INTERNATIONAL INHERITANCE FORUM

REPORT
ON
UNITED STATES OF AMERICA

The law of inheritance can be examined through the lens of relatively few categories of enquiry.

Core categories address the following topics: general rules applicable to both legal and testamentary succession (**General Rules**); legal devolution or intestacy (**Intestacy**); wills and testamentary dispositions (**Wills)**; and administration of decedents' property and judicial oversight of that administration (**Administration**). These broad categories are common to—indeed they overarch—all systems in the Western legal tradition.

In some systems, the subject matter of forced heirship (legal or compulsory portion - reserved share - légitime - *portio legitima*) is dealt with as part of the law of wills or, more generally, as part of *mortis causa* donations. In other systems, forced heirship andlike devices are stand-alone institutions of inheritance law. Moreover, some systems empower courts, under various dependants' relief schemes, to vary wills to promote equitable distribution of property. On the whole, however, all these devices can be examined as restraints on freedom of testation and, accordingly, are examined here under the topic of wills (**Wills**).

On another note, some systems may require persons in close personal relationships to elect between their marital property entitlements and their inheritance rights. Other systems consider that property acquired during a marital relationship or rights stemmingfrom a matrimonial regime do not impact spousal inheritance rights whether they be by operation of law or under testamentary dispositions. For this reason, marital property is reviewed as a common inheritance issue (**General Rules**).

One can adopt—and be defeated by—the approach that every system's law of inheritance is incommensurable, or one can proceed, as we intend to, with the convictionthat the law of inheritance may be usefully examined and compared under the following themes: **General Rules**, **Wills**, **Intestacy** and **Administration**.

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SUBMITTED BY:

1. GENERAL RULES

1.1 Origin and nature of property

Does your law distinguish between the origin or nature of property (real v personal; movable v immovable)? Are there different rules applicable to different classes of property?

The law in New York does distinguish between real property and personal property.
The New York Estates, Powers and Trusts Law ("EPTL") at §3-5.1(a) defines real property and personal property:

(1) Real property means land or any estate in land, including leaseholds, fixtures and mortgages or other liens thereon. EPTL §3-5.1(a)(1).

(2) Personal property means any property other than real property, including tangible and intangible things. EPTL §3-5.1(a)(2)
Real property consists of land and features that cannot be moved or are attached to the property, such as structures and trees. Tangible personal property includes household items, artworks, furniture, personal clothing, motor vehicles, and any item that can be touched. Tangible personal property is personal property that can be relocated. Intangible things include bank and brokerage accounts and other contractual entitlements. The disposition of real property at death is determined by the law of the jurisdiction in which the real property is situated. It is worth noting that New York treats an interest in a cooperative apartment, which is evidenced by ownership of shares in the cooperative, as personal property. The disposition of personal property is determined by the law of the jurisdiction in which the decedent was domiciled at death. See EPTL §3-5.1(b), which provides:

(1) "The formal validity, intrinsic validity, effect, interpretation, revocation or alteration of a testamentary disposition of real property, and the manner in which such property descends when not disposed of by will, are determined by the law of the jurisdiction in which the land is situated.
(2) The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death."

1.2 Simultaneous death

Which rules apply in the case of simultaneous death? How is the death of two or more heirs or testators determined? Are there presumptions?.

In New York, for purposes of a probate or intestacy proceeding, the death of a decedent is confirmed by a death certificate, issued by the appropriate official in the jurisdiction where the death occurred. If issued outside the United States the death certificate generally must be apostilled or otherwise authenticated as required by law.

EPTL §2-1.6 provides that where the title to property or the devolution of property depends on an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by one hundred and twenty (120) hours is deemed to have predeceased the other individual. This statutory provision may be altered in the decedent's will or testamentary substitute.

If the disposition of property under a governing instrument (i) depends upon the time of death of two or more beneficiaries designated to take alternatively by reason of surviving an event, including the death of another individual, and (ii) it is not established by clear and convincing evidence that such beneficiaries have survived the event by 120 hours, the property thus disposed of shall be divided into as many equal portions as there are alternative beneficiaries and such portions shall be distributed respectively to those who would have taken the whole property in the event that the designated beneficiary through whom they take had survived.

