CHAPTER 953

AN ACT in relation to surrogate's court practice and procedure governing, generally, the procedure in the surrogates' courts of the state of New York and before the judges thereof, constituting chapter fifty-nine-a of the consolidated laws

Became a law August 2, l966, with the approval of the Governor. Passed by a majority vote, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SURROGATE'S COURT PROCEDURE ACT

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ARTICLE 1
GENERAL

§ 101. Short title; how cited

This act shall be known as the surrogate's court procedure act and may be cited as "SCPA". A provision of this act may be cited by its number without being preceded either by the word "section" or the symbol "§". Reference to an article or section without reference to another law shall be deemed to refer to an article or section of this act.

§ 102. Application of CPLR and other laws

The CPLR and other laws applicable to practice and procedure apply in the surrogate's court except where other procedure is provided by this act.

§ 103. Definitions

When used in this act, unless otherwise required by the context, or unless a contrary intent is expressly declared in the provision to be construed, the words, phrases or clauses hereafter shall be construed as follows:

1. Acknowledged. Acknowledged or proved in the same manner as a deed is required to be acknowledged or proved and authenticated to be recorded in that county, except that when executed within the state, no certificate of the county clerk shall be required.

2. Administrator. Any person to whom letters of administration have been issued.

3. Administrator c. t. a. Any person to whom letters of administration with the will annexed have been issued.

4. Administrator d. b. n. Any person to whom letters of administration have been issued as a successor to an administrator.

5. Ancillary administrator. Any person to whom ancillary letters of administration have been issued.

6. Ancillary executor or administrator c. t. a. Any person to whom ancillary letters testamentary or ancillary letters of administration c. t. a. have been issued.

7. Ancillary guardian. Any person to whom ancillary letters of guardianship, whether of the person, property, or both, of an infant have been issued.

8. Beneficiary. Any person entitled to any part or all of an estate.

9. Bequest or legacy. A transfer of personal property by will.

9-a. Corporate trustee. Any trust company, any bank authorized to exercise fiduciary powers and any national bank having a principal, branch or trust office in this state and duly authorized to exercise fiduciary powers.

10. Court. The surrogate's court, including any judge or surrogate

assigned, elected or appointed to serve as judge of the court.

11. Creditor. Any person having a claim against a decedent or an estate.

12. Devise. When used as a noun, a transfer of real property by will. When used as a verb, to transfer real property by will.

13. Devisee. Any person to whom real property is transferred by will.

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

15. Domicile. A fixed, permanent and principal home to which a person wherever temporarily located always intends to return.

16. Domiciliary. A person whose domicile is within the state of New York.

17. Donee of a power during minority. Any person granted or deemed to have the power during minority to manage property vested in an infant.

18. Eligible to receive letters. Not disqualified on any of the grounds described in 707.

19. Estate. All of the property of a decedent, trust, absentee, internee or person for whom a guardian has been appointed as originally constituted, and as it from time to time exists during administration.

20. Executor. Any person to whom letters testamentary have been issued.

21. Fiduciary. An administrator, administrator c.t.a., administrator d.b.n., ancillary administrator, ancillary administrator c.t.a., ancillary executor, ancillary guardian, executor, guardian, preliminary executor, temporary administrator, testamentary trustee, to any of whom letters have been issued, and also the donee of a power during minority

and a voluntary administrator and a public administrator acting as administrator or a public administrator or county treasurer to whom letters have been issued, and a lifetime trustee.

22. Funeral expense. Includes reasonable expense of a funeral, suitable church or other services as an integral part thereof, expense of interment or other disposition of the body, a burial lot and suitable monumental work thereon and a reasonable expenditure for perpetual care of a burial lot of the decedent. For the purpose of subdivision one of section eighteen hundred eleven of this act, funeral expense shall also include burial expenses awarded pursuant to article twenty-two of the executive law.

23. Grantor. The creator of a lifetime trust.

24. Guardian. Any person to whom letters of guardianship have been issued by a court of this state, pursuant to this act, the family court act or article 81 of the mental hygiene law.

25. Incapacitated person. Any person who for any cause is incapable adequately to protect his or her rights, including a person for whom a guardian has been appointed pursuant to article 81 of the mental hygiene law.

26. Incompetent. Any person judicially declared incompetent to manage his affairs.

26-a. Individual trustee. Any trustee who is not a corporate trustee.

27. Infant. Any person under the age of eighteen years; provided, however, that for purposes of appointment of a guardian of an infant, the term infant also shall include a person who is under the age of twenty-one years who consents to the appointment of a guardian after the age of eighteen. It is further provided that such definition shall not be applicable to any provision relating to the New York Uniform Transfers to Minors Act, nor to section 1716 of this act.

28. Intestate. A person who dies without leaving a valid will. Where it is used with respect to particular property, a person who dies without effectively disposing of that property by will. When used as an adjective, to property not effectively disposed of by will.

29. Judicial settlement. A proceeding whereby the account of a fiduciary is settled and adjudicated by decree of the court.

30. Legal life tenant. Any person entitled for his life or for the life of another to the possession and use of real or personal property.

31. Lifetime trust. An express trust, including all amendments thereto, created during the grantor's lifetime other than a trust for the benefit of creditors, a resulting or constructive trust, a business trust where certificates of beneficial interest are issued to the beneficiary, an investment trust, voting trust, a security instrument such as a deed of trust and a mortgage, a trust created by the judgment or decree of a court, a liquidation or reorganization trust, a trust for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, or a trust created in deposits in any banking institution or savings and loan institution.

32. Lifetime trustee. A trustee acting under a lifetime trust.

33. Legatee. Any person designated to receive a transfer by will of personal property.

34. Letters. Includes letters of administration, letters of administration c. t. a., letters of administration d. b. n., limited letters of administration, ancillary letters of administration, ancillary letters of guardianship, ancillary letters testamentary, letters of guardianship, letters of temporary administration, letters testamentary, preliminary letters testamentary and letters of trusteeship. A testamentary trustee who has qualified without the issuance of letters shall be deemed for the purposes of this act to have received letters of trusteeship.

35. Mailing or mail. A direction to mail or for mailing of process, notice or other paper requires deposit of such process, notice or other paper enclosed in a sealed postpaid envelope, directed to the person to be served or notified, in any post office or other depositary under the exclusive care and custody of the United States Postal Service.

35-a. Mailing by express mail. Mailing in conformity with the requirements of the United States Postal Service respecting express mail.

36. Mailing by registered or certified mail. A direction for mailing of process, notice or other paper by registered or certified mail requires mailing in conformity with the requirements of the United States Postal Service respecting registered or certified mail, as the case may be.

37. Mailing by registered or certified mail; return receipt requested. Mailing in conformity with the requirements of the United States Postal Service respecting registered mail with return receipt requested or certified mail with return receipt requested, as the case may be.

37-a. Mailing by special mail service. A direction for mailing of process, notice or other paper by special mail service requires mailing by express mail or use of any designated delivery service within the meaning of §7502(f)(2) of the United States Internal Revenue Code of 1986, as from time to time amended.

38. May. When used in this act, in relation to an act to be performed by the court, means in the discretion of the court.

39. Person interested. Any person entitled or allegedly entitled to share as beneficiary in the estate or the trustee in bankruptcy or receiver of such person. A creditor shall not be deemed a person interested. Where this act provides that a "person interested" may apply for relief, a verified allegation of an interest in fact, suffices for the purpose of the application, although the interest may be disputed,

unless or until the fact of interest has been judicially determined and no appeal is pending therefrom.

40. Person under disability. Any person who is (a) an infant, (b) an incompetent, (c) an incapacitated person, (d) unknown or whose whereabouts are unknown or (e) confined as a prisoner who fails to appear under circumstances which the court finds are due to confinement in a penal institution.

40-a. Petition. A verified application in the manner provided in CPLR 3020, requesting action upon a matter or relief provided for in the estates, powers and trusts law or this act.

41. Preliminary executor. Any person to whom preliminary letters testamentary have been issued.

42. Presumptive distributee. Any person who would be a distributee as defined in this act, if the person alleged to be deceased, absentee or internee were dead.

43. Process. Citation, order to show cause, subpoena and any other mandate of the surrogate's court by which jurisdiction is obtained of a party.

44. Property. Anything that may be the subject of ownership and is real or personal property, or is a chose in action.

45. Respondent. Every party to a proceeding except a petitioner.

46. Safe deposit company. Any corporation authorized under the banking law to let out receptacles for safe deposit of personal property.

47. Temporary administrator. Any person to whom letters of temporary administration have been issued.

48. Testamentary trust. A trust created by will.

49. Testamentary trustee. Any person to whom letters of trusteeship have been issued.

50. Trust. A testamentary trust or a lifetime trust.

51. Upon the return of process. The time and place for the return of any process and any adjournment thereof, and implies that due proof has been made that the court has jurisdiction over all parties who appeared, have waived or been duly served.

52. Will. A last will, including all the codicils thereto.

§ 104. Application of act; confirmation of previous acts

Each provision of this act relating to the jurisdiction of the surrogate's court over lifetime trusts or to take the proof of a will and to grant letters or appoint trustees or regulating the mode of procedure in any manner concerning a lifetime trust or an estate of a decedent applies unless otherwise expressly declared therein, whether the estate, if a lifetime trust, was created, or the will was made or the decedent died before or after this act takes effect. All acts hitherto of surrogates and officers acting as such by completing and certifying in their own names any uncertified wills, and by signing and certifying in their own names any uncertified records of wills, and of other proofs and examinations taken in the proceedings of probate thereof before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements.

§ 105. Rules for surrogates' courts

The court in each county may make such rules for the conduct of business in its court as it may deem necessary, not inconsistent with statute, and subject to the rules and orders of the administrative board and appellate division applicable thereto.

§ 106. Appendix of official forms

The state administrator of the state of New York shall have the power to adopt, amend and rescind an appendix of forms. Forms adopted pursuant to this section shall be sufficient under the surrogate's court procedure act and shall be accepted for filing in all of the surrogate's courts. Any judge of the surrogate's court may provide forms other than the official forms for use in his county, provided, however, that the use of such forms shall not be required instead of the official forms.

§ 107. Use of electronic filing authorized

1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in the surrogate's court as provided in article twenty-one-A of the civil practice law and rules.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule twenty-one hundred three of the civil practice law and rules.

ARTICLE 2

JURISDICTION AND POWERS

Section

§ 201. General jurisdiction of the surrogate's court

1. The court has, is granted and shall continue to be vested with all the jurisdiction conferred upon it by the Constitution of the State of New York, and all other authority and jurisdiction now or hereafter conferred upon the court by any general or special statute or provision of law, including this act.

2. This and any grant of jurisdiction to the court shall be deemed an affirmative exercise of the legislative power under § 12 (e) of article VI of the Constitution and shall in all instances be deemed to include and confer upon the court full equity jurisdiction as to any action, proceeding or other matter over which jurisdiction is or may be conferred.

3. The court shall continue to exercise full and complete general jurisdiction in law and in equity to administer justice in all matters relating to estates and the affairs of decedents, and upon the return of any process to try and determine all questions, legal or equitable, arising between any or all of the parties to any action or proceeding, or between any party and any other person having any claim or interest therein, over whom jurisdiction has been obtained as to any and all matters necessary to be determined in order to make a full, equitable and complete disposition of the matter by such order or decree as justice requires.

§ 202. Enumerated proceedings not exclusive

The proceedings enumerated in this act shall not be deemed exclusive and the court is empowered in any proceeding, whether or not specifically provided for, to exercise any of the jurisdiction granted to it by this act or other provisions of law, notwithstanding that the jurisdiction sought to be exercised in the proceeding is or may be exercised in or incidental to a different proceeding.

§ 203. Jurisdiction of parties and subject matter

The court obtains jurisdiction in every case to make a decree or other determination by the existence of the jurisdictional facts prescribed by statute.

The jurisdiction of the court is exercised by the commencement of a proceeding in the court. All proceedings are special proceedings and are commenced by filing a petition. Personal jurisdiction of parties is obtained by service of process upon the parties or by submission to the jurisdiction of the court by waiver of issuance and service of process, appearance of an adult competent party in person or by attorney or by pleading.

§ 204. Presumption of jurisdiction

Where the jurisdiction of the court to make a decree or other determination is drawn in question collaterally, the jurisdiction is presumptively and in the absence of fraud or collusion, conclusively established by an allegation of the jurisdictional facts contained in a verified pleading. Jurisdiction of the parties is presumptively proved by a recital to that effect in the decree.

§ 205. Domiciliaries; jurisdiction and venue

1. The surrogate's court of any county has jurisdiction over the estate of a decedent who was a domiciliary of the state at the time of his death, disappearance or internment. The proper venue for proceedings relating to such estates is the county of the decedent's domicile at the time of his death, disappearance or internment.

2. A surrogate shall transfer any proceeding to the surrogate's court of the proper county either on his own motion or on the motion of any party.

3. Notwithstanding the foregoing provisions of this section, the surrogate's court of any county has jurisdiction over, and is a proper venue for, the proceedings of any decedent who was a domiciliary of the state at the time of his or her death and who died as a result of wounds or injury incurred as a result of the terrorist attacks on September eleventh, two thousand one.

§ 206. Non-domiciliaries; jurisdiction and venue

1. The surrogate's court of any county has jurisdiction over the estate of any non-domiciliary decedent who leaves property in the state, or a cause of action for wrongful death against a domiciliary of the state. The proper venue for proceedings relating to such estates is the county (a) where the non-domiciliary decedent left property, or (b) where personal property belonging to the non-domiciliary decedent has since his death, disappearance or internment come into and remains unadministered, or (c) of the domicile of the person against whom a non-domiciliary left a cause of action for wrongful death.

2. Where venue may lie in more than one county under the provisions of subdivision one, the court where a proceeding is first commenced with proper venue shall retain jurisdiction, and matters relating to the estate of the non-domiciliary decedent pending in the surrogate's courts of other counties shall be transferred to it.

3. A surrogate shall transfer any proceeding to the surrogate's court of the proper county either on his own motion or on the motion of any party.

§ 207. Lifetime trusts; jurisdiction and venue

1. The surrogate's court of any county has jurisdiction over the estate of any lifetime trust which has assets in the state, or of which the grantor was a domiciliary of the state at the time of the commencement of a proceeding concerning the trust, or of which a trustee then acting resides in the state or, if other than a natural person, has its principal office in the state. The proper venue for proceedings relating to such lifetime trusts is the county where (a) assets of the trust estate are located, or (b) the grantor was domiciled at the time of the commencement of a proceeding concerning the trust, or (c) a trustee then acting resides, or, if other than a natural person, has its principal office.

2. Where venue may lie in more than one county under the provisions of subdivision one, the court where a proceeding is first commenced with proper venue shall retain jurisdiction, and matters relating to the estate of the lifetime trust pending in the surrogate's courts of other counties shall be transferred to it.

3. A surrogate shall transfer any proceeding to the surrogate's court of the proper county either on his own motion or on the motion of any party.

§ 208. Jurisdiction; how affected by locality of certain assets

For the purpose of conferring jurisdiction upon the court:

1. A debt or a cause of action for wrongful death, in favor of a non-domiciliary against a domiciliary, is deemed personal property in the county where the domiciliary, or either of two or more such domiciliaries resides, or if other than a natural person, such domiciliary has its principal office, except that a debt evidenced by a negotiable instrument is deemed for jurisdictional purposes personal property in the county of the situs of the instrument.

2. An insurance policy upon the life of a non-domiciliary decedent

shall have the situs of the principal office in this state of the company or corporation issuing the policy of insurance.

3. A share of stock of a corporation of this state owned by a non-domiciliary is deemed personal property in the county where the corporation has its principal office.

4. A life insurance policy or share of stock owned by a non-domiciliary is deemed personal property in the county where the policy or share of stock is situated, the provisions of subdivisions 2 and 3 notwithstanding.

§ 209. Powers incidental to jurisdiction of the court

The court has power:

1. To open, vacate, modify or set aside any decree or order of the court directing distribution of the property of an estate which was made prior to the probate of and without knowledge of a will which affects such distribution, and in the same or a different proceeding, and on notice to the persons or the fiduciaries of the persons to whom the property has been distributed, to make such further and different direction as to such distribution as justice may require, and as an incident thereto, order the refund of any property theretofore distributed erroneously.

2. To sign any decision, decree or order, with its usual signature or initials, and all decisions, decrees or orders heretofore or hereafter so signed shall be valid and binding.

3. To transfer for trial in the surrogate's court having jurisdiction any action or proceeding pending in any court other than the supreme court, which affects or relates to the administration of an estate and to receive for trial any such action or proceeding pending in the supreme court which may by order of the latter court be transferred to the surrogate's court on the prior order of that court and to transfer

any action or proceeding other than one which has been previously transferred to it or which affects or relates to the administration of an estate, to any other court, except the supreme court, having jurisdiction of the subject matter in any other judicial district or county provided such other court has jurisdiction over the classes of persons named as parties.

4. To determine a decedent's interest in any property claimed to constitute a part of his gross estate subject to estate tax, or to be property available for distribution under his will or in intestacy or for payment of claims, and to determine the rights of any persons claiming an interest therein, as against the decedent, or as between themselves, and to construe any instruments made by him affecting such property.

5. To settle the account of a fiduciary of a common trust fund as provided in the banking law.

6. To determine any and all matters relating to lifetime trusts.

7. To entertain a proceeding under EPTL 8-1.1.

8. To dismiss any proceeding which the petitioner has neglected to prosecute diligently.

9. To determine any unfinished business pending before its predecessor in office and to sign or certify papers or records left uncompleted or unsigned by its predecessor.

10. In the exercise of its jurisdiction, the court shall have all of the powers that the supreme court would have in like actions and proceedings including, but not limited to, such incidental powers as are necessary to carry into effect all powers expressly conferred herein.

11. The enumeration of powers herein shall not be deemed exclusive.

§ 210. Jurisdictional predicate

1. Traditional bases. The court shall exercise jurisdiction over persons and property as heretofore or hereafter permitted by law.

2. Additional bases.

(a) The court may exercise personal jurisdiction over any non-domiciliary, or his fiduciary, as to any matter within the subject matter jurisdiction of the court arising from any act or omission of the non-domiciliary within the state, either in person or through an agent and the court may exercise personal jurisdiction over any non-domiciliary, or his fiduciary, as to any matter arising from any act or omission of the non-domiciliary without the state affecting the real property in this state which was in the name of the domiciliary decedent of an estate or personal property which was on deposit in this state in a savings bank, savings and loan institution, commercial bank, lending institution or a brokerage account, stocks, bonds or other marketable securities registered in the name of the domiciliary decedent or with another within one year of the date of death of the domiciliary decedent.

(b) The receipt and acceptance of any property paid or distributed out of and as part of the administration of an estate subject to the jurisdiction of the court, other than the payment of taxes under article 26 of the tax law to the commissioner of taxation and finance, shall constitute a submission by such recipient to the jurisdiction of the court as to any matter concerning the payment or distribution, including proceedings for the recovery thereof.

§ 211. When jurisdiction in personam obtained

The court may exercise personal jurisdiction over any person as to any matter within the subject matter jurisdiction of the court, if, on analogous facts in an action in the supreme court, such person would be subject to the personal jurisdiction of that court.

§ 212. Service of process

All processes of the court may be served and executed in any part of the state and without the state when authorized by law.

ARTICLE 3

PROCEEDINGS, PLEADINGS AND PROCESS

Section

§ 301. Statute of limitations

(a) For the purpose of computing the period of limitation under article two of the civil practice law and rules, a proceeding is commenced upon the filing of a petition, provided process is issued and service made upon any respondent within one hundred twenty days after the date of the filing of the petition, except that when process is served by publication, the first publication be made within one hundred twenty days of the filing of the petition.

(b) If a proceeding is dismissed for failure to effect proper service, the petitioner may commence a new proceeding, despite the expiration of the statute of limitations after the commencement of the original proceeding, based upon the same instrument, transaction or occurrence or transactions or occurrences within one hundred twenty days of such dismissal provided that service is effected within such one hundred twenty day period.

§ 302. Pleadings

1. Unless otherwise provided in this act

(a) Pleadings shall consist of the petition, answer or objections and account.

(b) There shall be no other pleading unless directed by the court.

(c) An answer or objection shall be served upon the return of process or at such later date as directed by the court.

2. Statements in a pleading shall be sufficiently particular to give the court and parties notice of the claim, objection or defense and shall contain a demand for the relief sought.

3. Copies of all pleadings, except an account, shall be served upon any party who has appeared in the proceeding and demanded a copy of all papers be served upon him, and upon all parties upon whom the court by order or oral direction entered in the minutes directs that service be made. A party who fails to comply with this requirement may be treated as a party in default.

§ 303. Verification

All pleadings shall be verified in the manner provided by CPLR 3020.

§ 304. Contents of petition

In addition to such other requirements as may be applicable to the petition in a particular proceeding, a petition must substantially set forth:

1. The title of the proceeding, the name and domicile of the person to whose estate or person the proceeding relates and of the petitioner.

2. The facts upon which the jurisdiction of the court depends in the particular proceeding.

3. So far as they can be ascertained with due diligence, the names and addresses of all the persons interested upon whom service of process is required or concerning whom the court is required to have information; and in addition there shall be shown by petition or affidavit in form satisfactory to the court, the following:

(a) If any person be an infant, his age, the date of his birth, whether he has a guardian, whether his father, or if he be dead, his mother, is living, his connection with the estate, and the names and addresses of such persons and the person with whom the infant resides.

(b) If any person be an incompetent, the name and address of his committee, if any, and of the person or institution having his care and custody and if there be no committee, the name and address of an adult relative or friend having an interest in his welfare.

(c) If any person be an incapacitated person, the facts regarding his incapacity and if confined, the name and address of the institution having his care and custody and the name and address of an adult relative or friend having an interest in his welfare, and if a conservatee as designated in section 77.01 of the mental hygiene law, the name and address of his conservator.

(d) If any person be unknown or his name or whereabouts be unknown, a general description of such person, showing his connection with the estate and his interest in the proceeding and the facts showing what effort has been made to ascertain his name or whereabouts.

(e) If any person be a prisoner confined in this state or elsewhere, the name and address of the institution in which he is confined, and the name and address of an adult relative or friend having an interest in his welfare.

(f) If any person be included in a class, and his name be unknown, the names and addresses of those persons of the class who are known, and a general description of all other persons belonging to the class, their connection with the estate, and their interest in the proceeding.

4. That there are no other persons than those mentioned interested in the application or proceeding.

5. A request for the relief sought.

§ 305. Process, where returnable

The process of a surrogate's court, except where otherwise prescribed by law, must be made returnable before the court from which it was issued.

§ 306. Citation. 1. A citation must substantially set forth:

(a) The name and domicile of the person to whose estate or person the proceeding relates and of the petitioner.

(b) The names of all persons to be served who have not waived issuance and service of process, or have not appeared. Where the number of persons of any class to be served exceeds 50, it need not specify the name of any person of the class but may be directed to the class by such appropriate designation as the court deems adequate.

(c) The time when and the place where the citation is returnable, which time must be not more than 4 months after the date of issuance.

(d) The object of the proceeding and the relief sought in the petition.

(e) The date when issued.

(f) The name, address and telephone number of the petitioner's attorney.

2. In addition it must substantially set forth:

(a) Where the names of some persons to be served comprising a class are unknown, the names of those persons of the class who are known and a general description of all other persons belonging to the class, showing their interest in the proceeding.

(b) Where the persons to be served are unknown, a general description of such persons, showing their interest in the proceeding.

In either of such cases, where the petitioner is ignorant of the name of a person to be served, he may designate that person in the citation by a fictitious name or so much of his name and identity as is known.

3. The citation shall be in substantially such form as may be provided by the Official Forms appended to this act.

4. The citation shall be attested in the name of the judge of the court and by the seal of the court, the original shall be filed by the clerk and a copy thereof shall be furnished to the petitioner.

§ 307. Service of process

1. Service by personal delivery. Service of the process may be made on any person by personal delivery of a copy of the process either within or without the state.

2. Service by registered or certified mail, or by special mail service. Service of the process may be made by registered or certified mail, or by special mail service, within or without the state.

3. Service by court order. As an alternative to service under subdivisions 1 and 2, service may be made in the manner directed by the court; but such service, except as provided by subdivision 6, shall not be ordered upon a domiciliary natural person unless it be shown that, with due diligence, service under subdivision 1 or 2 cannot be effected, or where for good cause shown, such service would be impracticable. Any proof necessary hereunder may be submitted in the petition or by affidavit. The court may take into account the size of the estate and the remoteness of kinship of any person to be cited in determining the appropriate due diligence necessary to permit alternate service under this section. The court may direct service by any one or more of the following methods, which shall not, however, be exclusive:

(a) service by publication, such as is provided by CPLR 316, subject to 308 and 309, and to such variations of CPLR 316 as the court may provide, except that

(i) where persons are to be served by publication, publication in only 1 newspaper shall be required, or

(ii) where a person is alleged to be within a country with which the United States of America is at war or a place with which the United States of America does not maintain postal communication, the court may direct that a copy of the process shall be mailed on behalf of such person to the officer who may have been appointed to take possession of the property of noncitizen enemies, or

(iii) where the person to be served is an absentee or alleged to be deceased, the court may direct that in addition to the foregoing requirements, the process be published in a newspaper published at or near the place where the absentee was last known to be, or

(iv) in an adoption proceeding under article seven of the domestic relations law or in a proceeding under section three hundred eighty-four-b of the social services law, a single publication in only one newspaper shall be sufficient.

(b) service by electronic means, as that term is defined by CPLR 2103(f)(2), bearing the caption of the matter in the subject line of said transmission;

(c) substituted service such as is provided by CPLR 308 (2) and (4), within or without the state, subject to 308 and 309, and to such variations of CPLR 308 as the court may provide;

(d) service within or without the state, by personal delivery to a person duly designated by respondent to receive process on the respondent's behalf, or to a person whose relationship, whatever its character, and by blood or otherwise to the respondent, indicates in the circumstances the probability that actual notice will reach the latter;

(e) if the interest of a non-domiciliary noncitizen in the estate is less than $2,500 or such person's address is unknown or such estate's gross assets are less than $25,000, by delivery of a copy of the process to a consular official of the noncitizen's nation.

4. Service upon an infant. Service upon an infant requires that service of process be made upon any one of the following, unless any

such one of them is the petitioner, in which case no such service shall be required: his father, his mother, his guardian, any adult person having the care and control of him or with whom he resides, or such person interested in his welfare or education as the court shall by order direct, where it appears to the satisfaction of the court that need for such order exists; and if the infant be of the age of 14 years or over, also upon the infant in person.

5. Service upon an incompetent, conservatee and persons other than natural persons. Unless this act otherwise provides or the court in a given proceeding otherwise directs, CPLR 307, 309 (b), 309 (c), 310, 310-a, 311, 311-a, 312 and 1025 are applicable to service under the foregoing subdivisions of this section.

6. Service upon creditors. Process may be served upon creditors, regardless of the number thereof, by mailing a copy of the process to each of them whether or not they be natural domiciliaries.

§ 308. Return day of citation

1. Based on place of service. Except as otherwise provided in subdivisions 2 and 3, the time of the return of a citation shall be governed by the following paragraphs:

(a) The citation shall be served at least the following number of days before the return day:

(i) 10 days if the person is served within the state by personal delivery;

(ii) 20 days if the person is served within the United States, the District of Columbia, the Commonwealth of Puerto Rico or the possessions or territories of the United States by other than personal delivery; and

(iii) 30 days in all other cases and where the office of the attorney general is a party.

(b) The time periods set forth under paragraph (a) of this subdivision shall commence to run from the time that service is complete as provided in 309.

2. Service by publication. If served by publication, the return day shall not be earlier than the day service is completed, as provided in 309.

3. Service on consular official. If served upon a consular official pursuant to 307, subdivision 3 (e), it shall be served at least 30 days prior to the return day.

4. For the purpose of fixing the time within which a process must be served, service upon the clerk of the court, pursuant to designation, is personal service upon the fiduciary within the county where the letters of the fiduciary were issued.

§ 309. When service of process complete

1. Service by personal delivery. The service of process is complete immediately upon personal delivery to the respondent when service is so made.

2. Service by other means. Unless the court directs otherwise, the service of the process shall be complete when served by:

(a) mailing or by registered or certified mail, upon the mailing thereof;

(b) special mail service, upon receipt of the envelope containing the process by the United States Postal Service in the case of express mail or upon receipt of the envelope containing the process by the designated delivery service in the case of any other special mail service;

(c) substituted service, upon the delivery or affixing and the mailing thereof, whichever is done last;

(d) personal delivery to a person duly designated by the respondent, or to a person or consular official designated by the court by order to be served in respondent's behalf, upon such personal delivery;

(e) publication, on the 28th day after the first publication;

(f) electronic means, upon transmittal of the process to the recipient; or

(g) any other means, as the court directs.

3. Service upon an infant. Where service of process upon an infant pursuant to subdivision 4 of section 307 does not require service upon the infant because the infant is under the age of 14 years and does not require service upon one of the other persons listed therein because such other person is the petitioner, service of process upon such infant shall be deemed complete upon the filing of the petition.

§ 310. Who may serve process

1. Any person over the age of 18 years, although a party, may serve process of the court within the state.

2. Personal service of process without the state may be made in the same manner as within the state by any of the persons authorized by CPLR 313 even though a party to the proceeding.

§ 311. Designee for person under disability

Whenever the person to be served is a person under disability, whether or not a party so requests, the court may in the interest of such person, require by order or direction in the minutes that a copy of the process issued be delivered to a person designated, in the manner and within the time specified. The person so designated shall have with respect to the proceeding while so designated, in behalf of such person, until the return of process and such further time as directed by the court, the same powers and duties as a guardian ad litem and is authorized to admit service of such process.

§ 312. Additional parties; supplemental process

The court may issue a supplemental process at any time and require any party to procure it and cause it to be served in conformity with the provisions of 307 and 308 on any person in any proceeding, so that any person necessary or proper to a final determination therein may be made a party thereto.

§ 313. Manner of giving notice when not otherwise prescribed

Whenever the manner of giving notice is not otherwise prescribed, the court may direct both as to the form of notice and the manner and time of service thereof. Such direction may be indicated on the process or endorsed upon the application with the same force and effect as if incorporated in an order.

§ 314. Proof of service of subpoena or process

Proof of service of a subpoena or process shall be made in the manner and form prescribed by CPLR 306 and 4532, provided, however, that a writing admitting service shall not be sufficient if made by an infant under the age of 16 years or an incompetent. Any person of the age of 16 years or over required to be served may in writing admit service of process.

§ 315. Joinder and representation of persons interested in estates

1. The provisions of this section shall apply in any proceeding in which all persons interested in the estate are required to be served with process. For the purposes of this section, the term "an interest in the estate" includes both interests in income and interests in principal.

2. Representation of class interests.
(a) Where an interest in the estate has been limited as follows, it shall not be necessary to serve process on any other person than as herein provided:
(i) In any contingency to the persons who shall compose a certain class upon the happening of a future event, the persons in being who

would constitute the class if such event had happened immediately before the commencement of the proceeding.

(ii) To a person who is a party to the proceeding and the same interest has been further limited upon the happening of a future event to a class of persons described in terms of their relationship to such party, the party to the proceeding.

(iii) To unborn or unascertained persons, none of such persons, but if it appears that there is no person in being or ascertained, having the same interest, the court shall appoint a guardian ad litem to represent or protect the persons who eventually may become entitled to the interest.

(b) Where a party to the proceeding has a power of appointment it shall not be necessary to serve the potential appointees and if it is a general power of appointment it shall not be necessary to serve the takers in default of the exercise thereof.

3. Representation of contingent interests.

Where an interest in the estate has been limited to a person who is a party to the proceeding and the same interest has been further limited upon the happening of a future event to any other person it shall not be necessary to serve such other person.

4. Representation in probate proceeding. In a proceeding for probate of a testamentary instrument the interests of the respective persons specified in subdivisions 2 (a) (ii) and 3 of this section shall be deemed to be the same interest, whether or not their respective interests are in income or in principal or in both, provided that they are beneficiaries of the same trust or fund, that they have a common interest in proving or disproving the instrument offered for probate and that the person who is a party under subdivision 2 (a) (ii) or the person to whom the interest has been limited under subdivision 3 would not receive greater financial benefit if such instrument were denied probate (in the case where such beneficiaries have a common interest in proving such instrument) or admitted to probate, (in the case where such beneficiaries have a common interest in disproving such instrument).

5. Representation of persons under a disability. If the instrument expressly so provides, where a party to the proceeding has the same interest as a person under a disability, it shall not be necessary to serve the person under a disability.

6. The decree or order entered in any such proceeding shall be binding and conclusive on all persons upon whom service of process is not required.

7. In any proceeding in which service of process upon persons interested in the estate may be dispensed with pursuant to the provisions of this section or section twenty-two hundred ten, in addition to such other requirements as may be applicable to the petition in the particular proceeding, the petition shall (i) set forth in a form satisfactory to the court the information required by subdivision three of section three hundred four with respect to the persons interested in the estate upon whom service of process may be dispensed with, the nature of the interests of such persons and the basis upon which service of process may be dispensed with, and (ii) state whether the fiduciary or any other person has discretion to affect the present or future beneficial enjoyment of the estate and, if so, set forth the discretion possessed and, if exercised, the manner in which it has been exercised. Notwithstanding the foregoing provisions of this section and any provisions of the instrument to the contrary, if the court finds that the representation of a person's interest is or may be inadequate it may require that he be served. The basis for such finding shall be set forth specifically in the order.

8. Nonjudicial settlements of accounts of fiduciaries. Unless the instrument expressly provides otherwise, an instrument settling an account, executed by all the persons upon whom service of process would be required in a proceeding for the judicial settlement of the account, shall be binding and conclusive on all persons upon whom service of process would not be required to the same extent as that instrument binds the persons who executed it.

§ 316. Process to attorney general where persons unknown

In every case where it appears that there is no distributee or beneficiary or that it is not known whether or not there be such, the process shall be issued to the attorney general of the state.

ARTICLE 4

APPEARANCE; PROTECTION OF PERSONS UNDER DISABILITY;
COUNSEL FOR INDIGENT ADULTS IN SURROGATE'S COURT PROCEEDINGS

Section

§ 401. Appearance of parties

1. Who may appear. A party other than an infant, incompetent or conservatee may appear and prosecute or defend a special proceeding in person or by attorney, except that a corporation or voluntary association shall appear by attorney. An infant by the guardian of his property, an incompetent by the committee of his property and a conservatee by his conservator may appear and prosecute or defend a special proceeding in person or by attorney as provided in 402.

2. How made. An appearance is made by pleading, by waiver, by serving upon the attorney for the petitioner and filing with the clerk a signed notice of appearance or by appearance in person noted upon the record in open court. The notice may be signed by any person authorized under

subdivision 1 to appear for the party.

3. Evidence of attorney's authority. Where a party is a non-domiciliary or has not been served personally with process within the state the court may require

(a) that any person appearing for the party furnish acknowledged evidence of authority so to appear and

(b) the authorization to set forth whether there has been executed previously by the party

(i) any power of attorney or similar instrument relating to the party's interest in the estate and

(ii) any assignment of the interest.

4. Appearance by waiver of process. Any adult competent party may also appear by an acknowledged waiver of issuance and service of process which upon filing with the clerk is equivalent to the filing of an acknowledged notice of appearance under subdivision 2. In a probate proceeding the waiver shall state the date of the will to which it relates and that a copy has been furnished or examined.

5. Termination of appearance of consul. When a consular official shall have appeared in behalf of a noncitizen, a subsequent appearance by the attorney in fact of the noncitizen pursuant to recorded power of attorney or appearance by an authorized attorney shall terminate the appearance of the consul.

§ 402. Appearance for infant, incompetent, conservatee or person under disability

1. An infant may appear by the guardian of his property, an incompetent by the committee of his property, and a conservatee by his conservator. The appointment of a guardian ad litem does not bar the guardian, committee or conservator from appearing as a party. The person so appearing and his attorney shall each file on or before the return day of process an affidavit showing

(a) that he is qualified to protect their rights,

(b) whether he is related to or connected in business with any party to the proceeding or the attorney for any party,

(c) whether he is entitled to share in the estate in which the infant, incompetent or conservatee is interested or is in any way interested therein,

(d) whether he has any interest adverse to or in conflict with that of the infant, incompetent or conservatee and

(e) such additional facts as may be required by the court.

2. A person under disability shall appear by a guardian ad litem where no appearance is made as provided in subdivision one or where the court so directs because of possible adversity or conflict of interest or for other cause.

§ 403. Appointment of guardian ad litem

1. By nomination. (a) An infant over the age 14 years or his parent or guardian may petition the court on or before the return day of process for the appointment of a named attorney as his guardian ad litem. There shall be filed with the petition the affidavit of the attorney showing

(i) that he is qualified to protect the rights of the infant and has no interest adverse to him and

(ii) the circumstances which led to his nomination.

(b) There shall also be filed with the petition the affidavit of the parent with whom the infant resides, or if not residing with a parent, by the person having his legal custody or an adult person with whom he resides, showing that the affiant

(i) consents to the appointment of the nominated attorney,

(ii) has no interest adverse to that of the infant and if he has an adverse interest, whether he has influenced the infant in the nomination and

(iii) such additional facts as may be required by the court.

(c) The court may appoint the nominated attorney guardian ad litem unless because of adversity or conflict of interest or for other cause a different appointment is required.

2. By the court. A person under disability who does not appear by his guardian, committee or conservator pursuant to 402 shall except as otherwise expressly provided appear by a guardian ad litem appointed by the court on nomination or on its own initiative whenever such person is a necessary party or for other reason the court deems it necessary to appoint a guardian ad litem to protect the interests of such party.

