

A close-up photograph of a hand holding a black fountain pen with a gold nib, writing on a white document. A red wax seal is visible on the left side of the document. The background is dark, and the lighting is focused on the hand and the pen.

Dream Gift or Dickensian Nightmare?

Probate Fundamentals for Estate Administrators

MARY C. MORAN

Charities frequently presume that estates in which they have a beneficial interest are being administered properly. Occasionally circumstances arise to contradict that assumption, leaving the gift planner with more questions than answers. Should the charitable organization participate in a will contest? On what basis might a charity object? When is it too late? What recourse does a charity have when it disagrees with a personal representative's¹ investment and other decisions? What should a charity do when there are delays in distributions or the fees of the attorney and personal representative are high? In each of these situations, knowledge of the potential probate court² remedies will help in dealing with a difficult personal representative. If all else fails, a basic knowledge of these remedies will assist the charity in being prepared for seeking a judicial remedy to protect the charity's interests.

The purpose of this article is to provide planned giving professionals with a broad overview of general probate laws, concepts and possible court recourses. Given that it is a general introduction, the concepts are intentionally explained in “plain English.” Many differences exist in the substantive law, as well as the probate court practices of the various states. However, there are certain principals and concepts that are followed to one degree or another in all states. For example, the rights guaranteed under the U.S. Constitution and as interpreted by the U.S. Supreme Court apply in all jurisdictions.³ Most courts look for guidance from the common law, previous court decisions and treatises such as the “Restatement on Property—Wills and Other Donatives Transfers”⁴ and the “Restatement on Trusts.”⁵

Given the enormous complexity of this subject matter and the many differences in state laws and procedures, the goals of this article are limited to:

- Assisting nonprofit organizations in identifying situations in which they should promptly seek legal counsel in order to preserve the charity’s legal rights.
- Encouraging communication between charities and personal representatives.
- Raising awareness of available judicial remedies as a last resort.

There are three stages in the administration of an estate. The first phase is the allowance of the will and the appointment of the personal representative. In the second stage, the personal representative collects the assets, pays creditors and any taxes and distributes the remaining assets to the beneficiaries in accordance with the terms of the will. In the final stage, the personal representative prepares accounts and closes the estate.

First Stage:

PROBATE OF THE WILL AND APPOINTMENT OF PERSONAL REPRESENTATIVE

Probate courts oversee the smooth and orderly disposition of a decedent’s probate assets, namely

those assets that are not otherwise disposed of through, for example, previously funded trusts, joint tenancies or beneficiary designations of life insurance policies or retirement plans. In some states, a common practice is to avoid probate courts altogether by the use of revocable living trusts. This article is limited in scope to the subject of the probate of wills and does not address revocable living trusts and other non-probate transfers.

In keeping with a general public policy in favor of promptly probating wills so that estates may be administered speedily, most states require that any person possessing a decedent’s will must file the will with the court in the jurisdiction of the decedent’s last domicile.⁶ Typically, no further action is required of that person. The next step is for an interested party to come forward so that the will may be probated and a personal representative be appointed.

Approximately one-third of the states have adopted the Uniform Probate Code (“UPC”), which is designed to simplify the process of settling a decedent’s affairs. Routine and non-controversial estates will typically be handled through informal probate. Heirs and beneficiaries are entitled to notice within 30 days of the granting of informal probate.⁷ However, a charity that has an interest in an estate can file with the court a “demand” that it receive notice of any filings or orders 14 days in advance.⁸ Furthermore, an interested charity that has concerns about the validity of the will or the appointment of the personal representative can protect its rights by petitioning for formal probate⁹, or by entering a written compromise agreement.¹⁰ During the course of the administration of the estate, a concerned charity can protect its interests by petitioning the court for supervised administration.¹¹

Non-UPC states have different rules. Typically, interested parties receive advance notice that the will has been offered for probate and the deadline by which they must take some action in order to preserve their legal rights. If no party has taken an action by that date, then by default, presumably, the will would be allowed and the personal representatives appointed. Probate laws and procedures are designed to promote certainty as to the rightful possessor of the property. Challenges to the will should be

initiated during the very limited window of time between the date that the will is offered for probate and the court date provided on the notice. Once a will has been allowed, courts are hesitant to hear subsequent challenges to the validity of the will, especially if the challenge is by a party who had received notice and did not respond in a timely manner.