EPTL§2-1.7 addresses the presumption of death from absence; effect of exposure of specific peril.
"A person who is absent for a continuous period of three (3) years, during which, after diligent search, he or she has not been heard of or from, and whose absence is not satisfactorily explained shall be presumed to have died three (3) years after the date such unexplained absence commenced. This is for purposes of any action or proceeding involving any property of such person, contractual or property rights contingent upon death or the administration of his or her estate."

The fact that a person was exposed to a specific peril of death may be a sufficient basis for determining at any time after such exposure that he or she died less than 3 years after the date of his or her absence.

1.3 Capacity to inherit

Who is capable of inheriting? For example, can minors, unborn children and absentees inherit? Are there restrictions based on nationality or domicile?

Any person or (charitable) entity can inherit. To receive the property outright the person must be at least 18 years of age and competent.

An "infant" or "minor" is defined at EPTL §1-2.9-as a person who has not attained the age of 18 years.
Adopted children have the same rights to inherit as biological children. Children conceived before but born after the decedent dies are treated as children.
An "incompetent" is defined in the EPTL §1-2.9 as a person judicially declared to be incapable of managing his or her affairs.

Non-US citizens and non-US residents, as well as foreign charitable entities, can inherit property subject to applicable Federal and State tax laws.

1.4 Ownership and vesting of property

Who has the ownership or the legal possession (seisin) of estate property on death? Are the legal or testamentary heirs automatically (by operation of law) vested with the deceased's property rights on death, or are there required judicial or administrative procedures before vesting takes place?

If the decedent dies leaving a Last Will and Testament (the "will"), a court supervised proceeding called a "probate proceeding" is commenced and once the will is found to be genuine by the Surrogate's Court of the State of New York ("Surrogate's Court"), the Court appoints the person named in the will as the "executor" of the estate. The executor collects and holds the decedent's property other than non-probate assets, in the "estate" until all debts of the decedent, estate administration costs, and taxes have been paid, and the executor then transfers the property to the beneficiaries of the estate in accordance with the wishes of the decedent as expressed in the will.

If a decedent dies "intestate," i.e. without leaving a Last Will and Testament, the entitlement to non-probate property is governed by a statute setting up a hierarchy beginning with family members and ending with the state. An intestate administration proceeding must be commenced in the Surrogate's Court, which then appoints an "administrator." The administrator, as overseen by the Court, holds the decedent's property until all the debts of the decedent, estate administration costs, and taxes have been paid, after which the property may be distributed to the intestate heirs.

1.5 Unworthiness

Are certain persons presumed or deemed unworthy to inherit by operation of law?

Under the common law in New York, the "slayer rule" essentially provides that an individual who kills another person forfeits any interest in the victim's estate.

A person who prepares a will for the testator generally cannot inherit under the same will. A person named in the will as a beneficiary should not act as witness to the will as to do so could make such witness ineligible to receive a bequest under the will.

1.6 Acceptance

How does an heir accept? Can acceptance be tacit, or must it be express? Is the heir presumed or deemed to have accepted in certain circumstances?

Acceptance is presumed. Entitlement can be renounced as discussed in 1.8 below.

In a probate proceeding, once notice on all necessary parties has been complied with and all documents have been filed with the Court and the will has been admitted to probate, when the executor is ready to make distributions to the beneficiaries, the beneficiary signs a receipt and release in writing to acknowledge receipt of the bequest from the executor and release the executor from further need to account.

1.7 Liability for debts

Does acceptance entail liability for the deceased's debts? To what extent are the heirs, who accept an estate, liable for its debts? If they are liable, can they accept under benefit of inventory? In other words, how do heirs accept without incurring personal liability exceeding their benefits under the law or under the will? Are there circumstances in which the heirs forfeit their rights to request an inventory or to accept subject to an inventory?

The debts of the decedent must be paid from the estate assets by the executor or administrator before property is distributed to the beneficiaries. It is the responsibility of the executor or administrator of the estate to pay from the estate all of the decedent's debts, the estate taxes and income taxes, and administration expenses.

All of the property of a decedent is chargeable with the payments of administration and reasonable funeral expenses, debts of the decedent, and any taxes to which the estate is liable. See EPTL §13-1.3.
In applying such property to the payment of any of these costs, no distinction is made between real and personal property.

