
§ 12:64	—Form and content of instrument under Section 2202
§ 12:65	—Persons to execute receipts and releases under Section 2202
§ 12:66	—Effect of receipt and release executed under Section 2202
§ 12:67	—Attacking an accounting settled under Section 2202
§ 12:68	Section 2203: informal settlement of accounting with judicial release and discharge of personal representative
§ 12:69	—Statutory authority
§ 12:70	—Form and content of petition under Section 2203
§ 12:71	— —Information relating to the decedent and personal representative
§ 12:72	——Names and addresses of interested persons
§ 12:73	——Payment of taxes
§ 12:74	——Disclosure of administration through accounting
§ 12:75	——Basis for petition
§ 12:76	— —Attachment of receipts and releases
§ 12:77	—Persons who must execute receipts and releases to be filed with petition under Section 2203
§ 12:78	—Time at which petition under Section 2203 will be heard
§ 12:79	——Revocation of letters
§ 12:80	— — Creditors' claim period has expired

V. COMPULSORY ACCOUNTING PROCEEDINGS-PERSONAL REPRESENTATIVES

§ 12:81	Introduction
§ 12:82	Time for compulsory accounting proceedings
§ 12:83	Types of accountings that may be the subject of a compulsory accounting proceeding
§ 12:84	Persons who may institute compulsory accounting proceedings
§ 12:85	—Illustrations
§ 12:86	Discretion of the court

VI. BINDING EFFECT OF JUDICIALLY SETTLED ACCOUNTING

- § 12:87 Authority of decrees or orders issued by the Surrogate's Court
- § 12:88 Case law supports authority by decree
- Decree is binding upon fiduciary as well as § 12:89 beneficiaries

VII. PRE-ACCOUNTING CONSIDERATIONS

- § 12:90 Retaining and maintaining adequate records
- -Retention of records of administration § 12:91
- § 12:92 — —Beneficiary discovery rights
- § 12:93 —Financial and transactional information to be maintained in records of administration
- —Banking records § 12:94
- Brokerage records § 12:95
- § 12:96 ——Bills and statements
- § 12:97 — —Tax returns
- § 12:98 ——Asset records
- § 12:99 —Record of exercise of discretionary powers
- § 12:100 —Beneficiary information
- § 12:101 Proceeding for discovery of estate assets prior to accounting
- § 12:102 —Statutory authority
- § 12:103 -Purpose
- § 12:104 ——Application

VIII. ROLE OF ACCOUNTING IN ESTABLISHING COMMISSIONS

- § 12:105 Estate administration
- § 12:106 Trust administration

IX. PRINCIPAL AND INCOME ISSUES IN ACCOUNTINGS

- Interplay with Prudent Investor Act § 12:107
- § 12:108 Discretion of the fiduciary
- § 12:109 Historical note: stock returns in kind and mortgage salvages
- § 12:110 Timing split interests and the practical problem of the delay of administration
- § 12:111 —Inter vivos gifts
- § 12:112 —Pecuniary gifts
- § 12:113 —Specific bequests

§ 12:114	—Pecuniary bequests in trust
§ 12:115	—Assets distributed in kind
§ 12:116	—Pecuniary bequests distributed in cash
§ 12:117	—Residue outright
§ 12:118	—Residue passing to testamentary trust
§ 12:119	Creating the principal and income accounts; non- probate accounts
§ 12:120	Default rules; discretion
§ 12:121	Trustees power to adjust
§ 12:122	—When trustee cannot make an adjustment
§ 12:123	—Judicial control of the trustee's power to adjust
§ 12:124	Optional Unitrust Provision
§ 12:125	Principal and income issues regarding trust
	property
§ 12:126	—Property received by transfer to <i>inter vivos</i> irrevocable trust by contract at death
§ 12:127	—Property received by transfer to <i>inter vivos</i> irrevocable trust by will at death
§ 12:128	—Property received by transfer to testamentary trust by a living donor
§ 12:129	—Property received by transfer to testamentary trust by will
§ 12:130	—Property transferred to successive life or remainder interest
§ 12:131	— — Marital deduction
§ 12:132	— —Generation-skipping transfer following QTIP marital trust
§ 12:133	——GST tax on dynasty trust

X. APPORTIONING INCOME: ESTATE ACCOUNTS

§ 12:134 In general § 12:135 What is apportioned § 12:136 What is accrued Accrued vs. due § 12:137 § 12:138 Retention of character as income § 12:139 Stipulation against or for apportionment Specific items: what overrides statute re § 12:140 apportionment Use of discretion § 12:141