3. An appearance for a person under disability by a guardian ad litem is not required and the court may dispense with the same whenever

(a) in an uncontested probate proceeding such person will receive a share equal to or greater than the share to which he would be entitled if decedent had died intestate,

(b) in an accounting proceeding such person receives a specific bequest or a specific devise or a general legacy of a stated sum of money and the accounting party shows to the satisfaction of the court that such person has received his legacy or devise or will receive same in full under the decree to be made in the proceeding,

(c) in any proceeding the public administrator receives process or notice in behalf of the person under disability.

(d) in a probate proceeding the decedent is survived by a spouse who receives the entire estate under the propounded instrument and the petition alleges that probate assets do not exceed $50,000. In such case, letters testamentary should limit the executor to the collection of assets which, in the aggregate, do not exceed $50,000.

§ 403-a. Proceedings for the commitment of the guardianships and custody of infants; appointment of guardians ad litem

1. The court shall appoint a guardian ad litem to represent an infant in a proceeding for the commitment of the guardianship and custody of such infant brought pursuant to section three hundred eighty-four-b of the social services law or in a proceeding where a revocation of an adoption consent is opposed under section one hundred fifteen-b of the domestic relations law.

2. As used in this section, "guardian ad litem" refers to an attorney

admitted to practice law in the state of New York and designated under this section to represent infants in proceedings for the commitment of the guardianship and custody of such infant brought pursuant to section three hundred eighty-four-b of the social services law.

3. (a) The office of court administration may enter into an agreement with a legal aid society for the society to provide guardians ad litem for the surrogate's court in proceedings brought pursuant to section three hundred eighty-four-b of the social services law in a county having a legal aid society.

(b) The appellate division of the supreme court for the judicial department in which a county is located may enter into an agreement, subject to regulations as may be promulgated by the administrative board of the judicial conference, with any qualified attorney or attorneys to serve as guardian ad litem for the surrogate's court in that county in proceedings brought pursuant to section three hundred eighty-four-b of the social services law.

(c) The appellate division of the supreme court for the judicial department in which a county is located may designate a panel of guardians ad litem for the surrogate's court in that county in proceedings brought pursuant to section three hundred eighty-four-b of the social services law, subject to the approval of the administrative board of the judicial conference. For this purpose, it may invite a bar association to recommend qualified persons for consideration by such appellate division in making its designation, subject to standards as may be promulgated by such administrative board.

4. (a) An agreement pursuant to paragraph (a) of subdivision three of this section may be terminated by the office of court administration by serving a notice on the society sixty days prior to the effective date of the termination.

(b) No designations pursuant to paragraph (c) of subdivision three of this section may be for a term of more than one year, but successive designations may be made. The appellate division proceeding pursuant to such paragraph (c) may at any time increase or decrease the number of guardians ad litem designated in any county and may rescind any designation at any time, subject to the approval of the office of court administration.

5. (a) If the office of court administration proceeds pursuant to paragraph (a) of subdivision three of this section, the agreement shall provide that the society shall be reimbursed on a cost basis for services rendered under the agreement. The agreement shall contain a general plan for the organization and operation of the providing of guardians ad litem by the respective legal aid society, approved by the administrative board, and the office of court administration may require such reports as it deems necessary from the society.

(b) If an appellate division proceeds pursuant to paragraph (b) or (c) of subdivision three of this section, guardians ad litem shall be compensated and allowed expenses and disbursements in the same amounts established by section seven hundred twenty-two-b of the county law.

6. The administrative board of the judicial conference may prescribe standards for the exercise of the powers granted to the appellate divisions under this section and may require such reports as it deems desirable.

7. The cost of guardians ad litem under this section shall be payable by the state of New York within the amounts appropriated therefor.

8. Upon an appeal in a proceeding brought pursuant to section three hundred eighty-four-b of the social services law, the court to which such appeal is taken, or is to be taken, shall appoint a guardian ad litem to represent the infant, in accordance with the provisions of this section.

§ 404. Qualification and duties of guardian ad litem

1. A guardian ad litem shall be an attorney admitted to practice in New York.

2. Before entering upon his duties he shall file a consent to act and unless he has previously done so, a statement of no interest adverse to

or in conflict with the person under disability.

3. He shall file an appearance and take such steps with diligence as deemed necessary to represent and protect the interests of the person under disability, and file a report of his activities together with his recommendation upon the termination of his duties or at such other time as directed by the court.

§ 405. Compensation of guardian ad litem

1. For services rendered a guardian ad litem shall receive reasonable compensation to be allowed by the court payable from any or all of the following, in such proportion as directed by the court:
(a) the estate,
(b) the interest of the person under disability, or
(c) for good cause shown, any other party.

2. The court may direct that the fixation of the amount of compensation be reserved for future determination.

3. If an infant, incompetent or conservatee appears by his guardian, committee or conservator pursuant to 402 the court may allow the guardian, committee or conservator such sum as the court deems reasonable for his counsel fees and other expenses incurred in protection of the infant's, incompetent's, or conservatee's interest subject to the same requirements in the case of a guardian ad litem of the provisions of the preceding subdivisions of this section.

4. The provisions of this section shall not apply to guardians ad litem appointed by the court pursuant to section four hundred three-a of this chapter.

§ 406. Person under disability bound by proceeding

Whenever a guardian ad litem shall be appointed for a person under

disability as defined in this act or an infant, incompetent or conservatee shall appear by his guardian, committee, or conservator, respectively, or where such appointment is not required under or is dispensed with pursuant to power conferred by this act the proceeding shall be binding upon such person to the same extent as if such person was under no disability.

§ 407. Assignment of counsel for indigent persons

1. (a) Each of the persons described below in this subdivision has the right to the assistance of counsel. When such person first appears in court, the surrogate shall advise such person before proceeding that he has the right to be represented by counsel of his own choosing, of his right to have an adjournment to confer with counsel, and of his right to have counsel assigned by the court in any case where he is financially unable to obtain the same;

(i) the respondent in any proceeding under section three hundred eighty-four-b of the social services law;

(ii) the respondent in any proceeding for the approval of a surrender instrument under section three hundred eighty-four of the social services law;

(iii) the parent of a child in any adoption proceeding who opposes the adoption of such child;

(iv) the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine such custody;

(v) any of the above persons upon an appeal in any of the above proceedings.

(b) In addition to the cases listed in paragraph (a) of this subdivision, a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of this state or of the United States, and includes such determination in the order assigning counsel.

2. Any order for the assignment of counsel issued under this section

shall be implemented as provided in article eighteen-B of the county law.

ARTICLE 5

TRIALS AND HEARINGS

Section

§ 501. Transfer, consolidation and severance

1. The court may upon motion by any party:

(a) Transfer for trial to the surrogate's court having jurisdiction over an estate any action or proceeding pending in any court other than the supreme court which affects or relates to the administration of an estate and transfer any action or proceeding other than one which has been previously transferred to it or which affects or relates to the administration of an estate, to any other court, except the supreme court, having jurisdiction of the subject matter in any other judicial district or county provided such other court has jurisdiction over the classes of persons named as parties.

(b) Consent to receive for trial any action pending in the supreme court which affects or relates to the administration of a decedent's estate.

2. Consolidation and severance

(a) Consolidation. When proceedings pending before the court, including actions transferred under subdivision 1, involve a common question of law or fact, the court upon the motion of any party or on its own initiative may order a joint trial of any or all of the matters in issue or order that the proceedings be consolidated or make such other orders concerning proceedings therein as may tend to avoid unnecessary cost or delay.

(b) Severance and separate trials. In furtherance of convenience or to avoid prejudice, the court upon the motion of any party or on its own initiative may order a severance of any or all of the matters in issue or may order a separate trial of any one or all of the matters in issue and upon determination thereof render an appropriate intermediate or final order.

§ 502. Trial by jury; waiver or withdrawal

1. Right to jury trial. A party is entitled to trial by jury, if duly demanded, in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right of trial by jury, in any proceeding for the probate of a will in which a controverted question of fact arises, and in any proceeding commenced after the death of the creator of a revocable lifetime trust to contest the validity of such trust in which a controverted question of fact arises.

2. Demand for jury.

(a) Cases initiated in the court. Each respondent demanding a jury trial must do so in his answer or objections. A petitioner who desires a jury trial must, without regard to whether or not an answering or objecting respondent has made such demand, serve and file in his own behalf a demand for jury trial within 6 days after the service upon him of an answer or objections.

(b) Cases transferred to the court. In an action transferred to the court under 501, subdivision 1, a party who has duly demanded a trial by jury in the court from which the case is transferred shall be deemed to have duly demanded it in this court. If the party moving such transfer has not so demanded a trial by jury and shall not have waived such right or his time to make such demand has not expired he shall do so in his moving papers. Any other party to the transferred action who has not demanded a trial by jury in the court from which the case is transferred and shall not have waived such right or his time to make such demand has not expired must serve and file with this court a demand for a trial by jury within 10 days after the service upon him of a copy of the order of transfer with notice of entry thereof.

3. Jury fee. The jury fee shall be paid by each party who demands a trial by jury.

4. Order framing issues. After joinder of issue an order framing the issues to be tried shall be submitted on notice by any party. The court may direct any party to submit an order framing issues. The court shall make an appropriate order, a copy of which shall be served by the party submitting it on all parties who have appeared and pleaded.

5. Waiver or withdrawal.

(a) Waiver. A party waives the right to a trial by jury by:

(i) failing to make a demand under subdivision 2;

(ii) failing to appear at the trial;

(iii) filing a waiver signed by him or his attorney with the clerk of the court; or

(iv) orally waiving a trial by jury in open court or at any pre-trial conference, if entered in the minutes taken at the time.

(b) Withdrawal. A party may withdraw a demand for a trial by jury without the consent of the other parties.

6. Advisory jury. The court may submit any issue of fact to an advisory jury as provided in the CPLR. Upon the motion of any party or on its own initiative the court may confirm or reject in whole or in part the verdict of an advisory jury; may make new findings with or without taking additional testimony and may order a new trial. The motion shall be made within 15 days after the verdict. Where no issues remain to be tried the court shall file its decision in writing.

7. The court may direct that any jury trial be had before it or at a

trial term of the supreme court to be held within the county or if there be a county court in such county, in that court. The verdict if not set aside by the court before which the question is tried, shall be certified to the surrogate's court by the clerk of the court in which the trial took place and shall be conclusive except upon appeal.

§ 503. Proceedings upon jury trial

1. At any time during trial the court upon motion of any party or on its own initiative may direct judgment on one or more issues whenever it determines as a matter of law that the evidence is insufficient to create an issue of fact for a jury on such issue. Whenever judgment is so directed the issue shall thereupon be deemed withdrawn from the jury and it shall render no verdict or finding thereon. The direction of the court shall be entered in the minutes.

2. On consent of the parties any issue may be likewise withdrawn from a jury and judgment directed thereon.

3. The verdict and any order or decision of the court shall be entered in the minutes and if the trial was not held in the surrogate's court the verdict, order or decision shall be certified by the clerk of the court to the surrogate's court, whereupon that court shall enter a final decree accordingly.

§ 504. Jurors

Jurors shall be selected from any panel in attendance at any trial term of the supreme court or county court of the county.

§ 505. Trial by the court

1. The court shall decide all issues not required to be tried by a jury.

2. Upon a trial by the court without a jury:

(a) the court shall render a decision directing the order or decree to be entered which, except for such direction, need not contain either the facts found or the conclusions of law.

(b) the decision may be rendered orally and entered in the minutes by the court reporter and transcribed and filed, or may be made and filed by the court in writing.

§ 506. Reference to hear and report

1. In any proceeding other than one instituted for probate of a will or where a constitutional right to trial by jury exists and is demanded, the court may appoint a referee to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report of the referee shall be filed and contain the facts found and the conclusions of law. No exceptions need be filed to the report.

2. No referee to examine an account rendered or to report questions arising upon the settlement of the account shall be appointed where the estate does not exceed $1,000 in value or in any case where the item or items in such account to which objections have been made do not aggregate more than $200, except that in any such proceeding the court may appoint a referee to serve without compensation.

3. A referee shall have the powers granted by CPLR 4201 and shall conduct the reference in the same manner as a court trying an issue without a jury. The referee shall file his report within 30 days after the matter has been finally submitted. Unless otherwise stipulated a transcript of the testimony together with the exhibits or copies thereof shall be filed with the report.

4. Upon the motion of any party or on its own initiative the court may confirm or reject in whole or in part the report of the referee; may make new findings with or without taking additional testimony or may order a new reference. Any party to the proceeding may serve notice of

the filing of the report. Unless the motion be made within 60 days after service of notice of the filing of the report, it shall be deemed confirmed. Where no issues remain to be tried the court shall file its decision in writing.

5. The compensation and expenses of such a referee shall be fixed and allowed as provided by CPLR 8003 (a) and 4321, except as limited by subdivision 2.

6. (a) Upon the consent of the attorneys for all parties who have appeared at the hearing, the court may designate the chief clerk, one of the other clerks, a court attorney or any assistant to take the testimony in any proceeding other than one where a right to trial by jury exists and to report to the court upon the facts or upon a specific question of fact or upon the law and the facts. The report shall be in writing and shall be filed. It shall state the facts deemed to be essential, but need not make findings of fact. No exceptions need be filed to the report. The person so designated must be an attorney at law and shall have all the powers granted by CPLR 4201 and shall conduct the reference in the same manner as a court trying an issue without a jury. A copy of the report shall be sent to the attorney for each party who appeared at the hearing together with a notice that the report shall be deemed confirmed as of course unless within ten days from the date of mailing the report any party shall file with the court, a notice of motion to modify or overrule the report. Upon motion of any party or upon its own initiative the court may confirm, modify or reject the report in whole or in part, may make new findings with or without taking additional testimony or may order a new hearing.

(b) It shall not be necessary to file a transcript of the testimony with such report but on a motion to modify or overrule the report any party may file a copy of the transcript.

(c) Upon the consent of the attorneys for all parties who have appeared at the hearing, the necessity of the preparation of the report by the person so designated may be waived and the matter decided by the court based upon the transcript of the hearing. In such event the expense of the transcript shall be a charge against the estate, or where appropriate, as otherwise directed by the court.

(d) The person so designated as referee shall not receive any compensation from the estate or from any party for his services and shall be reimbursed for his necessary expenses only as provided in 2609 (3) (a).

§ 507. Testimony of witness

1. The testimony of a witness may be taken at any place the court directs. The party applying therefor shall give such notice of the time and place of taking the examination as the court prescribes and shall pay the court its actual and necessary expenses incurred in taking testimony at a place other than the court.

2. In any uncontested proceeding where an attesting or a material witness who is in another county of the state cannot conveniently attend before the court it may make an order directing that the witness be examined in the surrogate's court of another county and specifying the nature and manner of the examination. A copy of the order must be transmitted to the surrogate so designated, together with the original will or court certified reproduction thereof, where the testimony relates to the execution of a will. The examination may be taken by one of the clerks of the court. After the examination is reduced to writing and subscribed by the witness or otherwise duly authenticated, it, together with a statement of the proceeding upon the execution of the order, must be certified by the surrogate or clerk taking the examination, attested by the seal of his court and returned with the original will or court certified reproduction thereof, if any, to the court which directed the examination, which must file the same in its office.

§ 508. Before whom testimony may be taken; issuance of commission.

1. Testimony may be taken within or without the state or in a foreign country by an attorney in addition to the persons enumerated in CPLR 3113 (a).

2. The court may issue a commission to a person authorized to take a commission under CPLR 3113 or to an attorney of this state or of the jurisdiction in which the commission is to be taken.

§ 509. Effect of uncontroverted allegations of fact

Except as otherwise prescribed by law, a petition, or account filed in a proceeding, unless denied by answer, objection or other proof, is due proof of the facts therein stated.

§ 510. Pretrial conference

At any time after issue has been joined, the court, in its discretion, may require the attendance of all parties and counsel at one or more pretrial conferences. The conferences shall be held for the purpose of settlement negotiation, or, in the alternative, to narrow the issues for trial, seek agreement among the parties and counsel as to the admissibility of evidence, seek agreement as to the order in which witnesses will be called, and otherwise provide for the speedy and orderly conduct of trial. Absent objection placed on the record, during a pretrial conference the court may confer with any party or parties and their counsel outside of the presence of any other party or parties and their respective counsel.

ARTICLE 6

ORDERS AND DECREES

Section

§ 601. Definition of decree and order; how order enforced

The determination of the rights of the parties to a special proceeding in the court is a decree.

A direction of the court made or entered in writing and not included in a decree is an order.

A decree or order has the same effect and may be enforced in like manner as a similar judgment, decree or order made by the supreme court in an action.

§ 602. Decree or order, when evidence of assets

A decree directing payment by a fiduciary to a creditor of, or a person interested in, the estate, or an order permitting a judgment creditor to issue an execution against a fiduciary is, except upon an appeal therefrom, presumptive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay or for which the order permits the execution to issue. A decree charging a deceased fiduciary with assets upon an accounting under 2207, is not evidence of assets in the hands of the accounting fiduciary.

§ 603. Transcript of decree or order

1. Clerk to furnish transcript. Upon the application of any person, the clerk must furnish to him a transcript of any decree or order. If it be for other than money only, the clerk shall insert in the transcript a brief statement of the nature of the relief awarded. Such statement may be inserted under "remarks" as contained in the form set forth in section 255-c of the judiciary law.

2. Docketing with county clerk. A transcript of a decree or order of the court may be filed in the office of the clerk of the county in which the court is located and upon such filing the clerk shall docket the decree or order in like manner and with like effect as a judgment entered in the supreme court within the county. The filing and docketing and any subsequent filing and docketing with any other county clerk shall be governed by the CPLR.

§ 604. Decree; instruments of satisfaction

Upon the request of any person interested, there may be recorded with the court any instrument acknowledging payment of moneys pursuant to a decree or order of the court. Every such instrument to be recorded shall be acknowledged and the record thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument and its due execution and of any payment of money or delivery of property therein acknowledged.

The foregoing shall be in addition to such procedure for satisfaction and the recording thereof as may be provided by the CPLR.

§ 605. Enforcement of decree by execution

An execution shall not issue out of the court. The enforcement by execution of any decree or order of the court shall take place only after the docketing of a transcript as set forth in 603 of this act, whereupon the decree or order shall be enforceable by execution as if it were a judgment of the supreme court.

§ 606. Enforcement of decree or order by punishment for contempt; when

1. In any of the following cases, a decree or order of the court, directing the payment of money or requiring the performance of any act, may be enforced by serving a certified copy thereof upon the party against whom it is directed, and if he refuses or wilfully negelects to obey it, by punishing him for a contempt of court:

(a) Where it cannot be enforced by execution.

(b) Where part of it cannot be enforced by execution; in which case the part or parts which cannot be so enforced may be enforced as prescribed in this section.

(c) Where an execution as prescribed in the preceding section has been returned wholly or partly unsatisfied.

(d) Where the delinquent is a fiduciary and the decree relates to the estate, in which case the court may enforce the decree or order as prescribed in this section, either with or without requiring the issuance of an execution, or after the return of an execution, as it deems proper.

2. For the purpose of enforcement of a decree or order by means of punishment for contempt of court, the proceeding which terminated in such decree or order is deemed continued.

3. The court may refuse to punish any person for contempt of court as authorized in this section, in an instance in which facts are demonstrated to its satisfaction which would justify a release of such person from imprisonment, in accordance with the provisions of section 775 of the judiciary law.

4. No proceedings taken to enforce a decree or order of the court, either by execution, punishment for contempt or otherwise, shall preclude or affect in any manner an action or proceeding on a bond given by the person against whom the decree or order was directed.

§ 607. Enforcement of decree or order by punishment for contempt; manner

A person interested in the compliance with a decree or order, directing the payment of a sum of money or the performance of any act, may present to the court a petition showing:

1. One of the grounds prescribed in the preceding section,

2. That a certified copy of the decree or order sought to be enforced has been personally served upon the person against whom it was entered, which service shall be equivalent to a personal demand upon the respondent for the payment of the sum directed to be paid, or the performance of the act directed by the decree or order to be performed,

3. That the respondent has refused or wilfully neglected to obey such order or decree, and

4. Praying that the respondent be directed to show cause why he should not be punished for contempt.

The court may direct that a warrant of commitment issue against the respondent, pursuant to section 757 of the judiciary law, or that the respondent show cause why he should not be punished for contempt. The order to show cause may be served upon the respondent personally or upon his attorney.

Upon the return thereof, if the court is satisfied that the respondent has refused or wilfully neglected to obey the decree or order, it may direct that a warrant of commitment issue against the respondent pursuant to section 757 of the judiciary law or punish the respondent under the provisions of the judiciary law.

ARTICLE 7

GENERAL PROVISIONS RELATING TO LETTERS

Section

§ 701. Requisites of letters

1. Letters granted by any court to a fiduciary shall be issued in the name of the people of the state, attested in the name of the judge of the court, sealed with the seal of the court and signed by the court or the chief clerk of the court or such other officer as the chief clerk shall have authorized or deputized for the purpose.

2. To all letters of guardianship of the property of an infant, the court must cause a copy of 1719 and 1720 to be annexed or printed thereon.

3. No court except the court which issues letters shall have power to suspend, modify or revoke them, so long as the court issuing them has jurisdiction of the estate or matter in which the letters were issued.

§ 702. Limited and restrictive letters

Letters may be granted limiting and restricting the powers and rights of the holder thereof:

1. To the enforcement or prosecution of a cause of action in favor of the decedent or his fiduciary under general or special provisions of law, to the defense of any claim or cause of action against a decedent or his fiduciary, and restraining the fiduciary from compromise of the action or the enforcement of a judgment recovered therein until the further order of the court and the filing of satisfactory security if required.

2. Where it is impracticable to give a bond in the full amount required by statute, to receiving and administering only the property which the court may specify, and restraining him from receiving or administering other property until further order of the court.

3. To the adjustment, settlement, satisfaction or discharge of any claim in favor of or against the decedent or his fiduciary.

4. To the performance of any act required in order to discharge the estate of a decedent from liability.

5. To an account in behalf of the decedent for the performance by him

of any trust or other responsibility.

6. To the completion of any transfer made by a decedent or his fiduciary and to the execution of any instruments confirming any transfer so made.

7. To the appearance in and conduct of an action in which a decedent or his fiduciary is a necessary or proper party.

8. In the discretion of the court, to represent the estate in a transaction in which the acting fiduciary could not or should not act in his or her fiduciary capacity because of conflict of interest.

9. To commence and maintain any action or proceeding against the fiduciary, in his or her individual capacity, or against anyone else against whom the fiduciary fails or refuses to bring such a proceeding.

10. To any other purpose or act deemed by the court to be appropriate or necessary in respect of the affairs of the estate, the protection thereof or to the proper administration thereof.

In any case where limited and restrictive letters are granted the court may reduce the amount of security otherwise required or dispense therewith according to the circumstances.

Any letters may contain appropriate recitals restraining the holder from doing any such acts or exercising any such powers as may be specified therein until the further order of the court and upon the filing, if ordered, of satisfactory security. The issuance of limited or restrictive letters under this section may be in addition to the issuance of general letters or other, limited or restrictive letters.

§ 703. Letters evidence of authority; effect of appeal

1. Subject to the provisions of the succeeding section, letters granted by the court are conclusive evidence of the authority of the persons to whom they are granted until the decree granting them is reversed or modified upon appeal or the letters are suspended, modified or revoked by the court granting them.

2. A certificate of letters testamentary or of administration duly issued by the clerk of the court shall be sufficient evidence, subject to the provisions of subdivision one hereof, of the existence of such letters and the identity of the fiduciary for all purposes for six months after the date of such issuance.

§ 704. Priority among different letters

A person who applies in good faith therefor, and to whom letters are first issued from a court having jurisdiction to issue them, has exclusive authority under the letters until they are revoked. He is entitled to demand and recover from any person to whom letters are afterwards issued by any other surrogate's court the property in his hands belonging to the estate. But the acts of a person to whom letters were afterwards issued, done in good faith before notice of the letters first issued are valid and an action or special proceeding commenced by him may be continued by and in the name of the person or persons to whom the letters were first issued.

§ 705. Time, how reckoned upon successive letters

Where it is prescribed by law that an act must or may be done within a specified time after letters are issued and successive or supplementary letters are issued upon the same estate, the time so specified must be reckoned from the issuing of the first letters, except where it is otherwise specially prescribed by law or where the first or any subsequent letters are revoked as provided in 1413.

§ 706. When surviving or remaining fiduciary may act; when successor must be appointed

1. Where one of two or more fiduciaries dies or is removed or where letters issued to one of them are revoked, a successor to the deceased fiduciary or to the one who has been removed or whose letters have been revoked shall not be appointed, except where such appointment is necessary in order to comply with the express terms of a will or lifetime trust instrument; but the others may proceed and complete the administration of the estate pursuant to the letters or lifetime trust instrument and may continue any action or special proceeding brought by or against all.

2. When all the persons to whom letters have been issued die or where letters issued to all of them have been revoked by a decree of the surrogate's court, or, in the case of a lifetime trust, when all persons serving as trustee die or are removed, without any successor trustee having been effectively appointed pursuant to the terms of the lifetime trust instrument, that court has, except in a case where it is otherwise specially prescribed by law, the same power to appoint a successor to the person or persons whose powers have ceased as if the letters had not been issued or as if no appointment had been made. The successor may complete the administration of the estate committed to his predecessor, he may continue in his own name a civil action or proceeding pending in favor of his predecessor and he may enforce a judgment, order or decree in favor of the latter.

§ 707. Eligibility to receive letters

Letters may issue to a natural person or to a person authorized by law to be a fiduciary except as follows:

1. Persons ineligible
(a) an infant
(b) an incompetent
(c) a non-domiciliary noncitizen except one who is a foreign guardian as provided in subdivision four of section one thousand seven hundred sixteen of this chapter, or one who shall serve with one or more

co-fiduciaries, at least one of whom is resident in this state. Any appointment of a non-domiciliary noncitizen fiduciary or a New York resident fiduciary hereunder shall be made by the court in its discretion

(d) one who does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.

2. Persons ineligible in court's discretion. The court may declare ineligible to act as fiduciary:

(a) a person unable to read and write the English language; or

(b) an individual convicted of a felony whose crime may be adverse to the welfare of the estate, including but not limited to, crimes such as embezzlement or any crime where there was a misappropriation of money or a breach of fiduciary duty.

§ 708. Qualification of fiduciaries

Before letters are granted to a fiduciary, the fiduciary shall file in the surrogate's court or family court:

1. An acknowledged instrument stating the fiduciary's domiciliary address and designating the clerk of the court to receive service of any process issuing from the court in like manner and with like effect as if it were served personally upon the fiduciary, whenever the person so receiving letters cannot be found and served within the state after due diligence, which designation shall be irrevocable and shall continue in effect so long as the fiduciary remains in office and until full compliance by the fiduciary with the terms of a decree providing for his or her final discharge. If the fiduciary shall change his or her address so stated the fiduciary shall promptly notify the court of the new address.

2. Unless exempted, an official oath taken before any officer authorized to administer oaths, to the effect that the fiduciary will

well, faithfully and honestly discharge the duties of the office and the trust reposed in him or her and duly account for all moneys or other property which may come into his or her hands. The oath shall also describe the office, and state that the fiduciary is not ineligible to receive letters.

3. Such bond as may be required by law or by order of the court.

4. In the case of a trust company or other fiduciary exempted by law from taking an oath of office and filing a bond, an acknowledged consent to accept its appointment.

5. In the case of a foreign banking corporation or trust company organized under the laws of another state, compliance with subdivision 3 of section 131 of the banking law is required.

§ 709. Objection to grant of letters or appointment of lifetime trustee

Any person interested, including a nominated fiduciary, before letters are granted to another fiduciary or the surrogate's court appoints a trustee of a lifetime trust, may file objections showing his or her interest in the estate and stating one or more of the legal objections set forth in 707 to granting the letters to or the appointment of one or more of the persons about to receive them or to be appointed. Where such objections are filed the court may stay the granting of letters to or the appointment of the person against whom the objection is made until the matter is determined.

§ 710. Objections which require bond from fiduciary not otherwise required to file bond

1. No bond shall be required of an executor unless required by the will or by 806 or by this section.

2. A person named as executor or a testamentary guardian or trustee

who is not required by the will to give a bond, shall be entitled to letters by giving a bond as prescribed by law, although an objection has been established to the satisfaction of the court that the person is a non-domiciliary.

3. If after the issuance of letters, a fiduciary not required by will to give a bond, who is a citizen of the United States, has become a non-domiciliary, he may be required to give a bond in an amount to be fixed by the court, upon objection filed and proof taken.

4. No fiduciary shall remove property of the estate without the state without the prior approval of the court and upon filing a bond if required by the court.

§ 711. Suspension, modification or revocation of letters or removal for disqualification or misconduct

In any of the following cases a co-fiduciary, creditor, person interested, any person on behalf of an infant or any surety on a bond of a fiduciary may present to the court having jurisdiction a petition praying for a decree suspending, modifying or revoking those letters and that the fiduciary may be cited to show cause why a decree should not be made accordingly:

1. Where the respondent was, when letters were issued to him, or has since become ineligible or disqualified to act as fiduciary and the grounds of the objection did not exist or the objection was not taken by the petitioner or a person whom he represents before the letters were granted.

2. Where by reason of his having wasted or improperly applied the assets of the estate, or made investments unauthorized by law or otherwise improvidently managed or injured the property committed to his charge, including by failing to comply with paragraph (c) of section 8-1.9 of the estates, powers and trusts law, or by reason of other misconduct in the execution of his office or dishonesty, drunkenness,

improvidence or want of understanding, he is unfit for the execution of his office.

3. Where he has wilfully refused or without good cause neglected to obey any lawful direction of the court contained in any decree or order or any provision of law relating to the discharge of his duty.

4. Where the grant of his letters was obtained by a false suggestion of a material fact.

5. Where by the terms of a will, deed or order, his office was to cease upon a contingency which has happened.

6. Where he has failed without sufficient reason to notify the court of his change of address within 30 days after such change.

7. Where he has removed property of the estate without the state without prior approval of the court.

8. Where he or she does not possess the qualifications required of a fiduciary by reason of substance abuse, dishonesty, improvidence, want of understanding, or who is otherwise unfit for the execution of the office.

9. In the case of a guardian, where he has removed or is about to remove from the state or where the interests of the infant will be promoted by the appointment of another person as guardian.

10. In the case of a testamentary trustee, where he has violated or threatens to violate his trust or is insolvent or his insolvenvy is apprehended or is for any other cause deemed an unsuitable person to execute the trust.

11. In the case of a lifetime trustee, a creditor or a person interested, any person in behalf of an infant or any surety on a bond of the trustee may present to the court having jurisdiction a petition praying for a decree removing the trustee or suspending or modifying his

appointment and that the trustee may be cited to show cause why a decree should not be made accordingly where the supreme court, if it had jurisdiction, would have cause to remove the trustee or to suspend or modify his appointment.

12. In the case of any fiduciary who fails to file an account within such time and in such manner as directed by the court.

§ 712. Petition; process thereupon; suspension

A petition as prescribed in the preceding section must show that the case is one therein specified and, if entertained, process must be issued according to the prayer thereof to the fiduciary against whom relief is sought and to such other persons as the court may direct.

Upon the issuance of process the court may by order suspend the respondent wholly or partly from the exercise of his powers and authority during the pendency of the proceeding. A certified copy of the order so made must be served with the process, but from the time it is made, the order is binding upon the respondent and upon all other persons, without service thereof, subject to the exceptions and limitations prescribed in 720 and 721.

§ 713. Hearing; decree

Upon the return of process issued as prescribed in the preceding section the court may make a decree suspending, modifying or revoking the letters issued to or removing the respondent or modifying the terms of his appointment or may dismiss the proceeding upon such terms as justice requires.

§ 714. Certain orders or decrees of other courts to be filed in the surrogate's court

Whenever the supreme court shall suspend or remove or accept the resignation of a guardian of an infant's person or property or both, or of a testamentary trustee appointed by it, a certified copy of the order or decree shall be filed in the surrogate's court of the county having jurisdiction of the infant's person or estate or of the testamentary trust and a minute thereof shall be made and indexed in the book or books kept by the surrogate in which similar orders or decrees made in each surrogate's court are entered.

The county clerk of the county in whose office the order or decree of the supreme court is entered, shall give written notice to the clerk of the proper surrogate's court of the filing of such order or decree.

§ 715. Application by fiduciary for permission to resign

A fiduciary may present to the court at any time a petition praying that he or she be permitted to resign, that his or her letters be revoked and that he or she be permitted to settle his or her account judicially or informally as such fiduciary, and that notice of the application be given to the persons and in the manner directed by the court. The petition shall show the facts upon which the application is founded.

§ 716. Proceedings thereupon

If it shall be determined that the petition should be granted, an intermediate order may be entered forthwith or at any time during the pendency of the proceeding, permitting the petitioner to resign, revoking his or her letters, or removing him or her, appointing a successor, and directing the resigning fiduciary to turn over all assets in his or her hands to his or her successor and settle his or her account judicially or informally. The proceedings thereupon, whether or not the letters of the petitioner be revoked or he or she be removed, must be the same as upon a petition for the judicial settlement of the petitioner's account, except that the successor fiduciary, if one shall have been appointed, shall be a necessary party to it. Upon the resigning fiduciary fully accounting and paying over all money which is found to be due from him or her and delivering over all books, papers and other property in his or her hands to his or her successor, or in such manner as the court directs, a decree may be made discharging him or her accordingly.

§ 717. Suspension of powers of fiduciaries in war service

1. Whenever a fiduciary is engaged in war service, as defined in this section, such fiduciary or any person interested, may present a petition to the court having jurisdiction, praying for a decree suspending the powers of such fiduciary while he is engaged in war service and until the further order of the court and if his suspension will leave no person acting as fiduciary or leave the sole beneficiary of a trust as the only acting trustee thereof, the petition must pray for the appointment of a successor unless a successor has been named in the will or lifetime trust instrument and such successor is not engaged in war service or is not for other reasons unable or unwilling to act as a fiduciary.

2. For the purposes of this section, a fiduciary is deemed to be engaged in war service if he is

(a) a member of the military or naval forces of the United States or any of its allies or if he has been accepted for such service and is awaiting induction therein, or

(b) engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objects, or

(c) interned in an enemy country or is in a foreign country or a possession, dependency or protectorate of the United States and is unable to return to this state, or

(d) a member of the merchant marine service or other similar service.

3. Where the application is made by a fiduciary engaged in war service notice shall be given to the persons and in the manner directed

by the court. Where the application is made by any other person notice shall be given to the fiduciary and such other persons and in the manner directed by the court.

4. Upon filing of the petition and proof of service of the notice prescribed, the court may, notwithstanding any other provision of law, suspend the fiduciary engaged in war service from the exercise of all his powers and duties while he remains engaged in war service and until the further order of the court. The decree may further provide that the remaining fiduciary, or if there be none, the successor named in the will or lifetime trust instrument or appointed by the court, is possessed of and may exercise all the powers and be subject to all the duties incidental to his office as fiduciary.

5. The compensation of the successor shall be limited to commissions as computed under 2307, 2308 or 2309, whichever section is applicable to the fiduciary, upon income received and disbursed, and upon principal disbursed. Commissions may be allowed also to his successor under the provisions of those sections, whichever section is applicable to the successor, if he is entitled to or required to collect the rents of and manage real property. In the event of the resignation or removal of the suspended fiduciary under any other section of this act or in the event of the death of the suspended fiduciary, the foregoing limitations on the computation of the commissions of his successor shall cease to apply and the commissions of the successor shall be computed in the same manner as any other fiduciary.

6. When the suspended fiduciary ceases to be engaged in war service, he may be reinstated as fiduciary if any of the duties of his office remain unexecuted, upon application to the court, and upon such notice as it directs. If the suspended fiduciary is reinstated the court shall remove his successor and revoke his letters and make such other order or decree as justice requires, but such removal and revocation of letters shall not bar the successor from subsequently qualifying as a fiduciary in accordance with the provisions of the will or lifetime trust instrument if for any reason thereafter it becomes necessary that a fiduciary be appointed.

§ 718. Nominated fiduciaries in war service

1. Whenever a person nominated in a will or lifetime trust instrument as executor, guardian or trustee is engaged in war service as defined in the preceding section and is unable to qualify as fiduciary because of such service, his failure to so qualify shall not be deemed a final renunciation but a temporary one which shall become final 6 months after such nominated fiduciary ceases to be engaged in war service. If the will or lifetime trust instrument does not name a co-fiduciary or successor fiduciary or if the co-fiduciary or successor fiduciary is unwilling or unable to act and the failure of the nominated fiduciary in war service to qualify leaves no person acting as fiduciary or will leave the sole beneficiary of a trust as the only active trustee thereof, any person interested may file a petition praying for the appointment of a successor to the nominated fiduciary in war service. Notice of the application shall be given to the persons and in the manner directed by the court. Within 6 months from the date the nominated fiduciary ceases to be engaged in war service, and if any of the duties of his office remain unexecuted, he may file a petition praying that he be appointed executor, guardian or trustee, as the case may be, in accordance with the terms of the will or lifetime trust instrument. Notice of the application shall be given to the persons and in the manner directed by the court. The court may grant the application and direct the issuance of letters to or appoint the petitioner jointly with the fiduciary acting or may remove or revoke the letters of the successor appointed to take the place of the nominated fiduciary or may make such other order or decree as justice requires. The removal and revocation of the letters of the original successor to the nominated fiduciary shall not bar the successor from subsequently qualifying as fiduciary if for any reason thereafter it becomes necessary that a fiduciary be appointed.

2. The commissions of a successor appointed under this section shall be computed in accordance with the provisions of 2307, 2308 or 2309, whichever section is applicable to the fiduciary, except that where the

successor is removed or his letters revoked he shall not be entitled to commissions for paying or delivering the estate to the nominated fiduciary upon his qualification.