If the property is insufficient to satisfy both the estate obligations and all dispositions under the will, interests in the decedent's estate "abate" for purposes of paying such estate obligations, in the order of: (i) distributive shares in property not disposed of by will, (ii) residuary dispositions, (iii) general dispositions, (iv) specific

dispositions, and any income derived therefrom, in accordance with the value of the respective interests of the beneficiaries of such dispositions; and (v) any disposition to a surviving spouse which qualifies for the estate tax marital deduction. EPTL §13-1.3.

The Surrogate's Court Procedure Act ("SCPA"), at Article 22, sets forth the rules for accountings by fiduciaries (executors, administrators, trustees). The court may require that the fiduciary prepare and file a compulsory intermediate or final accounting (SCPA §2205), or the fiduciary may present to the court a voluntary accounting and petition the Court to request that the account be judicially settled (SCPA §2208). The beneficiaries or heirs of an estate can request a formal accounting by the fiduciary or they can sign waiver releasing the fiduciary without a formal accounting.

1.8 Renunciation and disclaimer

When, and how, may an heir expressly renounce to or disclaim an inheritance? Are there situations in which the law deems that an heir has renounced, e.g., concealment of property? What are the effects of renunciation? Is a person who renounces generally or disclaims deemed never to have been an heir?

Any beneficiary of a disposition of property from the estate of a decedent may renounce and disclaim all or part of such beneficiary's interest. See EPTL §2-1.11(c)(1)

The renunciation must be made by an instrument in writing, signed and acknowledged (notarized) by the person renouncing, and filed in the office of the clerk of the court having jurisdiction over the estate within 9 months of death of the testator. It is worth noting that lifetime gifts may also be renounced within 9 months of the effective date of the disposition.
The person renouncing must not exercise any control over the property being renounced that demonstrates acceptance and must also sign (and file with the court) an affidavit attesting that he or she has not received and will not receive any consideration in money or money's worth for such renunciation from a person or persons whose interest is to be accelerated. Notice of the renunciation with a copy of the written renunciation must be personally served on the fiduciary (executor of the will or administrator) and on all persons whose interest may be created or increased by reason of such renunciation. EPTL §2-1.11(c)(2).

The effect of the renunciation with respect to the renounced interest is the same as if the renouncing person had predeceased the decedent and has the effect of accelerating the possession and enjoyment of subsequent interests. EPTL §2-1.11(e).

1.9 Marital rights

Are property rights acquired by spouses (howsoever defined) during the course of their marital relationship (howsoever defined) considered for purposes of determining a spouse's entitlement to an intestate share or determining a spouse's entitlement under a testamentary disposition? To what extent, if any, must a spouse elect between his, her or their matrimonial property rights and his, her or their intestate rights or rights under a will? Does a surviving spouse have a prior claim to a family residence or homestead in addition to or as part of any intestate claim or claim under a will?

If the decedent dies leaving a Last Will and Testament and does not leave at least one-third of his or her estate to the surviving spouse, the surviving spouse can "elect" to take the elective share, as set forth at EPTL §5-1.1-A. (Applicable to persons dying on or after September 1, 1992). The elective share is equal to the greater of (i) fifty thousand dollars ($50,000), or if the capital value of the estate is less than fifty thousand dollars ($50,000), such capital value, or (ii) one-third (1/3) of the net estate. See EPTL §5-1.1-A(a)(2).

In the case where a decedent dies intestate, the spouse will have certain rights in accordance with the laws of intestacy of the State of New York. See EPTL §4-1.1.

If the decedent dies intestate survived by a spouse, but no children or more remote issue, the spouse inherits the entire estate.

If the decedent was survived by a spouse and issue the spouse receives the first fifty thousand dollars ($50,000) plus one-half of the remaining estate, and the issue inherit the balance, by representation.

2. INTESTACY

2.1 Declarations of inheritance

Who establishes intestate entitlement? Are judicial, notarial or other formal declarations or certificates required to confirm entitlement?