XI. FORMS

§ 12:142 Accounting of personal representative § 12:143 Account of executor or administrator—Based on Official Form JA-7

§ 12	2:144	Form 12-2: Petition for supplemental accounting
§ 12	2:145	Form 12-3: Supplemental accounting form
§ 12	2:146	Form 12-4: Petition for voluntary accounting to be filed under SCPA § 2208
§ 12	2:147	Form 12-5: Citation to be issued upon the filing of a petition for voluntary accounting
§ 12	2:148	Form 12-6: Objections to personal representative's accounting under SCPA § 2211
§ 12	2:149	Form 12-7: Beneficiary's receipt and release
§ 12	2:150	Form 12-8: Agreement settling personal representative's accounting
§ 12	2:151	Form 12-9: Petition for discharge without accounting under SCPA § 2203
§ 12	2:152	Form 12-10: Petition to institute proceeding for compulsory accounting under SCPA § 2205
§ 12	2:153	Form 12-10.1: Petition to compel filing of final accounting—By remainder beneficiary of estate
§ 12	2:154	Form 12-11: Personal representative's answer to petition to institute compulsory accounting proceedings under SCPA § 2205
§ 12	2:155	Form 12-12: Objections to account
§ 12	2:156	Petition for judicial settlement of account
§ 12	2:157	Petition for compulsory accounting

CHAPTER 13. TRUSTS

I. VALIDITY OF TRUSTS UNDER NEW YORK LAW

§ 13:1	Requirements for valid express trust
§ 13:2	—Transfer of legal title
§ 13:3	——Compare: no title vests in executor or
	administrator
§ 13:4	— —Exceptions
§ 13:5	 —Right to revoke distinguished
§ 13:6	— —Where merger occurs, the trust interest
	converts
§ 13:7	——Result of merger
§ 13:8	—Terms of the trust
§ 13:9	—Evidence of trust creation
§ 13:10	— —Writing
§ 13:11	——Deed
§ 13:12	— Expression of terms of trust
§ 13:13	— — What is not necessary
§ 13:14	— —New revocable trust law—Multiple trust
-	agreements
§ 13:15	Trustee

```
§ 13:16
          —What passes to the trustee
§ 13:17
          —Divestiture of ownership and control
§ 13:18
          —Failure to specify trustee
§ 13:19
          —Appointment of trustees by will
§ 13:20
          Beneficiaries
§ 13:21
          —If sole trustee and sole beneficiary are the same
§ 13:22
          —Beneficiary not qualified to take
§ 13:23
          —Multiple beneficiaries
          —Defining "issue" and "descendants"
§ 13:24
          Termination or amendment of irrevocable trusts
§ 13:25
           other than by express terms
§ 13:26
          —Who must consent
§ 13:27
          -Revocation after grantor's death
§ 13:28
          —Waiver or laches
§ 13:29
          Multiple trustees
§ 13:30
          —Two trustees
§ 13:31
          —Three or more trustees
          ——Designation clauses
§ 13:32
§ 13:33
          —Delegation of trust powers between trustees
§ 13:34
          —Joint and several liability for breach of obligation
          Death of trustee
§ 13:35
§ 13:36
          Successor trustees
§ 13:37
          Removing trustees
§ 13:38
          —Friction between trustee and beneficiary
§ 13:39
          Inter vivos vs. testamentary trusts
§ 13:40
          —Statutory regulation
§ 13:41
          —Concurrent jurisdiction
§ 13:42

    — Jurisdiction and venue for lifetime trusts

          — Effect of concurrent jurisdiction
§ 13:43
§ 13:44
          —Limitations upon exoneration
§ 13:45
          ——Inter vivos trusts
§ 13:46
          — —Testamentary trusts
§ 13:47
          Coverage under SCPA; important definitions
§ 13:48
          —Grantor
          —Corporate trustee
§ 13:49
§ 13:50
          —Individual trustee
§ 13:51
          —Disclaimer or renunciation
          —Judicial settlement
§ 13:52
§ 13:53
          —Lifetime trust
§ 13:54
          —Person interested
          -Fiduciary
§ 13:55
§ 13:56
          -Trust
§ 13:57
          Compare definitions in EPTL
§ 13:58
          —Creator as compared to grantor
```