§ 719. In what cases letters may be suspended, modified or revoked, or a lifetime trustee removed or his powers suspended or modified, without process

In any of the following cases, the court may make a decree suspending, modifying or revoking letters issued to a fiduciary from the court or removing a lifetime trustee or modifying or suspending the powers of a lifetime trustee without a petition or the issuance of process:

1. Where the fiduciary being duly cited to account neglects to appear upon the return of process without showing a satisfactory excuse therefor and the court has sufficient reason to believe that no valid excuse can be made, or having been ordered to account, fails to file an account within such time and in such manner as directed by the court.

2. Where process issued to a fiduciary in a case prescribed by law cannot be personally served upon him by reason of his having absconded or concealed himself.

3. Where he has defaulted in supplying information concerning assets or affairs of the estate as ordered by the court, pursuant to 2102, or has neglected or refused to obey the order.

4. Where by the judgment of another court of competent jurisdiction the will or lifetime trust instrument under which letters have been issued or the fiduciary appointed is declared to be invalid or ineffective.

5. Where an administrator has failed to give the bond required to sell or to receive the proceeds of a sale of real property or to give a new bond or a new surety when required to do so by an order or decree of the court.

6. Where he has been convicted of a felony or has been judicially committed or has been declared an incompetent.

7. Where he mingles the funds of the estate with his own or deposits them with any person, association or corporation authorized to do business under the banking law in an account other than as fiduciary.

8. In any case in which ancillary letters have been issued where the original letters in the domiciliary jurisdiction have been revoked.

9. Where a temporary administrator has been appointed of the estate of an absentee, and it is shown that the absentee has returned or that he is living and capable of resuming the management of his affairs or that an executor or administrator has been appointed of his estate or that a committee of his property has been duly appointed in this state.

10. Where any of the facts provided in 711 are brought to the attention of the court.

§ 720. Effect and contents of decree suspending, modifying or revoking letters or removing a lifetime trustee or suspending or modifying his powers

Upon the entry of a decree made as prescribed in this act, removing a fiduciary or suspending, modifying or revoking his letters issued to a fiduciary, his powers are suspended, modified or cease, as the case may be. The decree may require him to account for all money and other property received by him and to pay over and deliver all money and other property in his hands, to the court or to his successor or to such other person as is authorized by law to receive it, or it may be made without prejudice to an action or special proceeding for that purpose then pending or thereafter to be brought. The removal suspension, modification or revocation does not affect the validity of any act within the powers of the fiduciary done by him before his removal or the suspension, modification or revocation of his letters or the service of process, where the other party acted in good faith, or done after the service of process and before entry of the decree where his powers with respect thereto were not suspended or modified by service of process or where the court in a case prescribed by law, permitted him to do the same, notwithstanding the pendency of the special proceeding against him and he is not liable for such an act done by him in good faith.

Where an executor or administrator is also a testamentary trustee of the same estate, a decree revoking his letters as executor or administrator does not affect his power or authority as testamentary trustee, except in the case specially prescribed for that purpose in 1505.

§ 721. Preceding section qualified

The preceding section does not affect the liability of a person to whom money or other property has been delivered as distributee or legatee to respond to the person lawfully entitled thereto, where letters are revoked because a supposed decedent is living or because a will is discovered after administration has been granted, in a case of supposed intestacy or a prior will is revoked upon which letters were granted.

§ 722. Deposit of securities may be ordered on revocation of letters or removal

When upon the revocation of letters or removal of a fiduciary a decree is made in which such fiduciary is personally charged with or directed to pay a sum of money upon a finding that he has made an unlawful investment or disposition of the estate in his hands and the security or other instrument by which such investment or disposition is evidenced or the property in the purchase of which such investment or disposition has been made shall not be a part of the assets which his successor may be required legally to receive, the decree may direct that such security or other instrument or such property, if practicably capable of delivery under such direction, be forthwith deposited with a safe deposit company in such manner as to prevent the withdrawal of the property except upon the order of the court.

§ 723. Copy of letters issued to chief fiscal officer of county to be transmitted to comptroller.

Within ten days after granting letters to the chief fiscal officer of the county the court must transmit to the state comptroller a certified copy thereof.

§ 724. Inapplicability to lifetime trustees

Except as otherwise expressly provided or required by context, this article shall not be applicable to lifetime trustees.

§ 725. Rules relating to estate valuation after letters

The chief administrator of the courts shall promulgate rules to insure that, after letters have been granted to a fiduciary and the fee based on the initial value of the estate has been paid, the court is notified of the actual value of the estate as subsequently shown by a tax return filed under article twenty-six of the tax law, by a proceeding under such article, by any proceeding in surrogate's court involving such estate, or by the filing with the court of such other papers or documents as such rules shall prescribe.

ARTICLE 8

GENERAL PROVISIONS RELATING TO BONDS

Section

§ 801. Amount; condition; number of sureties; obligees

1. Amount. Whenever a fiduciary or legal life tenant shall be required to file a bond, the amount thereof, except where the court has reduced it or dispensed therewith, shall be fixed as follows:

(a) Executor, administrator, administrator c. t. a., administrator d. b. n., and temporary administrator.	(a) Not Less Than: i. Value of all personal property receivable by the fiduciary. ii. Estimated gross rents of real property receivable by the fiduciary for 18 months. iii. Probable recovery in any cause of action prosecuted by the fiduciary.

In fixing the amount of a bond under this paragraph the court must also take into consideration in the case of a successor executor, administrator, administrator c. t. a., or administrator d. b. n., how much of the estate, if any, has already been administered.

No bond shall be required of any of the above mentioned fiduciaries if the value of the assets to be administered does not exceed the monetary amount defined as a small estate pursuant to subdivision one of section 1301 of this act.

(b) Guardian of the property of an infant	(b) Not less than: i. Value of all personal property receivable by the guardian. ii. Estimated gross rents of real property receivable by the guardian for three years. iii. Estimated gross income for three years from sources other than moneys or other assets committed to the guardian for administration.
(c) i. Testamentary trustee, or executor required to hold, manage or invest property for the benefit of another, ii. ancillary fiduciaries, iii. guardian of the person of an infant, iv. legal life tenant, or v. any case not provided for in this article where the filing of a bond is required.	(c) In such amount as the court directs.

(d) In granting limited and restrictive letters pursuant to the provisions of 702 the court may dispense with a bond altogether or fix the amount at such sum as it may deem sufficient.

(e) In addition to such powers as are conferred by CPLR 2508, the court may at any time increase or decrease the bond of a fiduciary or legal life tenant when good reason therefor appears.

(f) In fixing the amount of a bond, the court may require evidence as to the character and value of the assets to be committed to the fiduciary and may examine the applicant or any other person under oath or take such other steps as it deems necessary.

2. Condition. Unless the court directs otherwise the condition of the bond shall be that the fiduciary will faithfully discharge his trust, obey all lawful decrees and orders touching the administration of the assets committed to him including but not limited to decrees or orders directing repayment of amounts allowed as advances on commissions and render a verified account of his administration whenever required to do so by the court. In the case of a legal life tenant the condition shall be that the principal account for and deliver to his successors in interest the property held as life tenant.

3. Sureties. The court may authorize or direct the execution and filing of a bond with a sole surety or with two or more sureties or it may dispense with sureties altogether when good reason therefor appears.

4. Obligees of bond. The bond of a fiduciary shall run to the people of the state for the security and benefit of the persons then or thereafter interested in the estate.

§ 802. Approval and filing of bonds; designation of clerk

1. All bonds must be approved by the court. The court may by order authorize one or more clerks or law assistants to approve bonds. Approval of a bond must be endorsed thereon and when so endorsed the bond must be filed in the court.

2. Each surety on a bond shall file an acknowledged instrument stating his domiciliary address and designating the chief clerk of court and his successors in office as a person upon whom any process of any court of the state may be served in any action or proceeding relating to the bond with like effect as if served personally upon the surety whenever the

surety after due diligence cannot be found and served within the state of New York.

3. A corporate surety licensed to transact business in the state shall be deemed to have complied with the requirements of this section if it has filed or does file one acknowledged instrument which applies to all bonds of the corporate surety filed and approved after the date of the filing and which by its term is of indefinite duration and irrevocable.

4. The filing of a designation by a corporate surety shall have the same effect as if a separate designation had been filed with each bond to which it is a party.

§ 803. Deposit of assets to reduce bond

1. Whenever a bond or new surety may be required, if the value of the estate is so great or for other sufficient reasons the court deems it inexpedient to require security in the full amount prescribed by law it may direct that all or part of the assets of the estate be delivered subject to further order of the court to the county treasurer or other proper fiscal officer, the clerk of the court or a trust company, bank or safe deposit company or otherwise restrict the authority of the fiduciary. The court may thereupon fix the amount of the bond taking into consideration the value of the remainder only of the estate.

2. The assets so deposited shall not be withdrawn from the custody of the depositary and no person other than the proper fiscal officer of such county, city or depositary shall receive or collect any principal or income or other benefits derived from such assets without order of the court.

§ 804. Bond required when assets deposited with bank or trust company serving as co-fiduciary

When a bank or trust company is a fiduciary and is nominated to serve or is serving with one or more individual fiduciaries the court may make an order directing the deposit of assets with the bank or trust company upon such terms and upon the giving of such bond by the individual fiduciaries as it deems advisable.

§ 805. Bond of administrator, temporary administrator or administrator c.t.a.

1. Before letters are issued to an administrator, temporary administrator or administrator c.t.a. he shall execute and file a bond provided, however, that where the person or persons about to be appointed is or are entitled to the whole estate or where acknowledged consents that a bond be dispensed with or fixed at a reduced amount are executed and filed by all persons interested in the estate the court may dispense with a bond or fix the amount at such sum as will adequately protect the right of all creditors. If such consent be filed by some but not all of the persons interested in the estate, such consent must also specifically release any claim under the bond required and the court may fix the amount at such sum as will adequately protect the rights of all creditors and of the non-consenting persons interested.

2. The court may require that the amount of creditors' claims be ascertained by a notice to creditors which shall be published once a week for 4 consecutive weeks in such newspapers as the court may select and which shall direct the creditors to file their claims in writing with the clerk of court on or before a day fixed therein, which shall be at least 30 days after the day of first publication.

3. Before an administrator shall receive the proceeds of a disposition of real property pursuant to the provisions of EPTL 11-1.1 he shall file a further bond in the amount of the proceeds unless it be dispensed with as above provided or unless his existing bond is sufficient to cover the proceeds.

§ 806. Bond of a testamentary trustee or executor acting as trustee

Whenever a testamentary trustee is appointed by will or order of the court or an executor is appointed who is required to hold, manage or invest real or personal property for the benefit of another, he shall unless the will provides otherwise, execute and file a bond.

§ 807. Bond of a legal life tenant

Whenever a legal life tenant is entitled to the possession or control of property under a will, he shall if the court so directs execute and file a bond unless the will expressly provides otherwise.

§ 808. Liability of surety for assets received by principal in another fiduciary capacity

1. A fiduciary is liable for money or other personal property of the estate which was in his hands or under his control when his letters were issued or when he began to serve as lifetime trustee in whatever capacity it was received by him or came under his control.

2. Where the money or property was received by him or came under his control by virtue of letters previously issued to him or his previous appointment as lifetime trustee in the same or another capacity an action to recover the money or damages for failure to deliver the property may be maintained upon both bonds, but as between the sureties upon the bond given upon the issue of the prior letters or upon his prior appointment and those upon the bond given upon the issue of the subsequent letters or upon his subsequent appointment the latter are liable over to the former.

§ 809. Action or proceeding on bond; disposition of proceeds; summary determination in certain cases

1. When permitted. An action or proceeding on a fiduciary's bond may be brought in either of the following cases if leave of the court by motion on notice to the surety is granted:

(a) by a person having a judgment or decree against the fiduciary which remains unsatisfied after the expiration of 10 days from date of entry;

(b) by the fiduciary's successor or if the fiduciary has died, been removed, or his letters have been revoked and if no successor has been appointed, by any aggrieved person, for the recovery of any money or property received by the fiduciary and not duly administered by him or for an injury to the estate caused by his act or omission.

2. Disposition of proceeds. The decree or judgment in the action or proceeding on the bond shall provide for the disposition of any proceeds that may be recovered in the action or proceeding.

3. Summary determination in certain cases. Where a decree has been made directing payment by a fiduciary and payment has not been made within 10 days after date of entry, any person in whose favor the decree was rendered may as an alternative to an action or proceeding on the bond as provided in subdivision 1 seek a summary determination of the surety's liability in the court making the decree. Process shall issue to the surety and such other persons as the court may direct. Upon the return of process the court may conduct such proceedings and make such decree or order as justice shall require.

§ 810. Application of article to fiduciaries heretofore appointed

The provisions of this article shall apply to fiduciaries heretofore appointed and to trusts created before this act takes effect except that its provisions shall not affect in any manner the liability of sureties on bonds theretofore executed.

§ 811. General conformity of bonds to CPLR

The provisions of this article shall govern bonds in this court but to

the extent consistent with such provisions and as to matters of detail not provided for herein the provisions of CPLR article 25 shall also apply.

ARTICLE 9

TEMPORARY ADMINISTRATION--ABSENTEES AND INTERNEES

Section

§ 901. When temporary administration may be granted

Temporary administration may be granted if the court finds it is in the best interests of the estate in the following cases:

1. When for any cause delay occurs in the grant of letters on the estate of a decedent or a person alleged to be deceased or in the probate of his or her will.

2. When a person having an interest in property in this state has disappeared and is absent from his or her place of abode without being heard of after diligent inquiry. Such person shall be referred to as an absentee.

3. When a person having an interest in property in this state has been

made a prisoner of war or has been detained or interned by an enemy country or in an enemy-occupied country or by force, or imprisoned in this country, a foreign country, whether legal or illegal, and who is thereby unable to safeguard and care for his property in this state. Such person shall be referred to as an internee.

§ 902. Procedure for appointment of temporary administrator

1. If a proceeding is pending for probate of a will or for letters of administration, process shall issue to such persons and in such manner as directed by the court.

2. If no proceeding is pending and the alleged delay is in a proceeding for

(a) letters of administration on the estate of a decedent or a person alleged to be deceased, process shall issue to the persons who would be entitled to receive process on an application for such letters;

(b) probate of a will, process shall issue to the executor named in the last will on file in the court of a decedent or a person alleged to be deceased and to such beneficiaries named in such will and to such other persons as directed by the court.

3. In the case of an absentee, process shall issue to the absentee and to the persons who would be his or her distributees if he or she had died on the date of filing the petition. Upon return of process the court after hearing shall fix and determine the date when the absentee was last seen or heard of.

4. In the case of an internee, process shall issue to the persons who would be his or her distributees if he or she had died on the date of filing the petition.

5. In all cases under subdivisions 1, 2 and 4, the court may dispense with process if it finds that the best interests of the estate so require.

6. After a citation has been issued by the court in a case under subdivision 3 and it is established to the satisfaction of the court that the best interests of the estate of an absentee require immediate supervision or action by a fiduciary, the court may forthwith appoint the temporary administrator to serve during the pendency of the proceeding or for such shorter period of time as the court directs. In no event shall such appointment be for a longer period than six months from the date of issuance of the citation. During the pendency of the proceeding, the court may at any time revoke such letters of temporary administration. The temporary administrator shall not be entitled to commissions under 2307 for services rendered prior to the date of the decree finally appointing the temporary administrator and containing the finding required by subdivision 3, but the court may award such compensation for such services as shall be just, reasonable and proper, not to exceed a full commission for all services rendered by such person as fiduciary during the entire administration of the estate.

7. A petition for letters of temporary administration may be presented by any person interested in the estate of a decedent or a person alleged to be deceased, any beneficiary or nominated executor under the last will of a decedent or a person alleged to be deceased on file in the court, any person who would have an interest in the property of an absentee or internee if he or she were dead, a public administrator, county treasurer, creditor or by a person interested in an action brought or about to be brought in which the decedent, absentee or internee would be a proper party.

§ 903. General powers of temporary administrator

1. Letters of temporary administration shall confer upon the person named therein, subject to any limitation contained in an instrument offered for probate, all the powers and authority with respect to all real and personal property of a decedent, absentee or internee, and subject him or her to all the duties and liabilities of an administrator with respect thereto except that they do not confer any authority to pay or to satisfy any testamentary disposition or intestate share.

2. Where a temporary administrator is appointed upon the estate of an absentee or internee and the estate includes an interest as a tenant in common, joint tenant or tenant by the entirety of real property in the same or another county, the court may by order authorize the temporary administrator to join with the other tenants or tenant in a sale, mortgage or lease of the real property or in a conveyance to the other tenants or tenant upon such terms as may be approved by the court and assented to by the other tenants or tenant. The sale, mortgage or lease may be authorized without limitation by the purposes, conditions and restrictions stated in article 19. The proceeds of a sale and the rents received upon any lease made pursuant to this subdivision shall be apportioned according to the interest of the parties.

3. A temporary administrator appointed upon the estate of an absentee or internee has all the powers and authority enumerated in the preceding subdivisions of this section with respect to the real and personal property of the absentee or internee. The temporary administrator's acts done in pursuance of that authority are binding upon the absentee or internee, if living, or his or her distributees or devisees, if he or she be dead.

4. (a) The court may, in the order directing the issuance of temporary letters of administration or in one or more subsequent orders, limit such letters to the receipt of assets specified in such order or orders and may prohibit the collection of any other assets of the decedent, or may limit, restrict or authorize the person named in such letters in any manner that the court deems advisable for the effective protection of the rights of all persons who may have an interest in the estate of the decedent, absentee or internee.

(b) In such order or orders, the court may make such directions as it deems proper and necessary with respect to the custody and preservation of all papers and records of the decedent, absentee or internee. Discovery and production of such papers and records shall be governed by article 31 of the civil practice law and rules.

§ 905. Actions and proceedings maintainable by or against a temporary administrator

1. A temporary administrator may maintain any action or proceeding for the purpose of taking into his possession, securing and preserving all property of a decedent, absentee or internee or for determining the ownership of property.

2. Any action or proceeding may be maintained against a temporary administrator upon a debt of the decedent, absentee or internee or upon any cause of action to which the decedent, absentee or internee would have been a party in like manner and with like effect as if he were an administrator.

§ 906. Payment of claims by temporary administrator

At any time after the issuance of letters of temporary administration, process may issue to a temporary administrator requiring him to show cause why he should not pay the petitioner's claim. The court may dismiss the petition or direct payment or satisfaction of the claim in whole or in part and may require a refunding bond.

§ 907. Special powers of temporary administrator in estates of absentees or internees

1. Where it appears to the satisfaction of the court that the spouse, a child or a dependent presumptive distributee of an absentee or internee or the internee himself or herself requires provision out of the estate for his or her benefit, health, maintenance, clothing or education, the court may make such orders from time to time empowering the temporary administrator to make such provision therefor out of all property in his or her hands not needed for the payment of claims as the court deems proper.

2. The court may by order empower the temporary administrator from

time to time to conduct any inquiry and to expend funds of the estate therefor to ascertain the whereabouts or condition of an absentee or internee. The expenditures so made shall be deemed administration expenses.

§ 908. Settlement of temporary administrator's account of a decedent's estate

1. When the time for presentation of claims as fixed by notice duly published has expired or when 7 months have elapsed since the issuance of letters of temporary administration on the estate of a decedent the court may direct a temporary administrator to account upon the application of the temporary administrator. The court upon its own initiative or upon the petition of a person interested, a public administrator, county treasurer or creditor, may direct a temporary administrator to account at any time.

2. Upon the settlement of his account the court may direct the temporary administrator of a decedent's estate to pay the decedent's funeral and administration expenses and direct the ratable distribution of the remaining assets in payment of the claims allowed or established as valid claims against the decedent. The court may direct the payment into court or the retention by the temporary administrator of whatever may remain of the assets of the personal estate of such decedent.

§ 910. Annual account of internee's estate

1. Except as provided in subdivision 2 a temporary administrator of an internee's property must annually within 30 days after the anniversary of his or her appointment, as long as any of the internee's property or of the proceeds thereof remains under his or her control, file in the court an account in similar manner and form as provided in 1719 and the same shall be verified and examined as provided in 1720 and 1721.

2. Where the temporary administrator omits to file an account as

required under subdivision 1 or where it appears that the account is defective, proceedings may be taken as prescribed in 1722.

3. When an internee or another duly appointed representative appears and claims his or her property the temporary administrator shall account for, deliver and pay over the remainder thereof, after making such deductions as are allowable by law.

§ 911. Final determination and distribution of an absentee's estate

1. If it appears at any time during the administration of the estate that the absentee is in fact dead the temporary administrator or a person interested may petition for the probate of his or her will or the grant of full letters of administration and for a judicial determination of the fact of death and if the court finds that it is in the best interests of the estate an accounting and distribution may be directed without the issuance of permanent letters.

2. If before any decree of distribution has been made, an absentee or his duly appointed fiduciary appears and claims his or her property the temporary administrator shall account for, deliver and pay over to the absentee or such fiduciary the remainder thereof after making such deductions as are allowable by law.

3. If the absentee has not appeared or been heard of after the lapse of 5 years from the date of the finding required by 902, subdivision 3 or in case the temporary administrator is not appointed within 4 years after said date, upon the expiration of 1 year after the date of the appointment of the temporary administrator and if the remainder of the property has not been accounted for, delivered or paid over to the absentee or his or her fiduciary under the preceding subdivision of this section the court shall direct an accounting, require the absentee to show cause why his or her assets should not be distributed according to law and thereafter make a decree determining that all interest of the absentee in his or her property has ceased and terminated and directing that all his or her property be distributed to such persons as would be

entitled thereto, by will or as in an intestacy, as if such absentee died at the expiration of such 5 year period. Such decree may include a determination of the rights of the absentee or any other person in any contractual or property rights contingent upon the death of the absentee in the same manner as section 2-1.7 of the estates, powers and trusts law. No action shall be brought by an absentee to recover any portion of his or her property after the determination and decree.

ARTICLE 10

INTESTATE ADMINISTRATION

§ 1001. Order of priority for granting letters of administration

1. Letters of administration must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order:

(a) the surviving spouse,

(b) the children,

(c) the grandchildren,

(d) either parent,

(e) the brothers or sisters,

(f) any other persons who are distributees and who are eligible and qualify, preference being given to the person entitled to the largest share in the estate, except as hereinafter provided:

(i) Where there are eligible distributees equally entitled to administer the court may grant letters of administration to one or more

of such persons.
(ii) If the distributees are issue of grandparents, other than aunts or uncles, on only one side, then letters of administration shall issue to the public administrator or chief financial officer of the county.

2. If the sole distributee has died or is an infant, incompetent or conservatee, his fiduciary, committee or conservator, if he is eligible and qualifies shall be granted letters of administration. The court may deny letters to a guardian or committee of the person only.

3. (a) Where all the distributees have died or are infants, incompetents or conservatees the court may grant letters of administration to a fiduciary, committee or conservator of a deceased distributee or infant, incompetent or conservatee distributee, if he is eligible and qualifies. If the court exercises its discretion preference shall be given to the fiduciary, committee or conservator of the distributee entitled to the largest share in the estate.
(b) Where all such distributees are equally entitled to share in the estate the court may grant letters of administration to one or more of their fiduciaries, committees or conservators, if they are eligible and qualify.

4. (a) Where a distributee who has died or is an infant, incompetent or conservatee would have had a prior right to letters of administration except for his death or disability the court may grant letters to his fiduciary, committee or conservator, if he is eligible and qualifies.
(b) Where no eligible distributee having a prior or equal right to letters of administration will accept the same and there are distributees who have died or are infants, incompetents or conservatees the court may grant letters to a fiduciary, committee or conservator of a deceased distributee, infant, incompetent or conservatee distributee, if he is eligible and qualifies. If the court exercises its discretion preference shall be given to the fiduciary, committee or conservator of the distributee entitled to the largest share in the estate.
(c) Where all such distributees who have died or are infants, incompetents or conservatees in the circumstances of subdivision 4 (b) are equally entitled to share in the estate the court may grant letters

of administration to one or more of their fiduciaries, committees or conservators, if they are eligible and qualify.

5. Upon the petition of a distributee having a prior or equal right to letters of administration the court may grant letters jointly to an eligible distributee or distributees and to one or more eligible persons whether distributees or not, including a trust company or other corporation authorized to act as fiduciary. Such joint fiduciaries shall be entitled to commissions as authorized by 2307.

6. Letters of administration may be granted to an eligible distributee or to an eligible person who is not a distributee upon the acknowledged and filed consents of all eligible distributees, or if there are no eligible distributees, then on the consents of all distributees, except that the guardian of the property of an infant distributee, the committee of the property of an incompetent distributee or the conservator of property of a conservatee appointed within the State of New York may so consent on behalf of his ward. For purposes of this subdivision, a distributee is eligible if letters of administration could be issued to him or her alone or acting together with the person or persons so nominated.

7. Letters of administration may be granted to a trust company or other corporation authorized to act as fiduciary upon the acknowledged and filed consents of all eligible distributees, or if there are no eligible distributees, then on consents of all distributees, except that the guardian of the property of an infant distributee, the committee of the property of an incompetent distributee or the conservator of property of a conservatee appointed within the state of New York may so consent on behalf of his ward. For purposes of this subdivision, a distributee is eligible if letters of administration could be issued to him or her alone or acting together with the trust company or other corporation so nominated.

8. When letters are not granted under the foregoing provisions and an appointment is not made by consent as hereinbefore provided then letters of administration shall be granted in the following order:

(a) to the public administrator, or the chief fiscal officer of the county, or

(b) to the petitioner, in the discretion of the court, or

(c) to any other person or persons.

9. Letters of administration may be granted by the court in any case in which a paper writing purporting to be a will has been filed in the court and proceedings for its probate have not been instituted within a reasonable time or have not been diligently prosecuted.

§ 1002. Petition; persons entitled to petition for appointment of an administrator

1. Any person interested in the estate of an intestate or of a person alleged to be deceased or any person to whose appointment as administrator all distributees consent pursuant to 1001 or a public administrator, the chief fiscal officer of the county, creditor or a person interested in an action brought or about to be brought in which the intestate or the person alleged to be deceased, if living, would be a proper party may present a petition to the court having jurisdiction praying for a decree granting letters of administration to him or to another person upon the estate of the intestate or the person alleged to be deceased.

2. The petition must allege the citizenship of the petitioner and the decedent or person alleged to be deceased, that the decedent or person alleged to be deceased left no will, or that the case is within 1001, subdivision 9 and must state whether or not the intestate or person alleged to be deceased left any

(a) personal property and its estimated value and

(b) real property, whether it is improved or unimproved, a brief description thereof, the estimated value of the real property and improvements, if any, and the estimated gross rents for the period of 18 months.

§ 1003. Persons who must be served with process; waiver of process; dispensation with service of process

1. In a proceeding for letters of administration upon the estate of a person alleged to be deceased process shall issue directed to such person and to all his presumptive distributees.

2. Every eligible person who has a right to administration prior or equal to that of the petitioner and who has not renounced must be served with process upon an application for letters of administration. When the petitioner is a creditor or a person interested in an action brought or about to be brought in which the intestate, if living, would be a party, process shall also issue to all incompetents, conservatees and infants for whom a committee, conservator or guardian of the property has been appointed who are domiciliary distributees. When the petitioner is a public administrator or county treasurer process shall issue only to such incompetent or conservatee domiciliary distributees whose names and addresses are known to him. The court may dispense with the issuance and service of process upon non-domiciliaries.

3. Any person who has a right to administration prior or equal to that of the petitioner may renounce his right and waive the issuance and service of process by an acknowledged instrument which must be filed in the office of the clerk of the court, except that a public administrator or the chief fiscal officer of the county may not renounce his right and may only be excused from acting, upon his motion duly made and an order made and entered thereupon by the court.

4. The court may dispense with service of process upon a person who has a right to administration prior or equal to that of the petitioner where it appears that the name or whereabouts of such person is unknown and cannot be ascertained after diligent inquiry, subject to the requirement that the decree granting the letters shall contain a provision directing that in the proceeding for the judicial settlement of the account of the administrator process shall issue and be served upon such person.

5. If an application for letters of administration be made under the circumstances provided in 1001, subdivision 9, process shall also issue to the persons named in the paper writing referred to in that section and the persons to whom process would be required to issue in a proceeding for the probate of such paper writing.

§ 1004. Proceedings upon return of process; decree

1. Upon the return of process in a proceeding for letters of administration upon the estate of a person alleged to be deceased the court must inquire into the facts and take proof thereof and if it appears that he is dead the court may make a decree so determining and directing the issuance of letters of administration upon his estate as prayed for in the petition or to such other person who may appear entitled thereto.

2. When process has issued and been returned with proof of due service thereof and no objections have been interposed to the appointment of the petitioner the court may make a decree granting letters of administration as prayed for in the petition or to such other person who may appear entitled thereto.

3. When the issuance and service of process is not necessary or has been dispensed with the court may make a decree granting letters of administration as prayed for in the petition or to such other person who may appear entitled thereto upon presentation of the petition.

§ 1005. Notice of application for letters of administration

1. Before making a decree granting letters of administration on any application therefor the court may require the petitioner or any other person seeking such letters to serve by mail a written notice of the application upon every distributee of the intestate who has not been required to be served with process and who has not appeared in the proceeding or waived service of process therein.

2. The notice shall be entitled in the proceeding and shall state:

(a) each and every name of the intestate known to the person giving the notice,

(b) the fact that letters of administration on the estate have been applied for by petitioner,

(c) that a decree will be made granting letters and to whom,

(d) the names and post-office addresses of petitioner and of each and every distributee set forth in the petition,

(e) that no other distributees are known to exist,

(f) that letters will issue on or after the date fixed in the notice.

3. The original notice shall be filed with proof by affidavit of the mailing of copies thereof.

§ 1006. Failure to qualify

The court must upon application of any person interested, a public administrator, the chief fiscal officer of the county, or creditor require an administrator designated by it to receive letters to qualify within a time specified and direct that in default thereof he be deemed to have renounced his appointment.

§ 1007. Administration de bonis non

1. When the office of administrator becomes vacant for any reason the court may grant letters of administration de bonis non to one or more eligible persons and the proceedings to procure such letters shall be the same as upon an application for original letters of administration.

2. Where the estate has been partially administered by the former fiduciary the court may fix the penalty of the bond in a sum not less than the value of the assets of the estate remaining unadministered.

3. The court may refuse to issue letters of administration de bonis

non where distribution of the estate is possible pursuant to the provisions of 2207.

ARTICLE 11
PUBLIC ADMINISTRATORS OF THE COUNTIES WITHIN THE CITY OF NEW YORK

administrators.

§ 1101. Incumbents

The office of public administrator within the counties of the city of New York hereby is continued. The public administrators of the counties within the city of New York in office when this act takes effect shall continue in office until the end of their respective terms or until a vacancy occurs.

§ 1102. Appointment and removal; terms of office

Notwithstanding the provisions of any other law, appointment and removal shall be made as follows:

1. The public administrators of Kings, Richmond, New York, Bronx and Queens counties shall be appointed by and may be removed by the judge or judges of the court of their respective counties and shall continue in office until removed.

2. Each appointment shall be in writing and shall be filed in the office of the county clerk in the county for which the appointment is made.

§ 1103. Deputy public administrator

1. The deputy public administrators of the counties of New York city shall be appointed by the surrogate court judge of the county in which they shall serve.

2. The deputy public administrators of any county where the office exists or may be established shall perform the services and shall possess the powers as may be prescribed for and vested in him by the respective public administrators and shall possess every power and

perform every duty belonging to the office of public administrator in the circumstances specified by section nine of the public officers law.

3. The deputy public administrator of any county where the office exists or may be established shall continue in office until removed by the surrogate court judge or judges of that county.

4. Each appointment shall be in writing and shall be filed in the office of the county clerk in the county for which the appointment is made.

§ 1104. Oath and bond

Each person appointed to the office of public administrator or deputy public administrator in any of the counties within the city of New York before entering upon the duties of his office shall take and file the constitutional oath of office and execute a bond in the sum of $50,000 to the city of New York with such sureties as shall be approved by the judge or judges of the court of the county conditioned for the faithful discharge of all duties enjoined on him by law.

§ 1105. Compensation

1. The public administrators of the counties comprising the city of New York shall receive at least two-thirds of the amount paid to the judges of the surrogate's court of the counties within the city of New York.

2. Each of the deputy public administrators of the counties comprising the city of New York shall receive as compensation at least two-thirds of the amount paid or hereafter paid to the public administrators of each such county, respectively.

3. The public administrators shall not receive to their own use any fees or emoluments in addition to their salaries except as provided in

section 1106, subdivision 3.

The above annual salaries shall be included annually in the expense budget of the city of New York.

§ 1106. Commissions

1. The public administrators of Bronx, Kings, New York, Queens and Richmond counties shall each retain over and above all necessary expenses upon all moneys which shall come into their respective hands the same commissions as are now or may hereafter be allowed by law to fiduciaries under section 2307.

2. The value of any real or personal property and the increment thereof received, disbursed or delivered shall be considered as money in computing commissions, except where the real or personal property has been specifically devised or bequeathed.

3. On the settlement of the account of the public administrator in each instance, notwithstanding the provisions of subdivisions 1 and 2, the court may allow his reasonable and necessary expenses and disbursements and in addition, a reasonable amount for the expenses of his office, to be fixed by the court, and not to exceed the sum allowed in the respective offices of the public administrators as of December 31, 1992 unless prior to the proposed increase the public administrator has notified the administrative board in writing of the amount of the proposed increase and the reason therefor. Unless the administrative board notifies the public administrator in writing that the proposed increase has been approved by the board, the public administrator shall not implement such increase. The board must pass upon the proposed increase within sixty days of receipt of the request from the public administrator.

4. The commissions and allowances provided for by this section may be retained by the respective public administrators in preference to any debts or claims except funeral expenses.

5. The public administrators of Bronx, Kings, New York, Queens and Richmond counties shall not receive to their own use any fees or emoluments in addition to their salaries.

§ 1107. Deposit of funds.

1. The public administrators shall pay into the treasury of the city of New York all commissions and costs received by them from any source. Such payments shall be made monthly and shall be accompanied by a sworn statement in the form prescribed by the comptroller of the city of New York showing in detail the costs and commissions received and allowed to them.

2. The public administrators shall deposit to their respective credit all moneys by them severally collected and received within 5 days after receipt in demand, time, thrift or other accounts in one or more banks or trust companies designated by the mayor, comptroller and commissioner of finance for the deposit of moneys of the city of New York or in such accounts in savings banks or savings and loan associations located in their respective counties. All interest received on such deposits shall be credited to the respective estates. In case of the insolvency or involuntary liquidation of the depository all money so deposited shall be entitled to equal priority of payment with that given by law to deposits of money by the state superintendent of financial services.

3. Each public administrator shall whenever required exhibit to the city comptroller and the surrogate of the county where appointed the bank books or statements and all other vouchers and documents relating to his office. The comptroller and surrogate shall examine the bank books and statements showing the deposits and the vouchers on which the check is required to be drawn and shall satisfy himself fully as to the correctness thereof and in case of doubt or difficulty he shall report the case to the mayor for his direction.

§ 1108. Staff; salaries; offices

Notwithstanding the provisions of any other law, appointment and removal shall be made as follows:

1. Assistants and employees.
(a) The public administrators of the counties of the city of New York are hereby vested with the power to appoint and remove such other employees as may be allowed annually in the budget of the city of New York.
(b) The salaries above provided shall be included annually in the budget of the city of New York.

2. Counsel.
(a) In the counties of the city of New York, the court may appoint one or more counsels to the public administrator.
(b) The reasonable compensation of counsel so appointed shall be paid from the respective estates in which legal services are rendered and may be paid as provided in EPTL 11-1.1(b) (22) and the city of New York shall not be required to include in its expense budget any compensation for such counsel.
(c) Any legal fees allowed by the court pursuant to paragraph (b) of this subdivision shall be supported by an affidavit of legal services setting forth in detail the services rendered, the time spent, and the method or basis by which requested compensation was determined. In fixing the legal fees, the court shall consider the time and labor required, the difficulty of the questions involved, the skill required to handle the problems presented, the lawyer's experience, ability and reputation, the amount involved and benefit resulting to the estate from the services, the customary fee charged by the bar for similar services, the contingency or certainty of compensation, the results obtained, and the responsibility involved.

3. Offices.
(a) Suitable offices for the public administrators of Bronx, Kings, Queens and Richmond counties shall be provided by the appropriate fiscal authority in one of the county buildings of such counties, respectively,

provided however that in Richmond county such office may be provided in buildings other than a county building.

4. The office of public administrator of Bronx county shall be deemed a civil division within the meaning of section 45 of the civil service law.

§ 1109. Monthly reports to court, mayor and comptroller; annual audit

Each public administrator shall file monthly with the surrogate of the county where appointed, mayor and the comptroller of the city of New York a statement of such of his accounts as have been closed or finally settled in such form as the comptroller may prescribe.

Each public administrator shall file every six months with the surrogate of the county where appointed a report of every estate administered by the public administrator which has not been fully distributed within two years from the date when the first permanent letters of administration or letters testamentary were issued. Such report shall include the name of the decedent, file number, date of issuance of first permanent letters, approximate amount of gross estate, approximate amount that has been distributed to beneficiaries, approximate amount remaining in fiduciary's hands, reason that estate has not yet been fully distributed, date of report, address and phone of public administrator, and address and phone of attorney for the public administrator. Copies of such reports shall be provided, upon request to the attorney general and the state comptroller.