Under New York law, the laws of intestacy are determined by statute. EPTL §4-1.1 provides for the order of intestate succession and who is entitled to take or share in a decedent's estate.
An intestate administration is initiated in the Surrogate's Court by the filing of a petition for the appointment of an administrator. The procedure for filing a petition for an intestate administration is set forth at SCPA §1001-1007. The petition is reviewed by the Surrogate's Court, which identifies the intestate beneficiaries according to the law in New York for intestacy.

2.2 Relationship

Who is entitled to inherit? Is relationship based solely on blood? Do adopted children inherit their adopting parents' estates? Is the surviving spouse an intestate heir? For purposes of intestacy, who is a spouse?

EPTL §4-1.1 provides for the order of intestate succession and who is entitled to take or share in a decedent's estate.

The surviving spouse and family members are entitled to inherit according to the order set forth in the statute.

Adopted children have the same rights to inherit as biological children.

Children conceived before but born after the decedent dies are treated as children.

The surviving spouse is an intestate heir. The surviving spouse must have been legally married to the decedent at the time of the decedent's death.

2.3 Order of preference

What is the order of preference? Is inheritance based on degrees of relationship? What are the proportionate interests of descendants, ascendants and collaterals?

EPTL §4-1.1 provides for the order of intestate succession and who is entitled to take or share in a decedent's estate.

For example:

If the decedent is survived:

(i) By a spouse and issue: the spouse receives the first fifty thousand dollars ($50,000) plus one-half of the remaining estate, and the issue inherit the balance, by representation.
(ii) By a spouse, but no children or more remote issue, the spouse inherits the entire estate.
(iii) By issue, no spouse: the issue inherit the entire estate, by representation.
(iv) By one or both parents, no spouse, no issue: the surviving parent(s) inherit the entire estate.
(v) By issue of parents, but no spouse, no issue, no parent: the issue of the parents inherit the entire estate, by representation.

This continues through to grandparents, and issue of grandparents. In the absence of any heirs, the property passes to the State of New York to be held as abandoned property.

EPTL §1-2.16 defines "representation" to mean the distribution of property to persons who take as issue of a deceased ancestor: the property is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The remaining shares, if any, are combined and divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent.

3. WILLS

3.1 Formalities

How many types of wills are there? What are their formal requirements?

In almost every case, New York law requires a will to be written and executed with the formalities required by EPTL §3-2.1:

(1) The testator must sign the will ¬at the end of the document.
(a testator who is physically unable, may authorize another to sign in his place).

(2) The signing of the will must be witnessed by at least 2 persons – "the attesting witnesses."

(3) The testator must at some point during the will signing ceremony declare to each of the attesting witnesses that the instrument he signed is his will.

(4) While not required, it is good practice for the witnesses to attest (within a 30 day period) in a separate document to the following:

(a) to the testator's signature;
(b) that is was signed in their presence;
(c) at the request of the testator who declared it to be his will; and
(d) then sign their names and addresses at the end of the will.

An exception to the written requirement is made for members of US Armed Forces while in actual military or naval service during a war or armed conflict, who may create a "holographic will" - meaning a will which is written entirely in the handwriting of the testator and not executed and attested in accordance with the formalities prescribed by EPTL §3-2.1 or a "nuncupative will" which is unwritten, the making by the testator and its provisions are clearly established by at least 2 witnesses. Such wills are valid under limited circumstances.

(a) if made by a member of the US Armed Forces while in actual military or naval service during a war or armed conflict; and
(b) for a limited time, i.e. 1 year (or upon discharge from armed forces).
See EPTL §3-2.1

3.2 Revocation and revival

Is it possible to revoke a will, and how may it be revoked? Can a revoked will be revived, and how may it be revived?

Yes, a testator may revoke his or her will at any time by destroying or defacing it or by making a new written last will and testament that specifically revokes the former will.

3.3 Recognition, publication and probate

Describe your system's extrajudicial or judicial procedures, if any, for recognition and publication of a will. Which authority (judicial, notarial or other) determines whether a will has been validly executed in compliance with formal requirements?

The Surrogate's Court of the State of New York has jurisdiction over the probate process of a decedent's Last Will and Testament ("will") and it determines whether the will has been validly executed in compliance with formal requirements as set forth in the EPTL.
The probate process is initiated by the filing of a "petition" in the Surrogate's Court in the county in which the decedent was domiciled at the time of his or her death.
The probate proceeding is a formal process during which the Surrogate's Court must determine that:

(i) the will is valid and an original;
(ii) the will was properly executed and witnessed with all the necessary formalities; and
(iii) the testator had capacity to sign a will.