—Disposition
-Estate
—Fiduciary
—New definition: lifetime trust
Trustee commissions
—SCPA Section 2308
— —Annual commissions
———Computation of
— — Trustee's duty to provide statement to
beneficiaries
——Public, religious, charitable, scientific, literary,
educational or fraternal trusts
— Trustee authorized or required to accumulate
income Proporty considered as manay
—Property considered as money —Time bifurcation
—Paying out commissions—Definition of paying out commission
—Comparison to annual fee commission
—Other commissions
—Time of valuation for purposes of commissions
—Change in accounting period
—Limitation of commissions for multiple trustees
——Commissions for corporate trustees
——————————————————————————————————————
——Problems of court review
——Investment advisory and custodial fees
——Fee of corporate trustee for common trust fund
management
— —Exception
Governance of EPTL
—Default mode generally
—Fiduciary duties and powers
Investing prior to Prudent Investor Rule
—New York law
—May 1, 1970 through January 1, 1995
—Powers and duties relating to investments for
1970-1995
— —Application
—Prudent investor standard
——Standard
— —Mandate
——Additional requirements
 —Effective date and considerations
——Trust considerations

§ 13:99 - Delegation § 13:100 — Liability of investment advisor delegee; standard of care § 13:101 — Higher standard for professional trustee § 13:102 Powers of trustee § 13:103 -Structure of EPTL Section 11-1.1 § 13:104 -EPTL Section 11-1.1(b)(1)-(4) § 13:105 -EPTL Section 11-1.1(b)(5) § 13:106 — — Illustrations § 13:107 -EPTL Sections 11-1.1(b)(6)-(8) § 13:108 -EPTL Sections 11-1.1(b)(9)-(10) § 13:109 -EPTL Sections 11-1.1(b)(11)-(22) -EPTL Sections 11-1.1(c) and (d) § 13:110 § 13:111 —Incorporation by reference § 13:112 —Duty of loyalty § 13:113 —Self-dealing § 13:114 ——Purchases by trustee —Distribution by trustee § 13:115 § 13:116 —Self-dealing—Interests of trustee vs. beneficiaries § 13:117 — Exonerating trustee in the case of conflict of interest — —Limits of self-dealing § 13:118 § 13:119 —Segregation of trust property § 13:120 --- Nominee title by non-bank trustee forbidden -- Nominee title by bank trustee permitted § 13:121 § 13:122 — Effect of written override in trust instrument § 13:123 —Separating and consolidating trusts II. REVOCABLE TRUSTS Why choose a revocable trust § 13:124 § 13:125 —Identification of assets § 13:126 —Control of assets § 13:127 —Avoid court proceeding for incompetence § 13:128 —Capacity for valid execution III. IRREVOCABLE TRUSTS § 13:129 Powers and duties of income beneficiaries generally under New York law § 13:130 —Spendthrift provisions § 13:131 -Retained interest trust —Other rights of income beneficiary unless § 13:132 otherwise specified in governing instrument § 13:133 —Application of principal to income beneficiary § 13:134 —Trusts created on or after September 1, 1967

§ 13:135 —Share advance

IV. INCOME TAXATION OF IRREVOCABLE TRUSTS

§ 13:136	Income taxation and beneficial interests
§ 13:137	—Cash method
§ 13:138	—Tax vs. beneficial accounting
§ 13:139	—Overview of temporary entities
§ 13:140	—Allocation of taxable income and deductions
	between trust or estate and beneficiaries
§ 13:141	——Distributable net income
§ 13:142	— — Distributions to beneficiaries
§ 13:143	——Transactions between trusts as identified in Section 267(b) of the Code
§ 13:144	Simple vs. accumulating trusts
§ 13:145	—Income taxation of simple trusts and their
	beneficiaries
§ 13:146	——Distributions of DNI
§ 13:147	— — Ordinary income
§ 13:148	——Capital gains
§ 13:149	——Exception
§ 13:150	—Income taxation of accumulating trusts and their
	beneficiaries; distributions
§ 13:151	— — Ordinary income
§ 13:152	——Proration
§ 13:153	——Capital gains
§ 13:154	——Throwback rule; introduction
§ 13:155	——Elimination of throwback rule
§ 13:156	——Throwback rule; operation
§ 13:157	——Sixty-five day election
§ 13:158	 Recognition of gain on distribution of appreciated assets
§ 13:159	——Simple trust
§ 13:160	——Sale treatment at distribution
§ 13:161	——Basis
§ 13:162	——Allocation of DNI
§ 13:163	——Accumulating trust
§ 13:164	—Undistributed net income
§ 13:165	—Capital gains
§ 13:166	—Deductions
§ 13:167	—Items of trust income and deductions
§ 13:168	——Administration expenses
§ 13:169	— —Trust and estate expenses
§ 13:170	— Mortgage interest; fiduciary allocations