Each public administrator shall conduct annually an audit of his office by an independent certified public accountant and such a report based on such audit shall be filed with the surrogate of the county where appointed, the mayor and the comptroller of the city of New York, the attorney general of the state of New York and the comptroller of the state of New York. Within six months of receipt of the audit, the attorney general and the state comptroller shall report to the appropriate surrogate and public administrator their comments concerning the audit and any suggested recommendations they may have concerning the performance and operation of the public administrator's office. The audit shall be conducted in compliance with generally accepted government audit standards, and shall include a review of the performance of the office with respect to the guidelines and uniform fee schedules established by the administrative board. The costs of such audit and report shall be included annually in the budget of the city of New York.

§ 1110. Responsibility of the city

1. The city of New York shall be answerable for the faithful execution by the public administrator of all the duties of his office and for the application by him of all moneys and property received by him and for all moneys and securities and the interest, earnings and dividends thereon actually received by him or which he should have collected or received.

2. From all such sums paid into the city treasury the city may deduct any charges or commissions thereon which are now or may hereafter be authorized by law.

3. Any person aggrieved by any act or omission of a public administrator and any person entitled to receive any money or property for which the public administrator may be held to account, shall have each and every remedy against the city of New York as would be available against a fiduciary in like case and may initiate in the surrogate's court having jurisdiction a proceeding for the enforcement of his claim or right and shall serve process thereon on the comptroller of the city. The public administrator then in office shall be a necessary party in such proceeding.

§ 1111. Vacancy in office; delivery of money, papers and effects

1. Whenever a public administrator shall resign or be removed from his office he shall immediately deliver over to his successor all papers, moneys and effects in his hands.

2. In case of the death of a public administrator the persons into whose custody or possession any such papers, money or effects may come shall deliver them on demand to his successor.

3. Delivery may be enforced in the manner provided by law in relation to public officers.

4. The successor upon qualifying shall succeed at once to all the rights, duties and powers of his predecessor in office without the reissuance of letters to him.

§ 1112. Authority to act

The public administrator in his proper county shall have authority to take possession of, manage and collect the rents of the real property and take charge of the personal property of an intestate:

1. Whenever any person not known to have left him surviving a person eligible to receive letters shall die intestate either within this state or elsewhere leaving any real or personal property within the county and

2. Whenever any personal property of such intestate shall arrive within the county after his death.

3. Whenever all of the surviving relatives are not known the public administrator shall conduct a search for all living distributees of the decedent by reference to bank, postal, and telephone records and inquiry of neighbors, and other reasonable steps under the circumstances. The public administrator shall maintain records of all responses to such notices.

§ 1113. Reports of deaths and burials

1. Every person keeping a hotel, boarding or rooming house in any of the counties to which this article applies shall report in writing to the public administrator of his county information concerning every person not a member of his family who shall die in his hotel or house within 12 hours after such death.

2. The chief medical examiner or such similar public officer of each county to which this article applies within 12 hours after an inquest shall report in writing to the public administrator of his county, such information regarding the decedent which he may have.

3. Every undertaker shall file a report in writing with the public administrator of his county within 12 hours after receiving an order for the burial by him of any decedent having no known distributees or having been survived only by cousins or relatives by marriage, such information regarding the decedent which he may have.

§ 1114. Inquiry and subpoena

1. The public administrator may institute an inquiry in any case in which he is authorized to act as to any matter affecting the estate of the decedent.

2. For that purpose he may issue a subpoena or subpoena duces tecum either before or after the issuance of letters in the name of the court with the same effect as if either were issued by the court.

3. Failure to comply with the directions of the subpoena or subpoena duces tecum shall be punishable as a contempt of court.

§ 1115. Letters not required for small estates

1. Without the issuance of letters the public administrator by virtue of his office shall have all the powers of a fiduciary of a decedent's estate whenever the gross assets of the estate do not exceed the monetary amount defined as a small estate pursuant to subdivision 1 of section 1301 of this act.

2. In the event the aggregate sum of the assets of an estate in which the public administrator commences to act pursuant to subdivision 1 shall exceed the monetary amount defined as a small estate pursuant to subdivision 1 of section 1301 of this act the public administrator shall forthwith apply for letters.

3. The delivery by the public administrator to a debtor, transfer agent or person holding personal property of the decedent of a certificate evidencing his authority to act under this section, his receipt and the surrender of any evidentiary document shall constitute a complete release and discharge for any payment of money or delivery of property made pursuant to the certificate without such person being required to see to the application thereof and with the same effect as if made to any other fiduciary.

§ 1116. Application for letters; when court may direct probate

1. The public administrator is authorized to apply for and receive letters as defined in this act.

2. The court may direct the public administration to present a petition for probate of a will at any time after it is filed.

§ 1117. No separate bond or oath

The public administrators within the counties of the city of New York shall not be required to file the designation, separate bond or oath required by 708 before the issuance of letters to him.

§ 1118. Powers before issuance of letters

Before letters are issued to him and subject to the provisions of section 1128 of this article the public administrator is authorized to:

1. Take possession of, collect and secure the personal property within his county of any person who shall die intestate or testate within this state or elsewhere or whose property shall arrive with the county after his death whenever there is no person eligible to act as fiduciary of an intestate or of a testator, if the executor named in the will refuses or neglects to act or is dead or his whereabouts are unknown or if he is not eligible to receive letters.

2. Take possession of, manage and collect the rents of the real property of an intestate whose distributees are unknown or, whose distributees if known, are non-domiciliaries or of a testator if the executor named in the will refuses or neglects to act or is dead or his whereabouts are unknown or if he is not eligible to receive letters.

3. Pay the funeral expenses of the decedent.

4. Sell as and when authorized by the court perishable property or such other property of the decedent as the preservation of the estate requires.

5. Sell at public auction all property delivered to him as the effects of persons whose deaths have been reported to him by the department of hospitals, the police department or any other department or person.

6. Defray the expenses of the foregoing activities and the expenses incidental to his application for letters.

§ 1119. Notice to consuls

When the estate is that of a noncitizen it shall be the duty of the public administrator when making application for letters to mail a notice to the consular representative of the nation of which the decedent was a citizen or subject if any there be in the city of New York.

§ 1120. Appearance by consuls

1. In any action or proceeding brought by or against a public administrator in which a non-domiciliary noncitizen is a necessary or proper party the consular representative of the country of which the noncitizen is a citizen or subject may appear in person or by attorney in behalf of the noncitizen if the latter shall default in appearance.

2. No power of attorney or other specific authority from the noncitizen shall be required as a condition to such appearance.

3. Service upon a noncitizen pursuant to 307, subdivision 3, paragraph (e) may be made without prior service of process personally or otherwise upon the noncitizen.

4. The interests of noncitizen persons under disability shall, however, be represented in all such proceedings by their guardians of the property, committee of the property or conservators of the property, or by guardians ad litem appointed by the court.

§ 1121. Grant of letters to others

If any eligible distributee of the decedent shall petition to supersede the public administrator within 4 months after the public administrator has become vested with the powers of a fiduciary on the estate letters shall be granted to him upon proof that the petitioner did not receive notice of the application by the public administrator and upon the further showing that all persons prior or equal in right have been served and have defaulted or waived; but the court may refuse to supersede the public administrator if 6 months have elapsed since he became vested with the powers of a fiduciary.

§ 1122. Delivery of estate assets to fiduciary; expenses, costs and commissions

When the public administrator has been superseded he shall account and deliver to the fiduciary superseding him all the personal property belonging to the estate which he has in his possession or control after deducting his expenses, costs and commissions as provided by law.

§ 1123. General powers of public administrator.

1. Every public administrator shall have all the powers specifically granted herein and also the powers given by law to a fiduciary of a decedent's estate.

2. In addition to the foregoing grant of powers and without limitation thereon each public administrator is authorized to:

(a) Sell personal property of the decedent at public auction pursuant to notice appearing for 3 successive days prior to the sale in a newspaper published in the county pursuant to the provisions of section 1128 of this article.

(b) Retain marketable securities beyond 4 months after letters have been granted to him provided that the court has so permitted by order.

(c) Serve process on creditors, legatees or other persons interested, distributees, domiciled outside the city of New York by certified mail, return receipt requested, whenever directed by the court by order in any proceeding, the provisions of section 308 notwithstanding. Such service shall be valid if made at least 30 days before the return day thereof.

(d) Distribute without an accounting proceeding the assets of any estate defined as a small estate in subdivision 1 of section 1301 of this act and upon distribution to take the costs and commissions ordinarily allowed by the court upon the entry of a decree upon final accounting.

(e) File in the court an informatory account in a form prescribed by rule where the gross value of the assets of the estate accounted for does not exceed the monetary amount defined as a small estate in subdivision 1 of section 1301 of this act and shall serve a copy of such informatory accounting by certified mail on all interested parties at least 30 days prior to filing with the court.

(f) Pay for the use and benefit of an infant distributee or legatee who has no guardian of the property the share or legacy due the infant if not exceeding $5,000 by payment thereof in the discretion of the public administrator to a parent or to an adult competent person with whom the infant resides.

(g) Pay or deliver to the commissioner of finance of the city of New York the balance of any moneys or other assets in his hands remaining after settlement of his account or the filing of an informatory account, where payable to persons under disability or whose shares are to be deposited pursuant to section 2218 of this act.

(h) Apply ex parte or upon such notice as directed by the court for an order or decree in any appropriate proceeding requiring the city of New York to return to the public administrator any money or unliquidated assets theretofore deposited by the public administrator and remaining in the treasury of the city of New York and upon further order of the court to make distribution of such recovered funds to the persons entitled thereto.

(i) Receive process or other notice as a necessary party in the following proceedings:

(1) Any proceeding pending in the court where service of process or notice in behalf of any known or unknown person is directed by the court or where the court by order directs the public administrator to appear therein.

(2) Every proceeding for the appointment of an administrator or for the probate of a will where it does not appear that the persons applying or named in the petition are all the distributees of the decedent or where it appears that such persons are related to the decedent in the fourth degree of consanguinity or are more remotely related.

(3) Every proceeding to effect distribution of moneys or property deposited for the account of unknown persons or of infants or incompetents, or of known persons whose shares were deposited pursuant to section 2218. In any such proceeding the public administrator shall be deemed a person interested.

(4) In all such proceedings the public administrator, in his

discretion, may take any action in behalf of such person or persons as a person interested might.

(5) Whenever a public administrator acts pursuant to this subparagraph he shall be allowed by the court his proper expenses and his counsel shall be allowed his reasonable fee. Such expenses and fee shall be payable either from the estate generally or from the shares or interests of the respective persons represented by the public administrator, as may be directed by the court.

§ 1124. Appeal; bond

1. The public administrator is authorized to appeal from any order, decree or judgment affecting an estate in his charge or in which he is a party.

2. On such an appeal no bond on his part shall be required to stay execution of the order, decree or judgment appealed from.

§ 1125. Notification to corporation counsel

1. In any proceeding under 1123, subdivision 2, subparagraph (j) (iii) service upon the public administrator having jurisdiction shall be sufficient and service upon any officer of the city of New York shall not be required.

2. In such proceeding neither the comptroller nor the corporation counsel of the city of New York shall be charged with any duty in respect of the proceedings or with any responsibility for the distribution of the funds made pursuant to the order or decree therein.

3. The public administrator shall in each such proceeding give notice to the corporation counsel of the city of New York of the pendency of the proceeding and shall file a copy of the notice with proof of service thereof as part of the record of the proceeding before entry of an order or decree therein.

§ 1126. Property without value where no administration had.

Whenever the public administrator shall receive papers or property of a decedent upon whose estate no letters have been issued or whose property is not sufficient to require administration under 1116, the public administrator is authorized to abandon or destroy all such papers and property in his possession after 5 years have elapsed from the death of the decedent and upon proof satisfactory to him that they are without value. The public administrator and the city of New York shall not be liable or held to account for such property.

§ 1127. Disposition of records after 10 years

The public administrator is authorized to destroy the file and all of the papers relating to a decedent after the lapse of 10 years from the completion of the administration of his estate. The public administrator and the city of New York shall not be liable or held to account for such action.

§ 1128. Administrative board for the offices of the public administrators

1. An administrative board for the offices of the public administrators of the state of New York is hereby created. The board shall consist of thirteen members of whom five shall be surrogate court judges, one each selected by the presiding justice of the appellate divisions of the first, third and fourth departments and two selected by the presiding justice of the appellate division of the second department of whom one shall be a surrogate from a county within the city of New York and one shall be a surrogate from a county outside the city of New York, three members shall be selected by the chief administrative judge of the state of New York, two members shall be selected by the president of the New York state bar association of whom one shall be a resident of the city of New York and one member each shall be selected by the state comptroller, the attorney general and the president of the New York state surrogates' association. The three members selected by the chief administrative judge of the state of New York, and the members selected by the state comptroller, the attorney general, and the president of the New York state bar association, shall not be surrogate court judges or employees of the surrogates court. Each member shall serve without compensation but shall be reimbursed for expenses actually and necessarily incurred in the performance of his or her official duties for the board from the moneys appropriated to the office of court administration. Notwithstanding any inconsistent provisions of this or any other law, general, special or local, no officer or employee of the state or any public corporation, as defined in article two-A of the general construction law, shall be deemed to have forfeited or shall forfeit his or her office or employment or any benefits provided under the retirement and social security law or under any public retirement system maintained by the state or any of its subdivisions by reason of his or her being a member of the board.

2. The board shall establish guidelines and uniform fee schedules for the operation of the offices of public administrators. These guidelines shall include but are not limited to rules for the initial inspection of the decedent's premises and guidelines for the selection and compensation of investigators, appraisers, accountants, warehouses, auctioneers and procedures for the disposal of personal property. With respect to real property the board shall be responsible for preparing uniform procedures for sale; fixing a schedule of approved expenses attendant to such a sale; appraisals, title fees and broker's commissions. This section shall apply to article twelve of this act.

ARTICLE 12

PUBLIC ADMINISTRATORS IN THE COUNTIES OF ERIE, MONROE, NASSAU, ONONDAGA, SUFFOLK AND WESTCHESTER AND COUNTY TREASURERS APPOINTED ADMINISTRATORS

§ 1201. Definitions

Whenever used in this article the term public administrator, unless otherwise required by the context or unless a contrary intent is expressly declared, shall mean the public administrators of the counties of Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester.

§ 1202. Office established; appointment of successor

The office of public administrator hereby is continued. The public administrator shall continue in office unless removed by the court. Vacancy in such office for any reason shall be filled by the court of the county by appointing a public administrator for the county immediately. In the counties of Westchester, Nassau and Suffolk, the court may appoint a deputy public administrator who shall act generally for and in place of the public administrator whenever required.

§ 1203. General bond

Except in the counties of Erie, Monroe and Onondaga the person so appointed shall execute a bond with sureties to be approved by the court to the county in a penal sum to be fixed by the board of supervisors on recommendation of the court and conditioned for the faithful discharge of the duties of his office and that he will fully and correctly account for and pay over all moneys and property which may come into his hands as public administrator according to law, which bond shall be filed with the clerk of the county and the premium thereon shall be a county charge. The bond in the counties of Erie, Monroe and Onondaga shall be in a penal sum fixed by the court and the premium shall be borne personally by the public administrator.

§ 1204. Separate bonds

Except in the counties of Erie and Onondaga the public administrator upon entering upon his duties in every estate the gross assets of which exceed the monetary amount defined as a small estate pursuant to subdivision 1 of section 1301 of this act, shall file a bond in a penal sum to be fixed by the court not less than the value of the personal property and the estimated gross rents for 18 months of the real property of which the decedent died seized or possessed and of the probable amount to be received by reason of any right of action granted to a fiduciary for damages for the wrongful death of the decedent. The public administrator in the counties of Erie and Onondaga shall file a bond in every estate in which he shall be appointed or be entitled to act pursuant to section 1211 of this article after the effective date of this act in a penal sum fixed by the court to be determined by such proof as the court deems proper. The bond must be conditioned that the public administrator or his successor will faithfully discharge the trust reposed in him as such and obey all lawful decrees and orders of the court touching the administration of the estate committed to him. The cost of the bond shall be borne by the estate in each instance.

§ 1205. Vacancy in office; delivery of money, papers and effects; discharge

1. Whenever the public administrator shall resign or be removed, he shall immediately deliver over to his successor all papers, moneys and effects in his hands.

2. In case of the death of a public administrator the persons into whose custody or possession any such papers, moneys or effects shall come, shall deliver them on demand to the successor. Upon the resignation, removal or death of any public administrator, if there be no deputy public administrator, the clerk of the surrogate's court of his county shall immediately take possession for custodial purposes only of all papers, moneys and effects which were in the hands of the public administrator. Delivery in either of the above cases may be enforced in the manner provided by law in relation to public officers. Upon the appointment of a duly qualified successor the clerk shall immediately deliver over to the successor all such papers, moneys and effects so held by him and such successor upon duly qualifying shall succeed at once to all the rights, duties and powers of his predecessor without the reissuance of formal letters to him.

3. In any final accounting by a public administrator the court shall discharge the acting administrator and any prior public administrator who may have acted in the estate.

§ 1206. Staff; offices; counsel

1. Each public administrator, except in the counties of Erie and Onondaga, shall appoint such assistants and employees at such compensation as may be provided by the board of supervisors of his county.

2. Each such county except Erie, Monroe and Onondaga shall provide suitable office space, accommodations and storage space for its public administrator which shall be located conveniently to the court. The board of supervisors of the counties of Monroe and Onondaga may allow the public administrator a reasonable amount for the operation of his office and any allowance presently provided by the board shall continue unless modified or altered by it.

3. Each public administrator may employ counsel in any estate, whose fees and expenses therein shall be approved by the court of his county and shall be charged against the estate.

4. The court may deputize any assistant or employee in the office of the public administrator or other suitable person to hold the title of deputy public administrator who shall perform in the absence of the public administrator such services and shall possess such powers as may be prescribed and vested in him by the court. The deputy public administrator so appointed shall continue in office until removed by the court. In case of vacancy in office for any cause the court may fill it by appointing a suitable assistant or employee as deputy public administrator to take office immediately upon his appointment and qualification. The appointment shall be in writing and shall be filed in the office of the court. Except in the counties of Erie and Onondaga such deputy public administrator shall not receive any extra compensation for acting unless authorized by the board of supervisors.

§ 1207. Salary; commissions; retention of commissions

1. Except as herein provided the public administrator shall receive an annual salary to be fixed by the board of supervisors of his county for the administration of all estates.

2. The public administrator of the counties of Erie and Onondaga shall be entitled to retain from all moneys or property which come into his hands, after deducting all reasonable and necessary expenses, the

same commissions as are now allowed by law to a fiduciary other than a trustee. If he be a licensed attorney-at-law he shall receive as his compensation, in addition to his commissions, the legal fees as attorney for the estate as may be allowed by the court together with his reasonable and necessary expenses and disbursements which shall be a charge against the estate in each instance.

3. The public administrator of the county of Monroe, if he be a duly licensed attorney-at-law shall receive no salary and may act as his own counsel and shall receive as his compensation such legal fees as the attorney of the estate as may be allowed by the court together with his reasonable and necessary expenses and disbursements which shall be a charge against the estate in each instance. If he shall not be an attorney-at-law he shall be compensated as is provided for in subdivision 1.

4. On the settlement of the account of the public administrator in each instance, except as provided in subdivisions 2 and 3 the court may allow his reasonable and necessary expenses and disbursements and in addition, in the counties of Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester, a reasonable amount for the expenses of his office, to be fixed by the court. In addition thereto he shall be entitled to receive commissions on all moneys or property of any decedent or the proceeds of a cause of action for wrongful death which may come into his hands as provided for a fiduciary other than a trustee.

5. Except as hereinabove provided the public administrator shall not receive to his own use any remuneration in addition to his salary for his services and he shall pay to the treasurer of his county all commissions and costs received by him. Such payments shall be made monthly and shall be accompanied by a sworn statement in such form as the comptroller of his county shall prescribe showing in detail the commissions and costs received and allowed to him.

§ 1208. Deposit of funds; report to court; annual audit

1. All moneys collected shall be deposited by the public administrator in a state or national bank, savings bank, savings and loan association or trust company and shall, in case of the insolvency or voluntary or involuntary liquidation of the depositary be entitled to equal priority of payment with that given by law to deposits of moneys by the state superintendent of financial services.

2. The public administrator or chief fiscal officer of a county appointed administrator of an estate shall file monthly with the surrogate of the county where appointed a statement of such of his accounts as have been closed or finally settled in such form as the surrogate may prescribe. Each public administrator or chief fiscal officer of a county appointed administrator of an estate shall file every six months with the surrogate of the county where appointed all estate accounts that are unsettled, stating the date the estate was opened, the gross assets of the estate and a list of current charges and disbursements of the estate.

3. Each public administrator shall conduct an annual audit of his office by an independent certified public accountant and such a report based on such audit shall be filed with the surrogate of the county where appointed, the attorney general of the state of New York and the comptroller of the state of New York. The audit shall be conducted in compliance with generally accepted government audit standards, and shall include a review of the performance of the office with respect to the guidelines and uniform fee schedules established by the administrative board. The costs of such annual audit and report shall be included annually in the budget of the county of appointment; provided however that any expenses of the public administrator's office permitted pursuant to section 1106 of this act may be used to pay the costs of such audit.

§ 1209. Reports of deaths and burials

1. Every person keeping a hotel, boarding or rooming house in any of the counties to which this article applies shall report to the public administrator of his county information concerning every person not a member of his family who shall die in his hotel, boarding or rooming house, within 12 hours after such death.

2. The chief medical examiner or such similar public officer of each county to which this article applies within 12 hours after an inquest shall report in writing to the public administrator of his county, information, if known, regarding the decedent.

3. Every undertaker shall file a report in writing with the public administrator of his county upon the form provided by him, within 12 hours after receiving an order for the burial by him of any decedent having no known distributees or having been survived only by cousins or relatives by marriage, such information regarding the decedent which he may have.

§ 1210. Application for letters; when court may direct probate

1. The public administrator shall have the power to apply for and receive letters as defined in this act.

2. The court may, pursuant to 1402, direct the public administrator to present a petition for the probate of a will at any time after it is filed.

§ 1211. Letters not required; notice to be filed

1. Without the issuance of letters the public administrator in virtue of his office shall have all powers of a fiduciary of a decedent's estate whenever the gross assets of an estate do not exceed in value the monetary amount defined as a small estate pursuant to section 1301 of this act.

2. Upon commencing to act pursuant to this section the public administrator shall file with the court a statement showing the name and

domicile of the decedent, the date and place of death and the names, addresses and relationship of any known distributees. The filing of such notice shall have the same effect as the issuance of formal letters.

3. In the event the aggregate sum of the assets of an estate in which the public administrator commences to act pursuant to subdivision 1 shall exceed the monetary amount defined as a small estate pursuant to section 1301 of this act the public administrator shall forthwith apply for letters and file separate bond in the estate.

4. In the event the public administrator acting in any estate pursuant to subdivision 1 shall ascertain the names and whereabouts of persons believed to be distributees in the estate, then and in that event he shall forthwith file a supplemental statement pursuant to subdivision 2.

§ 1212. Powers before issuance of letters

Before letters are issued to him and subject to the provisions of section 1128 of this act the public administrator is authorized to

1. Take possession of, collect and secure the personal property within his county of any person who shall die intestate or testate either within this state or elsewhere or whose property shall arrive within the county after his death whenever there is no person eligible to act as fiduciary of an intestate or of a testator if the executor named in the will refuses or neglects to act or is dead or if his whereabouts are unknown or if he is not eligible to receive letters.

2. Take possession of, manage and collect the rents of the real property of an intestate whose distributees are unknown or whose distributees, if known, are non-domiciliaries, or of a testator, if the executor named in the will refuses or neglects to act or is dead or if his whereabouts are unknown or if he is not eligible to receive letters.

3. Make necessary funeral arrangements for the decedent and to pay the reasonable charges therefor.

4. Institute an inquiry as provided by 1216.

5. Sell, as and when authorized by the court, perishable property or such other property of the decedent as the preservation of the estate requires.

6. Defray the expenses of the foregoing activities and the expenses incidental to his application for letters.

§ 1213. General powers

1. The public administrator shall have all the powers specifically granted herein and also the powers given by law to a fiduciary of a decedent's estate.

2. In addition to the foregoing grant of powers and without limitation thereon and subject to the provisions of section 1128 of this act he is authorized to

(a) Sell at public auction the personal property of the decedent delivered to him by any county officer or department, but such sale shall not be had until notice of the public auction shall be published once a week for two consecutive weeks in a newspaper published in the county, the first publication to be not less than 20 days prior to the public auction.

(b) Retain marketable securities beyond 4 months after he has commenced to act as fiduciary of the estate when authorized to do so by order of the court.

(c) File in the court after the expiration of 7 months from the time he or she commences to act as fiduciary of the estate an informatory account in estates in which the gross value of the assets accounted for does not exceed the monetary amount defined as a small estate pursuant to subdivision 1 of section 1301 of this act and a copy of such account shall be mailed by certified mail, return receipt requested, to each of the persons entitled to receive process upon an accounting proceeding provided the names and addresses of such persons be known to him or her.

Unless objection or claim be properly filed in the court within 30 days from mailing such account a final decree settling his or her account may be entered without further notice or proceedings and with the same effect as in an accounting proceeding and he or she shall be entitled to the commissions, costs and allowances allowed him or her by the court in the decree.

(d) Pay for the use and benefit of an infant distributee or legatee who has no guardian the share or legacy due him if not exceeding $5,000 by payment thereof in his discretion to a parent or to an adult, competent person with whom the infant resides.

(e) Pay to the comptroller of the state of New York the balance of any moneys or other assets in his hands remaining after settlement of his accounts, formally or informally, where payable to unknown persons or to known persons whose residences are unknown.

(f) Apply ex parte or upon such notice as directed by the court for an order or decree in any appropriate proceeding requiring the county treasurer to return to the public administrator any money or unliquidated assets theretofore deposited by him and remaining in the treasury of the county for the account of unknown persons or of known persons whose domiciles are unknown and upon further order of the court to make distribution of such recovered funds to the persons entitled thereto.

§ 1214. Service of process

The public administrator is authorized to make service of process on creditors, legatees or distributees who are non-domiciliaries of his county by certified mail, return receipt requested, whenever the court by order made in any proceeding shall direct. The provisions of 308 notwithstanding, process so served shall be valid if made at least 30 days before the return date thereof.

§ 1215. When authorized to receive process or appear

1. The public administrator may be authorized by the court to receive process or other notice as a necessary party in the following proceedings:

(a) Any proceeding pending in the court where service of process or notice of or in behalf of any known or unknown persons is directed by the court or where the court by order directs the public administrator to appear therein.

(b) Every proceeding for the appointment of an administrator or for the probate of a will where it appears that the persons applying or named in the petition are not all of the distributees of the decedent or where it appears that such persons are related to the decedent in the fourth degree of consanguinity or are more remotely related.

(c) Every proceeding to effect distribution of moneys or property to be deposited or deposited for the account of unknown persons or of infants or incompetents, of known persons whose residences are unknown or of known persons whose shares were deposited pursuant to 2218. In any such proceeding when so authorized the public administrator shall be deemed an interested party.

2. In all such proceedings the public administrator, in his discretion, may take any action in behalf of such person or persons as a party interested might.

3. Whenever a public administrator acts pursuant to this section he shall be allowed by the court his proper expenses and his counsel shall be allowed his reasonable fee. Such expenses and fee shall be payable either from the estate generally or from the shares or interests of the respective persons represented by the public administrator, as may be directed by the court.

§ 1216. Inquiry and subpoena

The public administrator may institute an inquiry in any case in which he is authorized to act as to any matter affecting the estate of the decedent. For that purpose he may issue a subpoena or subpoena duces tecum in the name of the court either before or after the issuance of letters. Failure to comply with the directions of the subpoena or subpoena duces tecum shall be punishable as a contempt of court.

§ 1217. When superseded; accounting authorized

1. When the public administrator in virtue of his office has been superseded he shall deliver to the fiduciary who has superseded him all the personal property belonging to the estate which he has in his possession after deducting therefrom his expenses, costs and commissions as ordinarily allowed by the court upon the entry of a decree upon final accounting.

2. When letters issued to the public administrator have been revoked he shall institute a proceeding for the judicial settlement of his account.

§ 1218. Appeal; bond

The public administrator is authorized to appeal from any decree, order or judgment affecting an estate in his charge or in which he is a party. No bond on his part shall be required to stay execution of the order, decree or judgment from which an appeal is taken.

§ 1219. Chief fiscal officer of county appointed administrator; qualifications; fees. A chief fiscal officer of a county appointed administrator of an estate shall qualify in the manner prescribed in 708 of this act, shall be vested with all the powers and rights of an administrator and be subject to the same duties and obligations and shall be allowed the same commissions as an administrator, which commissions shall be in addition to the salary and fees now allowed by law to such chief fiscal officer. He may employ an attorney to act for him as such administrator other than the one, if any, appointed to act as the county attorney or the official attorney of such chief fiscal officer.

Where the administrator appointed as above provided leaves office, resigns or is removed from office, or dies, his successor in office, with respect to each of the estates of which his predecessor in office was appointed administrator, shall apply to be appointed administrator de bonis non, within one hundred twenty days after assuming office.

The chief fiscal officer shall be subject to the provisions of section 1128 as it pertains to his administrator's duties.

ARTICLE 13

SETTLEMENT OF SMALL ESTATES WITHOUT COURT ADMINISTRATION

§ 1301. Definitions

In this article:

1. A small estate is the estate of a domiciliary or a non-domiciliary who dies leaving personal property having a gross value of $50,000 or less exclusive of property required to be set off under EPTL 5-3.1 (a).

2. A voluntary administrator is a person who qualifies and undertakes to settle the estate of the decedent without the formality of court administration as hereinafter provided.

§ 1302. Kinds of property

This article is not applicable to any interest in real property in this state owned by a decedent, but his owner ship of an interest in real property shall not prevent the use of this article in administering his personal property.

§ 1303. Persons who may become a voluntary administrator.

(a) If the deceased dies intestate, the right to act as a voluntary administrator is hereby given first to the surviving adult spouse, if any, of the decedent and if there be none or if the spouse renounce, then in order to a competent adult who is a child or grandchild, parent, brother or sister, niece or nephew or aunt or uncle of the decedent, or if there be no such person who will act, then to the guardian of the property of an infant, the committee of the property of any incompetent person or the conservator of the property of a conservatee who is a distributee and if none of the foregoing named persons will act or if there are no known distributees within the categories listed above, then to the chief fiscal officer of the county except in those counties in which a public administrator has been appointed under articles eleven and twelve of this act. After the surviving spouse, the first distributee within the class of persons entitled or if no distributee will act or there are no known distributees within the class of persons entitled, then the chief fiscal officer of the county as above who makes and files the required affidavit, is authorized to act as voluntary administrator, or as successor voluntary administrator in the event of the death or resignation of the voluntary administrator before the completion of the settlement of the estate.

(b) If the deceased dies testate, the named executor or alternate executor shall have the first right to act as voluntary administrator, upon filing the last will and testament with the surrogate's court. If the named executor or alternate executor renounces or fails to qualify by filing the required affidavit within thirty days after the last will and testament has been filed in the surrogate's court, then any adult person who would be entitled to petition for letters of administration with will annexed under section 1418 of this chapter may file the required affidavit and have the right to act as voluntary administrator.

(c) No person other than one hereinbefore mentioned can become a voluntary administrator.

§ 1304. Summary procedure

1. When available. No waiting period after the death of the decedent is required.

The procedure prescribed in this article may be used after the decedent's death.

2. Bond. The voluntary administrator need not give a bond.

3. Affidavit. A person may qualify as a voluntary administrator by making and filing with the clerk of the court of the decedent's domicile, or in the case of a non-domiciliary, of the county in which his personal property is located, an affidavit in the form provided by the Official Forms appended to this act, and also a certified copy of the death certificate of the decedent.

4. Record. The clerk shall file the affidavit and assign it a number. The clerk shall enter each such proceeding in the records and indexes of the court. The clerk shall charge a fee of $1 for filing the affidavit. No order of the court or other proceeding shall be necessary. The clerk shall mail to each distributee who has not renounced his or her right to act and to each beneficiary mentioned in the affidavit other than the affiant, a letter or postcard notice of the proceeding under this article. The giving of such notice is not jurisdictional.

5. Furnishing evidence of qualification and authority. A short certificate of the court showing the filing by the voluntary administrator of the required affidavit, shall evidence his, her or its qualification and authority to act. The clerk may indicate on the certificate that it is valid only for a transfer or transaction as specified thereon. The voluntary administrator shall deliver a certificate to each debtor, transfer agent, safe deposit company, bank, trust company or other person holding or having custody, possession or control of any personal property of the decedent which the voluntary administrator seeks to reduce to possession or otherwise affect the title thereof.

§ 1305. Discharge of debtor, transfer agent, safe deposit company, bank, trust company or other person

The delivery by a voluntary administrator to a debtor, transfer agent, safe deposit company, bank, trust company or other person holding or having custody or possession or control of any personal property of the decedent, of the short form certificate of the court, the receipt of the administrator, and the surrender of any evidentiary document, shall constitute a complete release and discharge for any payment of money or delivery of personal property made pursuant to the certificate, without such person being required to see to the application thereof and with the same effect as if made to any duly appointed fiduciary.

§ 1306. Powers

1. If any person to whom a certificate and receipt are presented by a voluntary administrator refuses to pay, deliver, transfer or issue to the voluntary administrator any personal property of the decedent, the voluntary administrator may maintain an action or proceeding to recover or compel the delivery of the property, or to enforce a contractual or quasi contractual claim owned by decedent, provided the amount claimed, together with all other assets of the estate to be administered under this article, does not exceed the monetary amount defined as a small estate pursuant to subdivision one of section 1301 of this article. In such action or proceeding, a certified copy of the affidavit shall be prima facie proof of the facts therein stated.

2. A voluntary administrator may sell for its reasonable value in cash any personal property of the decedent coming into the voluntary administrator's possession.

3. For the purpose of this article, a voluntary administrator shall be deemed to be the fiduciary of the estate until another fiduciary is appointed, and except as hereinafter provided, the voluntary administrator shall have the rights, powers and duties with respect to personal property of an administrator duly appointed for the estate. The voluntary administrator shall have no power to enforce a claim for the wrongful death of or a claim for personal injuries to the decedent.

Upon the appointment and qualification of another fiduciary of the estate, the powers of the voluntary administrator shall cease.

§ 1307. Duties

A voluntary administrator shall

1. Deposit in an estate bank account to be opened by him in a bank, trust company, savings bank, savings and loan association or federal savings and loan association in this state, credit union or federal credit union in this state all money received. He shall sign all checks drawn on or withdrawals from the account in the name of the estate by himself as voluntary administrator. Without compensation for his services, he shall pay so far as possible out of the decedent's assets coming into his possession, the necessary expenses of administration, the reasonable funeral expenses of the decedent and the decedent's debts in the order provided by law. He shall then distribute the balance to the person or persons entitled and in the amount or amounts provided by EPTL 4-1.1 if decedent died intestate or if a will is filed which is valid on its face, he shall distribute to the persons named in such will, subject to the right of any person affected to contest such will at any time.

2. Account for all personal property of the decedent received and disbursed by him by filing with the clerk of the court a statement of all assets collected and of all payments and distributions made by him and receipts for or cancelled checks evidencing such payments and distributions. No fee shall be charged for the filing of such account.

§ 1308. Liability of voluntary administrator collecting assets

1. A voluntary administrator shall be answerable and accountable to all persons including creditors and distributees of the decedent, beneficiaries named in the will filed with the affidavit and to any fiduciary thereafter appointed, aggrieved by his administration of the decedent's estate under this article, in the same manner as now provided by this act concerning a fiduciary.

2. A voluntary administrator or other person who wilfully and knowingly makes a false affidavit in order to obtain personal property of the decedent as provided in this article, is subject to prosecution for perjury and upon conviction shall be punishable as provided by law in relation to such crime.

§ 1309. General provisions

1. The use of this article in the settlement of a small estate without the formality of court administration is permissive and not mandatory.

2. As a matter of comity a debtor, transfer agent, safe deposit company, bank, trust company or person in this state holding personal property of a non-domiciliary decedent, may recognize a certified copy of an affidavit or of a short certificate of a judge or clerk of a probate court made under a statute of another state, providing for the settlement of small estates without administration, for the purpose of

collecting or obtaining possession of an asset of a decedent in his state, provided that debtors, transfer agents, safe deposit companies, banks, trust companies or persons in such other state holding personal property of a domiciliary decedent shall, whether pursuant to statute or otherwise, recognize and pay or transfer his personal property pursuant to a short certificate of the court made under this article.

3. A debtor, transfer agent, safe deposit company, bank, trust company or person of another state, shall not be liable to any person in respect of any payment, transfer or delivery of personal property made to a voluntary administrator pursuant to such short certificate.