In those instances in which the decedent has disclosed to the charity their bequest provisions, it is prudent for a charity to make inquiries if it does not receive a probate court notice. Since probate filings are public, one option is for the charity to contact the appropriate court clerk and inquire as to whether a will has been filed and the current status of the estate, and to request a copy of the will and other probate court filings.

Will Challenges

The word probate means to “prove.” In this context, it must be proved that the document is the decedent’s last will and testament and that, at the time that the document was signed, the decedent had testamentary capacity. In order to have testamentary capacity, the person, at the time of signing the will, must be of sound mind, meaning that he or she understood the nature and extent of his or her property, the persons who are the natural objects of his or her bounty and the disposition that he or she is making of that property. The testator must also be under no undue influence and the execution of the will must be his or her free act and deed. The formal requirements for a will are that it must be in writing, signed by the testator in the presence of witnesses. These long-standing requirements derive from England’s Statute of Wills of 1540, Statute of Frauds of 1677 and the Wills Act of 1837.

Will contests based on lack of testamentary capacity are difficult to prove, since they center on the mental condition of the person *at the time* that the will is signed, regardless of the mental condition at times either prior or subsequent to the execution of the will. When there isn’t sufficient evidence as to the person’s testamentary capacity, the will can still be challenged on the basis of undue influence, duress or fraud, of which

the most common is undue influence.

A recent case illustrates the relationship between testamentary capacity and undue influence.¹² Ms. Romaine Efros executed a will in 2001 providing six-figure bequests to each of three family members and the residue, valued at over six million dollars, to be divided among four charities (the “Charities”). After she suffered a stroke in early 2005, her long-time attorney received several phone calls from her family members regarding modifying her will in their favor. She told him repeatedly that she didn’t want to change her will. The attorney then warned the family members that their actions could be construed as undue influence.

Eventually she instructed her attorney to revise her will in favor of the family members. Under the new draft, the value of each charity’s share declined from approximately \$1.6 million to \$500,000. Although the attorney sent her the draft, it was never executed in his presence because he determined that she was not able to freely execute it.

Meanwhile, the family members arranged for another attorney to supervise the execution of the will. Two and a half months later, Ms. Efros passed away. Her 2005 will was admitted to probate and two of the family members along with JP Morgan Chase Bank (the “Bank”) were appointed personal representatives. Several months later, Ms. Efros’ friend and investment advisor contacted the Bank with his concerns about the possible undue influence of the family members. After Ms. Efros’ stroke, he had almost daily phone conversations with her, which were recorded as a matter of company policy. Based on the transcripts of those conversations and a discussion with her original lawyer, the Bank sought to vacate the decree based on the newly discovered evidence.

The family members’ case relied on the will being executed under the supervision of an attorney who affirmed Ms. Efros’ testamentary capacity. The court distinguished testamentary capacity from undue influence and noted that testamentary capacity does not overcome the evidence of undue influence and that the facts as presented “paint a picture of a 93-year-old woman who believed she ‘had no choice’ but to change

her will to accord with the unremitting demands of her closest family members.”¹³

The court vacated the decree admitting the 2005 will to probate. It acknowledged that while this action “disrupts the orderly process of administration and creates... uncertainty and nonfinality... the court should also be slow to say that an injustice may not be corrected.”¹⁴ The existence of the transcripts makes this a very unique case. Without the transcripts, it would have been much more difficult, if not impossible, for the Bank and the Charities to convince the court to vacate the will, which it had previously allowed. This case is an exception to the general rule that most will contests fail because they are brought after the will has been admitted to probate, creating a presumption “that the will is the final, properly executed expression of the testator’s intent.”¹⁵

A further requirement for a successful will contest is that it must be brought by a party who has an interest or right that will be adversely affected if the will is allowed. This requirement, known as “standing,” centers on whether the challenger to the will is the proper one to object. Charities should not assume that other parties, such as family members or fiduciaries, can or will protect their interests. In some cases, a charity may be the only party with standing. For example, Miss Adelaide Briskman’s penultimate will left her estate to charity.¹⁶ Six months before her death, she changed her will and named a bank officer as the sole beneficiary under her will. A niece successfully challenged the will in probate court. Upon appeal, the niece’s challenge was dismissed because she had no standing, since she was not a beneficiary of the penultimate will and thus she was not adversely affected by the allowance of the later will.