§	13:171	——Depreciation and depletion
§	13:172	—Interplay between DNI and principal and income
		law
	13:173	—Definition of DNI
§	13:174	—Accounting income and the deduction for
		distribution of DNI
	13:175	—Equitable adjustments
	13:176	——Determination of whether inequity exists
_	13:177	— — When an inequity is determined to exist
_	13:178	——Determination whether repayment is necessary
	13:179	— — Method of repayment
	13:180	——Income tax effects of repayment
Ş	13:181	——Where principal pays taxes ultimately
o	10.100	chargeable to income
	13:182	——Fiduciary practice
	13:183	——Drafting solutions
	13:184	——Instruction to make adjustment
8	13:185	——Specific allocations of items of income and
2	19.106	principal — —Limitations under the Code
_	13:186	
8	13:187	— — Manipulation of discretionary items
V	. PRI	NCIPAL AND INCOME GENERALLY
§	13:188	Allocations between principal and income
	13:189	—Allocation of receipts
_	13:190	——Income from other trusts or estates
_	13:191	——Rental property
_	13:192	— — Obligation to pay money
	13:193	——Insurance policies and similar contracts
8	13:194	——Deferred compensation, annuties and
		equivalents
§	13:195	— —Liquidating assets
§	13:196	——Natural resources
	13:197	— —Timber
	13:198	——Derivatives and options
_	13:199	——Asset–backed security
§	13:200	—Allocation of expenses
	13:201	Areas of discretion
§	13:202	Treatment of qualified plan benefits passing to and
		distributed from the trust
§	13:203	Treatment of corporate obligations purchased at discount
8	13:204	Problems caused by characterization rules; burden
3	10,201	of "phantom" income
8	13:205	—Phantom income included in DNI

§ 13:206	—In the case of a simple trust
§ 13:207	—New York law
§ 13:208	—Underproductive property in the characterization of income and principal
§ 13:209	—Successive income beneficiaries
§ 13:210	—Special corporate yields
§ 13:211	— — Definition of principal
§ 13:212	— — Definition of income
§ 13:213	— New York law
§ 13:214	—Characterization of passive income and losses
	under principal and income law
§ 13:215	—Partnership distributions under principal and income law
§ 13:216	——Problems created by characterization of partnership distributions
8 13.217	——Depletion and depreciation
	——Phantom income
-	Effect of the prudent investor rule on principal
, 10.210	and income
§ 13:220	—Companion changes in the concepts of income and principal
§ 13:221	—Drafting in anticipation of change
§ 13:222	—Option to treat trust as unitrust
§ 13:223	—Commencement of beneficiary's interest
-	·

VI. PARTICULAR ASPECTS OF IRREVOCABLE TRUSTS

§ 13:224 Powers of appointment; generally § 13:225 —Intent of creator; limitations § 13:226 —Broad coverage of powers regulated by the EPTL —Compare: EPTL coverage of other powers § 13:227 —Classifications of powers of appointment pertinent § 13:228 to EPTL limitations § 13:229 — — Types of special powers § 13:230 ——Imperative or discretionary powers § 13:231 —Creation of power ——Ambiguity § 13:232 —Exercise of classified powers § 13:233 § 13:234 ——Beginning date —Creditors' rights in appointive property § 13:235 ——Special powers § 13:236 § 13:237 ——General powers § 13:238 ——Matured powers § 13:239 ——Postponed powers not yet exercisable