The probate petition filed with the court provides the necessary information about the decedent (name, date of birth, date of death, marital status, domicile), the information required about the beneficiaries and fiduciaries named in the will and identifies all persons that must be given notice - have been given notice of the probate.

The original will and an original death certificate must be filed with the Court unless the proceeding is for ancillary administration to an original probate in another jurisdiction, typically when the decedent was domiciled elsewhere, but owned property in New York.

Additional information about the probate process is set forth below.

3.4 Curing formal deficiencies and rectification

Can your courts save, cure or validate testamentary paper that does not comply with formal requirements?
Where a will contains errors, slips or omissions or where a will fails to carry out the testator's instructions, do your courts have a power to rectify the will?
What remedial powers, if any, can your courts exercise in order to secure the testator's true intentions?
In instances where the written terms of a will may be unclear, interested parties may disagree during the probate process as to how a provision in the will should be interpreted. SCPA §1420, provides for a proceeding for the construction of a will that allows interested parties to petition the Surrogate's Court to settle the matter.
SCPA §1420 provides that a fiduciary or a person interested in obtaining a determination as to the validity, construction or effect of any provision of a will may present to the court in which the will was probated showing the interest of the petitioner, the names and addresses of the other persons interested, the particular portion of the will concerning which petitioner requests the determination of the Court and the necessity. If the application for a proceeding is accepted, the Court will require that all persons interested in the question to be notified and show cause why such a determination should not be made. The court may consider the evidence provided and make a determination, as justice requires. See SCPA §1420.

Once the Surrogate's Court has issued a decree determining how to interpret the provision in question, the decree is binding upon all parties, unless the decree is reversed or modified on appeal.

In order for the court to entertain a petition to challenge the validity of a will or to clarify the effect of terms of a will, the petitioner must have legal standing. Only those with an interest in the outcome of the proceeding have standing. Typically, that includes beneficiaries named in the will, beneficiaries named in a prior will, and the testator's legal heirs.

3.5 Pacts and agreements as to future successions

Does your law permit parties to enter into covenants, pacts or agreements with respect to future successions?

The testator may by his or her last will and testament create a limited or general "power of appointment" which is an authority created or reserved by a person having property subject to his or her disposition, which enables the donee, that is the person to whom the power is given, to designate, within such limits as may be prescribed by the donor, the appointees of the property or shares of property, who are the persons in whose favor a power of appointment is exercisable, as well as the manner in which such property shall be received.

The rules governing the creation and exercise of powers of appointment are defined at EPTL §10-3.1 through §10-6.9.
By granting a power of appointment by will, the testator is giving the power to the donee to name the beneficiaries of the will or trust created by the will.

A testamentary power of appointment is power given by the testator in a will. An inter vivos power of appointment is created by the donor during lifetime.
A testator also has the right to create a testamentary trust by his or her will and to include.

3.6 Forced, reserved and elective shares and other legal rights

Are there portions of an estate that are reserved for certain individuals (forced heirs)? Who qualify as forced heirs? What portion of an estate is reserved for these heirs (portio legitima) and what portion is freely disposable under a will?

How is the quantum of the forced share calculated? Are lifetime gifts (gifts inter vivos) taken into consideration and, if so, are these lifetime gifts reduced if estate assets are insufficient to satisfy claims of forced heirs?
Are there limits (monetary or otherwise) when calculating the forced shares?
Do the forced shares constitute ownership claims on estate property (real rights or rights in rem), or are they expressed as monetary claims? Can the forced shares be satisfied by a life interest or enjoyment (usufruct), an interest in trust or any other proprietary entitlement less than full ownership?
As between forced heirs, e.g., siblings, are there mechanisms to secure equal treatment?
Some systems have laws entitling certain persons, notably a spouse, to elect to receive a portion of a decedent's assets instead of benefits under a will. If this applies to your system, describe the applicable law.