Will contests can be costly in terms of time and money, and they may cause uncertainty and bad press for the organization. A charity may prefer to avoid litigation through either a settlement agreement, a will compromise, mediation or an alternative dispute

resolution. In order to take advantage of these alternatives, a party should preserve its legal rights by participating in the will contest until such time as an alternative solution is reached.

Appointment of a Personal Representative

Normally, a court appoints as personal representative the person or entity nominated by the decedent in his or her will, unless there is a reason for disqualification, such as incompetency or lack of capability. Usually, a court will take into consideration a beneficiary’s objections when there is a conflict of interest or other reason for the beneficiary to lack trust and confidence in the nominated party. A recent example of this occurred during the probate litigation surrounding the estate of Brooke Astor, between her son and several charities. He successfully objected to the appointment of his mother’s friend Annette de la Renta as one of the personal representatives on the grounds that she would be hostile and biased against him, and that she had a conflict of interest in that she was on the board of several of the charities that would benefit from provisions in the estate.¹⁷

Second Stage:

ADMINISTERING THE ESTATE

Poor communication can lead to perceived and or actual breaches of duty by the personal representative. It behooves both beneficiaries and personal representatives to communicate clearly and often in order to prevent misunderstandings. The will, inventories and accounts are public documents and the personal representative should provide these to the beneficiaries upon request. Depending on the circumstances, it may be prudent for residuary beneficiaries to request copies of the fiduciary income and estate tax returns and other documents as well as to be kept apprised of other matters such as all decisions regarding the sale of real estate or other illiquid assets.

While the estate is being administered, there are a number of probate court procedures available when disputes arise between the personal representative and the beneficiary. Beneficiaries may seek judicial intervention to compel an inventory, an accounting or a distribution. Although the court may be disinclined to substitute its judgment in matters in which the personal representative has discretionary authority, there are some instances in which a court will become involved. For example, a personal representative may seek instructions from the court when he has questions as to the interpretation of a will provision or his duties, the nature and extent of his duties, or in matters involving *cy pres*.¹⁸ In turn, beneficiaries can seek judicial intervention to enjoin a personal representative from taking certain actions, or to compel a personal representative to act. In addition, either party may seek a declaratory judgment to resolve disputes.

The first duty of a personal representative, once the will has been allowed and he or she has been appointed, is to collect the assets of the estate in order to pay the reasonable funeral expenses, debts, administrative expenses and taxes, and ultimately to distribute the remaining assets in accordance with the will or trust agreement.

Typically, state laws provide a set period of months in which creditors can file claims. A prudent personal representative will wait until at least the expiration of that time before paying any bequests. Once the assets are collected, the personal representative has a duty to manage the estate. In so doing, the personal representative must hold the title of the assets in the name of the fiduciary as fiduciary and not individually. The assets should be kept separate from the fiduciary's personal assets and not mixed with the fiduciary's own assets. The personal representative must take reasonable steps to safeguard the assets and to take out insurance where appropriate.

The personal representative has both a duty to invest and a duty to preserve estate assets. Depending on the terms of the will and on applicable state statutes, the investment powers of a personal representative may be substantially more restrictive than those granted to a trustee. For example, many states restrict the re-investment of sale proceeds of estate assets to conservative instruments such as short-term government obligations.

It is a common practice for remainder beneficiaries to inform the personal representative of any preferences regarding assets that it would like either to be sold or retained for distribution. The personal representative may be prevented from complying with these wishes by the terms of the will or for some other reason, but effective communication at the beginning of the administration of the estate will reduce the likelihood of the beneficiaries later suing on the basis of breach of duty for the representative's handling of the estates assets.

When the personal representative is charged with selling real estate or other illiquid assets, there are a number of decisions on which reasonable people may disagree. For example, should the personal representative sell the property "as is," or make improvements? At what point might those improvements be considered a waste of the estate's assets? Should the real estate be priced to sell, or priced to test the market? Might a personal representative accept a lower offer with

no contingencies rather than a higher offer with contingencies? These are all questions that involve various duties owed by the personal representative to the beneficiaries. Once again, clear communication between the beneficiaries and personal representative is one way to eliminate the need to seek judicial remedies.