Trusts and Estates Practice in New York

§ 13:240	——Powers relating to real property
§ 13:241	— —Donor's intent
§ 13:242	—Donee's powers and duties under the plain
	language of the power
§ 13:243	——Rule against perpetuities
§ 13:244	——Power to contract
§ 13:245	——Remedies in event of invalid contract to appoint
§ 13:246	——Making clear the intention to exercise
§ 13:247	——Meaning of "manifest"
§ 13:248	——Construing and meeting the technical
6 10 040	requirements
§ 13:249	— Conforming to the directions of the creator
§ 13:250	——Default rules
§ 13:251	Interpretation of instruments
§ 13:252	—Partial invalidity —EPTL Section 3-3.1: What the trust can receive
§ 13:253	under the will
§ 13:254	— — What is covered
§ 13:255	— —General language
§ 13:256	——After-acquired property; historical note
§ 13:257	— — Property under contract
§ 13:258	— — Partial disposition
§ 13:259	— — Meaning of "partial" change in interest
§ 13:260	—Aspects of lifetime trusts
§ 13:261	——Interpreting lifetime trusts
§ 13:262	——Interpreting "beneficiary"
§ 13:263	Where testator has become incapacitated
§ 13:264	—What is not covered
§ 13:265	—Express exclusion of after-acquired property
§ 13:266	—Failure to amend description of property
§ 13:267	—Residuary gift as exercise of power of appointment
§ 13:268	—Disposition of "all my property"
§ 13:269	—Presumption of exercise
§ 13:270	—Power granted after execution of will
§ 13:271	—Where presumption operates to include ineligible
0.40.000	appointees
§ 13:272	—Disposition of the property of the kind covered by
\$ 19.079	the power
§ 13:273	—Failure to exercise "by necessary implication"
§ 13:274	—Problems inherent in determination
§ 13:275	—Standards for determination of no exercise by necessary implication
§ 13:276	—Use of extrinsic evidence
§ 13.270 § 13:277	—Debts relating to specific bequests at death, such
8 10.411	as mortgages and other encumbrances
	as moregages and owner encumbrances

TABLE OF CONTENTS

TABLE OF CONTENTS		
§ 13:278	——Mortgage and other liens relating to specific	
§ 13:279	asset — —Assumption of liability to avoid sale	
§ 13.279 § 13:280	——Assumption of hability to avoid safe ——Override of assumption	
§ 13:281	— — Direction to pay from residue	
§ 13:281	——Effect of general instruction to pay debts	
§ 13:283	——Liability of insurance proceeds	
§ 13:284	——Liability of multiple takers	
§ 13:285	—Lapse and its preventions	
§ 13:286	——Gifts covered	
§ 13:287	——"Issue"	
§ 13:288	— —Timing distinction due to change in definition	
, 10.200	of "per stirpes"	
§ 13:289	— Exceptions	
§ 13:290	——Construction	
§ 13:291	— —Where anti-lapse does not apply	
§ 13:292	—Revival of prior will	
§ 13:293	Interpretation of instruments—Revival of prior	
	will—Application of doctrine of dependent relative	
0.40.004	revocation	
§ 13:294	—Vesting and terminations: presumptions applicable	
§ 13:295	— —When presumptions operate	
§ 13:296	— Cut-off date for contingencies	
§ 13:297	——Accumulations of income	
§ 13:298	Marital trusts; special issues under New York law	
§ 13:299	—Retention of property	
§ 13:300	Distribution by spouse trustee	
§ 13:301	—Distributions by and to beneficiary/trustee; generally	
§ 13:302	—Discretionary power only affected	
§ 13:303	—Allocation of receipts between principal and income	
§ 13:304	—Co-trustees	
§ 13:305	—Jurisdiction in appropriate court for exercise	
§ 13:306	Savings clauses	
§ 13:307	Exclusions from application of perpetuities rule	
VII. GRANTOR TRUSTS		
§ 13:308	Grantor trusts	

§ 13:308	Grantor trusts
§ 13:309	—Income tax consequences; ING Trusts
§ 13:310	—No application to charitable trusts
§ 13:311	Limitation: trust for benefit of grantors void as
	against creditors

VIII. CHARITABLE TRUSTS

- § 13:312 Who is entitled to enforce a charitable trusts; standing
- § 13:313 Registration
- § 13:314 Annual Reports
- § 13:315 Filing required by the New York State Department of State, Office of Charities Registration
- § 13:316 —How to register
- § 13:317 —Annual reports

IX. EXTENDING THE LIFE OF A TRUST

- § 13:318 Appointment in further trust by trustee
- § 13:319 Restrictions on appointment—Intent of creator
- § 13:320 —Best interests of beneficiaries
- § 13:321 —Exclusion of beneficiaries
- § 13:322 —Miscellaneous
- § 13:323 Avoidance of transfer taxes
- § 13:324 Notice of exercise of power
- § 13:325 Compare: trust amendment

X. STATUTORY TRUST SPLITTING

- § 13:326 Purpose
- § 13:327 Consent as key distinction
- § 13:328 —For specified purpose
- § 13:329 —For other appropriate reasons
- § 13:330 — Judicial proceeding
- § 13:331 ——Nonjudicial proceeding
- § 13:332 ——Definition of persons interested
- § 13:333 Types of trusts that can be split
- $\S~13:334$ $\,$ Documenting the split trusts where court proceeding not held
- § 13:335 Funding the split trusts
- § 13:336 Trustee commissions for split trusts