4. As used in this section, the word "state" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 1310. Payment of certain debts without administration

1. As used in this section

(a) "Debt" means

(i) money or securities payable on account of a deposit in a bank, national bank, trust company, branch of a foreign banking corporation, savings bank, industrial bank, state or federal savings and loan association or state or federal credit union or with a private banker, or funds or securities invested with, held by or deposited with a broker-dealer or with, by or in securities of a management type investment company or trust payable or returnable to, or to the estate of, or to a beneficiary designated by, the depositor or

(ii) money payable by a state or federal savings and loan association or state or federal credit union to, or to the estate of, or to a beneficiary designated by, a member on account of the withdrawal value of his shares or

(iii) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract or a policy of life, group life, industrial life or accident and health insurance or a contract made by such an insurer, relating to the payment of proceeds or avails thereof, to, or to the estate of, or to a beneficiary designated by, the owner or the person purchasing the annuity or the person insured or the person effecting the insurance or the person effecting the supplemental contract or

(iv) money payable by a public corporation, a state or the federal government or an agency thereof, to, or to the estate of, or to a beneficiary designated by, any natural person or

(v) a pension or retirement or death benefit, profit share, earnings, wages, salary or bonus payable by an employer or by a pension, retirement or profit-sharing plan or system to, or to the estate of, or to a beneficiary designated by, an employee, or

(vi) a balance of money due on an accepted claim or account payable, on account of dividends payable by the superintendent of financial services in liquidation of bank assets, to, or to the estate of, or to a beneficiary designated by, a depositor or

(vii) any personal property deposited with a county treasurer by a coroner or county medical examiner pursuant to sections 785 and 786 of the code of criminal procedure, or

(viii) any personal property on deposit with a hospital, nursing home, residential health care facility or out-patient lodge described in section twenty-eight hundred one of the public health law at the time of the death of a decedent that is payable or returnable to the estate of the decedent;

(b) "Debtor" means the person or persons, partnership, corporation, government or government agency by whom a debt defined in this section is to be paid,

(c) "Creditor" means the employee, depositor, member, or other person, to whom, or to whose estate, or to a beneficiary designated by whom, a debt defined in this section is to be paid and shall include any beneficiary validly designated by such a creditor,

(d) A "designation of a beneficiary" means any writing, signed by the creditor and delivered to the debtor purporting to designate the person to whom a debt shall be paid on death of the creditor or any transaction which operates pursuant to statute as such a designation.

2. Upon the death of a creditor, unless otherwise provided by a designation of a beneficiary which is then in effect, it shall be lawful

for the debtor forthwith to pay to the surviving spouse of the decedent not more than thirty thousand dollars of the debt, upon an affidavit made by the spouse showing that the payment and all other payments received by the spouse under this subdivision do not in the aggregate exceed thirty thousand dollars.

3. Not less than thirty days after the death of a creditor, unless otherwise provided by a designation of a beneficiary which is then in effect, it shall be lawful for the debtor to pay not more than fifteen thousand dollars of the debt to

(a) the surviving spouse,

(b) one or more of the children eighteen years of age or older,

(c) either parent,

(d) the brother or sister,

(e) the niece or nephew of the decedent, preference being given in the order named if request for payment shall have been made by more than one such person,

(f) a creditor of the decedent or to a person who has paid or incurred the funeral expense of the decedent, upon the request of the surviving spouse or of one of such relatives.

Payment under this subdivision may be made upon an affidavit by the surviving spouse or relative to whom or at whose request the payment is made, showing

(i) the date of the death of the decedent,

(ii) the relationship of the affiant to the decedent,

(iii) that no fiduciary has qualified or been appointed,

(iv) the names and addresses of the persons entitled to and who will receive the money paid, and

(v) that such payment and all other payments made under this section by all debtors, known to the affiant, after diligent inquiry do not in the aggregate exceed fifteen thousand dollars. This subdivision does not limit the right of a debtor to make payment to a surviving spouse within less than thirty days after the death of the creditor as provided in subdivision two.

4. Not less than 6 months after the death of a creditor, unless

otherwise provided by a designation of a beneficiary which is then in effect, it shall be lawful for the debtor to pay a debt which does not exceed $5,000, or any part of such debt, to a distributee or, to the extent that the funds are not exempt from claims of creditors, to a creditor or to a person who has paid or incurred the funeral expenses upon an affidavit made by the person paid showing

(a) the date of the death of the decedent,

(b) that no fiduciary has qualified or been appointed,

(c) that the decedent was not survived by a spouse or minor child,

(d) that the affiant is entitled to the payment, and

(e) that such payment and all other payments made under this section by all debtors, known to the affiant, after diligent inquiry, do not in the aggregate exceed $5,000.

5. A payment made in good faith under this section shall be a complete discharge to the debtor to the extent of the payment, even though the affidavit on which payment is made be false, and even though payment pursuant to subdivision 3 was not made in the order of preference indicated in that subdivision, provided only that the creditor be dead and that the required number of days elapse between death and payment and, in the case of a payment under subdivision 2 or subdivision 3 that the affiant in fact bear the stated relationship to the decedent and in the case of a payment under subdivision 4 that the affiant be in fact a distributee or creditor or have paid or incurred the funeral expenses.

6. Any person receiving payment pursuant to this section is accountable therefor to the fiduciary of the decedent if one be appointed or to the public administrator of the county having authority to take possession of the money or property constituting the debt except that a surviving spouse entitled to have property set aside to him or to her pursuant to EPTL 5-3.1 need not account for such payments to the extent of the exemption provided therein, and the amount so received shall be credited to such exemption.

7. Nothing in this section shall deprive any person of any right which he would otherwise have to receive payment of a debt, except as against a debtor who has made a payment which is a discharge under subdivision

5, nor shall anything in this section deprive any debtor of any right to make or refuse payment which it would otherwise have. This section does not limit article 26 of the tax law.

8. It shall be lawful for the debtor to pay a debt which does not exceed five thousand dollars or any part of such debt, under subdivision four of this section, to the department of social services or a social services district where the debt is money payable on account of a deposit with the debtor for the personal needs of the deceased creditor while residing in a medical institution or other facility, or otherwise, and the deceased creditor is indebted to the department or district on account of medical assistance furnished to or on behalf of the deceased creditor.

9. This section applies only to creditors who die on or after September 1, 1952.

§ 1311. Administration of funds payable under social security act of the United States, the unemployment insurance law and the workmen's compensation law.

1. In virtue of his office and without issuance of letters each public administrator, and in counties having no public administrator, each county treasurer is authorized to receive from the social security board of the United States or the unemployment insurance fund of the state or from any person making payment under the workmen's compensation law, for application according to law in the payment of administration expenses, funeral expenses and for distribution to the distributees of the deceased any moneys not exceeding $500 payable pursuant to title II of the social security act of the United States or pursuant to the unemployment insurance law, or pursuant to the workmen's compensation law, as the case may be, to the estate of any person dying intestate a resident of his county.

2. The moneys so received by the public administrator or county treasurer shall be applicable to the payment of the expenses of

administration, to the payment of reasonable funeral expenses not otherwise provided for and any balance may be distributed without prior accounting decree to the persons entitled thereto as distributees of the decedent.

3. In the case of an infant or incompetent his share, if not exceeding $1,000, may be paid for the use and benefit of the infant to a parent or to some competent person with whom the infant or incompetent resides or who has an interest in his welfare.

4. If the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive pursuant to section 29.23 of the mental hygiene law, it may be paid to such director for use as provided in that section.

§ 1312. Construction

This article is remedial and shall be given a liberal construction.

ARTICLE 14

PROBATE PROCEEDINGS; CONSTRUCTION OF WILLS; RIGHT OF ELECTION

Section

§ 1401. Proceeding to compel production of will

Whenever it shall appear to the court, sua sponte, or by the petition of a person authorized under the succeeding section of this act to present a petition for the probate of a will, that there is reasonable ground to believe that any person has knowledge of the whereabouts or destruction of a will of a decedent the court may make an order requiring the person or persons named therein to attend and be examined in the premises. Service of the order must be made by delivery of a certified copy thereof to the person or persons named therein either personally or in such manner as the court shall direct. The court may either in the order or otherwise in the proceeding require the production and filing in court of any will of the decedent which it finds is in the possession or under the control of the respondent. The court may impose the reasonable attorneys fees of the petitioner in such a proceeding against a respondent when the court determines the respondent did not have good cause to withhold production of such will or codicil.

§ 1402. Who may propound will; contents of petition; direction of court

1. Who may petition. A petition for the probate of a will may be presented by

(a) any person designated in the will as legatee, devisee, fiduciary or guardian or by the guardian of an infant legatee or devisee or the committee of an incompetent legatee or devisee, or the conservator of a legatee or devisee who has been designated a conservatee pursuant to article seventy-seven of the mental hygiene law;

(b) a creditor or any person interested or any person entitled to letters of administration with the will annexed under 1418;

(c) any party to an action brought or about to be brought in which action the decedent, if living, would be a party;

(d) the Public Administrator or County Treasurer on order of the court, where a will has been filed in the court and proceedings for its probate have not been instituted or diligently prosecuted.

2. Contents of petition. The petition for probate shall allege the citizenship of the petitioner and the testator and shall describe the will being offered for probate and any other will of the same testator on file in the court and shall set forth the names and post-office addresses so far as they can be ascertained with due diligence of all of the persons required to be cited and all of the legatees, devisees and fiduciaries named in the will or any other will so filed.

3. Direction of court.

(a) Where a petition for probate has been filed and the proceeding has not been diligently prosecuted the court may direct the Public Administrator or County Treasurer or authorize any party to take such steps as may be required to bring the proceeding to a decree.

(b) Where necessary, the court shall determine the text or tenor of the will as admitted to probate and may incorporate the will or any part thereof in the decree.

§ 1403. Persons to be served; content of process

1. In a proceeding for the probate of a will process must issue to the following persons if not petitioners:

(a) The distributees of the testator.

(b) The person or persons designated in the will as executor except that a person designated in the will as substitute or successor executor in the event the designated executor cannot act or fails to qualify need not be served where the designated executor is under no disability.

(c) Any person designated in the will as beneficiary, executor, trustee or guardian, whose rights or interests are adversely affected by any other instrument offered for probate that is later in date of execution or which amends or modifies an instrument offered for probate.

(d) Any person designated as beneficiary, executor, trustee or guardian in any other will of the same testator filed in the surrogate's court of the county in which the propounded will is filed whose rights or interests are adversely affected by the instrument offered for probate.

(e) If the propounded will expressly refers to an instrument which created a power of appointment and purports to exercise such power of appointment, any persons designated in the instrument that created such power of appointment whose rights or interests are adversely affected by the instrument offered for probate.

(f) The testator in any case where the petition alleges that the testator is believed to be dead.

(g) The state tax commission in the case of a non-domiciliary testator.

(h) Where any person to whom process is required to be issued has died, process shall issue to his fiduciary and if none has been appointed, to all persons interested as distributees, nominated fiduciaries or named as legatees or devisees under any will of the deceased filed in the court.

(i) The provisions of section three hundred fifteen shall apply to a proceeding under this section.

2. The process must set forth the name of the proponent and if the will is nuncupative, that fact.

§ 1404. Witnesses to be examined; proof required

1. Except as otherwise provided in this article, 2 at least, of the attesting witnesses must be produced before the court and examined before a written will is admitted to probate if so many of the witnesses are within the state and competent and able to testify.

2. Where the will offered for probate is on file in a court or public office under the laws of which jurisdiction the will cannot be removed the court may issue a commission to a person authorized to take a commission under CPLR 3113 or to an attorney and counsellor-at-law of the state or of the jurisdiction in which the commission is to be taken, to take the testimony and may admit the will to probate upon proof of its provisions, of its existence at the time of the death of the testator and of its due execution. Where the will offered for probate is brought to the surrogate's court by a representative of a public office of another jurisdiction, the court may take proof of the will and permit the representative to return the will to such other jurisdiction. The decree admitting the will to probate shall set forth the full text of the will. The proof so taken and the decree admitting the will to probate shall have the same force and effect as though the will had been filed or had remained in the court.

3. Before a nuncupative will executed under the provisions of EPTL 3-2.2 is admitted to probate its execution and the tenor thereof must be proved by at least two witnesses. Before a holographic will made under the provisions of that section is admitted to probate its execution and the handwriting of the testator must be proved.

4. In all cases the proofs must be reduced to writing. Any party to the proceeding, before or after filing objections to the probate of the will, may examine any or all of the attesting witnesses, the person who prepared the will, and if the will contains a provision designed to prevent a disposition or distribution from taking effect in case the will, or any part thereof, is contested, the nominated executors in the will and the proponents and, upon application to the court based upon special circumstances, any person whose examination the court determines

may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will. No person who has been examined as a witness under this section shall be examined in the same proceeding under any other provision of law except by direction of the court. The attesting witnesses, the person who prepared the will, the nominated executors in the will and the proponents may be examined as to all relevant matters which may be the basis of objections to the probate of the propounded instrument. There shall be made available to the party conducting such examination, all rights granted under article 31 of the civil practice law and rules with respect to document discovery.

5. Unless the court directs otherwise for good cause shown, the costs of the examinations conducted pursuant to subdivision 4 of this section shall be paid as follows:

(a) In the case of examinations conducted before objections are filed, the testator's estate shall pay the costs of:

(1) the initial production or commission and the examination of (A) the first two attesting witnesses within the state who are competent and able to testify who are produced by the proponent, or (B) if no witness is within the state and competent and able to testify, the witness without the state who resides closest to the county in which the probate proceedings are pending and who is competent and able to testify; and

(2) the stenographer and one copy of the transcripts of such examinations for the court and any guardians ad litem.

The costs of all other examinations, including subsequent examinations of the witnesses described in subparagraph (1) of this paragraph, shall be governed by article 31 of the civil practice law and rules.

(b) In the case of examinations conducted after objections are filed, all costs of such examinations shall be governed by article 31 of the civil practice law and rules.

(c) All costs of document discovery in connection with such examinations shall be governed by article 31 of the civil practice law and rules.

6. Unless the court directs otherwise for good cause shown, if more than one person shall have been involved in the preparation of the will,

the term "person who prepared the will" shall mean the person so involved to whom the testator's instructions for preparing the will were communicated by the testator.

§ 1405. When court may dispense with testimony of witness

1. The death, absence from the state or incompetency of an attesting witness required to be examined as prescribed in this or the preceding section or the fact that the witness cannot with due diligence be found within the state or cannot be examined as an attesting witness by reason of his physical or mental condition may be shown by affidavit or by any competent evidence and when so shown to its satisfaction, the court may by the decree on probate or by order either in writing or entered in the minutes dispense with the testimony of such attesting witness. Where the testimony of an attesting witness has been dispensed with as provided in this section and 1 attesting witness has been examined the will may be admitted to probate upon the testimony of the attesting witness who has been examined without further or additional proof.

2. Where an attesting witness is absent from the state and it is shown that his testimony can be obtained with reasonable diligence the court may and shall upon the demand of any party require his testimony be taken by commission.

3. Where an attesting witness has forgotten the occurrence or testifies against the execution of the will and at least 1 other attesting witness has been examined the will may be admitted to probate upon the testimony of the other witness or witnesses and such other facts as would be sufficient to prove the will.

4. If all of the attesting witnesses are dead or incompetent or unable to testify by reason of physical or mental condition or are absent from the state and their testimony has been dispensed with as provided in this section the will may nevertheless be admitted to probate upon proof of the handwriting of the testator and of at least one of the attesting witnesses and such other facts as would be

sufficient to prove the will.

§ 1406. Proof of will by affidavit of attesting witness out of court

1. In addition to other procedures prescribed for the proof of wills, any or all of the attesting witnesses to a will may at the request of the testator or after his death, at the request of the executor named in the will or of the proponent or the attorney for the proponent or of any person interested, make an affidavit before any officer authorized to administer oaths stating such facts as would if uncontradicted establish the genuineness of the will, the validity of its execution and that the testator at the time of execution was in all respects competent to make a will and not under any restraint. The sworn statement of a witness so taken shall be accepted by the court as though it had been taken before the court, unless:

(a) a party entitled to process in the proceeding raises objection thereto or

(b) for any other reason the court may require that the witness or witnesses be produced and examined.

2. For the purposes of making the affidavit referred to in this section, after the death of the testator, the exhibition to the witnesses of a court-certified photographic reproduction of the will shall be deemed equivalent to the exhibition to them of the original will.

§ 1407. Proof of lost or destroyed will

A lost or destroyed will may be admitted to probate only if

1. It is established that the will has not been revoked, and

2. Execution of the will is proved in the manner required for the probate of an existing will, and

3. All of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete.

§ 1408. Probate not allowed unless court satisfied

1. Before admitting a will to probate the court must inquire particularly into all the facts and must be satisfied with the genuineness of the will and the validity of its execution. The court may, however, accept an affidavit of an attesting witness in the manner and under the circumstances prescribed in this article.

2. If it appears that the will was duly executed and that the testator at the time of executing it was in all respects competent to make a will and not under restraint it must be admitted to probate as a will valid to pass real and personal property, unless otherwise provided by the decree and the will and decree shall be recorded.

3. Where the petition alleges that the testator has disappeared under circumstances sufficient to justify the belief he is dead the court shall take proof of the facts. If it appears that the testator is dead the court may make a decree determining such fact and admitting the will to probate. The decree shall be binding in its effect upon the interests in the estate of persons under disability and of future contingent interests of persons not in being as well as the interests of adult competent persons.

§ 1409. Notice of probate

1. Before letters are issued there shall be filed in the court a notice entitled in the proceeding stating the name of the testator, the name and address of the proponent, and that the will of the testator has been offered for probate or probated, as the case may be. The notice shall further set forth the name and post-office address of each person named or referred to in the petition who has not been served or has not appeared or waived service of process and shall state whether such person is named or referred to in the will as legatee, devisee, trustee, guardian or substitute or successor executor, trustee or guardian. The notice shall further set forth the name and post-office address of the attorney general of the state of New York if the will that has been offered for probate contains a charitable bequest which is either to an unnamed charitable organization or is in an unspecified amount, including but not limited to, a bequest of all or part of the residuary estate.

(a) Where by the terms of the will an interest in a trust or other fund or property has been limited in any contingency to the persons who shall compose a certain class upon the happening of a future event it shall be sufficient to name only the persons in being at the death of the decedent who would constitute the class if such event had happened immediately before the date of such notice, and who have not been served or appeared or waived service of process.

(b) Where by the terms of the will an interest in a trust or other fund or property has been limited to a person who is named in such notice or who has been served or has appeared or waived notice of process, and has been further limited upon the happening of a future event to a class of persons described in terms of their relationship to such person it shall not be necessary to name such class of persons.

2. There shall be filed with the notice proof by affidavit of the mailing of a copy thereof to each of the persons required by the preceding subdivision to be named in such notice, and if any person is an infant or an incompetent, of the mailing of a copy thereof to the person or persons upon whom personal service of process is required to be made with respect to the infant or incompetent. When it appears by the petition for probate that the name or address of any person referred to in this section is unknown mailing to such person of the notice herein described shall not be required.

3. Upon the probate of an estate and distribution of its assets, if any, under this chapter, if an undistributed asset is subsequently found by the estate, the surrogate's court that granted such probate petition shall maintain jurisdiction and shall not require any additional service

of the notice required by this section to be served again by the estate, unless such previously undiscovered asset has an estimated value of more than five thousand dollars or it has been more than seven years since the distribution of the assets pursuant to the original probate.

§ 1410. Who may file objections to probate of an alleged will

Any person whose interest in property or in the estate of the testator would be adversely affected by the admission of the will to probate may file objections to the probate of the will or of any portion thereof except that one whose only financial interest would be in the commissions to which he would have been entitled if his appointment as fiduciary were not revoked by a later instrument shall not be entitled to file objections to the probate of such instrument unless authorized by the court for good cause shown. The objections must be filed on or before the return day of the process or on such subsequent day as directed by the court; provided however that if an examination is requested pursuant to 1404, objections must be filed within 10 days after the completion of such examinations, or within such other time as is fixed by stipulation of the parties or by the court.

§ 1411. Citation upon filing of objections

1. Whenever objections are filed to the probate of a will, the proponent shall submit to the court for issuance a citation returnable at a motion term of the court (a) reciting that objections have been filed to the will offered for probate and that such objections may be determined at a trial or at a hearing or conference on the return date or on a date to be fixed by the court, and (b) reciting the consequences of failing to appear set forth in the provisions of subdivision six of this section.

2. The citation shall be submitted by the proponent to the court within thirty days after the filing of objections. If the proponent fails to submit the citation, the citation may be submitted by an

objectant or any other interested person.

3. The citation shall be issued to (a) each person named or referred to in the propounded instrument who has not appeared in the proceeding and whose interests would be affected by the outcome of the proceeding, and (b) such other persons as directed by the court.

4. The citation shall be served in accordance with the requirements of sections 307 and 308, except that service may be made by mail as therein provided upon any person whether or not a resident of this state. Proof of the service of the citation shall be made and filed in the court at least two days before the return date of the citation.

5. Each person to whom the citation must be issued, as provided in subdivision three of this section, may waive service of the citation. Each person who has waived or has been served under this section may appear personally or by filing a notice of appearance.

6. Any person who has waived or has been served under this section and who does not appear will not be entitled to further notice, and each objection filed may be determined at a trial or at a hearing or conference on the return date or on a date to be fixed by the court. If a settlement is entered into and agreed to by all parties appearing at the trial, hearing or conference, such settlement and any final determination by the court will be binding on all persons who have waived or have been served with process and who have failed to appear. Any person so failing to appear may be required to contribute to such settlement an amount which bears the same proportion to the total amount of the settlement as his or her interest in the estate bears to the aggregate of the interests in the estate of all persons required to contribute to the settlement.

§ 1412. Preliminary letters testamentary

1. Whenever a petition for probate of a will (other than a lost or destroyed will) has been filed and process has issued thereon, an executor named in the will may file with the court a written request for the issuance to him of preliminary letters testamentary. In its discretion the court may accept a written request for such letters prior to the issuance of process upon such proof as the court shall deem necessary. Where the request is made by one of several nominated executors, notice shall be given to all persons who under the terms of the will have a right to letters testamentary equal to that of the petitioner. Where there is another will of the same testator on file in the court that is later in date than the propounded instrument, notice shall be given to all persons who under the terms of the later will would have the right to letters testamentary immediately upon probate of such later will.

2. (a) Notice hereunder shall be given at the time and in the manner directed by the court and may be given either before or after issuance of preliminary letters. Any person having a right to letters testamentary equal to that of an applicant for preliminary letters testamentary may join in the application for such letters and may request that they issue to him or after the issue of such letters may request that the letters heretofore issued be extended to him. A person named in the will to act as executor upon the occurrence of any contingency may in like manner request issuance of such letters, provided that the contingency has occurred which would entitle him to be appointed executor. A person named as executor in a will later in date than that in which the first applicant is appointed may file a written cross-request for preliminary letters testamentary after he has filed a petition for probate of such later will and process has been issued thereon. Unless, for good cause shown, the court shall otherwise direct, the person named as executor in the latest such will shall have a prior right to preliminary letters testamentary.

(b) When preliminary letters testamentary have been issued and thereafter a will later in date has been filed with a petition for its probate, and process has been issued thereon, an executor named in the later will may request the revocation of the prior letters and the issuance of preliminary letters to him, and upon such notice as the court may direct, the court shall have discretion to revoke the letters theretofore issued and grant preliminary letters testamentary to the executor named in the later will, to grant preliminary letters testamentary jointly to the executors named in both wills, to confirm the grant of letters theretofore issued, or to take such other action as the court deems to be for the best interests of the estate and of the persons interested therein.

3. (a) Upon due qualification as provided in subdivision 5 and upon the issuance of process, and whether before or after the return day of said process, preliminary letters testamentary must thereupon be issued to the person or persons who appear to the court to be entitled thereto, and where the court has accepted a request for such letters prior to the issuance of process, preliminary letters testamentary may be issued in the discretion of the court upon due qualification as provided in subdivision 5. The letters shall confer upon the person named therein, subject to any limitations contained in the instrument offered for probate, all the powers and authority and shall subject him to all the duties and liabilities of an administrator except that they do not confer any power to pay or to satisfy a legacy or distributive share. Unless the court or the instrument offered for probate directs otherwise, a preliminary executor is also authorized to take possession of, manage and sell any real property devised by and any personal property specifically bequeathed by the instrument offered for probate and to allocate the expenses of managing such property in accordance with what is reasonable and equitable in view of the interests of those persons interested in such property and in the estate, except that any such property specifically devised or bequeathed may only be sold or otherwise disposed of with the written consent of the specific devisee or legatee or by court order. This authority shall not prevent the preliminary executor from permitting the devisee or legatee of such property to have possession of such property.

(b) A preliminary executor shall give notice to all parties who have appeared of his or her appointment within ten days of such appointment.

4. (a) The court may in the order directing the issuance of preliminary letters testamentary or in one or more subsequent orders limit preliminary letters testamentary to the receipt of assets specified in such order or orders and may prohibit the collection of any

other assets of the decedent, or may limit or authorize the person named in such letters in any manner that the court deems advisable for the effective protection of the rights of all persons who may have an interest in the estate of the decedent.

(b) In such order or orders, the court may make such directions as it deems proper and necessary with respect to the custody and preservation of all papers and records of the decedent. Discovery and production of such papers and records shall be governed by article thirty-one of the civil practice law and rules.

5. Before preliminary letters testamentary are issued to a named executor he shall qualify as provided in 708. If the will offered for probate shall require the filing of a bond by the executor the person requesting preliminary letters testamentary must file his bond in accordance with the requirements of the will. In addition the court shall have full and complete discretion to require him to file such additional bond as it deems advisable under the circumstances of the particular case. Where the will is silent in respect of the filing of a bond or where it explicitly dispenses with the filing of a bond the court shall nevertheless have full and complete discretion at any time and from time to time to require the person seeking such letters to file a bond in such amount as the court deems advisable under the circumstances of the particular case or it may grant such letters without bond. Where the will explicitly dispenses with the filing of a bond, the court shall grant such letters without bond, unless it determines there are extraordinary circumstances in the particular case to warrant filing of a bond, in which case the court shall have discretion to require the person seeking such letters to file a bond in such amount as the court deems advisable.

6. A decree denying probate to a propounded instrument shall revoke any preliminary letters testamentary issued upon such instrument unless the court shall direct that such letters continue until the termination of any appeal and in such case the court may make such limitations, restrictions or conditions on such letters as justice may require. The court may revoke preliminary letters testamentary at any time

(a) if it shall appear that the preliminary executor is guilty of unreasonable delay in the probate proceeding or

(b) for any cause that would justify the revocation of letters under 719 or

(c) for any other reason deemed by the court to be in the best interests of the estate.

7. A preliminary executor shall not be entitled to the commissions provided for a fiduciary in this act unless the will be admitted to probate and letters testamentary are issued to him, in which event he shall be entitled to commissions as provided in this act for a case where successive letters are issued to the same person on the estate of the same decedent. If the will be denied probate or his letters are revoked for any reason during the pendency of the probate proceeding he shall be entitled for such service to receive only such compensation, if any, as the court shall determine to be reasonable and just for the services rendered by him to the estate, not to exceed the commissions to which an executor would be entitled. For purpose of the fixation of such commissions or compensation any real property or specifically devised personal property of which a preliminary executor took possession and then distributed or otherwise disposed of shall be treated as property received, distributed or delivered.

§ 1413. Revocation of letters upon proof of will

Where temporary letters of administration, preliminary letters testamentary or letters of administration on the ground of intestacy have been granted and a will is thereafter admitted to probate and letters issued thereupon or where a subsequent will is admitted to probate and letters issued thereupon, the decree granting probate must revoke the former letters.

§ 1414. When letters testamentary may be issued

1. After a will has been admitted to probate any person entitled to letters thereunder who is eligible and who appears and qualifies is entitled to letters testamentary.

2. Where a judgment has been rendered in an action establishing a will the surrogate must record the will and issue letters as directed by the judgment.

3. A person entitled to letters upon a contingency may appear and show that the contingency has happened by which he is entitled to such letters.

4. A person named as an executor by a person other than the testator under a valid power contained in a will must appear and file an acknowledged selection of himself as an executor.

§ 1415. Supplementary letters, executors not named in letters not to act

If the disability of an infant or a noncitizen named as an executor in a will be removed before the administration of the estate is completed he shall be entitled on petition showing the facts to supplementary letters testamentary to be issued in the same manner as the original letters to join in the completion of the administration of the estate with the person or persons previously appointed. A person named in a will as executor shall be deemed to be superseded by the issue to another person of letters testamentary and shall have no power or authority as executor until he or she appears and qualifies and letters testamentary are issued to him or her.

§ 1416. Executor failing to qualify or renounce; how excluded

1. Upon the application of a fiduciary, a person interested or a creditor, the court shall direct an executor named in a will to qualify within a time specified by the court or in default of so doing to be deemed to have renounced the appointment in any case where

(a) a person named as executor in a will does not qualify or renounce within 15 days after probate thereof or

(b) a person chosen by virtue of a power in a will does not qualify or renounce within 15 days after the filing of the instrument designating him or

(c) objections are filed to the grant of letters to a person named as executor in a will or chosen by virtue of a power therein contained and such person does not qualify or renounce within 5 days after the objections have been determined in his favor or, in a case specified in 710, within 5 days after an objection to letters has been established.

2. Where it appears by affidavit or other written proof to the satisfaction of the court that such an order cannot with due diligence be served personally within the state upon the person therein named the court may prescribe the manner in which it must be served.

3. If the person so designated executor does not qualify within the time fixed or within such further time as the court may allow for that purpose an order shall be made declaring that he has renounced his appointment as executor. Such an order may be revoked by the court and letters testamentary issued to the person so failing to renounce or qualify upon his application in a case where he might have retracted an express renunciation as prescribed in the succeeding section.

§ 1417. Renunciation by nominated executor; retraction thereof

1. A person named as executor in a will may renounce his right to letters testamentary by an acknowledged instrument.

2. A renunciation may be retracted by an instrument executed in like manner as required for the execution of a renunciation at any time before letters testamentary or letters of administration with will annexed have been issued to any other person in his place or after they have been so issued, if such letters have been revoked or the person to whom they were issued has died or become an incompetent and there is no other acting executor or administrator.

3. Where a retraction is so made letters testamentary may be issued

to the person making it upon such notice as directed by the court.

4. An instrument specified in this section must be filed in the court having jurisdiction over the estate.

§ 1418. Letters of administration with will annexed; when and to whom granted

1. If no person is named as executor in the will or selected by virtue of a power contained therein or if at any time there is no executor or administrator with will annexed qualified to act, upon the application of any person who may petition for the probate of the will under 1402 the court must issue letters of administration with will annexed in the following order of priority:

(a) to a sole beneficiary or if he be dead to his fiduciary;

(b) to one or more of the residuary beneficiaries or, if any be dead, to his fiduciary;

(c) if there is no eligible person entitled to letters under subparagraphs (a) and (b) of this subdivision who will accept, the court may issue letters to one or more of the persons interested in the estate or, if any be dead, to his fiduciary.

2. If there is no eligible person entitled to letters under the foregoing subdivision who will accept or an appointment is not made by consent as provided in subdivision 6, letters shall issue to the public administrator or, if there be none for the county, to the treasurer of the county.

3. If none of the persons mentioned in subdivisions 1 and 2 will accept letters the court may issue them to the petitioner or upon petitioner's refusal to accept the same to any person designated by the court.

4. A corporation incorporated within the territorial limits of the United States which is a sole or residuary legatee may act as administrator with will annexed although not specifically so authorized

by its charter or by any provision of law.

5. If any person otherwise entitled to letters under subdivision 1 is an infant, incompetent or conservatee the court may issue letters with will annexed to the guardian of the property of the infant, the committee of the property of the incompetent, or the conservator of the property of the conservatee with the same priority as if the infant, incompetent or conservatee had himself been eligible to take letters.

6. Administration may be granted to an eligible person or persons not entitled as beneficiaries upon the acknowledged and filed consent of all of the eligible beneficiaries, or if there are no eligible beneficiaries, then on the consent of all of the beneficiaries, except that the guardian of the property of an infant beneficiary, the committee of the property of an incompetent beneficiary or the conservator of the property of a conservatee beneficiary appointed within the state of New York, may so consent on behalf of his or her ward. For purposes of this subdivision, a beneficiary is eligible if letters of administration with will annexed could be issued to him or her alone or acting together with the person or persons or so nominated.

7. Administration may be granted to a trust company or other corporation authorized to act as fiduciary upon the acknowledged and filed consents of all the eligible beneficiaries, or if there are no eligible beneficiaries, then on the consent of all beneficiaries, except that the guardian of the property of an infant beneficiary, the committee of the property of an incompetent beneficiary, or the conservator of the property of a conservatee beneficiary appointed within the state of New York, may so consent on behalf of his or her ward. For purposes of this subdivision, a beneficiary is eligible if letters of administration with will annexed could be issued to him or her alone or acting together with the trust company or other corporation so nominated.

8. The court may refuse to issue letters of administration with will annexed where distribution of the estate is possible pursuant to the provisions of this act.

§ 1419. Process; renunciation or exclusion of persons having prior or equal right

Every eligible person having a right to letters of administration with the will annexed prior or equal to that of the petitioner including an infant, incompetent or conservatee whose guardian, committee or conservator would be entitled to letters, and who has not renounced, must be served. The proceedings upon the application are the same as upon an application for administration upon the estate of an intestate. The court may dispense with the issuance and service of process upon non-domiciliaries.

§ 1420. Proceeding for construction of will; effect of decree

1. 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 a petition showing the interest of the petitioner, the names and post-office addresses of the other persons interested, the particular portion of the will concerning which petitioner requests the determination of the court and the necessity for construction. If the application be entertained process shall issue to all persons interested in the question to be presented to show cause why the determination should not be made. On the return of process the court shall take such proof and shall make such decree as justice requires.

2. If in any proceeding for the judicial settlement of an account of a fiduciary any question is presented by any party to the proceeding respecting the propriety of any debit or credit in the account, the determination of which involves the validity, construction or effect of any portion of the will which requires such construction the presentation of the question shall have the same effect as if the petition had expressly requested a construction of the particular portion of the will involved in such determination.

3. If a party in a proceeding for the probate of a will requests a determination of the validity, construction or effect of any provision contained in the will process shall issue to all persons interested in the determination who have not appeared in the proceeding and notice shall be given in such manner as directed by the court to all those persons who have so appeared therein. Upon the entry of a decree admitting the will to probate the court may determine the question of construction or in its discretion may admit the will to probate and reserve the question for future consideration and decree.

4. A decree in any proceeding authorized in this section or a decree settling an account of a fiduciary or a decree on probate which construes or interprets any portion of a will, unless reversed or modified on appeal, shall thereafter be binding and conclusive in all courts upon all parties to the proceeding and upon their successors in interest as to all questions of construction or interpretation of the will therein or thereby determined and of all rights and obligations of the parties involved in the construction, depending thereon, or resulting therefrom.

5. The provisions of section three hundred fifteen shall apply to a proceeding under this section.

§ 1421. Election by surviving spouse

1. Any person interested in obtaining a determination as to the validity or effect of an election to take a share under EPTL 5-1.1 or EPTL 5-1.1-A may present to the court in which the will was probated or from which letters of administration were issued, a petition showing his interest, the names and post-office addresses of the other persons interested and the particular question concerning which he requests the determination of the court.

2. If the application be entertained process shall issue to all persons interested in the question to be presented to show cause why the

determination should not be made. On the return of process the court may take proof and shall make such decree as justice requires.

3. The validity or effect of any such election may also be determined in a proceeding for the judicial settlement of the accounts of a fiduciary.

4. For the purpose of determining the validity or effect of any election made pursuant to EPTL 5-1.1 or EPTL 5-1.1-A, either under this section or in a proceeding for the judicial settlement of the accounts of the fiduciary, a person interested shall include any person who has an interest in any of the transactions described in EPTL 5-1.1 or EPTL 5-1.1-A. Where any such person has an interest as trustee of an express trust it shall be sufficient to name and serve the trustee.

5. Whenever it shall appear that a fund or property required to be included in the net estate under EPTL 5-1.1 or EPTL 5-1.1-A has not come into the possession of the fiduciary of the decedent as such, the court shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise.

§ 1422. Record of wills; evidence

A certified copy of the record of the decree admitting a will to probate and of the record of the will so admitted to probate shall be received in evidence in any court in any action or proceeding with the same force and effect as if the original will had been produced and proved in such action or proceeding. The recording of a will in the court shall be evidence that it was duly admitted to probate.

§ 1423. Record of wills in former courts of probate; evidence

The exemplification of the record of a will proved before the judge of the former court of probate and recorded in his office before January 1, 1785, certified under the seal of the officer having custody of the record, shall be admitted in evidence in any case after it has been made to appear that diligent and fruitless search has been made for the original will.

§ 1424. Foreign wills; evidence after lapse of time

The exemplification of the record of a will which has been duly proved before a court or officer of competent jurisdiction in any other state, shall, when certified by the officer having by law custody of the record at the time the certificate was made, be admitted in evidence as if the original will was produced and proved when 20 years have elapsed since the will was so proved.

ARTICLE 15

TRUSTS AND TRUSTEES

Section

§ 1501. Application of act to trusts

1. The provisions of this act apply to any of the following trusts without regard to the domicile of the trustee or to the time of the execution of the will or of the creation of the lifetime trust:

(a) A trust created by the will of a domiciliary.

(b) A trust relating to real or personal property, without regard to the domicile of the testator or the grantor, where if a testamentary trust the will creating the trust was admitted to probate in any surrogate's court of this state or where the situs of the trust or any real property held by the trust is within this state and if a testamentary trust the will creating the trust was duly proved or established or admitted to probate within a foreign country or state, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States where it was executed or where the testator was domiciled at the time of his death.

(c) A lifetime trust of which the supreme court would also have jurisdiction.

2. The situs of a trust of personal property created by the will or lifetime trust instrument of a non-domiciliary shall be deemed to be in this state if the personal property is in this state at the date of the testator's death with respect to a testamentary trust or at the time of the creation of the lifetime trust with respect to a lifetime trust and is held and administered in this state in accordance with the will or lifetime instrument or, except where the will or lifetime trust instrument or the laws of the domicile of the testator or the domicile at the time the trust was created of the grantor expressly provide otherwise, if such property is brought into this state for administration.