Duties of Loyalty: Self-Dealing and Conflicts of Interest¹⁹

The personal representative has a duty to administer the estate for the sole benefit of the beneficiary. The duty of loyalty is the cornerstone of the fiduciary relationship. Justice Cardozo famously stated that the fiduciary “is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”²⁰

The issue of the duty of loyalty most frequently arises in cases when the personal representative either has a conflict of interest or has entered into a self-dealing transaction.

Self-dealing occurs when a personal representative has entered into a transaction between the estate and him or herself individually. When this occurs, the court does not take into consideration the fairness of the transaction or the personal representative’s good faith. All acts of self-dealing are prohibited except when the transaction is a fair one and the personal representative has:

- given the beneficiaries notice and obtained court approval; or
- provided full disclosure to the beneficiaries and obtained their consent; or
- acted upon authority granted under the will or by statute.²¹

A conflict of interest occurs when the personal

representative enters a transaction with a party in which the personal representative has an ongoing business relationship. In such situations, there is no breach of the duty of loyalty so long as the transaction is fair to the estate and entered into in good faith.

There are a variety of judicial remedies for breaches of the duty of loyalty, including removing the personal representative, denying compensation and requiring the representative to personally make up the loss caused by the breach. All three of these judicial remedies were imposed on the personal representatives of the estate of the modernist painter, Mark Rothko. In the opinion by the highest New York state court, the Court of Appeals of New York, the conduct of the personal representatives were “manifestly wrong and indeed shocking.”²²

The remainder beneficiaries of the painter’s estate were his two children and the Mark Rothko Foundation, Inc. Shortly after Rothko’s death, the personal representatives disposed of the principal assets of his



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estate by selling 100 paintings and consigning nearly 700 other paintings to a prominent art gallery. The terms of these contracts were extremely favorable to the gallery, and they were deemed to be a conflict of interest in that one of the personal representatives was a director of the gallery and another personal representative was a client of the gallery. The third personal representative had no business relationship with the art gallery, and therefore did not have a conflict of interest. Nonetheless, he was found to have failed to exercise ordinary prudence in not investigating essential facts and not consulting competent and disinterested appraisers.

Rothko's daughter sought judicial intervention and was granted a temporary restraining order preventing the personal representatives and the art gallery from selling or disposing of any of Rothko's artwork without prior court authorization.²³ At that time, 57 pieces of art had been invoiced but not yet delivered to the buyers. The personal representatives and the gallery violated the restraining order by going ahead and

delivering the artwork without consulting the court. The court found the terms of the contract to be neither fair nor in the best interests of the estate, and therefore voided the contracts with the gallery. In addition, the court found that the violations of the personal representatives were so substantial that they were removed as personal representatives, denied commissions and, along with the gallery owner, were held liable for \$9.2 million in damages, which included the appreciation in value between the date of the sale of 57 paintings and their value as of the court decree.²⁴

The 11-year *Rothko* controversy extracted a high price from some of its participants. One of the personal representatives declared bankruptcy, and the gallery owner spent years as a fugitive after having been indicted for tampering with evidence.²⁵

Duty of Impartiality

The personal representative also has a duty to be impartial. Absent authority in the will, the personal

representative must treat all beneficiaries equitably, although not necessarily equally. The duty of impartiality is most commonly examined when the fiduciary's investment decisions seem to favor either the income beneficiary or the remainder beneficiary; however, impartiality pertains to other fiduciary decisions as well. For example, the duty of impartiality was raised in a case that involved the construction of a tax apportionment clause. The will of George Gordon established a trust (the "Marital Trust") in which his wife had a life income interest.²⁶ His personal representatives claimed an estate tax marital deduction for the Marital Trust, thereby deferring the estate taxes until the wife's death. Their election disregarded a provision in his will that his personal representatives take into consideration the interests of the beneficiaries of his wife's estate in determining the extent to which they should elect the marital deduction. The election by his personal representatives resulted in his estate having a zero tax liability.