XI. SUPPLEMENTAL NEEDS TRUSTS

- § 13:337 History
- § 13:338 Scope
- § 13:339 Trusts not covered
- § 13:340 Rules of construction in event of policy change
- § 13:341 Coordination with income beneficiary's statutory entitlements
- § 13:342 Special needs trusts and guardianships

§ 13:343 Compensable disbursements by the trustee; compensable services

XII. INSURANCE TRUSTS

§ 13:344	Generally
§ 13:345	Beneficiary designations
§ 13:346	—Unfunded revocable life insurance trust
§ 13:347	—Testamentary trust created by will of insured
§ 13:348	—Default: no designation of beneficiary
§ 13:349	Creditors' rights, generally
§ 13:350	Insurance as testamentary substitute for purpose of elective share
§ 13:351	Proceeds as income or principal of insurance trust

XIII. FORMS

§ 13:352	Form 13-1: Form of supplemental needs trust under EPTL § 7-1.12(E)(1)
§ 13:353	Proposed order, agreement, and settlement
§ 13:354	Charitable foundation trust agreement
§ 13:355	—Corporate settlor
§ 13:356	—Payments directed by committee
§ 13:357	—Payments directed by trustees
§ 13:358	Application for appointment of additional trustee of
	charitable remainder unitrust
§ 13:359	Petition for permission to consolidate trusts

CHAPTER 14. MINORS AS ESTATE BENEFICIARIES

I. OVERVIEW

§ 14:1 Generally

II. AGE OF MAJORITY

- § 14:2 Who is a minor
- § 14:3 —Minors over age 14
- § 14:4 Minors under the Uniform Transfers to Minors Act

III. ESTATE DISTRIBUTIONS TO MINORS

§ 14:5 Overview
§ 14:6 Outright distributions to minors
§ 14:7 —Power to manage funds during minority
§ 14:8 —Powers of a donee of a power during minority

§ 14:9 Distributions to the minor's parent or other interested adult
§ 14:10 Distributions to the guardian of a minor
§ 14:11 Payment to the court or financial institution
§ 14:12 Distributions to a custodian under the Uniform Transfers to Minors Act

IV. GUARDIANSHIPS

- § 14:13 Overview § 14:14 Who is appointed as a guardian? § 14:15 § 14:16 —Someone other than the parent § 14:17 Powers of the guardian in general —Under the SCPA § 14:18 —Under the DRL § 14:19 -Guardian to use "prudent investor" standard in § 14:20 investing § 14:21 Disposition of real property § 14:22 —Under the SCPA § 14:23 — —Contents of the petition § 14:24 ——Service of process § 14:25 — —Hearing § 14:26 —Under the Real Property Actions and Proceedings Law § 14:27 Administration of an infant's property § 14:28 —Use of guardianship assets for a minor's support and education
- § 14:32 —Petitioning the court

family

§ 14:33 Appointment of the guardian under the SCPA

—Use of assets for funeral expenses

—Use of guardianship assets for benefit of minor's

—Use of Social Security payments

- § 14:34 —Jurisdiction of the Surrogate's Court
- § 14:35 —Petition

§ 14:29

§ 14:30

§ 14:31

- § 14:36 ——By whom made
- § 14:37 ——Contents of the petition
- § 14:38 ——Service of process
- § 14:39 Others may be required
- § 14:40 ——Exceptions
- § 14:41 —Guardianship hearing
- § 14:42 ——Infant's preference
- § 14:43 —Guardianship decree
- § 14:44 —Bonding requirements

§ 14:45	——Exceptions
§ 14:46	——Procedure for joint control of guardianship
	assets
§ 14:47	—Term of guardian's office
§ 14:48	—Removal of a guardian
§ 14:49	Accounting for guardianship property
§ 14:50	—Contents of the accounting
§ 14:51	—Review of the accounting
§ 14:52	Commissions