3. If original probate of the will of a non-domiciliary has been had in any county of this state jurisdiction of the trust created under the will shall be vested in the surrogate's court of that county. If ancillary proceedings in respect of any phase of the estate of a non-domiciliary have been had in any county of the state, jurisdiction of the trust shall be vested in the surrogate's court of that county. If neither an original nor ancillary proceedings has been had in any county of the state, and in all cases involving lifetime trusts, jurisdiction shall be vested in the surrogate's court of any county in which real property subject to the trust is situated, or if there is no

such real property subject to the trust, in the surrogate's court of the county in which any trustee has his residence or its principal place of business: provided that in case the surrogate's court in more than one county might be entitled to entertain jurisdiction over any such trust jurisdiction shall be vested in the surrogate's court first entertaining a proceeding in relation to the trust.

4. Any surrogate may decline to entertain jurisdiction over the administration of a trust of personal property created by the will of or lifetime trust instrument created by a non-domiciliary. Every application to the court to entertain jurisdiction over such a trust shall state whether any previous application for such relief has been made in this state and shall state the disposition thereof and be accompanied by a copy of the will and of the foreign letters, if any have been issued, authenticated as prescribed in 1614, or of the lifetime trust instrument creating the trust, with proof of its authenticity. If the application be entertained the court shall record the will or such instrument in its office.

§ 1502. Appointment of trustee

1. The court may appoint a trustee or successor or successors or co-trustee or co-trustees whenever there is no trustee able to act or all or one of the trustees is unable to act and a successor or co-trustee in his or their place is necessary in order to execute the trust or execute any power created by a will or lifetime trust instrument creating a trust, the execution of which has devolved upon the court or upon the supreme court.

2. The court shall not appoint a trustee, successor or co-trustee if the appointment would contravene the express terms of the will or lifetime trust instrument or if a trustee may be or has been named in the will or lifetime trust instrument as successor, substitute or co-trustee and is not disqualified to act.

3. Until a successor or co-trustee is appointed the remaining trustee

or trustees may execute the trust.

4. A trustee, successor or co-trustee may be appointed upon the application of any person interested and upon notice to such persons as the court may designate.

5. The court may appoint a successor trustee for any purposes deemed necessary to complete administration or distribution of a trust which has terminated by the occurrence of the event measuring its duration when there is no person in office able to execute it.

6. A successor trustee shall be subject to the same duties, as to accounting and trust administration, as are imposed by law on trustees and, in addition to the reasonable expenses incurred in the course of trust administration, shall be entitled to commissions as may be fixed by any court having jurisdiction to pass upon the trustee's final account, which shall in no case exceed the commissions allowable by law to trustees.

§ 1503. Qualification of trustee appointed by another court

When the supreme court appoints a testamentary trustee a certified copy of the order or decree of appointment and of the bond given by the trustee shall be filed in the surrogate's court of the county having jurisdiction of the trust and a minute thereof shall be made and indexed in the book kept by the court in which orders or decrees appointing trustees are entered. The trustee shall file in such surrogate's court the oath or consent and the instrument of designation required of such fiduciary and letters shall thereupon issue to him from such court. He shall be subject to all the duties and liabilities of a testamentary trustee appointed by the surrogate's court.

§ 1504. Renunciation of appointment: retraction thereof

1. A testamentary trustee may renounce his appointment by a duly acknowledged instrument.

2. By like instrument the renunciation may be retracted at any time before letters have been issued to another in his place or after such letters have been issued, if they have been revoked or the person to whom they have been issued has become unable to act or disqualified. The court may issue letters to the person so retracting upon such notice as it may require.

3. The instrument of renunciation and the instrument of retraction authorized by this section must be filed in the office of the court having jurisdiction of the trust.

§ 1505. Proceeding when testamentary trustee is also executor or administrator

1. Where the same person is a testamentary trustee and also the executor of the will or the administrator upon the same estate, proceedings taken by or against him as trustee, as prescribed in this act, do not affect him as executor or administrator or persons interested in the general estate, except in one of the following cases:

(a) Where he presents a petition praying for the revocation of his letters, he may in the same petition show that he is entitled to resign as testamentary trustee and may thereupon pray for a decree allowing him to resign and for process accordingly.

(b) Where a person presents a petition praying for the revocation of letters issued to an executor or administrator and any of the facts in the petition are made, by the provisions of this act, sufficient to entitle the same person to present a petition praying for the removal of a testamentary trustee, the petitioner may pray for a decree removing the person complained of in both capacities, and for process accordingly.

2. In either case proceedings upon the petition for resignation or removal, as the case requires, of the testamentary trustee, and for the judicial settlement of his account, may be taken as prescribed in this

act, in connection with or separately from the like proceedings upon the petition for the revocation of the letters, as directed by the court.

§ 1506. Nonliability for acts of predecessor executor

A trustee who was not an executor of the estate of the same decedent shall not be liable for breach of trust committed by the executor in any of the following cases:

1. He received the assets of the trust pursuant to a final decree of the court.

2. He did not know of a situation constituting a breach of trust committed by the executor, and does not improperly permit it to continue.

3. He does not neglect to take proper steps to compel the executor to deliver trust property to him.

4. He does not neglect to take proper steps to redress a breach of trust committed by the executor.

§ 1507. Authority to mortgage, sell, lease or exchange

1. In any case in which the power to mortgage, sell, lease or exchange real property does not exist under the provisions of EPTL 11-1.1 or for other reasons it is for the best interests of the trust, the court of the county having jurisdiction of the trust may on such terms and conditions as seem just and proper authorize any testamentary trustee to mortgage, sell, lease or exchange real property or any part thereof belonging to the trust.

2. If the application be entertained process shall issue to all persons interested in the trust to show cause why the relief requested in the petition should not be granted.

3. On the return of process the court shall make such order as justice requires. Such order and the mortgage, sale, lease or exchange executed in conformity therewith shall be binding and conclusive on the remainders and reversions as well as the immediate or future trust interests in the real property and shall be valid and effectual against all persons under disability as defined in this act and persons not in being, having estates or interests vested or contingent, for life or in trust or in reversion or remainder in such real property or in the proceeds of the sale thereof and shall bind and be conclusive against all other persons so interested or having such estates or interests who shall by acknowledged instrument consent to such order or who have been made parties to the proceeding.

§ 1508. Authority to release claims against the state by reason of appropriation of trust property not subject to power of sale

1. The surrogate of any county having jurisdiction of the trust may, by order, authorize any testamentary trustee to release a claim against the state for compensation on account of the appropriation by the state of any real property or any right, interest or easement therein belonging to the trust, and for legal damages caused by the appropriation and for damages sustained by any entry upon, use or occupation of, or injury to the real property by the state prior to completion of the appropriation.

2. Application for the order may be entertained by the court in all cases where the will does not contain a valid power of sale with regard to such property or a sale is not authorized under the provisions of EPTL 11-1.1.

3. Notice of the application shall be given to such persons and in such manner as directed by the court. Prior to the application and irrespective of when the appropriation was effected, the trustee may enter into an agreement with the state, subject to the approval of the court, for the payment of such compensation, a copy of which agreement

shall be presented to the court together with the petition.

4. Upon consideration by the court of the petition, the allegations and proofs of the parties and upon the testimony of the petitioner and of at least 2 disinterested persons acquainted with the facts, presented orally or by affidavit, as to the value of the interest of the trust in the property so appropriated, including the legal damage caused by the appropriation and the damages, if any, sustained by the entry upon, use or occupation of, or injury to the real property by the state prior to completion of appropriation and upon inquiring into the facts and circumstances, if it shall appear to the satisfaction of the court that the amount of compensation offered by the state represents the fair market value of the property appropriated and just compensation for the legal damages caused by the appropriation and the damages, if any, sustained by the entry upon, use or occupation of or injury to the property by the state prior to completion of appropriation, the court may by order confirm the agreement and authorize and direct the trustee to execute and deliver to the state a release of such claim and any documents or instruments required by the state to give full effect to the release, for the amount of consideration so offered by the state for such release in full payment of such claim for compensation for the use and benefit of the trust.

5. The order made pursuant to this section and the release and attendant documents and instruments executed and delivered in conformity therewith shall be binding and conclusive on the remainders and reversions as well as the immediate or future trust interests in the real property so held under the trust and shall bind and be conclusive against all persons under disability as defined in this act and persons not in being and all other persons having estates or interests vested or contingent, for life or in trust, or in reversion or remainder in the trust property or in the proceeds of the appropriation thereof by the state.

§ 1509. Power over lifetime trusts

Except to the extent inconsistent with other provisions of this act, the surrogate having jurisdiction of a lifetime trust shall have such power over the lifetime trust and its trustee as a justice of the supreme court having jurisdiction over the trust would have.

ARTICLE 16

FOREIGN ESTATES

Section

§ 1601. Legislative declaration of purpose

It is the intent and purpose of this article that ancillary administration shall be granted in this state only when there is an actual administration in the domiciliary jurisdiction. If the law of such jurisdiction does not provide for the appointment of a fiduciary but vests the property of a decedent in a person or persons subject to the obligation to pay the decedent's debts and expenses and the legacies bequeathed in his will or the distributive shares provided by law, such a person shall be recognized as the person acting therein to administer the decedent's estate in accordance with the law thereof, but only if such person has complied with all the requirements of such jurisdiction to entitle him to receive the property of the decedent and is acting or will act there to administer the estate.

§ 1602. Ancillary probate based upon domiciliary probate

1. A written will which upon probate may operate upon any property in this state shall be admitted to probate by the surrogate's court having jurisdiction over the property upon proof that it has been admitted to probate at the testator's domicile or has been established in accordance with the law of such jurisdiction, and if its probate or establishment remains subject to contest under the law of his domicile, upon proof that it is not being contested thereat. A will so admitted to probate under this section is sufficient to operate on any property within the terms of the will, subject to any limitations upon its operation imposed by the law of the testator's domicile in respect of legal capacity. Rights granted by the law of the domicile to take against the will are not affected by this section.

2. A will offered for probate under this section may be contested only upon the ground that the conditions prescribed herein have not been satisfied or that the will has been denied probate in this state.

§ 1603. Effect of right to contest or of revocation

1. If under the law of the testator's domicile the probate or establishment of his will therein is subject to contest within a time specified after probate or establishment, no property shall be transmitted to the domicile or distributed to beneficiaries under the will during such period of time unless the court which granted ancillary probate authorizes such transmission or distribution upon proof that

(a) 7 months have elapsed since the issuance of ancillary letters in this state,

(b) a contest of the will is not pending in the testator's domicile and

(c) either the time provided in the domicile for the institution of a contest has expired or one year has expired since the will was admitted to ancillary probate under this article.

2. An ancillary fiduciary who transmits assets to the domicile or distributes to beneficiaries in good faith and pursuant to an order or decree under subdivision 1 shall be discharged from any liability even if the probate or establishment of the will at the domicile is thereafter set aside or revoked for any cause whatever.

§ 1604. Ancillary letters on foreign will

1. Upon admission of a will to probate under 1602 the court shall issue, if such be requested, ancillary letters to the following persons in the following order:

(a) The person expressly appointed in the will as executor with respect to property located within this state.

(b) The person to whom domiciliary letters have been issued or if domiciliary letters are not issued, the person appointed in the will to administer all property wherever located.

(c) The person acting in the domiciliary jurisdiction to administer and distribute the testator's estate.

(d) A person entitled under this act to letters of administration c.t.a.

2. If no person named in any subparagraph of subdivision 1 is willing to qualify or to designate a person eligible to receive ancillary letters they shall issue to a person in the succeeding subparagraph of such subdivision who will qualify or to a person designated by him who is eligible to receive letters.

§ 1605. Original probate

1. A will of a non-domiciliary which upon probate may operate upon any property in this state and is deemed by the laws of this state to have been validly executed for probate in this state, may be admitted to probate in the same manner as any other will may be admitted to probate under this act, except as herein otherwise prescribed.

2. A will which has been admitted to probate or established in the testator's domicile shall not thereafter be admitted to original probate in this state except

(a) in a case where the court is satisfied that ancillary probate would be unduly expensive, inconvenient or impossible under the circumstances,

(b) where the testator has directed in such will that it shall be offered for probate in this state or

(c) where the laws of testator's domicile discriminate against domiciliaries of New York either as a beneficiary or a fiduciary.

3. A will which by judgment or decree of a competent court in the testator's domicile has been denied probate or establishment shall not be admitted to probate in this state except where the denial of probate or establishment is solely for a cause which is not ground for rejection of a will of a domiciliary testator.

§ 1606. Proof of will by probate in non-domiciliary jurisdiction

In the case of original probate of the will of a non-domiciliary testator an authenticated copy of the will and of its probate or establishment in the jurisdiction in which the will was executed shall be sufficient proof of its contents and of compliance with the law of the place of execution, if no objection is made thereto. If objection to the probate of such a will is filed this section shall not relieve proponent from offering competent proof of the contents and legal sufficiency of the will except that the original will need not be produced unless directed by a court.

§ 1607. Ancillary letters of administration

1. Upon petition as provided in 1609 and upon proof that letters of administration of the estate of a decedent have been issued by a competent court in the decedent's domicile or upon proof that under the law of that jurisdiction letters of administration are not granted but that a person is acting in that jurisdiction to administer the decedent's estate in accordance with the law thereof, the court may issue ancillary letters of administration. In a case where the court has theretofore issued original or ancillary letters or there is pending before the court an application therefor, the court shall take such proceedings as justice requires.

2. The court shall issue ancillary letters of administration to the following persons in the following order:
(a) The person appointed administrator in the domiciliary jurisdiction or the person acting in that jurisdiction to administer the decedent's estate in accordance with the law thereof.
(b) A person entitled to original letters of administration under this act.

3. If no person named in any subparagraph of subdivision 2 is willing to qualify or to designate a person eligible to receive ancillary letters they shall issue to a person in the succeeding subparagraph of such subdivision who will qualify or to a person designated by him who is eligible to receive letters.

§ 1608. Ancillary letters generally

1. A person acting in the decedent's domicile as executor or administrator or to administer the decedent's estate in accordance with the law thereof may by an acknowledged instrument designate and authorize the appointment of a person eligible to receive letters to act as ancillary administrator or ancillary administrator c.t.a. If conflicting designations or joint plural designations are made or if two or more persons are entitled jointly to letters under this article the court may appoint one or more of the persons so designated or one or more of the persons so entitled.

2. A person to whom ancillary letters are issued must qualify in the same manner as prescribed in this act for the qualification of a fiduciary except that the penalty of the bond may be in such sum as to the court seems just, unless the will dispenses with the filing of a bond by the fiduciary named therein, in which case the court may dispense with the filing of a bond by the fiduciary so named.

3. In any case where the court is satisfied that there is no creditor of the decedent who is a domiciliary of this state and that no estate tax is assessable in this state, ancillary letters may issue without bond. Before issuing such letters without bond, however, the court may require that supplemental process issue, directed generally to all creditors or persons claiming to be creditors who are domiciled in this state and that it be served by publication unless such process had theretofore been served in the proceeding.

4. All of the provisions of this act relating to eligibility to receive letters shall be applicable to appointments made under this article.

5. Before granting ancillary letters on any application therefor the court may require the petitioner or any other person seeking such letters to serve by mail a written notice of the application upon every domiciliary beneficiary who has not been served with process or has not appeared in the proceeding for ancillary letters or waived service of process therein. Such notice shall be in the form prescribed in 1005 if the application be for ancillary letters of administration or in the form prescribed in 1409 if the application be for ancillary letters testamentary or ancillary letters of administration c.t.a. and shall be served in accordance with the applicable section.

6. Any corporate banking institution of any state of the United States, the Commonwealth of Puerto Rico, territory or possession of the United States not entitled of right under the banking law to receive such letters may nevertheless be authorized by the court to receive such

letters upon filing such bond as the court may require.

§ 1609. Petition; process

1. A petition for ancillary probate or for ancillary letters of any kind may be made by any creditor, public administrator, county treasurer or person interested or to whom letters may issue under this article. The petition shall state all of the decedent's property in this state and the value thereof, the amount of the security given on the original appointment, the name and post-office address of each domiciliary creditor or each domiciliary claiming to be a creditor and the amount of each claim so far as it is ascertainable.

2. If ancillary letters be requested, process shall issue to the state tax commission, to all domiciliary creditors or domiciliaries claiming to be creditors and to such other persons entitled to letters or to designate an appointee as the court by order directs. The court may issue process generally to all creditors or persons claiming to be creditors who reside within the state, who shall be served in such manner as directed by the court.

3. If petitioner prays for ancillary probate of a will but does not ask that ancillary letters be issued, it shall be unnecessary to issue any process except to the state tax commission.

§ 1610. General powers and duties of ancillary fiduciary

1. The provisions of law governing the rights, powers, duties and liabilities of a fiduciary apply to a person to whom ancillary letters are granted under this article except where a special provision is otherwise made or where a contrary intent is expressed in or plainly to be inferred from the context.

2. The court or any court of this state having jurisdiction may direct a person to whom ancillary letters have been issued to pay from

the assets received by him in this state the debts of the decedent due to creditors who reside in this state. If the amount of all the decedent's debts here and elsewhere exceeds the amount of all the decedent's property applicable thereto the court may direct the ancillary fiduciary to pay such sum to each resident creditor as equals that creditor's share of all distributable assets.

3. The court or any court of the state having jurisdiction may direct the ancillary fiduciary to distribute the remaining assets after the payment of creditors and expenses to those entitled thereto or to otherwise dispose of the assets as justice requires.

4. Unless a court shall direct the ancillary fiduciary to distribute the assets as provided in the preceding subdivisions he is required to transmit the remaining assets to the state or country where domiciliary letters were granted to be disposed of pursuant to the law thereof.

§ 1611. Ancillary administration of estate of absentee

If it appears that the foreign probate or the grant of foreign administration was based upon the disappearance or absence of the person on whose property ancillary letters are sought under circumstances as to afford reasonable ground to believe that he is dead process shall issue to the disappeared or absent person and shall be served upon him by publication. It shall also be served upon the public administrator of the county or if there be none, upon the county treasurer. If it appears to the satisfaction of the court from the foreign probate or grant of administration or from such other proof as it may require, that such person be dead, it may make a decree determining that fact and granting ancillary administration as prescribed in this article.

§ 1612. Effect of adjudication for or against fiduciary

A prior adjudication rendered by a court of competent jurisdiction for or against an estate fiduciary shall be as conclusive as to the ancillary fiduciary in this state as if he were a party to the adjudication unless it resulted from fraud or collusion of the fiduciary to the prejudice of the estate. This section shall not apply to an adjudication in another jurisdiction admitting or refusing to admit a will to probate.

§ 1613. Application of general law

Except where special provision is made otherwise, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in the case of a non-domiciliary testator and the law and procedure of this state relating generally to administration and to fiduciaries shall apply to ancillary administration and ancillary fiduciaries.

§ 1614. Authentication of foreign will or letters

In any case in which a foreign will or letters are required to be proved under this article, the will or letters shall be authenticated in the manner prescribed by the CPLR.

§ 1615. Record of wills and letters recorded under former law

The record in the court or an authenticated copy of the record of any will recorded pursuant to section 44 of the decedent estate law prior to the effective date of this act shall be presumptive evidence of the will, of the execution thereof and of the letters granted thereon in any action or special proceeding relating to real property. The record in the court or an authenticated copy thereof shall be presumptive evidence of a petition for letters of administration and of the letters granted thereon recorded pursuant to section 44 of the decedent estate law prior to the effective date of this act.

§ 1616. Application of article

This article shall apply only to the wills and estates of non-domiciliaries.

ARTICLE 17

GUARDIANS AND CUSTODIANS

Section

§ 1701. Power of court

The court has power over the property of an infant and is authorized and empowered to appoint a guardian of the person or of the property or of both of an infant whether or not the parent or parents of the infant or child are living. Where the guardianship and custody of a child have been committed to an authorized agency pursuant to section six hundred thirty-one of the family court act, or section three hundred eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law, or where both parents of the child whose consent to the adoption of the child would have been required pursuant to section one hundred eleven-a of the domestic relations law are dead, the court may appoint a permanent guardian of a child if the court finds that such appointment is in the best interests of the child.

§ 1702. Jurisdiction

1. Where an infant has no guardian the court may appoint a guardian of his person or property, or of both, in the following cases:

(a) Where the infant is domiciled in that county or has sojourned therein immediately preceding the application.

(b) Where the infant is a non-domiciliary of the state but has property situate in that county.

2. Where an infant or child has no guardian, the court may appoint a permanent guardian for the child in accordance with the provisions of section seventeen hundred one of this article where the infant is domiciled in that county or where such child is in the care or custody of an authorized agency, as defined in subdivision ten of section three hundred seventy-one of the social services law, and such authorized agency has its principal office in that county.

3. Where the permanency goal for a foster child who is the subject of

a proceeding under article ten or ten-A of the family court act is referral for legal guardianship, a petition filed under this article by a fit and willing relative or other suitable person shall be filed with the court before whom the most recent proceeding under article ten or ten-A of the family court act is pending.

§ 1703. Petition for appointment; by whom made

A petition for the appointment of a guardian of the person or property, or both, of an infant may be made by any person on behalf of the infant or if the infant be over the age of fourteen years, it may be made by the infant. A petition for appointment as a guardian of the property of an infant may also be made by the public administrator of the county in which the infant resides where no one else is available to serve as guardian. The court may grant such a petition of the public administrator upon its certification that all other efforts to appoint a guardian have been exhausted. A petition for appointment as a permanent guardian of an infant or child may be brought by any person on behalf of the infant or child.

§ 1704. Petition for appointment; contents

A petition for the appointment of a guardian of an infant must show:

1. The full name, domicile and date of birth of the infant.

2. The names of the parents whose consent to the adoption of a child would have been required pursuant to section one hundred eleven of the domestic relations law or who was entitled to notice of an adoption proceeding pursuant to section one hundred eleven-a of the domestic relations law, and whether or not they are living or have had their parental rights terminated pursuant to section three hundred eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law or section six hundred thirty-one of the family court act, and if living, their domiciles, the

name and address of the person with whom the infant resides and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead.

3. Whether the infant has had at any time a guardian appointed by will or deed or an acting guardian in socage or guardianship and custody committed pursuant to section three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law or section six hundred thirty-one of the family court act.

4. The estimated value of the real and personal property and of the annual income therefrom to which the infant is entitled.

5. If the infant is a non-domiciliary married person and the petition relates to personal property only, that the property is not subject to the control or disposition of the person's spouse by the law of his or her domicile, and the name and domicile of his or her spouse.

6. Whether the petitioner has knowledge that a person nominated to be a guardian therein, or any individual eighteen years of age or over who resides in the home of the proposed guardian is a subject of an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide central register of child abuse and maltreatment pursuant to title six of article six of the social services law, or has been the subject of or the respondent in a child protective proceeding commenced under article ten of the family court act, which proceeding resulted in an order finding that the child is an abused or neglected child.

7. The petition may state the reasons why a person nominated would be a suitable guardian and if either parent be living why either of them should not be appointed guardian.

8. In addition, the petition for appointment of a permanent guardian of an infant or child shall include:

(a) an assessment to be performed by the local social services district, which shall contain:

(i) the full name and address of the person seeking to become the guardian;

(ii) the ability of the guardian to assume permanent care of the child;

(iii) the child's property and assets, if known;

(iv) the wishes of the child, if appropriate;

(v) the results of the criminal history record check with the division of criminal justice services of the guardian and any person eighteen years of age or older residing in the guardian's household conducted by the office of children and family services pursuant to subdivision two of section three hundred seventy-eight-a of the social services law if such a criminal history record check has been completed;

(vi) the results of a search of the statewide central register of child abuse and maltreatment records regarding the guardian and any person eighteen years of age or older residing in the guardian's household, including whether such person has been the subject of an indicated report conducted pursuant to subparagraph (e) of paragraph (A) of subdivision four of section four hundred twenty-two of the social services law, if such a search has been conducted; and

(vii) the results of all inspections and assessments of the guardian's home and the child's progress while placed in the home, if any;

(b) a certified copy of the order or orders terminating the parental rights of the child's parents or approving the surrender of the child or the death certificates of the child's parents, as applicable;

(c) the recommendation of the authorized agency involved, if any; and

(d) the suitability, ability and commitment of the permanent guardian to assume full legal responsibility for the child and raise the child to adulthood.

§ 1705. Persons to be served

1. Upon presentation of the petition process shall issue:

(a) To the parent or parents, and if the infant is married, to the spouse, if such persons are within the state and their residences therein are known, or if there be none, to the grandparents who are within the county.

(b) To the person having the care and custody of the infant or with whom he resides.

(c) If the application is made in behalf of an infant over the age of 14 years by any person, to the infant.

2. No process shall be necessary to a parent who has abandoned the infant or is deprived of civil rights or divorced from the parent having legal custody of the infant or an incompetent or who is otherwise judicially deprived of the custody of the infant or in case the infant is married to a spouse who has abandoned the infant or is deprived of civil rights or divorced or an incompetent.

3. The court shall ascertain so far as practicable what relatives of the infant are domiciled in its county or elsewhere and with whom the infant resides and it may issue process to any relative or class of relatives to show cause why the appointment should not be made.

§ 1706. Proceedings thereupon

1. Where process is not issued or upon the return of process, the court shall ascertain the age of the infant, the amount of his or her personal property, the gross amount of the rents and profits of his or her real estate during his or her minority and the sufficiency of the security offered by the proposed guardian. With respect to applications for appointment as a guardian of a child, the guardian shall have the right and responsibility to make decisions, including issuing any necessary consents, regarding the child's protection, education, care and control, health and medical needs, and the physical custody of the person of the child. A permanent guardian may consent to the adoption of the child. Provided, however, that nothing in this subdivision shall be construed to limit the ability of a child to consent to his or her own medical care as may be otherwise provided by law. If the youth is over the age of fourteen years, the court shall ascertain his or her preference for a suitable guardian. Notwithstanding any other section of law, where the youth is over the age of eighteen, he or she shall consent to the appointment of a suitable guardian.

2. The court shall inquire of the office of children and family services and such office shall inform the court whether or not a person nominated to be a guardian of such infant, or any individual eighteen years of age or over who resides in the home of the proposed guardian is a subject of an indicated report or in a report which is under investigation at the time of the inquiry, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide central register of child abuse and maltreatment pursuant to title six of article six of the social services law. The office shall, upon completion of the investigation, inform the court as to the outcome of such investigation.

§ 1707. Decree appointing guardian; term of office

1. If the court be satisfied that the interests of the infant will be promoted by the appointment of a guardian or by the issuance of temporary letters of guardianship of his or her person or of his or her property, or of both, it must make a decree accordingly. If the court determines that appointment of a permanent guardian is in the best interests of the infant or child, the court shall issue a decree appointing such guardian. The same person may be appointed guardian of both the person and the property of the infant or the guardianship of the person and of the property may be committed to different persons. The court may appoint a person other than the parent of the infant or the person nominated by the petitioner. When the court is informed that the infant, a person nominated to be a guardian of such infant, the petitioner, or any individual eighteen years of age or over who resides in the home of the proposed guardian is a subject of or another person named in an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide register of child abuse and maltreatment pursuant to title six of article six of the social services law or is or has been the subject of or the respondent in or a party to a child protective proceeding commenced under article ten of the family court act which resulted in an order finding that the child is an abused or neglected child the court shall obtain such records regarding such report or proceeding as it deems appropriate and shall give the information contained therein due consideration in its determination. The court shall provide in its order appointing a guardian of a child for whom the guardian and a local department of social services have entered into an agreement under title ten of article six of the social services law: (a) if the guardian would meet the definition of relative guardian as such term is defined in section four hundred fifty-eight-a of the social services law, the compelling reasons that exist for determining that the return home of the child and the adoption of the child are not in the best interests of the child and are, therefore, not appropriate permanency options for the child; and (b) that the local department of social services and the attorney for the child must receive notice of, and be made parties to, any subsequent proceeding to vacate or modify the order of guardianship.

2. The term of office of a guardian of the person or property so appointed expires when the infant attains majority, unless the infant consents to the continuation of or appointment of a guardian after his or her eighteenth birthday, in which case such term of office expires on his or her twenty-first birthday, or after such other shorter period as the court establishes upon good cause shown; except that the term of office of a guardian of the person of an infant expires upon the infant's marriage prior to attaining majority. The appointment of a guardian of a child shall expire when the infant or child reaches the age of eighteen years, unless the infant or child consents to the continuation of a guardian after his or her eighteenth birthday, in which case such term of office expires on his or her twenty-first birthday, or unless vacated by the court prior to the infant or child's eighteenth or twenty-first birthday if the court finds that, based upon clear and convincing evidence, the guardian failed to or is unable, unavailable or unwilling to provide proper care and custody of the infant or child, or that the guardianship is no longer in the best interests of the infant or child.

§ 1708. Bonding Requirements; Investment of Guardianship Funds

1. Except as provided in this section, all property of the infant shall be secured by bond as provided in this act.

2. (a) The court may dispense with a bond wholly or partly and direct that the guardian jointly with a person or depositary designated collect and receive the moneys and other property of the infant as directed by order and that such moneys and property as it directs be deposited in the name of the guardian, subject to the order of the court, with a bank, savings bank, trust company, safe deposit company, or state or federal credit union designated in the order or invested in the name of the guardian, subject to the order of the court, in the shares of a savings and loan association or the savings account of a federal savings and loan association designated in the order, provided that no deposit or investment of the funds of any one infant in any single bank, savings bank, trust company, savings and loan association, federal savings and loan association, or state or federal credit union shall exceed the maximum amount insured by the federal deposit insurance corporation or the national credit union share insurance fund.

(b) The court may also dispense with a bond wholly or partly when it authorizes the guardian to purchase and invest in United States savings bonds, treasury bills, treasury notes, treasury bonds, or bonds of the state of New York or bonds or other obligations of any county, city, town, village or school district of the state of New York for the benefit of the infant and directs the guardian to deposit such bonds, bills, notes or other municipal obligations in joint custody with a bank, savings bank, trust company, safe deposit company, or state or federal credit union invested in the name of the guardian, subject to the order of the court. The guardian shall collect and receive all interest and income from such United States savings bonds, treasury notes, treasury bonds or bonds of the state of New York or bonds or other obligations of any county, city, town, village or school district of the state of New York and deposit such interest and income in an account in the name of the guardian, subject to the order of the court, as authorized pursuant to this section with the bank, savings bank, trust company, safe deposit company, or state or federal credit union having joint custody with the guardian of such United States savings bonds, treasury bills, treasury notes, treasury bonds, or bonds of the state of New York or bonds or other obligations of any county, city, town, village or school district of the state of New York.

(c) The court may also dispense with a bond wholly or partly when it authorizes the guardian to invest the guardianship funds pursuant to an investment advisory agreement with a bank, trust company, brokerage house, or other financial services entity acceptable to the court. The investment advisory agreement shall provide that the guardianship funds will be invested in accordance with the provisions of section 11-2.3 of the estates, powers, and trusts law and that the funds so invested shall not be released from the custody of the custodian identified therein except on order of the court. The petition to invest the guardianship funds pursuant to this subdivision shall be accompanied by a copy of the proposed investment advisory agreement. If the custodian of the funds is not the same person or entity providing the investment advice, a separate custodial agreement shall also accompany the petition to invest the guardianship pursuant to this subdivision. Such custodial agreement shall be with an institution acceptable to the court for the purpose of retaining control of the guardianship funds and shall also provide that the funds under the control of the custodian shall not be released from custody except on order of the court.

(d) Such deposit or investment shall be withdrawn or removed only on the order of the court, except that no court order shall be required to pay over to the infant who has attained the age of eighteen years all the moneys so held unless the depository is in receipt of an order from a court of competent jurisdiction directing it to withhold such payment beyond the infant's eighteenth birthday.

3. Where an infant is a beneficiary of a contract of life insurance under which moneys are payable to the infant or under which rights may accrue to the infant pursuant to election made by his guardian under the terms of the contract, the court may by order dispense wholly or partly with a bond and direct that the insurance company and the guardian shall make no withdrawal of the funds due to the infant under the contract except by joint check to the order of the guardian and a person designated by the court to receive such moneys.

4. The letters issued shall contain the substance of the order.

§ 1709. Appointment of guardian by supreme court

1. Where the supreme court appoints a guardian of an infant's person or property, or both, a certified copy of the order or decree appointing the guardian and of the bond given by the guardian shall be filed in the surrogate's court of the county in which the infant is domiciled, or if the infant be a non-domiciliary of the state, in the county in which the infant has property and a minute thereof made and indexed in the book kept by the court in which orders or decrees appointing guardians are entered.

2. Letters shall thereupon issue to the guardian from such court upon qualifying as provided in section 708.

3. A guardian so appointed shall be subject to all the duties and liabilities of a guardian specified in this article.

§ 1710. Will or deed containing appointment to be proved

A person shall not exercise within the state any power or authority as guardian of the person or property of an infant by virtue of the appointment by the will of an infant's parent, being a domiciliary and dying after this act takes effect, unless the will has been duly admitted to probate and recorded in the proper court and letters of guardianship have been issued thereon; or by virtue of an appointment contained in a deed of the infant's parent, being a domiciliary, executed after this act takes effect, unless the deed has been acknowledged so as to entitle it to be recorded and has been recorded in the office for recording deeds in the county of domicile of the person making the appointment at the time of execution thereof.

§ 1711. Guardian by will or deed; qualification; renunciation

1. Where a deed containing the appointment of a guardian is not recorded within 3 months after the death of the grantor, the person appointed is presumed to have renounced the appointment and if a guardian is thereafter appointed by the court the presumption is conclusive.

2. Where a will containing the appointment of a guardian is admitted to probate or a deed is recorded as prescribed in the preceding section, the person appointed guardian must within 3 months thereafter qualify as provided by 708 unless contrary to the express provisions of the will or deed and by filing a petition showing the facts which entitle him to qualify and receive letters; otherwise he is deemed to have renounced the appointment.

3. No guardian by will or deed shall receive any property other than the property derived under the instrument of appointment without first giving a bond in a penalty to be fixed by the court.

4. Either before or after the expiration of 3 months the court may extend the time so to qualify for such time as it deems reasonable, upon good cause shown.

5. A person appointed guardian by will or deed may at any time before he qualifies renounce the appointment by an acknowledged instrument filed in the office of the court.

§ 1712. Appointment of successor

When no guardian by will or deed remains in office a guardian may be appointed by the court with all the powers conferred by the will or deed and with the effect prescribed in 706 of this act unless such appointment would be contrary to the express provisions of the will or deed.

§ 1713. Administration of infant's property

1. Upon the petition of the guardian or of the infant or of any person in his behalf, the court, upon notice to such persons, if any, it deems proper, may by order direct the application by the guardian of the infant's property to

(a) the support and education of the infant;

(b) the cost of the funeral of a parent of the infant;

(c) the cost of the funeral of any other person who had no other assets available for funeral expenses and who had named the infant as beneficiary of a policy of insurance upon his life or as beneficiary or donee of any other property, to the extent that the guardian shall have collected such proceeds or property.

2. In all cases the court may determine the amount of expenditure of the infant's funds that is reasonable, proper and just under the circumstances, taking into consideration the liability, if any, of any other person to pay such expenses, his financial ability to pay and all other relevant facts. The payment may be made from income or principal. No payment for the funeral expense of any person shall be authorized unless the court finds that the estate of such person is insufficient to pay it.

3. Notwithstanding the provisions of subdivision 1 a guardian is authorized to apply social security payments received for the benefit of the infant to his education and support without order of the court.

4. Any infant over 14 years of age or any person in behalf of any infant may petition the court having jurisdiction over the infant's estate for the appointment of a guardian ad litem to initiate in behalf of the infant a proceeding for the protection of the infant's financial or other interests and in such proceeding authorize the guardian ad litem to take such action as the court deems proper. The court may entertain the petition if in its judgment the interests of the guardian of the infant are adverse to those of the infant or if in its opinion other valid reasons exist for the initiation of such a proceeding by another than his guardian. It may in similar case appoint a guardian ad litem for such purpose whenever facts have come to its attention showing

the necessity for protecting the interests of the infant.

§ 1714. Power to manage during minority property vested in an infant

The donee of a power to manage during minority property vested in an infant resulting from an ineffectual attempt by will or deed to appoint the donee as guardian shall be subject to the provisions of this article. In respect of such property he shall have all the rights and duties of a guardian and shall be entitled to receive the commissions allowed to a guardian.

§ 1715. Authority of guardian to sell, lease, exchange or mortgage

1. The surrogate's court of the county from which letters were issued to the guardian of the property of an infant may, in accordance with this section, authorize the guardian in the name of the infant to sell, lease, exchange or mortgage any interest of the infant in real property.

2. A proceeding therefor may be commenced by the guardian by filing a petition in which the infant, if over the age of 14 years, may join. It must show the facts as to the real property, the interest of the infant therein, the other property of the infant, his financial circumstances and such other facts showing that it is for the best interest of the infant to sell, lease, exchange or mortgage all or a portion of the infant's interest in the real property.

3. If the petition be entertained process shall issue to the infant if he has not joined therein, to the parent or parents, or if there be none, to an adult person with whom the infant resides, the person having his care and custody, and if the infant be married, to the infant's spouse. If the guardian show to the satisfaction of the court either by the petition or affidavit that he lacks knowledge of the existence, identity, name, residence or location of any person to be served or shows that with due diligence any such person cannot be personally served with process within any state of the United States, the District

of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States, the court may dispense with such service or make such direction as it deems appropriate for the protection of the infant.

4. On the return of process the court shall take such proof as it deems necessary and make such order as justice and the best interests of the infant require.

5. Any instrument executed by the guardian in the name of the infant in conformity with the provisions of this section shall have the same effect as if the infant being of full age had executed it.

6. The court shall have jurisdiction on like application to ratify and confirm any lease or leases made by the guardian in behalf of the infant and not theretofore authorized, ratified or confirmed by a court of competent jurisdiction.

7. Nothing in this section shall be deemed to authorize a guardian appointed by will or deed to sell, lease, exchange or mortgage the infant's real property contrary to the express provisions of the will or deed.