The wife's personal representatives requested that the court construe the tax clause of her will so that the remainder beneficiaries of the Marital Trust would be obligated to reimburse her estate for that portion of the estate taxes attributable to the Marital Trust. (Although she was entitled to the income of the Marital Trust, she had no power to dispose of the principal of the trust either by her will or otherwise.) Her testamentary estate was about \$600,000 and, if her estate were liable for the estate tax on the portion of the Marital Trust included in her estate, then her charitable residuary bequest to the Albert Einstein College of Medicine of Yeshiva University ("Yeshiva University") would in effect be wiped out. The court authorized her personal representatives to recover from the Marital Trust's remainder beneficiaries the estate taxes attributable to the Marital Trust, on the basis that her probable intent was to not exonerate the Marital Trust from contributing its share of estate taxes. As an aside, the court stated that the decisions made by the husband's personal representatives would likely be considered a breach of their duty of impartiality and that, citing the

Rothko decision, the personal representatives should have at the very least applied to the court for advice and direction.

Third Stage:

ACCOUNTS

Finally, a personal representative has a duty to account for the management of the estate assets. This is a fundamental duty, because without it no one would be able to monitor the administration of the estate or to seek judicial remedies. The purpose of an account is to report on the activities within the estate over a given period of time. Accounts typically include a statement of the assets at the beginning of the period, the payments of debts and taxes, the distribution of the assets and all transactions during the period.

Pecuniary Bequests

A beneficiary of a pecuniary bequest may choose to forgo a review of the accounts in estates in which it has received in a timely manner all that it is entitled to under the will. In straightforward estates, pecuniary bequests are typically paid at some point between the expiration of the creditor's claim period and one year from either the decedent's death or the appointment of the personal representative. If a bequest is not paid on a timely manner, a beneficiary may choose to request the court to order a distribution.

Depending on the terms of the will, a pecuniary bequest may accrue interest if it is not paid by a set date. If the will is silent, there may be a common law right to interest. Although several states have statutory rates of interest, a few states limit interest to cases in which the will so provides.

Sometimes a personal representative has good reasons for delaying payment of a pecuniary bequest. For example, in a Texas case, the personal representative waited until after the



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estate was audited and she received the estate tax closing letter from the Internal Revenue Service before paying a \$10 million charitable bequest to the Juliette Fowler Homes, Inc. ("Fowler Homes").²⁷ The personal representative also distributed an additional \$1,052,054.79 of statutory interest, which accrued at a rate of six percent beginning one year from the personal representative's appointment. The IRS challenged the personal representative's estate tax refund claim for the statutory interest. Upon appeal, the court ruled in favor of the personal representative. In that case, the will required that the Fowler Homes be a charitable organization. At that time, Fowler Homes did not have a separate IRS determination letter because it claimed tax-exempt status by virtue of its affiliation with the Christian Church (Disciples of Christ). The court ruled that the delay in distribution was prudent given the size of the bequest and the

explicit requirement in the decedent's will that Fowler Homes be a charitable organization.

Residuary Bequests

Beneficiaries of residuary bequests are well advised to carefully review the personal representative's accounts and to verify that the payment of administrative expenses, debts and taxes are necessary and proper. A prudent beneficiary will request from the personal representative an explanation of any transaction that is not understandable. Failure to object to the accounts on a timely basis may preclude the charity from later challenging the accounts. Although litigating fiduciary accounts can be expensive, the probate court may offer cost-effective methods of resolving disputes through either settlement or alternate dispute resolution procedures.

The reasonableness of the attorney's and personal representative's compensation is one of the more frequent concerns of residuary beneficiaries. Although some states have statutory fee schedules, many other states rely on a "reasonable" standard for determining the appropriateness of the fee. According to the National Probate Court Standards²⁸, the following factors may be considered in determining the reasonableness of the fee:

- the usual and customary fees charged within that community
- the responsibilities and risks associated with the services provided
- the size and complexity of the estate
- the amount of time, skill and expertise required to perform the services
- the experience, reputation and ability of the person providing the services
- the benefit of the services provided

Factors that might support a higher fee include the threat or initiation of litigation, the operation of a business or extensive reporting or monitoring requirements. On the other hand, a significant breach of duty, as in the *Rothko* estate, may justify a reduction or denial of compensation. As in most other matters, when there are questions about the fees, a charity (or its legal counsel) should communicate with the personal representative or the attorney for the estate. There may be a reasonable basis for the fees or they may be willing to reduce some of the charges.