V. GUARDIANS AD LITEM

§ 14:53	Generally
§ 14:54	Duties of the guardian ad litem
§ 14:55	—Limit on guardian <i>ad litem</i> 's role
§ 14:56	—Compare guardian <i>ad litem</i> and minor's attorney
§ 14:57	Qualification of the guardian <i>ad litem</i>
§ 14:58	Appointment of the guardian ad litem
§ 14:59	—Nomination by the infant or his parent or guardian
§ 14:60	—Court-appointed guardians <i>ad litem</i>
§ 14:61	Proceedings where a guardian <i>ad litem</i> is not required
§ 14:62	Tenure of the guardian <i>ad litem</i>
§ 14:63	—Cessation of the guardian <i>ad litem</i> 's authority
§ 14:64	—Removal of the guardian <i>ad litem</i>
§ 14:65	Guardian <i>ad litem's</i> compensation

VI. CUSTODIANS UNDER THE UNIFORM TRANSFERS TO MINORS ACT

§ 14:66	Introduction
§ 14:67	Testamentary transfers to minors under the Act
§ 14:68	Who can be a custodian?
§ 14:69	Duties and powers of the custodian
§ 14:70	—Investment and sale of custodial property
§ 14:71	—Consenting to reorganizations
§ 14:72	—Special considerations for life insurance policies
	and annuity contracts
§ 14:73	—Payments to or for the minor
§ 14:74	— —By court order
§ 14:75	— — Upon termination of custodianship
§ 14:76	—No commingling of property
§ 14:77	—Transferring property under the Act
§ 14:78	——Permissible custodial property
§ 14:79	— — Manner of transferring specific property under the Act

——Registered securities § 14:80 § 14:81 — — Unregistered securities § 14:82 — —Money — Life insurance policies or annuity contract § 14:83 § 14:84 — —Transfers of real property § 14:85 Transfers of tangible personal property § 14:86 —Transfers of all other types of property § 14:87 Effect of the transfer § 14:88 Compensation and expenses of custodian § 14:89 Liability of custodians and third parties § 14:90 Bond requirement § 14:91 Removal of a custodian § 14:92 Accounting by a custodian

VII. SPECIAL CONSIDERATIONS OF MINORS IN ESTATE PROCEEDINGS

§ 14:93 Introduction Service of process upon a minor § 14:94 § 14:95 —Under the SCPA § 14:96 —Under the CPLR § 14:97 Appearance on behalf of a minor § 14:98 —Appearance under the SCPA § 14:99 —Appearance under the CPLR § 14:100 Default judgments Liability for costs of minor § 14:101 § 14:102 —Under the SCPA § 14:103 —Under the CPLR § 14:104 Compromise of controversies under the SCPA § 14:105 —Procedures for approval of compromise -Who may petition the court to approve a § 14:106 compromise § 14:107 —Representation of minor in a compromise proceeding § 14:108 —Payment of minor's share to court § 14:109 Compromise of controversies under the CPLR —Who may petition the court for approval of § 14:110 settlement § 14:111 —Affidavit of minor's representative § 14:112 -Affidavit of attorney of minor or minor's representative —Appearance and representation at hearing § 14:113 § 14:114 Arbitration of controversy involving a minor

VIII. FORMS

§ 14:115 Form 14-1: Transfer under the New York Uniform
Transfers to Minors Act

§ 14:116 Petition—Withdrawal of infant's property for support and education

CHAPTER 15. THE MOBILE CLIENT: MULTIJURISDICTIONAL ISSUES

I. DEFINING THE GOVERNING LAW IN THE CASE OF A MULTISTATE STRADDLE

§ 15:1	What law governs
§ 15:2	—Importance of domicile
§ 15:3	—Nature of property
§ 15:4	Common straddles and issues
§ 15:5	—Real property
§ 15:6	—Personal Property
§ 15:7	—Mixed asset form
§ 15:8	—Will executed while testator is a New York domiciliary
§ 15:9	—Will executed while testator was not domiciled in New York but is a domiciliary at death
§ 15:10	—Cross-border powers of appointment
§ 15:11	——Powers created out of state but exercisable by a New York resident; real vs. personal property
§ 15:12	——Powers of appointment over personal property
§ 15:13	—Effect of law on interpretation of dispositions when
	testator becomes New York domiciliary prior to death
§ 15:14	—Revocations
§ 15:15	—Non-domiciliary election of New York law
§ 15:16	——New York law governs
§ 15:17	——Limitation; law governing formal validation
§ 15:18	—Expansion of choice of New York law in <i>Matter of Renard</i>
§ 15:19	——Prior law
§ 15:20	— —Intervening legislation
§ 15:21	——Application of <i>Renard</i> after <i>Clark</i>
§ 15:22	— — Determining the domicile of the decedent
§ 15:23	—Post-Renard
§ 15:24	— — Factual dissimilarities of Clark and Renard
§ 15:25	——Applying Section 3-5.1
§ 15:26	— —No coverage of <i>inter vivos</i> instruments
§ 15:27	— — Matters of validity, construction and
	interpretation vs. administration
§ 15:28	— —Choice of law by implication
§ 15:29	— —Totten trust accounts