There is no forced heirship in New York: the testator has the right to leave his or her estate by will to whomever, or whatever organization or trust or entity that he or she wishes, subject in the case of a married testator to the spouse's right to claim his or her elective share as defined in at EPTL §5-1.1-A – generally one-third of the decedent's estate. See also answer to 3.8, below.

3.7 Disinheritance

Does your system permit disinheritance (disherison, exheredation)? On what grounds can forced heirs be disinherited?

See answer to 3.6, above.

3.8 Dependents' relief or maintenance

If your system provides for dependents' relief or maintenance, who is entitled to claim? Does your system provide a mechanism for dependents, who are not forced heirs, to make an alimentary or maintenance claim? If so, on what grounds can they make a claim? Are there limits to these maintenance claims? Can forced heirs submit a maintenance claim, in addition to their forced share, against the disposable portion of the estate?

Pursuant to EPTL §5-3.1, if a person dies leaving a surviving spouse or children under the age of twenty-one, certain items of property are not assets of the estate but vest in the surviving spouse (unless disqualified) or if there is no surviving spouse, in the decedent's children under the age of 21. These items include certain household items and utensils, furniture, appliances, heating fuel, and other items such as farm animals and machinery, one motor vehicle, and cash subject to limits as set forth in EPTL §5-3.1 and if such items of property are in existence at the time of the decedent's death.

If your system does not have forced, reserved or elective shares, can a claim be made against the estate by dependents and, if so, who may make such a claim and on what grounds?

The applicable claims are set forth above under EPTL §5-3.1. Only the surviving spouse has a right of election under EPTL §5-1.1-A, as set forth above.

In general, describe who may make a claim for maintenance where a will has not made adequate provision. Must a maintenance claim be made within a certain time?

The spousal right of election, if exercised, offers the only relief for a disinherited spouse. The entitlement is fixed by statute, and the right must be exercised with 6 months of appointment of an executor or administrator by the Surrogate's Court.

3.9 Restraints on freedom of testation

Are there restraints on freedom of testation, other than the issues outlined under 3.5 and 3.6?

In order to make a valid will, the testator must have attained the age of 18 years and be competent.
An "incompetent" is defined in the EPTL §1-2.9 as a person judicially declared to be incapable of managing his or her affairs.

4. ADMINISTRATION

4.1 Intestate administration

Who administers an intestate estate? Is there a requirement to appoint an administrator? Do the heirs agree on the administrator and on the terms of administration, or does a court or other authority appoint an administrator?
Describe the administration of intestate estates.

If a person domiciled in New York dies without a will, his or her estate is distributed according to the rules governing intestate succession, as set forth in Article 4 of the EPTL §4-1.1 and as summarized in section 2.3 above.

An administrator is appointed by the Surrogate's Court to administer an intestate estate.

Persons who are "distributees" of an intestate estate are given priority to petition the court to commence an administration and be granted letters of administration, in the following order:

(a) spouse,
(b) children,
(c) grandchildren,
(d) father or mother,
(e) brothers or sisters,
(f) any other person who is a distributee and who is eligible and qualifies. Statute provides for relection.

An intestate proceeding is initiated in Surrogate's Court by the filing of a petition by the proposed administrator or an interested party, such as a creditor. Once the petition for administration has been filed, all the necessary information and supporting documents have been filed and the necessary parties have been made parties to the proceeding, the court will issue "Letters of Administration" to the Administrator.

It should be noted that the law requires at least one administrator to be a U.S. citizen or resident in New York. A distribute who does not qualify may appoint such a person to serve with him or her.

4.2 Testamentary administration

Who administers a testamentary estate? If an executor or administrator has been named under the will, is there a requirement for the appointment to be confirmed by a court or other authority?
Describe the administration of testate estates.

A testamentary estate is administered by an executor who is named in the decedent's last will and testament and who is appointed by the court in a "probate proceeding."
See answer 4.1 above with respect to service by non-citizen, non-residents.

Typically, the executor prepares and files the probate petition, often with the help of an attorney. Other persons (i.e. beneficiaries, a guardian of a minor child, or a creditor having an interest in the estate can file a probate petition pursuant to SCPA §1402.)

The petition must be "verified" by the person signing the petition, which mean signed and sworn to in front of a notary public.