§ 1716. Application for ancillary letters to foreign guardians

1. Where an infant is domiciled within a state of the United States other than this state, or the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States and is entitled to property within the state or to maintain an action or special proceeding in any court thereof, a guardian of his property to whom letters have been issued by a court of competent jurisdiction within the foreign state, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States where the infant is domiciled, and has there given security in at least the value of the personal property and of the rents and profits of the real property of the infant, may present to the surrogate's court having jurisdiction, a petition showing the facts and particularly whether or not there are any debts due or to become due from the infant to a domiciliary and that the security given is sufficient to cover the property sought to be obtained through such letters and that the court has jurisdiction of the infant and praying for ancillary letters of guardianship accordingly.

2. The petition must be accompanied with exemplified copies of the records and other papers showing that he has been so appointed and has given the security required in this section, which must be authenticated in the manner prescribed by the CPLR. The petition and authenticated records and papers shall be conclusive evidence of the facts therein set forth in any court of this state.

3. Any corporate banking institution in any state, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States not entitled of right under section 131 of the banking law to receive such letters may nevertheless be authorized to receive them upon giving the bond which the court may require.

4. Where a non-domiciliary infant resides in a foreign country and is entitled to property within the state or to maintain an action or special proceeding in any court thereof respecting such property, a guardian of his property authorized to act as such within the domicile of the infant may apply to the surrogate's court of the county where the property or any part thereof is situate, for ancillary letters of guardianship on the estate of the infant and the person so authorized must present a petition showing the facts and the additional allegations regarding debts and security required by subdivision 1 and praying for ancillary letters. The petition must be accompanied with the authenticated copies of the records and other papers showing the appointment of the petitioner or where the foreign guardian has not been appointed by any court, with other proof of his authority to act as guardian within the foreign country and also with proof that pursuant to the laws of the foreign country he is entitled to the possession of the infant's personal estate. Authenticated copies of the records where used pursuant to this subdivision must be authenticated by the seal of the

court or officer by which or by whom he was appointed or by the officer having the custody of the seal or the record thereof and the signature of a judge of such court or the signature of such officer and of the clerk of such court, if any, and must be further authenticated by the certificate under the principal seal of the department of foreign affairs or of the department of justice of such country, attested by the signature or seal of a United States consul. The petition and authenticated records and papers shall be conclusive evidence of the facts therein set forth in any court of this state.

§ 1717. Proceedings thereupon

1. Where the court is satisfied upon the papers presented as prescribed in the preceding section that the case is within that section and that it will be for the infant's interest that ancillary letters issue to the petitioner, it may make a decree accordingly.

2. The decree may be made without process or process may issue to such persons as the court deems proper, to show cause why the prayer of the petition should not be granted.

3. Before ancillary letters are issued the court may direct that any debts appearing to be due or owing from the infant to domiciliaries be paid or security given therefor.

§ 1718. Effect of such letters

1. Ancillary letters of guardianship shall be issued as prescribed in the preceding section, without security, except as provided in that section.

2. They authorize the person to whom they are issued to demand and receive the personal property and the rents and profits of the real property of the infant and the proceeds of the sale, mortgage or lease of the real property of the infant, to dispose of them in like manner as

a guardian of the property appointed as prescribed in this article, to remove them from the state and to maintain any action or special proceeding in the infant's behalf.

3. Letters so issued do not authorize the ancillary guardian to receive from a domiciliary fiduciary subject to the jurisdiction of the court, money or other property belonging to the infant, in a case where domiciliary letters have been issued in this state to a guardian of the infant's property, except by special direction made for good cause shown of the court from which the domiciliary letters were issued or unless the domiciliary letters have been revoked.

§ 1719. Annual account

A guardian of an infant's property must within the counties within the city of New York and within the counties of Nassau, Orange, Suffolk and Westchester annually within 30 days after the anniversary of his appointment and within every other county in the month of January of each year, as long as any of the infant's property or the proceeds thereof remains under his control, file in the court the following papers:

1. An account containing a true statement and description of each item of personal property of the infant received by him since his appointment or since the filing of his last annual account, as the case requires, the value of each item so received, a list of the items remaining in his hands, a statement of the manner in which he has disposed of each item not remaining in his hands and a description of the amount and nature of each investment of money made by him.

2. A true account in form of debtor and creditor of all his receipts and disbursements of money during the preceding year, charging himself with any balance remaining in his hands when the last account was rendered and stating the balance remaining in his hands at the conclusion of the year to be charged to him in the next year's account.

3. The names and addresses of the sureties on his bond; if natural persons whether they are living and whether the security of the bond has become impaired.

4. The guardian of an infant's property may be required by the court to produce for examination by it all securities or evidences of deposit or investment which he has relating to the estate of the infant.

5. When the property of an infant has been deposited under the provisions of 1708, and the clerk or guardian clerk of the court shall keep in his office, or the depositary furnishes to the court, an accurate record of receipts of deposits of principal and income of the infant's estate and of withdrawals therefrom, the guardian shall not be required to file an annual account unless the court direct the filing of an account for any year or years.

§ 1720. Affidavit to be annexed thereto

To each account as prescribed in the preceding section must be appended the affidavit of the guardian to the effect that the account is a true statement according to the best of his knowledge and belief.

§ 1721. Annual examination of guardian's accounts

In the month of February of each year and thereafter until completed or at such other time as the court deems proper, the court must for the purposes specified in the succeeding section, examine or cause to be examined under its direction all accounts filed within the preceding year. The examination may be made by the clerk of the court or by a special examiner appointed by the court, who must before he enters upon the examination subscribe and take before the court and file with the clerk an oath faithfully to execute his duties and to make a true report to the court.

§ 1722. Proceedings where account defective

1. If it appears to the court upon an examination made as prescribed in the preceding section or by the report of the special examiner that a guardian of an infant's property has omitted to file his annual account or the affidavit relating thereto as prescribed in this article or if the court deems that the interest of the infant requires that the guardian render a more full or satisfactory account or where the court has reason to believe that sufficient cause exists for the guardian's removal, it may appoint a guardian ad litem for the infant for the purpose of filing a petition in his behalf for the removal of the guardian and prosecuting the proceeding for that purpose.

2. In a case specified in subdivision 1 where a special examiner has been appointed the court may appoint such examiner guardian ad litem for the infant and authorize him to procure the filing of an amended or proper account and to prosecute a proceeding for the removal of the guardian when necessary.

3. In all cases of examination or prosecution as provided in this section the court shall fix the compensation of the special examiner and guardian ad litem and may make an order charging it in whole or in part upon the guardian personally, the funds in his hands or upon the county, in which latter case it shall certify the items thereof to the treasurer of the county or the chief fiscal officer thereof or in the city of New York to the proper officers and they shall be audited and paid as other county or city charges.

§ 1723. Powers of a guardian of the property.

1. A guardian of the property of an infant shall protect, preserve and manage the property of the infant. He shall have the power to sell the personal property of the infant for any purpose connected with the faithful discharge of his trust, including investing such property or the proceeds thereof, changing investments and disposing of investments, except where his authority is otherwise limited by court order or

decree, or in the case of a testamentary guardian, by the terms of the will which appointed him.

§ 1724. Custodians

An infant or a custodian acting under part six of article seven of the estates, powers and trusts law shall be subject to the jurisdiction of the court in accordance with the provisions of such law.

§ 1725. Temporary guardianship by adoptive parent prior to adoption

1. Upon the filing of a petition for temporary guardianship, as described in section one hundred fifteen-c of the domestic relations law, or upon the filing of a petition for adoption when no prior application has been made for an order of temporary guardianship, the court shall determine promptly whether or not to grant temporary guardianship.

2. A petition for temporary guardianship of the person of an infant to be adopted shall contain at least the following:

(a) The first and last name of the infant, the anticipated surname of the infant subsequent to the completion of the adoption, the anticipated residence of the infant and the infant's date of birth;

(b) The full names, addresses and telephone numbers of the petitioners;

(c) Proof of the consent to the adoption of the infant as required by section one hundred fifteen-b of the domestic relations law; and

(d) A verified statement that the infant will be residing with the petitioners and that the petitioners intend to file a petition for adoption of such infant within forty-five days of the execution of the consent to the adoption of the infant.

3. (a) The court shall inquire of the statewide central register of child abuse and maltreatment and the register shall inform the court whether the petitioner is a subject of an indicated report, as such

terms are defined in section four hundred twelve of the social services law, filed with such register. When the court is informed that the petitioner is a subject of an indicated report, as such terms are defined in section four hundred twelve of the social services law, filed with the statewide central register of child abuse and maltreatment, the court shall give such information contained therein due consideration in its determination.

(b) The court shall make an order based upon the best interests of the child. Such order shall:

(i) appoint the petitioner temporary guardian of the person of the child; or

(ii) continue the proceeding for further investigation; or

(iii) if there is apparent cause to remove the child from the petitioners, follow the procedure set forth in subdivision two of section one hundred sixteen of the domestic relations law.

(c) Any decree or order of temporary guardianship issued pursuant to this section shall expire no later than nine months following the date of its issuance or entry of a final order of adoption, whichever is sooner. Such decree or order may be extended for periods of up to three months, upon application to the court, for good cause shown.

(d) Any decree or order issued pursuant to this section shall terminate upon the withdrawal or denial of the petition to adopt the infant named therein, unless the court orders the continuation thereof during the pendency of an appeal from an order denying the adoption petition.

4. If the court denies an application for temporary guardianship, or removes a child from the physical custody of the petitioners, or an order of temporary guardianship expires without the entry of a final order of adoption, or if the petition for adoption is withdrawn or denied, the court:

(a) if such withdrawal, denial or removal is within forty-five days of the execution of the consent to adoption by the birth parent, shall promptly inform the birth parent who consented to the adoption of such withdrawal, denial or removal;

(b) if such withdrawal, denial or removal is subsequent to forty-five days of the execution of the consent to adoption by the birth parent, may inform the birth parent who consented to the adoption of such withdrawal, denial or removal where the court determines that such notice will be in the best interests of the child; and

(c) in any case, shall direct the child protective service to conduct an investigation to assess the condition of the infant and to report its findings to the court within the time specified in the order. If the court has reason to believe that a crime was committed, it shall report such belief to the appropriate district attorney.

5. Rules of court shall provide for the monitoring by the court of filing of an adoption petition within forty-five days of the execution of a consent to adoption, when an application for temporary guardianship has been filed.

§ 1726. Standby guardians

1. For the purpose of this section:

(a) "Standby guardian" means (i) a person judicially appointed pursuant to subdivision three of this section as standby guardian of the person and/or property of an infant whose authority becomes effective upon the incapacity, administrative separation, or death of the infant's parent, legal guardian, legal custodian or primary caretaker or upon the consent of the parent, legal guardian, legal custodian or primary caretaker; and (ii) a person designated pursuant to subdivision four of this section as standby guardian whose authority becomes effective upon the death, administrative separation, or incapacity of the infant's parent, legal guardian, legal custodian or primary caretaker or upon the debilitation and consent of the parent, legal guardian, legal custodian or primary caretaker.

(b) "Legal guardian" means the court-appointed guardian of the infant's person and/or property.

(c) "Attending physician" means the physician who has primary responsibility for the treatment and care of the infant's parent, legal guardian, legal custodian or primary caretaker. Where more than one physician shares such responsibility, or where a physician is acting on the attending physician's behalf, any such physician may act as the attending physician pursuant to this section. Where no physician has such responsibility, any physician who is familiar with the parent's, legal guardian's, legal custodian's or primary caretaker's medical condition may act as the attending physician pursuant to this section.

(d) "Debilitation" means a chronic and substantial inability to care for one's dependent infant, as a result of (i) a progressively chronic or irreversibly fatal illness, or (ii) a physically debilitating illness, disease or injury. "Debilitated" means the state of having a debilitation.

(e) "Incapacity" means a chronic and substantial inability, as a result of mental impairment, to understand the nature and consequences of decisions concerning the care of one's dependent infant, and a consequent inability to care for such infant. "Incapacitated" means the state of having an incapacity.

(f) "Administrative separation" means a parent, legal guardian, legal custodian or primary caretaker's (i) in connection with a federal immigration matter: arrest, detention, incarceration, removal and/or deportation; or (ii) receipt of official communication by federal, state, or local authorities regarding immigration enforcement which gives reasonable notice that care and supervision of the child by the parent, legal guardian, legal custodian, or primary caretaker will be interrupted or cannot be provided.

2. The provisions of this article relating to guardians shall apply to standby guardians, except insofar as this section provides otherwise.

3. (a) A petition for the judicial appointment of a standby guardian of the person and/or property of an infant pursuant to this subdivision may be made only by a parent, a legal guardian of the infant or a legal custodian of the infant; or where the infant is not residing with a parent, legal guardian or legal custodian and, to the satisfaction of the court, such parent, legal guardian or legal custodian cannot be located with due diligence, the primary caretaker of such infant may petition for a judicial appointment of such standby guardian. Application for standing to petition as a primary caretaker shall be upon motion to the court upon notice to such parties as the court may direct.

(b) A petition for the judicial appointment of a standby guardian of an infant shall, in addition to meeting the requirements of section seventeen hundred four of this article:

(i) State whether the authority of the standby guardian is to become effective upon the petitioner's incapacity, upon the petitioner's death, upon the petitioner's consent, or upon the petitioner's administrative separation accompanied by his or her consent required pursuant to the provisions of subdivision seven of this section, or upon whichever occurs first;

(ii) State that the petitioner suffers from (A) a progressively chronic illness; (B) an irreversibly fatal illness and the basis for such statement, such as the date and source of a medical diagnosis, without requiring the identification of the illness in question, or (C) state that the petitioner may become subject to administrative separation and the basis for such statement.

(c) Upon a petition for the judicial appointment of a standby guardian of an infant pursuant to paragraph (a) of this subdivision or for the judicial appointment of a guardian pursuant to paragraph (d) of subdivision four of this section, the court shall conduct a hearing. The court may in its discretion dispense with a hearing for the appointment of a standby guardian, and may in its discretion appoint a guardian ad litem or an attorney for the infant to recommend whether the appointment of a standby guardian as proposed in the application is in the best interest of the infant.

(d) (i) If the court finds that the petitioner suffers from a progressively chronic illness or an irreversibly fatal illness, or finds that the petitioner may become subject to administrative separation, and that the interests of the infant will be promoted by the appointment of a standby guardian of the person and/or property it must make a decree accordingly.

(ii) Such decree shall specify whether the authority of the standby guardian is effective upon the receipt of a determination of the petitioner's incapacity, upon the receipt of the certificate of the petitioner's death, or other such evidence of death that may be satisfactory to the court, or upon the receipt of documentation of the petitioner's administrative separation, and receipt of the petitioner's consent to the commencement of the standby guardian's authority required pursuant to the provisions of subdivision seven of this section, or upon whichever occurs first. The decree shall also provide that the authority of the standby guardian may earlier become effective upon written consent of the parent pursuant to subparagraph (iv) of paragraph (e) of this subdivision.

(iii) If at any time prior to the commencement of the authority of the standby guardian the court finds that the requirements of subparagraph (i) of this paragraph are no longer satisfied, it may rescind such decree.

(e) (i) Where the decree provides that the authority of the standby guardian is effective upon receipt of a determination of the petitioner's incapacity, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of a determination of incapacity made pursuant to subdivision six of this section. The standby guardian shall file a copy of the determination of incapacity with the court that issued the decree within ninety days of the date of receipt of such determination or the standby guardian's authority may be rescinded by the court.

(ii) Where the decree provides that the authority of the standby guardian is effective upon receipt of a certificate of the petitioner's death, or other such evidence of death that may be satisfactory to the court, the standby guardian's authority shall commence upon the standby guardian's receipt of a certificate of death, or other such evidence of death as may be specified in the decree. The standby guardian shall file the certificate of death, or other such evidence of death, with the court that issued the decree within ninety days of the date of the petitioner's death or the standby guardian's authority may be rescinded by the court.

(iii) Where the decree provides that the authority of the standby guardian is effective upon the standby guardian's receipt of documentation of the petitioner's administrative separation, the standby guardian's authority shall commence upon the standby guardian's receipt of documentation of the petitioner's administrative separation pursuant to subdivision seven of this section, and receipt of the petitioner's consent to the commencement of the standby guardian's authority as required pursuant to the provisions of subdivision seven of this section. The standby guardian shall file the documentation of administrative separation with the court that issued the decree within sixty days of the date of the standby guardian's receipt of documentation of the petitioner's administrative separation or the standby guardian's authority may be rescinded by the court.

(iv) Notwithstanding subparagraphs (i) and (ii) of this paragraph, a standby guardian's authority shall commence upon the standby guardian's receipt of the petitioner's written consent to such commencement, signed by the petitioner in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written consent on the petitioner's behalf and at the petitioner's direction if the petitioner is physically unable to do so, provided such consent is signed in the presence of the petitioner and the witnesses. The standby guardian shall file the written consent with the court that issued the decree within ninety days of the date of receipt of such written consent or the standby guardian's authority may be rescinded by the court.

(f) The petitioner may revoke a standby guardianship created under this subdivision by executing a written revocation, filing it with the court that issued the decree, and promptly notifying the standby guardian of the revocation.

(g) A person judicially appointed standby guardian pursuant to this subdivision may at any time before the commencement of his or her authority renounce the appointment by executing a written renunciation and filing it with the court that issued the decree, and promptly notifying the petitioner of the revocation.

4. (a) A parent, a legal guardian, a legal custodian, or primary caretaker under the circumstances described in paragraph (a) of subdivision three of this section or under circumstances described in subparagraph (i) of paragraph (b) of this subdivision may designate a standby guardian by means of a written designation, signed by the parent, legal guardian, legal custodian or primary caretaker in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written designation on the parent's, legal guardian's, legal custodian's or primary caretaker's behalf and at the parent's, legal guardian's, legal custodian's or primary caretaker's direction if the

parent, legal guardian, legal custodian or primary caretaker is physically unable to do so, provided the designation is signed in the presence of the parent, legal guardian, legal custodian or primary caretaker and the witnesses.

(b) (i) A designation of a standby guardian shall identify the parent, legal guardian, legal custodian or primary caretaker, the infant and the person designated to be the standby guardian, and shall indicate that the parent, legal guardian, legal custodian or primary caretaker intends for the standby guardian to become the infant's guardian in the event the parent, legal guardian, legal custodian or primary caretaker either: (A) becomes incapacitated; (B) becomes debilitated and consents to the commencement of the standby guardian's authority; (C) becomes subject to an administrative separation and consents to the commencement of the standby guardian's authority as required pursuant to the provisions of subdivision seven of this section; or (D) dies prior to the commencement of a judicial proceeding to appoint a guardian of the person and/or property of an infant.

(ii) A parent, legal guardian, legal custodian or primary caretaker may designate an alternate standby guardian in the same writing, and by the same manner, as the designation of a standby guardian.

(iii) A designation may, but need not, be in the following form:

Designation of Standby Guardian

(NOTE: As used in this form, the term "parent" shall include a parent, a court-appointed guardian of an infant's person or property, a legal custodian, or a primary caretaker, and the term "child(ren)" shall include the dependant infant of a parent, court-appointed guardian, legal custodian or primary caretaker

I (name of parent) hereby designate (name, home address and telephone number of standby guardian) as standby guardian of the person and property of my child(ren) (name of child(ren)).

(You may, if you wish, provide that the standby guardian's authority shall extend only to the person, or only to the property, of your child, by crossing out "person" or "property", whichever is inapplicable, above.)

The appointment of ___________ as the standby guardian of the person and property of my child(ren) would be in the best interests of my child(ren) because: (Insert justification for appointment of this person as the standby guardian) __________

____

____ .

The standby guardian's authority shall take effect: (1) if my doctor concludes in writing that I am mentally incapacitated, and thus unable to care for my child(ren); (2) if my doctor concludes in writing that I am physically debilitated, and thus unable to care for my child(ren) and I consent in writing, before two witnesses, to the standby guardian's authority taking effect; (3) If I become subject to an administrative separation such that care and supervision of the child will be interrupted or cannot be provided; or (4) upon my death.

In the event the person I designate above is unable or unwilling to act as guardian for my child(ren), I hereby designate (name, home address and telephone number of alternate standby guardian), as standby guardian of my child(ren).

I also understand that my standby guardian's authority will cease sixty days after commencing unless by such date he or she petitions the court for appointment as guardian.

I understand that I retain full parental, guardianship, custodial or caretaker rights even after the commencement of the standby guardian's authority, and may revoke the standby guardianship at any time.

Signature: ____

Address: ____

Date: ____

I declare that the person whose name appears above signed this document in my presence, or was physically unable to sign and asked another to sign this document, who did so in my presence. I further declare that I am at least eighteen years old and am not the person designated as standby guardian.

Witness' Signature: _______________________________________

Address: ____

Date: ____

Witness' Signature: ____

Address: ____

Date: ____

(iv) Notwithstanding paragraphs (a) and (b) of this subdivision, a designation of standby guardian shall be effective as if made in accordance with the requirements of this subdivision if it was validly made: (a) where the parent, legal guardian, legal custodian or primary caretaker was domiciled at the time it was executed; (b) in the jurisdiction where it was executed or (c) where the parent, legal guardian, legal custodian or primary caretaker is domiciled at the time the designation becomes effective.

(c) The authority of the standby guardian under a designation shall commence upon either: (i) the standby guardian's receipt of a copy of a determination of incapacity made pursuant to subdivision six of this section; (ii) the standby guardian's receipt of (A) a copy of a determination of debilitation made pursuant to subdivision six of this section and (B) a copy of the parent's, legal guardian's, legal custodian's or primary caretaker's written consent to such commencement, signed by the parent, legal guardian, legal custodian or primary caretaker in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Another person may sign the written consent on the parent's, legal guardian's, legal custodian's or primary caretaker's behalf and at the parent's, legal guardian's, legal custodian's or primary caretaker's direction if the parent, legal guardian, legal custodian or primary caretaker is physically unable to do so, provided such consent is signed in the presence of the parent, legal guardian, legal custodian or primary caretaker and the witnesses; (iii) an administrative separation and consent as required pursuant to the provisions of subdivision seven of this section or (iv) the standby guardian's receipt of a certificate of death, funeral home receipt or other such document indicating that the parent, legal guardian, legal custodian or primary caretaker has died. The standby guardian shall file a petition pursuant to paragraph (d) of this subdivision within sixty days of the date of its commencement pursuant to this paragraph or such standby guardian's authority shall cease after such date, but shall recommence upon such filing.

(d) The standby guardian may file a petition for appointment as guardian after receipt of either: (i) a copy of a determination of incapacity made pursuant to subdivision six of this section; or (ii) (A) a copy of a determination of debilitation made pursuant to subdivision six of this section and (B) a copy of the parent's, legal guardian's, legal custodian's or primary caretaker's written consent, pursuant to paragraph (c) of this subdivision; (iii) documentation of an administrative separation and consent as required pursuant to the provisions of subdivision seven of this section; or (iv) a certificate of death, or other such evidence of death that may be satisfactory to the court. Such petition must, in addition to meeting the requirements of section seventeen hundred four of this article:

(i) append the written designation of such person as standby guardian; and

(ii) append a copy of: (A) the determination of incapacity of the parent, legal guardian, legal custodian or primary caretaker; or (B) the determination of debilitation and the parental, guardian's, custodian's or caretaker's consent; (C) documentation of an administrative separation and consent as required pursuant to the provisions of subdivision seven of this section; or (D) a copy of the parent's, legal guardian's, legal custodian's or primary caretaker's death certificate, or other such evidence of death that may be satisfactory to the court; and

(iii) if the petition is by a person designated as alternate standby guardian, state that the person designated as standby guardian is unwilling or unable to act as standby guardian, and the basis for such statement.

(e) Subject to the provisions of paragraph (c) of subdivision three of this section, if the court finds that the petitioner was duly designated as standby guardian, that the parent, legal guardian, legal custodian or primary caretaker of the infant is (i) incapacitated, (ii) debilitated and consents, (iii) has become subject to an administrative separation and consents as required pursuant to the provisions of subdivision seven of this section, or (iv) has died, as established by a copy of a death certificate or other such evidence of death as may be satisfactory to the court, that the interests of the infant will be promoted by the appointment of a standby guardian of the person and/or property, and that, if the petition is by a person designated as alternate standby guardian, the person designated as standby guardian is unwilling or unable to act as standby guardian, it must make a decree accordingly. Prior to making its finding, the court may, in its discretion, appoint an attorney for the infant to recommend whether the appointment of the standby guardian as proposed in the petition is in the best interests of the infant.

(f) The parent, legal guardian, legal custodian or primary caretaker may revoke a standby guardianship created under this subdivision: (i) by executing a subsequent designation of guardianship pursuant to paragraphs (a) and (b) of this subdivision, or (ii) notwithstanding the provisions of sections seventeen hundred ten and seventeen hundred eleven of this article, in the case of a standby guardian whose authority becomes effective upon the death of the parent, legal guardian, legal custodian or primary caretaker of the infant, by a subsequent designation of standby guardian set forth in a will of the parent, legal guardian, legal custodian or primary caretaker, or (iii) by notifying the standby guardian verbally or in writing or by any other act evidencing a specific intent to revoke the standby guardianship prior to the filing of a petition. Where the petition has already been filed, by executing a written revocation, filing it with the court where the petition was filed, and promptly notifying the standby guardian of the revocation.

5. The standby guardian may also file a petition for appointment as guardian in any other manner permitted by this article or article six of the family court act, on notice to the parent, legal guardian, legal custodian or primary caretaker and may append a designation of standby guardian to the petition for consideration by the court in the determination of such petition.

6. (a) A determination of incapacity or debilitation must: (i) be made by the attending physician to a reasonable degree of medical certainty; (ii) be in writing; and (iii) contain the attending physician's opinion regarding the cause and nature of the parent's, legal guardian's, legal

custodian's or primary caretaker's incapacity or debilitation as well as its extent and probable duration. The attending physician shall provide a copy of the determination of incapacity or debilitation to the standby guardian, if the standby guardian's identity is known to the physician.

(b) If requested by the standby guardian, an attending physician shall make a determination regarding the parent's, legal guardian's, legal custodian's or primary caretaker's incapacity or debilitation for purposes of this section.

(c) The standby guardian shall ensure that the parent, legal guardian, legal custodian or primary caretaker is informed of the commencement of the standby guardian's authority as a result of a determination of incapacity and of the parent's, legal guardian's, legal custodian's or primary caretaker's right to revoke such authority promptly after receipt of the determination of incapacity, provided there is any indication of the person's ability to comprehend such information.

7. Documentation of an administrative separation (a) shall consist of an administrative order, judicial order, affidavit or affirmation indicating the parent, legal guardian, legal custodian or primary caretaker's administrative separation as defined in this section and (b) shall be accompanied by written consent of the parent, legal guardian, legal custodian, or primary caretaker, signed by the parent, legal guardian, legal custodian, or primary caretaker in the presence of two witnesses at least eighteen years of age, other than the standby guardian, who shall also sign the writing. Consent contained in the formal petition submitted pursuant to subdivision three of this section or the written designation made pursuant to subdivision four of this section shall be sufficient to satisfy the requirement for consent set forth in this subdivision.

8. The commencement of the standby guardian's authority pursuant to a determination of incapacity, determination of debilitation, administrative separation, or consent shall not, itself, divest the parent, legal guardian, legal custodian or primary caretaker of any parental, guardianship, custodial or caretaker rights, but shall confer upon the standby guardian concurrent authority with respect to the infant.

9. (a) The clerk of any county upon being paid the fees allowed therefor by law shall receive for filing any instrument appointing or designating a standby guardian pursuant to this section made by a domiciliary of the county, and shall give a written receipt therefor to the person delivering it. The filing of an appointment or designation of standby guardian shall be for the sole purpose of safekeeping and shall not affect the validity of the appointment or designation.

(b) The appointment or designation shall be delivered only to: (i) the parent, legal guardian, legal custodian or primary caretaker who appointed or designated the standby guardian; (ii) the standby guardian or alternate standby guardian; (iii) the person designated as standby guardian or alternate standby guardian; or (iv) any other person directed by the court.

§ 1727. Petition for termination of account of guardian, committee, or conservator

Where a guardian, committee or conservator is presently maintaining an account on behalf of an infant, incompetent, conservatee or person under disability in an amount not exceeding $10,000.00, which account was established prior to the effective date of this section, the guardian, committee or conservator may petition the court in the county having jurisdiction over said account for an order authorizing the termination of the account and payment of the balance of the account to a parent of such person or to some competent adult with whom such person resides or who has some interest in such person's welfare for the use and benefit of such person.

ARTICLE 17-A

GUARDIANS OF PERSONS WHO ARE INTELLECTUALLY DISABLED AND DEVELOPMENTALLY DISABLED

§ 1750. Guardianship of persons who are intellectually disabled

When it shall appear to the satisfaction of the court that a person is a person who is intellectually disabled, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the person who is intellectually disabled. Such appointment shall be made pursuant to the provisions of this article, provided however that the provisions of section seventeen hundred fifty-a of this article shall not apply to the appointment of a guardian or guardians of a person who is intellectually disabled.

1. For the purposes of this article, a person who is intellectually disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with an intellectual disability, having qualifications to make such certification, as being incapable to manage him or herself and/or his or her affairs by reason of intellectual disability and that such condition is permanent in nature or likely to

continue indefinitely.

2. Every such certification pursuant to subdivision one of this section, made on or after the effective date of this subdivision, shall include a specific determination by such physician and psychologist, or by such physicians, as to whether the person who is intellectually disabled has the capacity to make health care decisions, as defined by subdivision three of section twenty-nine hundred eighty of the public health law, for himself or herself. A determination that the person who is intellectually disabled has the capacity to make health care decisions shall not preclude the appointment of a guardian pursuant to this section to make other decisions on behalf of the person who is intellectually disabled. The absence of this determination in the case of guardians appointed prior to the effective date of this subdivision shall not preclude such guardians from making health care decisions.

§ 1750-a. Guardianship of persons who are developmentally disabled

1. When it shall appear to the satisfaction of the court that a person is a person who is developmentally disabled, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the best interest of the person who is developmentally disabled. Such appointments shall be made pursuant to the provisions of this article, provided however that the provisions of section seventeen hundred fifty of this article shall not apply to the appointment of a guardian or guardians of a person who is developmentally disabled. For the purposes of this article, a person who is developmentally disabled is a person who has been certified by one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of persons with developmental disabilities, having qualifications to make such certification, as having an impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability and that such condition is permanent in nature or likely to continue indefinitely, and whose disability:

(a) is attributable to cerebral palsy, epilepsy, neurological impairment, autism or traumatic head injury;

(b) is attributable to any other condition of a person found to be closely related to intellectual disability because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of persons with intellectual disabilities; or

(c) is attributable to dyslexia resulting from a disability described in subdivision one or two of this section or from intellectual disability; and

(d) originates before such person attains age twenty-two, provided, however, that no such age of origination shall apply for the purposes of this article to a person with traumatic head injury.

2. Notwithstanding any provision of law to the contrary, for the purposes of subdivision two of section seventeen hundred fifty and section seventeen hundred fifty-b of this article, "a person who is intellectually disabled and his or her guardian" shall also mean a person and his or her guardian appointed pursuant to this section; provided that such person has been certified by the physicians and/or psychologists, specified in subdivision one of this section, as (i) having an intellectual disability, or (ii) having a developmental disability, as defined in section 1.03 of the mental hygiene law, which (A) includes intellectual disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability.

§ 1750-b. Health care decisions for persons who are intellectually disabled

1. Scope of authority. Unless specifically prohibited by the court after consideration of the determination, if any, regarding a person who is intellectually disabled's capacity to make health care decisions, which is required by section seventeen hundred fifty of this article, the guardian of such person appointed pursuant to section seventeen hundred fifty of this article shall have the authority to make any and all health care decisions, as defined by subdivision six of section twenty-nine hundred eighty of the public health law, on behalf of the person who is intellectually disabled that such person could make if such person had capacity. Such decisions may include decisions to withhold or withdraw life-sustaining treatment. For purposes of this section, "life-sustaining treatment" means medical treatment, including cardiopulmonary resuscitation and nutrition and hydration provided by means of medical treatment, which is sustaining life functions and without which, according to reasonable medical judgment, the patient will die within a relatively short time period. Cardiopulmonary resuscitation is presumed to be life-sustaining treatment without the necessity of a medical judgment by an attending physician. The provisions of this article are not intended to permit or promote suicide, assisted suicide or euthanasia; accordingly, nothing in this section shall be construed to permit a guardian to consent to any act or omission to which the person who is intellectually disabled could not consent if such person had capacity.

(a) For the purposes of making a decision to withhold or withdraw life-sustaining treatment pursuant to this section, in the case of a person for whom no guardian has been appointed pursuant to section seventeen hundred fifty or seventeen hundred fifty-a of this article, a "guardian" shall also mean a family member of a person who (i) has intellectual disability, or (ii) has a developmental disability, as defined in section 1.03 of the mental hygiene law, which (A) includes intellectual disability, or (B) results in a similar impairment of general intellectual functioning or adaptive behavior so that such person is incapable of managing himself or herself, and/or his or her affairs by reason of such developmental disability. Qualified family members shall be included in a prioritized list of said family members pursuant to regulations established by the commissioner of the office for people with developmental disabilities. Such family members must have a significant and ongoing involvement in a person's life so as to have sufficient knowledge of their needs and, when reasonably known or ascertainable, the person's wishes, including moral and religious beliefs. In the case of a person who was a resident of the former Willowbrook state school on March seventeenth, nineteen hundred seventy-two and those individuals who were in community care status on that date and subsequently returned to Willowbrook or a related facility, who are fully represented by the consumer advisory board and who have no guardians appointed pursuant to this article or have no qualified family members to make such a decision, then a "guardian" shall also mean the Willowbrook consumer advisory board. A decision of such family member or the Willowbrook consumer advisory board to withhold or withdraw life-sustaining treatment shall be subject to all of the protections, procedures and safeguards which apply to the decision of a guardian to withhold or withdraw life-sustaining treatment pursuant to this section.

In the case of a person for whom no guardian has been appointed pursuant to this article or for whom there is no qualified family member or the Willowbrook consumer advisory board available to make such a decision, a "guardian" shall also mean, notwithstanding the definitions in section 80.03 of the mental hygiene law, a surrogate decision-making committee, as defined in article eighty of the mental hygiene law. All declarations and procedures, including expedited procedures, to comply with this section shall be established by regulations promulgated by the commission on quality of care and advocacy for persons with disabilities.

(b) Regulations establishing the prioritized list of qualified family members required by paragraph (a) of this subdivision shall be developed by the commissioner of the office for people with developmental disabilities in conjunction with parents, advocates and family members of persons who are intellectually disabled. Regulations to implement the authority of the Willowbrook consumer advisory board pursuant to paragraph (a) of this subdivision may be promulgated by the commissioner of the office for people with developmental disabilities with advice from the Willowbrook consumer advisory board.

(c) Notwithstanding any provision of law to the contrary, the formal determinations required pursuant to section seventeen hundred fifty of this article shall only apply to guardians appointed pursuant to section seventeen hundred fifty or seventeen hundred fifty-a of this article.

2. Decision-making standard. (a) The guardian shall base all advocacy

and health care decision-making solely and exclusively on the best interests of the person who is intellectually disabled and, when reasonably known or ascertainable with reasonable diligence, on the person who is intellectually disabled's wishes, including moral and religious beliefs.

(b) An assessment of the person who is intellectually disabled's best interests shall include consideration of:

(i) the dignity and uniqueness of every person;

(ii) the preservation, improvement or restoration of the person who is intellectually disabled's health;

(iii) the relief of the person who is intellectually disabled's suffering by means of palliative care and pain management;

(iv) the unique nature of artificially provided nutrition or hydration, and the effect it may have on the person who is intellectually disabled; and

(v) the entire medical condition of the person.

(c) No health care decision shall be influenced in any way by:

(i) a presumption that persons who are intellectually disabled are not entitled to the full and equal rights, equal protection, respect, medical care and dignity afforded to persons without an intellectual disability or a developmental disability; or

(ii) financial considerations of the guardian, as such considerations affect the guardian, a health care provider or any other party.

3. Right to receive information. Subject to the provisions of sections 33.13 and 33.16 of the mental hygiene law, the guardian shall have the right to receive all medical information and medical and clinical records necessary to make informed decisions regarding the person who is intellectually disabled's health care.

4. Life-sustaining treatment. The guardian shall have the affirmative obligation to advocate for the full and efficacious provision of health care, including life-sustaining treatment. In the event that a guardian makes a decision to withdraw or withhold life-sustaining treatment from a person who is intellectually disabled:

(a) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, must confirm to a reasonable degree of medical certainty that the person who is intellectually disabled lacks capacity to make health care decisions. The determination thereof shall be included in the person who is intellectually disabled's medical record, and shall contain such attending physician's opinion regarding the cause and nature of the person who is intellectually disabled's incapacity as well as its extent and probable duration. The attending physician who makes the confirmation shall consult with another physician, or a licensed psychologist, to further confirm the person who is intellectually disabled's lack of capacity. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, must (i) be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or (ii) have been employed for a minimum of two years to render care and service in a facility or program operated, licensed or authorized by the office for people with developmental disabilities, or (iii) have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating intellectual disability. A record of such consultation shall be included in the person who is intellectually disabled's medical record.