§ 15:30	——Equitable modifications following <i>Clark</i> and
§ 15:31	Renard —Reviewing the will of the testator who becomes
8 19.51	domiciled in New York
§ 15:32	— —The problem of the pour-up trust to trust with
	single trustee (the California and Florida models)
§ 15:33	——Self-trusteed trust under New York law
§ 15:34	— —Additional trustee
§ 15:35	— —Holographic will
§ 15:36	——Incorporation by reference
§ 15:37	——Reference to letters of instruction
§ 15:38	——Reference to fee schedules
§ 15:39	—Choosing New York law; inter vivos trusts
§ 15:40	—Assessing the text of an out-of-state trust under
	New York law
§ 15:41	——Standard of care
§ 15:42	——Delegation
§ 15:43	——Principal and income law
§ 15:44	—Conflict of law issues pertaining to Alaska and
	Delaware asset protection trusts

II. NEW YORK ESTATE TAXATION AFFECTING MULTI-SITUS ASSETS

in New

III. NEW YORK STATE INCOME TAX

§ 15:49	Pension benefits earned in New York by the New
	Yorker domiciled in New York
§ 15:50	General rule
§ 15:51	Lump-sum payments to nonresidents
§ 15:52	Benefits exempt
§ 15:53	Income tax consequences of change of New York resident trust mid-year
§ 15:54	Change in residency of grantor of <i>inter vivos</i> revocable trust
§ 15:55	—Source of income
§ 15:56	—Applicable credits
§ 15:57	—New York State income tax for multi-situs trusts
§ 15:58	-New York resident beneficiary of out-of-state trust
8 15.59	-Nonresident heneficiary of New York trust

§ 15:60	—Where federal DNI, as adjusted, is reported on New
	York return
§ 15:61	—Where there is no DNI sufficient to require a
	federal tax filing
§ 15:62	—Throwback distributions to nonresident beneficiary
	of New York trust
§ 15:63	—Where trust is part-year resident
§ 15:64	—Filing requirements for part-year or nonresident
	trust
§ 15:65	—Who must file and sign return
§ 15:66	-Example: Nonresident trust with nonresident
	beneficiaries
§ 15:67	—Example: Resident trust with mixed-residence
-	beneficiaries

IV. MOVING TRUSTS

Procedure

§ 15:80

§ 15:68 —Example: Allocation of deductions

§ 15:69 Generally Court approval in moving the testamentary trust out § 15:70 of New York State § 15:71 —Historical reluctance § 15:72 —Newer acceptance § 15:73 Testamentary trusts § 15:74 Inter vivos trusts Charitable trusts subject to New York registration § 15:75 § 15:76 -Registration —Annual reports § 15:77 § 15:78 New York State unrelated business income § 15:79 Registration of other trusts in New York State

V. PRESERVATION OF COMMUNITY PROPERTY UNDER NEW YORK LAW

§ 15:81	Community property system
§ 15:82	Disposition of community property
§ 15:83	Uniform Disposition of Community Property Rights at Death Act
§ 15:84	—Importance
§ 15:85	—Qualification
§ 15:86	—Effect on elective share
§ 15:87	—Property left behind in community property state
§ 15:88	—Property left behind in New York State
§ 15:89	-Property moving out of New York State; intangibles
§ 15:90	—Separate property moved out of New York State

VI. SURROGATE'S COURT JURISDICTION

§ 15:91 In general Jurisdiction § 15:92 § 15:93 Venue Additional situs rules determined by SCPA § 15:94 § 15:95 —Personal property and venue for non-domiciliary —Exception § 15:96 § 15:97 —Insurance policy on life of non-domiciliary § 15:98 —Stock owned by non-domiciliary

VII. FOREIGN TRUSTEES ACTING FOR NEW YORK TRUSTS

§ 15:99 Foreign trustees acting for New York trust
 § 15:100 Qualification of foreign bank
 § 15:101 Payment from New York probate to out-of-state corporate trustee
 § 15:102 Law governing limits of trust powers relating to real estate in New York State

Table of Laws and Rules

Table of Cases

Index