Tax Calculations

This is perhaps the most complicated aspect of reviewing accounts. In addition to reviewing the accuracy of estate and income tax calculations, it may also be fruitful to question which portion of the estate rightfully bears the estate tax burden. In essence, the question is whether the charitable deduction benefits all beneficiaries of the estate, or just the charitable beneficiaries. The answer depends on the testator's intent and the tax provisions in the will and in other estate planning documents, such as previously funded trusts. If the tax provisions are conflicting, the answer is even more complicated and may result in the personal representative seeking a judicial determination, a settlement agreement among the relevant parties or probate litigation. If the will is silent, then federal or state law applies, depending on the circumstances.

This is an extremely complex topic and the following is only a basic outline of three of the possible ways of determining which party bears the estate tax burden:²⁹

1. The estate tax is treated as an administrative expense and in effect the tax burden is borne by the residuary beneficiaries. This results in a decrease in any charitable residuary bequest and an increase in tax liability. A circular calculation is needed to determine the tax liability, because the tax coming from the charitable share reduces the charitable deduction, which then increases the estate tax, which then reduces the charitable deduction and so on and so on.
2. The entire estate tax is paid from the non-charitable shares. This is known as equitable apportionment and is obviously the most favorable to the charitable residuary beneficiaries.
3. The estate tax liability is apportioned between the probate assets and any non-probate assets included in the taxable estate.

The amounts at stake can be quite substantial. One recent case involved the will of Louis Fiel whose \$250 million dollar estate provided for \$20 million to fund a trust for family members (the “Family Trust”) and the remainder to a zeroed out charitable lead trust.³⁰ The two personal representatives disagreed as to whether the estate taxes should be paid from the Family Trust or from the charitable lead trust. If the Family Trust was responsible for the estate taxes, the tax liability would be approximately \$11 million, the Family Trust would receive roughly \$9 million and the charitable lead trust would receive about \$250 million. In the alternative, if the \$20 million Family Trust was not responsible for the taxes, then the total tax liability would increase to about \$25 million leaving \$225 million to fund the charitable lead trust. The court took the latter position, even though it resulted in a larger tax bill.

Although this is a complicated matter, especially when there are several estate planning documents with conflicting clauses, the amount at stake can be quite substantial. When there is an estate tax liability, unless the charity reviews the tax clause and the tax returns, it cannot know for certain whether it has received all that it is entitled to. That is why some organizations review each line of the accounts, including how the taxes are calculated and paid.

THE BALANCING ACT

The testator, by providing for a charity in his or her estate plan, is expressing the ultimate vote of confidence in that organization. In turn, the charity has an obligation to honor those intentions by making sure that the bequest is used for the charity’s exempt purposes, especially in cases in which the bequest was not an afterthought, but rather an important desire by the testator to support the charity’s work.

At times this may be quite a difficult balancing act. While the charity should act to protect the bequest from unscrupulous individuals who have exerted undue influence or from the personal representative’s mistakes, at the same time the charity should not spend its limited resources on futile litigation. Clear communication between the charity and the personal representative at each stage of the process is one way to ensure that the donor’s philanthropic wishes are carried out. When communication is not sufficient, the probate court can and does offer some recourse so that the organization may fulfill the donor’s intentions to the best extent possible.

Mary C. Moran is an attorney at law and the primary consultant for MCM Planned Giving Services. She has nearly two decades of experience in the field of charitable gift planning. She counsels her clients on a wide variety of planned giving and estate administration matters. A 1991 graduate of Georgetown University Law Center, she started her career as an estate-planning attorney with the Boston law firm of Palmer & Dodge. Subsequently, she was the planned giving director at the College of the Holy Cross and at WGBH Educational Foundation. She is also the author of a cover article for the August 2009 issue of *Trusts & Estates* magazine, “Babe Ruth Hit Home Runs, But His Foundation Struck Out.” Previously, she was a board member of the Planned Giving Group of New England and the YWCA of Central Massachusetts and a steering committee member of LEAVE A LEGACY™ of Central Massachusetts. She has given many presentations before numerous professional organizations.