The following documents must be filed with the court in a probate proceeding:

(i) the original will;
(ii) affidavit of at least two (2) attesting witnesses who witnessed the signing of the will if one was executed, otherwise the Court will examine the witnesses;
(iii) a certified copy of the decedent's death certificate;
(iv) verified probate petition, which contains the names and addresses of the distributees (heirs at law) and the names and addresses of beneficiaries named in the will;
(v) proof that beneficiaries named in the will have been given notice;
(vi) proof of service on the distributes and certain other persons upon whom service of process is required; and
(vii) filing fee based on the value of the estate.

Once the Surrogate's Court is satisfied that the will was properly executed and other formalities have been satisfied, the judge will issue a decree admitting the will to probate and appointing an executor. The Court will issue a document called "Letters Testamentary" to the executor giving the executor legal authority to administer the estate.

4.3 Management and control

To what extent, if any, is the management and control of an intestate or testate estate, by the heirs, by a court-appointed administrator or by the executor under a will, supervised by a court or subject to judicial oversight? For example, are administration fees subject to court review? Must administrators publicly file accounts? Describe the administration process.

The Surrogate's Court of the State of New York has jurisdiction over probate proceedings and intestate proceedings and retains jurisdiction of the estate until it has closed.

For descriptions of probate and administration proceedings, see answers to sections 4.1 and 4.2 above.

Inventory of Estate Assets.

The executor or administrator or the attorney representing the estate must also file with the Surrogate's Court an Inventory of Assets indicating the total value of the estate within 9 months of the date of issuance of Letters Testamentary to the executor(s) as provided in Rule 207.20 of the Uniform Rules for Surrogate's Court. The form only reports generalized information needed by the Court to confirm the proper filing fee was paid.

Accountings.

Statute provides for an "accounting" by the executor or administrator before the estate is closed. Executors and administrators are required to keep accurate and detailed accounts setting out the assets that form part of the estate, details of estate debts, taxes and administration expenses and confirming what steps have been taken with assets throughout the estate administration.

The beneficiaries can agree with the fiduciary to an informal estate accounting, which may adopt the format of a judicial accounting or provide records of the estate's administration. Provided the beneficiaries are satisfied that they have all the information regarding the estate assets and costs and can provide such an informal accounting to the beneficiaries, neither the accounting or agreement is required. The executor should ask the beneficiaries to approve the informal accounting and release the fiduciary before the executor makes distributions of estate funds.

The executor may decide on his or her own to present a voluntary accounting to the Court to be judicially settled. SCPA §2208. Individuals having an interest in the estate, such as the beneficiaries or creditors of the estate, may petition the Court to compel the executor to provide a formal accounting. SCPA §2205, and the Court may order an accounting on its own.

The accounting shall include a statutorily prescribed set of schedules that show all possible information about the estate, such as:

- the funds or property received by the estate;
- the expenses of the estate;
  an itemized list of the assets remaining to be distributed;
- the beneficiary distributions already disbursed; and
- the beneficiary distributions yet to be disbursed.

Where the Court orders the fiduciary to prepare and file a compulsory accounting to be served on all interested parties, the fiduciary may be removed by the Court if (s)he fails to comply. In the case where an executor is suspected of providing an incomplete or fraudulent accounting, or is slow to close the estate, beneficiaries can sue to challenge those accountings and get the money that the fiduciary may have squandered or may be keeping from the beneficiaries.

Fiduciary Compensation.

Under New York law, executors and administrators are entitled to receive fees for serving as the fiduciary of an estate. The fees – called "commissions" are set by statute at SCPA §2307.

The commission rate in New York for per fiduciary is 5% on the first $100,000 in the estate, 4% on the next $200,000, 3% on the next $700,000, 2-1/2 % on the next $4,000,000 and 2% on any amount above $5,000,000. Certain assets, such as assets passing outside of the "estate" by beneficiary designation or bequests made by the testator in a will to specifically named beneficiaries, are not included in the New York State fiduciary fee calculation.

Payment of commissions are made pursuant to a judicial accounting or an informal settlement among the fiduciary and the beneficiaries.

Fiduciaries are also entitled to be reimbursed for reasonable and necessary expenses actually paid by the fiduciary in carrying out the administration of the estate.