Endnotes

- 1 For purposes of uniformity, the term “personal representative” includes executors, executrices, special administrators and all other persons appointed by the court to settle the estate of the testator.
- 2 The name of the court that handles the probate of estates varies from state to state. It is sometimes called the Surrogate’s Court, Ordinary Court, Prefect’s Court, Orphan’s Court, or the Court of Chancery. For the sake of uniformity, the term “probate court” will be used in this article to refer to all such courts.
- 3 For example, two U.S. Supreme Court decisions have applied the due process protections of the 14th amendment to the manner in which fiduciaries provide notice to interested parties. See *Mullane v. Central Hanover Trust Co.* 339 U.S. 306, 318 (1950) (trust beneficiaries whose address was known to the trustee were entitled to notice by mail of the pending allowance of accounts); *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478 (1988) (reasonably ascertainable creditors of decedents in states that do not have self-executing statutes of limitations are entitled to notice by mail).
- 4 Restatement of the Law Third, Property (Wills and Other Donative Transfers) Volumes 1 (1999) and 2 (2003).
- 5 Restatement of the Law Third, Trusts, Volumes 1 and 2 (2003).
- 6 In addition, if the decedent owned property in another state, in order for the property to be transferred, it may be necessary to have an ancillary probate proceeding in that state.
- 7 Unif. Probate Code Section 3-306.
- 8 Unif. Probate Code Section 3-204; Unif. Probate Code Section 1-401.
- 9 Unif. Probate Code Section 3-401.
- 10 Unif. Probate Code Section 3-1101.
- 11 Unif. Probate Code Section 3-501.
- 12 *In the Matter of Efros*, 2008 NY Slip Op 50678 (U) (N.Y. Sur. Ct. 3/18/2008).
- 13 See *Efros*, 2008 NY Slip Op 50678 at p. 7.
- 14 See *Efros*, 2008 NY Slip Op 50678 at p. 6 quoting *Matter of Musso*, 642 N.Y.S.2d 322, 323 (internal citations omitted)(App. Div. 2d Dept., 1996).
- 15 Jeffrey N. Pennell and Alan Newman, *Estate and Trust*

- Planning* (First ed., American Bar Association, 2005, Chicago) p. 61.
- 16 *In re Estate of Briskman*, 808 A.2d 928 (Pa., Super. Ct. 2002).
- 17 Barbara Whitaker, “Brooke Astor’s Guardians and Son Battle Over Estate,” *The New York Times*, August 23, 2007.
- 18 When a testator has a general charitable purpose but for some reason the charitable bequest can not be fulfilled, the doctrine of *cy pres* allows for the court to construe the will so that the charitable gift can be carried out as near as possible.
- 19 See *supra* note 15 at pp. 388-393 for a detailed explanation of the duties of loyalty.
- 20 *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928).
- 21 See *supra* note 15 at pp. 389-390.
- 22 *Estate of Rothko*, 401 N.Y.S.2d 449, 451 (N.Y., 1977).
- 23 *In re Rothko’s Estate*, 336 N.Y.S.2d 130 (N.Y. Sur. Ct., 1972), mod and aff’d 338 N.Y.S.2d 854 (N.Y.A.D. 1 Dept., 1972).
- 24 See *supra* note 21, 379 N.Y.S.2d 923 (N.Y. Sur. Ct. 1975), mod and aff’d 392 N.Y.S.2d 870 (N.Y.A.D. 1 Dept., 1977), 401 N.Y.S.2d 449 aff’d (N.Y., 1977).
- 25 Judith Dobrzynski, “A Betrayal the Art World Can’t Forget; The Battle for Rothko’s Estate Altered Lives and Reputations,” *The New York Times*, November 2, 1998.
- 26 *In the Matter of the Estate of Gordon*, 510 N.Y.S.2d 815 (N.Y. Sur. Ct., 1986).
- 27 *Turner ex rel. Estate of Jackson v. U.S.*, 306 F. Supp. 2d 668 (N.D. Tex. 2004).
- 28 Commission on National Probate Court Standards (U.S.), National College of Probate Court Judges (U.S.) and the National Center for State Courts, *National Probate Court Standards*, (National Center for State Courts, 1999).
- 29 Jeffrey N. Pennell and Robert T. Danforth, *Transfer Tax Payment and Apportionment* (Tax Management Inc., 2001, Washington D.C.) pp. A-5, A-6.
- 30 *In re Proceeding of Feil*, 2009 NY Slip Op 33096 (U) (N.Y. Sur. Ct. 12/23/2009).