(b) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, with the concurrence of another physician with whom such attending physician shall consult, must determine to a reasonable degree of medical certainty and note on the person who is intellectually disabled's chart that:

(i) the person who is intellectually disabled has a medical condition as follows:

A. a terminal condition, which for the purpose of this section means an illness or injury from which there is no recovery, and which reasonably can be expected to cause death within one year; or

B. permanent unconsciousness; or

C. a medical condition other than such person's intellectual disability which requires life-sustaining treatment, is irreversible and which will continue indefinitely; and

(ii) the life-sustaining treatment would impose an extraordinary burden on such person, in light of:

A. such person's medical condition, other than such person's intellectual disability; and

B. the expected outcome of the life-sustaining treatment, notwithstanding such person's intellectual disability; and

(iii) in the case of a decision to withdraw or withhold artificially provided nutrition or hydration:

A. there is no reasonable hope of maintaining life; or

B. the artificially provided nutrition or hydration poses an extraordinary burden.

(c) The guardian shall express a decision to withhold or withdraw life-sustaining treatment either:

(i) in writing, dated and signed in the presence of one witness eighteen years of age or older who shall sign the decision, and presented to the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(ii) orally, to two persons eighteen years of age or older, at least one of whom is the person who is intellectually disabled's attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law.

(d) The attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, who is provided with the decision of a guardian shall include the decision in the person who is intellectually disabled's medical chart, and shall either:

(i) promptly issue an order to withhold or withdraw life-sustaining treatment from the person who is intellectually disabled, and inform the

staff responsible for such person's care, if any, of the order; or
(ii) promptly object to such decision, in accordance with subdivision five of this section.

(e) At least forty-eight hours prior to the implementation of a decision to withdraw life-sustaining treatment, or at the earliest possible time prior to the implementation of a decision to withhold life-sustaining treatment, the attending physician shall notify:

(i) the person who is intellectually disabled, except if the attending physician determines, in writing and in consultation with another physician or a licensed psychologist, that, to a reasonable degree of medical certainty, the person would suffer immediate and severe injury from such notification. The attending physician who makes the confirmation, or the physician or licensed psychologist with whom the attending physician consults, shall:

A. be employed by a developmental disabilities services office named in section 13.17 of the mental hygiene law or employed by the office for people with developmental disabilities to provide treatment and care to people with developmental disabilities, or

B. have been employed for a minimum of two years to render care and service in a facility operated, licensed or authorized by the office for people with developmental disabilities, or

C. have been approved by the commissioner of the office for people with developmental disabilities in accordance with regulations promulgated by such commissioner. Such regulations shall require that a physician or licensed psychologist possess specialized training or three years experience in treating intellectual disability. A record of such consultation shall be included in the person who is intellectually disabled's medical record;

(ii) if the person is in or was transferred from a residential facility operated, licensed or authorized by the office for people with developmental disabilities, the chief executive officer of the agency or organization operating such facility and the mental hygiene legal service; and

(iii) if the person is not in and was not transferred from such a facility or program, the commissioner of the office for people with developmental disabilities, or his or her designee.

5. Objection to health care decision. (a) Suspension. A health care decision made pursuant to subdivision four of this section shall be suspended, pending judicial review, except if the suspension would in reasonable medical judgment be likely to result in the death of the person who is intellectually disabled, in the event of an objection to that decision at any time by:

(i) the person who is intellectually disabled on whose behalf such decision was made; or

(ii) a parent or adult sibling who either resides with or has maintained substantial and continuous contact with the person who is intellectually disabled; or

(iii) the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law; or

(iv) any other health care practitioner providing services to the person who is intellectually disabled, who is licensed pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-six, one hundred thirty-nine, one hundred forty-one, one hundred forty-three, one hundred forty-four, one hundred fifty-three, one hundred fifty-four, one hundred fifty-six, one hundred fifty-nine or one hundred sixty-four of the education law; or

(v) the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section; or

(vi) if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office for people with developmental disabilities, the mental hygiene legal service; or

(vii) if the person is not in and was not transferred from such a facility or program, the commissioner of the office for people with developmental disabilities, or his or her designee.

(b) Form of objection. Such objection shall occur orally or in writing.

(c) Notification. In the event of the suspension of a health care decision pursuant to this subdivision, the objecting party shall promptly notify the guardian and the other parties identified in paragraph (a) of this subdivision, and the attending physician shall record such suspension in the person who is intellectually disabled's medical chart.

(d) Dispute mediation. In the event of an objection pursuant to this subdivision, at the request of the objecting party or person or entity authorized to act as a guardian under this section, except a surrogate decision making committee established pursuant to article eighty of the mental hygiene law, such objection shall be referred to an ethics review committee, established pursuant to section two thousand nine hundred ninety-four-m of the public health law or similar entity for mediating disputes in a hospice, such as a patient's advocate's office, hospital chaplain's office or ethics committee, as described in writing and adopted by the governing authority of such hospice, for non-binding mediation. In the event that such dispute cannot be resolved within seventy-two hours or no such mediation entity exists or is reasonably available for mediation of a dispute, the objection shall proceed to judicial review pursuant to this subdivision. The party requesting mediation shall provide notification to those parties entitled to notice pursuant to paragraph (a) of this subdivision.

6. Special proceeding authorized. The guardian, the attending physician, as defined in subdivision two of section twenty-nine hundred eighty of the public health law, the chief executive officer identified in subparagraph (ii) of paragraph (e) of subdivision four of this section, the mental hygiene legal service (if the person is in or was transferred from a residential facility or program operated, approved or licensed by the office for people with developmental disabilities) or the commissioner of the office for people with developmental disabilities or his or her designee (if the person is not in and was not transferred from such a facility or program) may commence a special proceeding in a court of competent jurisdiction with respect to any dispute arising under this section, including objecting to the withdrawal or withholding of life-sustaining treatment because such withdrawal or withholding is not in accord with the criteria set forth in this section.

7. Provider's obligations. (a) A health care provider shall comply with the health care decisions made by a guardian in good faith pursuant to this section, to the same extent as if such decisions had been made by the person who is intellectually disabled, if such person had capacity.

(b) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require a private hospital to honor a guardian's health care decision that the hospital would not honor if the decision had been made by the person who is intellectually disabled, if such person had capacity, because the decision is contrary to a formally adopted written policy of the hospital expressly based on religious beliefs or sincerely held moral convictions central to the hospital's operating principles, and the hospital would be permitted by law to refuse to honor the decision if made by such person, provided:

(i) the hospital has informed the guardian of such policy prior to or upon admission, if reasonably possible; and

(ii) the person who is intellectually disabled is transferred promptly to another hospital that is reasonably accessible under the circumstances and is willing to honor the guardian's decision. If the guardian is unable or unwilling to arrange such a transfer, the hospital's refusal to honor the decision of the guardian shall constitute an objection pursuant to subdivision five of this section.

(c) Notwithstanding paragraph (a) of this subdivision, nothing in this section shall be construed to require an individual health care provider to honor a guardian's health care decision that the individual would not honor if the decision had been made by the person who is intellectually disabled, if such person had capacity, because the decision is contrary to the individual's religious beliefs or sincerely held moral convictions, provided the individual health care provider promptly informs the guardian and the facility, if any, of his or her refusal to honor the guardian's decision. In such event, the facility shall promptly transfer responsibility for the person who is intellectually disabled to another individual health care provider willing to honor the guardian's decision. The individual health care provider shall cooperate in facilitating such transfer of the patient.

(d) Notwithstanding the provisions of any other paragraph of this subdivision, if a guardian directs the provision of life-sustaining treatment, the denial of which in reasonable medical judgment would be likely to result in the death of the person who is intellectually disabled, a hospital or individual health care provider that does not wish to provide such treatment shall nonetheless comply with the guardian's decision pending either transfer of the person who is intellectually disabled to a willing hospital or individual health care provider, or judicial review.

(e) Nothing in this section shall affect or diminish the authority of a surrogate decision-making panel to render decisions regarding major medical treatment pursuant to article eighty of the mental hygiene law.

8. Immunity. (a) Provider immunity. No health care provider or employee thereof shall be subjected to criminal or civil liability, or be deemed to have engaged in unprofessional conduct, for honoring reasonably and in good faith a health care decision by a guardian, or for other actions taken reasonably and in good faith pursuant to this section.

(b) Guardian immunity. No guardian shall be subjected to criminal or civil liability for making a health care decision reasonably and in good faith pursuant to this section.

§ 1751. Petition for appointment; by whom made

A petition for the appointment of a guardian of the person or property, or both, of a person who is intellectually disabled or a person who is developmentally disabled may be made by a parent, any interested person eighteen years of age or older on behalf of the person who is intellectually disabled or a person who is developmentally disabled including a corporation authorized to serve as a guardian as provided for by this article, or by the person who is intellectually disabled or a person who is developmentally disabled when such person is eighteen years of age or older.

§ 1752. Petition for appointment; contents

The petition for the appointment of a guardian shall be filed with the court on forms to be prescribed by the state chief administrator of the courts. Such petition for a guardian of a person who is intellectually disabled or a person who is developmentally disabled shall include, but not be limited to, the following information:

1. the full name, date of birth and residence of the person who is intellectually disabled or a person who is developmentally disabled;

2. the name, age, address and relationship or interest of the petitioner to the person who is intellectually disabled or a person who is developmentally disabled;

3. the names of the parents, children, adult siblings if eighteen years of age or older, the spouse and primary care physician if other than a physician having submitted a certification with the petition, if any, of the person who is intellectually disabled or a person who is developmentally disabled and whether or not they are living, and if living, their addresses and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead;

4. the name and address of the person with whom the person who is intellectually disabled or a person who is developmentally disabled resides if other than the parents or spouse;

5. the name, age, address, education and other qualifications, and consent of the proposed guardian, standby and alternate guardian, if other than the parent, spouse, adult child if eighteen years of age or older or adult sibling if eighteen years of age or older, and if such parent, spouse or adult child be living, why any of them should not be appointed guardian;

6. the estimated value of real and personal property and the annual income therefrom and any other income including governmental entitlements to which the person who is intellectually disabled or person who is developmentally disabled is entitled; and

7. any circumstances which the court should consider in determining whether it is in the best interests of the person who is intellectually disabled or person who is developmentally disabled to not be present at the hearing if conducted.

§ 1753. Persons to be served

1. Upon presentation of the petition, process shall issue to:

(a) the parent or parents, adult children, if the petitioner is other than a parent, adult siblings, if the petitioner is other than a parent, and if the person who is intellectually disabled or person who is developmentally disabled is married, to the spouse, if their residences are known;

(b) the person having care and custody of the person who is intellectually disabled or person who is developmentally disabled, or with whom such person resides if other than the parents or spouse; and

(c) the person who is intellectually disabled or person who is developmentally disabled if fourteen years of age or older for whom an application has been made in such person's behalf.

2. Upon presentation of the petition, notice of such petition shall be served by certified mail to:

(a) the adult siblings if the petitioner is a parent, and adult children if the petitioner is a parent;

(b) the mental hygiene legal service in the judicial department where the facility, as defined in subdivision (a) of section 47.01 of the mental hygiene law, is located if the person who is intellectually disabled or person who is developmentally disabled resides in such a facility;

(c) in all cases, to the director in charge of a facility licensed or operated by an agency of the state of New York, if the person who is intellectually disabled or person who is developmentally disabled resides in such facility;

(d) one other person if designated in writing by the person who is intellectually disabled or person who is developmentally disabled; and

(e) such other persons as the court may deem proper.

3. No process or notice shall be necessary to a parent, adult child, adult sibling, or spouse of the person who is intellectually disabled or person who is developmentally disabled who has been declared by a court as being incompetent. In addition, no process or notice shall be necessary to a spouse who is divorced from the person who is intellectually disabled or person who is developmentally disabled, and to a parent, adult child, adult sibling when it shall appear to the satisfaction of the court that such person or persons have abandoned the person who is intellectually disabled or person who is developmentally disabled.

§ 1754. Hearing and trial

1. Upon a petition for the appointment of a guardian of a person who is intellectually disabled or person who is developmentally disabled eighteen years of age or older, the court shall conduct a hearing at which such person shall have the right to jury trial. The right to a jury trial shall be deemed waived by failure to make a demand therefor. The court may in its discretion dispense with a hearing for the appointment of a guardian, and may in its discretion appoint a guardian ad litem, or the mental hygiene legal service if such person is a resident of a mental hygiene facility as defined in subdivision (a) of section 47.01 of the mental hygiene law, to recommend whether the appointment of a guardian as proposed in the application is in the best interest of the person who is intellectually disabled or person who is developmentally disabled, provided however, that such application has been made by:

(a) both parents or the survivor; or

(b) one parent and the consent of the other parent; or

(c) any interested party and the consent of each parent.

2. When it shall appear to the satisfaction of the court that a parent or parents not joining in or consenting to the application have abandoned the person who is intellectually disabled or person who is

developmentally disabled or are not otherwise required to receive notice, the court may dispense with such parent's consent in determining the need to conduct a hearing for a person under the age of eighteen. However, if the consent of both parents or the surviving parent is dispensed with by the court, a hearing shall be held on the application.

3. If a hearing is conducted, the person who is intellectually disabled or person who is developmentally disabled shall be present unless it shall appear to the satisfaction of the court on the certification of the certifying physician that the person who is intellectually disabled or person who is developmentally disabled is medically incapable of being present to the extent that attendance is likely to result in physical harm to such person who is intellectually disabled or person who is developmentally disabled, or under such other circumstances which the court finds would not be in the best interest of the person who is intellectually disabled or person who is developmentally disabled.

4. If either a hearing is dispensed with pursuant to subdivisions one and two of this section or the person who is intellectually disabled or person who is developmentally disabled is not present at the hearing pursuant to subdivision three of this section, the court may appoint a guardian ad litem if no mental hygiene legal service attorney is authorized to act on behalf of the person who is intellectually disabled or person who is developmentally disabled. The guardian ad litem or mental hygiene legal service attorney, if appointed, shall personally interview the person who is intellectually disabled or person who is developmentally disabled and shall submit a written report to the court.

5. If, upon conclusion of such hearing or jury trial or if none be held upon the application, the court is satisfied that the best interests of the person who is intellectually disabled or person who is developmentally disabled will be promoted by the appointment of a guardian of the person or property, or both, it shall make a decree naming such person or persons to serve as such guardians.

§ 1755. Modification order

Any person who is intellectually disabled or person who is developmentally disabled eighteen years of age or older, or any person on behalf of any person who is intellectually disabled or person who is developmental disabled for whom a guardian has been appointed, may apply to the court having jurisdiction over the guardianship order requesting modification of such order in order to protect the person who is intellectually disabled's, or person who is developmentally disabled's financial situation and/or his or her personal interests. The court may, upon receipt of any such request to modify the guardianship order, appoint a guardian ad litem. The court shall so modify the guardianship order if in its judgment the interests of the guardian are adverse to those of the person who is intellectually disabled or person who is developmentally disabled or if the interests of justice will be best served including, but not limited to, facts showing the necessity for protecting the personal and/or financial interests of the person who is intellectually disabled or person who is developmentally disabled.

§ 1756. Limited guardian of the property

When it shall appear to the satisfaction of the court that such person who is intellectually disabled or person who is developmentally disabled for whom an application for guardianship is made is eighteen years of age or older and is wholly or substantially self-supporting by means of his or her wages or earnings from employment, the court is authorized and empowered to appoint a limited guardian of the property of such person who is intellectually disabled or person who is developmentally disabled who shall receive, manage, disburse and account for only such property of said person who is intellectually disabled or person who is developmentally disabled as shall be received from other than the wages or earnings of said person.

The person who is intellectually disabled or person who is developmentally disabled for whom a limited guardian of the property has been appointed shall have the right to receive and expend any and all wages or other earnings of his or her employment and shall have the power to contract or legally bind himself or herself for such sum of money not exceeding one month's wages or earnings from such employment or three hundred dollars, whichever is greater, or as otherwise authorized by the court.

§ 1757. Standby guardian of a person who is intellectually disabled or person who is developmentally disabled

1. Upon application, a standby guardian of the person or property or both of a person who is intellectually disabled or person who is developmentally disabled may be appointed by the court. The court may also, upon application, appoint an alternate and/or successive alternates to such standby guardian, to act if such standby guardian shall die, or become incapacitated, or shall renounce. Such appointments by the court shall be made in accordance with the provisions of this article.

2. Such standby guardian, or alternate in the event of such standby guardian's death, incapacity or renunciation, shall without further proceedings be empowered to assume the duties of his or her office immediately upon death, renunciation or adjudication of incompetency of the guardian or standby guardian appointed pursuant to this article, subject only to confirmation of his or her appointment by the court within one hundred eighty days following assumption of his or her duties of such office. Before confirming the appointment of the standby guardian or alternate guardian, the court may conduct a hearing pursuant to section seventeen hundred fifty-four of this article upon petition by anyone on behalf of the person who is intellectually disabled or person who is developmentally disabled or the person who is intellectually disabled or person who is developmentally disabled if such person is eighteen years of age or older, or upon its discretion.

3. Failure of a standby or alternate standby guardian to assume the duties of guardian, seek court confirmation or to renounce the guardianship within sixty days of written notice by certified mail or

personal delivery given by or on behalf of the person who is intellectually disabled or person who is developmentally disabled of a prior guardian's inability to serve and the standby or alternate standby guardian's duty to serve, seek court confirmation or renounce such role shall allow the court to:

(a) deem the failure an implied renunciation of guardianship, and

(b) authorize, notwithstanding the time period provided for in subdivision two of this section to seek court confirmation, any remaining standby or alternate standby guardian to serve in such capacity provided (i) an application for confirmation and appropriate notices pursuant to subdivision one of section seventeen hundred fifty-three of this article are filed, or (ii) an application for modification of the guardianship order pursuant to section seventeen hundred fifty-five of this article is filed.

§ 1758. Court jurisdiction

1. The jurisdiction of the court to hear proceedings pursuant to this article shall be subject to article eighty-three of the mental hygiene law.

2. After the appointment of a guardian, standby guardian or alternate guardians, the court shall have and retain general jurisdiction over the person who is intellectually disabled or person who is developmentally disabled for whom such guardian shall have been appointed, to take of its own motion or to entertain and adjudicate such steps and proceedings relating to such guardian, standby, or alternate guardianship as may be deemed necessary or proper for the welfare of such person who is intellectually disabled or person who is developmentally disabled.

§ 1759. Duration of guardianship

1. Such guardianship shall not terminate at the age of majority or marriage of such person who is intellectually disabled or person who is developmentally disabled but shall continue during the life of such person, or until terminated by the court.

2. A person eighteen years or older for whom such a guardian has been previously appointed or anyone, including the guardian, on behalf of a person who is intellectually disabled or person who is developmentally disabled for whom a guardian has been appointed may petition the court which made such appointment or the court in his or her county of residence to have the guardian discharged and a successor appointed, or to have the guardian of the property designated as a limited guardian of the property, or to have the guardianship order modified, dissolved or otherwise amended. Upon such a petition for review, the court shall conduct a hearing pursuant to section seventeen hundred fifty-four of this article.

3. Upon marriage of such person who is intellectually disabled or person who is developmentally disabled for whom such a guardian has been appointed, the court shall, upon request of the person who is intellectually disabled or person who is developmentally disabled, spouse, or any other person acting on behalf of the person who is intellectually disabled or person who is developmentally disabled, review the need, if any, to modify, dissolve or otherwise amend the guardianship order including, but not limited to, the appointment of the spouse as standby guardian. The court, in its discretion, may conduct such review pursuant to section seventeen hundred fifty-four of this article.

§ 1760. Corporate guardianship

No corporation may be appointed guardian of the person under the provisions of this article, except that a non-profit corporation organized and existing under the laws of the state of New York and having the corporate power to act as guardian of a person who is intellectually disabled or person who is developmentally disabled may be appointed as the guardian of the person only of such person who is intellectually disabled or person who is developmentally disabled.

§ 1761. Application of other provisions

To the extent that the context thereof shall admit, the provisions of article seventeen of this act shall apply to all proceedings under this article with the same force and effect as if an "infant", as therein referred to, were a "person who is intellectually disabled" or "person who is developmentally disabled" as herein defined, and a "guardian" as therein referred to were a "guardian of the person who is intellectually disabled" or a "guardian of a person who is developmentally disabled" as herein provided for.

ARTICLE 18

CLAIMS; PAYMENT OF DEBTS AND FUNERAL EXPENSES

Section

§ 1802. Effect of failure to present claim

If any claim is not presented within 7 months from the date of issue of letters, the fiduciary shall not be chargeable for any assets or moneys that he may have paid in good faith in satisfaction of any lawful claims or of any legacies or distributions to the legatees or distributees of the decedent before such claim was presented. Such 7 month period shall begin on the date letters were first issued to any fiduciary, including a temporary administrator or a preliminary executor, and shall not be interrupted by any subsequent issue of letters, except that the time during which there is no fiduciary in office shall not be counted as part of such period.

§ 1803. Form and verification of claims; service of notice

1. Every claim against the estate of a decedent other than claims for expenses of administration and claims of the United States or the state of New York must be in writing, contain a statement of the facts upon which it is based and the amount thereof. In addition the fiduciary may require the claimant to present proof by affidavit that the amount of the claim is justly due, that all payments thereon, if any, have been credited, that the claimant knows of no offsets and no evidence of indebtedness and holds no security, except as specifically described in the affidavit.

2. The notice of claim required by this section shall be presented by delivering a copy thereof to a fiduciary personally or by certified mail return receipt requested addressed to the fiduciary at the place of residence stated in the designation required by 708 or upon the clerk of the court pursuant to the designation required under 708 whenever the fiduciary cannot be found or served within the state after due diligence.

3. No claimant shall be entitled to enforce payment of a claim in any proceeding in the court unless the claim be presented in accordance with the provisions of this section or unless it shall be based upon a decree or order of the court or a valid judgment rendered by a court of

competent jurisdiction.

§ 1804. Contingent or unliquidated claims; retention of assets for estate taxes

1. Whenever at the death of any person there shall be a contingent or unliquidated claim against the decedent's estate or an outstanding bond, recognizance or undertaking upon which the decedent was principal, surety, or indemnitor and on which at the time of the decedent's death the liability is still contingent or unliquidated, a claimant or a surety shall have the right to file with the fiduciary an affidavit showing the facts upon which the contingent or unliquidated liability is based and the probable amount thereof, and there shall be no distribution without reservation of such estate assets as the court, by a special proceeding or upon the final accounting, shall determine to be adequate to pay the contingent or unliquidated claim when the amount thereof shall become due and payable. In fixing the amount to be reserved for payment of the claim the court may determine the value of any security or collateral to which the creditor may resort for payment of the debt and may thereafter direct the reservation if necessary of sufficient estate assets to make up the difference between the value of such security or collateral and the amount necessary to pay the contingent or unliquidated claim.

2. If before a final judicial accounting and decree the contingent or unliquidated claim or liability shall have become fixed and liquidated, then evidence thereof shall be filed with the fiduciary in accordance with the provisions of 1803. If the contingent or unliquidated claim has not become so fixed and liquidated the decree on a final accounting shall direct that the assets found sufficient to satisfy the claim or the proportion to which it is entitled be retained in the hands of the accounting party for such period or periods as the court may deem proper for the purpose of being applied to the payment of the claim when fixed and liquidated and that so much of the assets as are not needed for that purpose be afterwards distributed according to law.

3. Where the state estate tax is or may be due and the amount thereof has not been finally determined or such tax cannot for any reason be paid at the time of final judicial accounting and decree thereon, the decree on a final accounting shall direct that assets found sufficient to satisfy the tax or possible tax be retained in the hands of the accounting party for such period as the court may deem proper for the purpose of being applied to the payment of the tax. In that event the commissioner of taxation and finance shall be among those served upon the final accounting. Such portion of the assets as are not needed for that purpose shall be distributed according to law.

§ 1805. Determination of issues arising between representative and the estate; suspension of statute of limitations in certain cases

1. A fiduciary shall not pay out of the property of the decedent any debt alleged to be owing to him by the decedent until proved and allowed by the court in the proceeding for the judicial settlement of his account. Where a contest arises between the accounting party and any of the other parties respecting property alleged to belong to the estate which the accounting party claims individually or respecting a debt alleged to be due by the accounting party to the decedent or by the decedent to the accounting party, the contest must be tried and determined in the same manner as any other issue arising in the court.

2. Notwithstanding the provisions of the preceding subdivision a fiduciary at any time may present a petition for permission to pay a debt alleged to be owing to him by the decedent. The court may authorize such payment by ex parte order upon such protection to the estate as it deems proper or may require notice of the application to be given to such persons and in such manner as it directs.

3. From the death of the decedent until the first judicial settlement of the account of the fiduciary, the running of the statute of limitations against a debt owing to him from the decedent or any other cause of action in his favor against the decedent is suspended, unless the fiduciary was appointed on the revocation of former letters issued

to another person, in which case the running of the statute is so suspended from the issuance of letters to him until the first judicial settlement of his account. After the first judicial settlement of the account of a fiduciary the statute of limitations begins to run again against a debt due to him from the decedent or any other cause of action in his favor against the decedent.

§ 1806. Allowance or rejection of claims

1. Every fiduciary shall promptly give notice in writing to the claimant of the allowance of the claim or of its rejection or of the rejection of some part thereof which he specifies.

2. A notice rejecting a claim in whole or in part shall state the reasons therefor.

3. If the fiduciary shall fail to allow the claim within 90 days from the date that it has been presented to him, the claim shall be deemed to have been rejected.

4. If a claim has been allowed pursuant to the terms of this section, process may issue to the fiduciary requiring the fiduciary to show cause why the petitioner's claim should not be paid. The court may dismiss the petition or direct payment or satisfaction of the claim in whole or in part and may require a refunding bond.

§ 1807. Effect of allowance of claim by fiduciary

1. Whenever a fiduciary shall allow a claim other than the fiduciary's own the validity of the claim shall thereby be established, but if it shall appear that the claim was improperly allowed or was fraudulently or negligently paid, any party adversely affected thereby may file objections thereto in any proceeding for the judicial settlement of the account of the fiduciary. A copy of the objections shall be served upon all parties who have appeared and if the claimant has not appeared a copy shall be served upon the claimant personally or by mail. If the court sustains the objections the claim shall thereupon be dismissed if it has not been paid. If it has been paid, in whole or in part, and an amended petition or objections request a direction that the claimant repay to the fiduciary of the estate any amount of the estate assets determined on the settlement of the account to have been paid to a claimant as a result of fraud, negligence or collusion and if a supplemental citation to this effect was issued and served upon the claimant, then the court, is authorized in the accounting decree to direct repayment by the creditor of the excess to the fiduciary of the estate and may, in addition, impose a surcharge against the fiduciary or otherwise as justice shall require. If there is no amended petition or answer requesting a direction that the claimant repay the amount of estate assets determined to have been paid as a result of fraud, negligence or collusion then a surcharge shall be imposed against the fiduciary in the amount the estate has been damaged by such fraud, negligence or collusion.

2. In such accounting proceeding a party adversely affected may show that a judgment on a claim against a fiduciary was obtained by fraud, negligence or collusion. If the court determines that the judgment was so obtained, a surcharge shall be imposed against the fiduciary in the amount the estate has been damaged by such fraud, negligence or collusion.

§ 1808. Effect of rejection of claim by fiduciary

1. Except as otherwise provided in 1810, whenever a fiduciary rejects a claim in whole or in part all issues relating to the validity and enforceability of the claim shall be tried and determined upon the judicial settlement of his account.

2. The account of the fiduciary shall list all claims rejected by him in whole or in part and the reason for their rejection.

3. Service of the notice required by 1806 shall be completed prior to

the filing of any account reporting a rejected claim.

4. Any claimant adversely affected may within 8 days from the return of process serve and file objections to the account together with a copy of his notice of claim and any supporting affidavit filed with the fiduciary. If the fiduciary shall raise any affirmative defense to the claim that is not set forth in his account, he shall within 5 days from the service upon him of a copy of the objections serve and file a reply to the objections setting forth the affirmative defense. Any person whose interests in the estate may be adversely affected by the allowance of the claim may within 8 days from the filing of objections by a claimant serve and file a reply to the objections setting forth any defense to the claim not set forth in the account.

5. Where one whose claim has been rejected by the fiduciary has petitioned for a compulsory judicial settlement of his account the fiduciary may in his answer to the petition show the condition of the estate and all facts relating to the rejection of the claim and pray for a judicial determination of the validity and enforceability of the claim as a preliminary step in the accounting proceeding. The court may thereupon determine the claim and all issues relating thereto and make such direction for its payment as justice shall require.

6. With respect to any limitation of time within which an action or proceeding may be brought and with respect to examinations before trial, bills of particulars and disclosure generally, the presentation of a claim as provided in 1803 shall be deemed the institution of a special proceeding for the collection of the claim.

§ 1809. Proceeding to determine validity and enforceability of claims

1. Whenever a fiduciary has knowledge or notice that a claim may be asserted and no written notice of claim has been presented to him or if a fiduciary has reason to question the validity of any claim, whether such notice has been presented to him or not, and no action or proceeding to enforce the claim has been instituted, the fiduciary may present a petition to the court showing the facts and praying that the claimant or possible claimant be required to show cause why his claim, if any, should not be disallowed. Similarly, any claimant whose claim is made in compliance with 1803, and whose claim has not been allowed in whole pursuant to 1806 may petition the court showing the facts and praying that the fiduciary be required to show cause why the claim should not be allowed.

2. If the petition be entertained process shall issue to the claimant or possible claimant or fiduciary, as the case may be, and, whenever the claim sought is in excess of ten thousand dollars or constitutes twenty-five percent or more of the estimated gross probate estate, whichever is the lesser, to any person whose rights or interests will be affected by allowance of the claim and the person cited may within 8 days from the return day, serve and file an answer. The answer, if filed by the claimant, shall be accompanied by a copy of any notice of claim, supporting affidavit or other evidence of the claim, if any, filed with the fiduciary. If the fiduciary deems it necessary he may, within 5 days from the service upon him of a copy of the answer, serve and file a reply thereto. The claimant may also file a reply to an answer served by the fiduciary.

3. The court may determine the claim and all issues relating thereto as a preliminary step in the accounting proceeding and make such direction as justice shall require.

§ 1810. Claimant's right to action at law or in equity

Nothing in this article shall prevent a claimant from commencing an action on his claim at law or in equity, provided that where a claim has been presented and rejected or deemed rejected pursuant to 1806 in whole or in part the action must be commenced within 60 days after such rejection. Failure to bring such action within 60 days shall not, however, be deemed a waiver of claimant's right to a jury trial.

§ 1811. Payment of debts and funeral expenses

1. The reasonable funeral expenses of the decedent subject to the payment of expenses of administration shall be preferred to all debts and claims against his estate and shall be paid out of the first moneys received by his fiduciary.

2. Every fiduciary must proceed with diligence to pay the debts of the decedent according to the following order:

(a) Debts entitled to a preference under the laws of the United States and the state of New York.

(b) Taxes assessed on property of the deceased previous to his death. Any taxes so paid by a fiduciary on real property which descends to a distributee or passes to a devisee shall be a charge thereon for which the beneficiary must reimburse the estate unless in the case of wills the testator has indicated expressly or by necessary implication that such taxes be otherwise paid.

(c) Judgments docketed and decrees entered against the decedent according to the priority thereof respectively.

(d) All recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.

3. Preference shall not be given in the payment of a debt over other debts of the same class, except those specified in subparagraph (c) of subdivision 2. A debt due and payable shall not be entitled to a preference over debts not due. The commencement of a suit for the recovery of a debt or the obtaining of a judgment thereon against the fiduciary shall not entitle this debt to preference over others of the same class. Debts not due may be paid according to the class to which they belong, after deducting a rebate of legal interest on the sum paid for the unexpired term of credit without interest. A debt or claim of the fiduciary shall not have preference over others of the same class, except that if the claim of the fiduciary is secured by collateral the fiduciary may apply to the court for leave to surrender the collateral and make payment of the claim upon such conditions as directed by the court. Preference may be given to rents due or accruing on leases held by the decedent at the time of his death over other debts specified in

subdivision 2 (d) if it appears to the court's satisfaction that such preference will benefit the estate of the decedent.

4. Dividends payable to secured creditors in insolvent estates shall be computed only upon the difference between the face amount of the claim without security and the value of the security itself as of a date to be determined by the court for the fixation of the rights of creditors, unless the creditor shall surrender his security to the fiduciary, in which event the dividend upon such claim when established as valid shall be computed on the full face amount thereof.

§ 1812. Leave to issue execution against decedent's real property

For the purpose of procuring a decree granting leave to issue execution against a decedent's real property a judgment creditor shall present to the court a verified petition showing the facts and praying for such decree and that the person whose interest in the property will be affected by a sale by virtue of the execution and the fiduciary of the judgment debtor may be required to show cause why it should not be granted. Upon the presentation of the petition the court must issue process accordingly. The process must be served either personally or in such manner as directed by the court and upon the return thereof the court may make such decree as justice shall require.

§ 1813. Disputed or unsettled debt or claim may be compromised, compounded or sold; compromise of infant's claim or action in supreme court

1. Upon the application of a fiduciary or any person (other than a claimant) whose rights or interests will be affected by allowance of the claim, the court may for good cause shown either ex parte or upon notice to such persons and in such manner as it directs authorize the compromising or compounding of any debt, claim or demand, due or to become due, which is necessary to be settled, adjusted or liquidated in connection with the settlement of an estate and the sale at public auction on such notice as directed by the court of any uncollectible, stale or doubtful debt or claim belonging to the estate, but any party interested in the final settlement who has not received notice may show on the settlement that the debt or claim was fraudulently compromised or compounded.

2. In addition to the foregoing powers, the surrogate of any county in which there is no resident justice of the supreme court qualified to act and in which there is then no term of supreme court in session may act pursuant to the provisions of the CPLR with respect to an application for the approval of a settlement of an infant's claim or of a cause of action belonging to an infant, pending in the supreme court in that county, to the same extent and with the same power and jurisdiction as though he were a justice of the supreme court.

§ 1814. Application

The provisions of this article are not applicable to trusts or the administration thereof.

ARTICLE 19

DISPOSITION OF REAL PROPERTY

Section

§ 1901. Real property subject to disposition; "disposition" and "fiduciary" defined

1. The court may authorize or direct the disposition of a decedent's real property or any interest therein for any of the purposes set forth in the succeeding section. The court may entertain an application for disposition under this article even if the proposed disposition is or appears to be authorized by the will or by a statute.

2. Disposition of the real property of a decedent within the meaning of this article includes:

(a) Sale,
(b) Mortgage,
(c) Exchange,
(d) Lease,
(e) Confirmation of a prior lease made without court approval,
(f) Release of the right to an award for the taking of real property

by eminent domain, and
(g) Transfer to a spouse or other beneficiary in full or partial satisfaction of the interest or share of such person in the decedent's estate.
(h) Enter into possession of any real property, receive the rents thereof and apply them as directed by the court.
(i) In the event the estate of a decedent is the owner of an estate in common in real property, the executor or administrator may bring a partition action or intervene in a pending partition action on behalf of the estate, if, upon application duly made, the surrogate approves.

3. The term "fiduciary" as used in this article does not include a trustee, guardian, donee of a power to manage during minority property vested in an infant or a voluntary administrator.

§ 1902. For what purposes real property is subject to disposition

The real property may be disposed of for any or all of the following purposes:

1. For the payment of the expenses of administration.

2. For the payment of funeral expenses.

3. For the payment of the debts of the decedent, including judgment or other liens, excepting mortgage liens, existing thereon at the time of his death.

4. For the payment of any transfer, estate or other death tax.

5. For the payment of any debt or legacy charged thereupon.

6. For the payment and distribution of their respective shares to the persons entitled thereto.

7. For any other purpose the court deems necessary.

§ 1903. Limitations

1. Unless a proceeding under this article to satisfy a debt of the decedent is brought within 18 months from the date when letters were issued to the original fiduciary and unless such letters were granted within 2 years after the date of the death of the decedent the title of a purchaser or mortgagee from the distributee or devisee of the decedent which was acquired before the proceeding was instituted cannot be affected in any way by the proceeding.

2. A proceeding under this article to satisfy any debt cannot be maintained when the real property is exempt by law from levy and sale by virtue of an execution.

3. A proceeding under this article to satisfy a legacy expressly or impliedly charged on the real property must be instituted within 10 years from the date of the death of the decedent.

§ 1904. Petition and process

1. A proceeding under this article may be instituted by filing of a verified petition by a fiduciary or any person interested. The petition shall include facts showing the condition of the estate.

2. If the petition be entertained process shall issue to all persons interested and also to the creditors if the court so directs.

3. Upon judicial settlement of the accounts of a fiduciary any party to the proceeding may show facts which make a disposition of the real property left by the decedent desirable. When such relief is sought upon an accounting notice thereof shall be given in the process.

4. If any part of the reversion or remainder in the real property or in proceeds of sale thereof is limited in any contingency to the persons

who shall compose a certain class upon the termination of any trust or legal life estate, the process shall issue to and be served upon those persons who would be entitled to the reversion, remainder or proceeds if the event upon which the termination of the trust or legal life estate depended had happened immediately before the application was made.

5. No person shall be entitled to process under this section solely by reason of the fact that he has been or may be designated as appointee of said property or proceeds or of any interest therein, under a power of appointment or disposition.

6. The disposition may be authorized whether any persons who may eventually become entitled to the remainders in the real property or to the proceeds of the sale thereof are in being or not, and whether at the time of the disposition the reversion is in the life tenant or in some other person.

7. The state of New York may be made a party in the same manner as a private person where it appears that the property may have escheated or where the state has a lien of record on the interest of any beneficiary. The petition in that case shall show the nature of the interest of the state and the reason or reasons for making the state a party to the proceedings. Upon failure to state such facts, the proceeding shall be dismissed as to the state.

8. The provisions of section three hundred fifteen shall apply to a proceeding under this section.

§ 1905. When disposition may be refused or delayed

1. The court may deny the application upon such terms and conditions as justice shall require.

2. If the disposition affects real property and it appears that the net income thereof may be sufficient to make the disposition unnecessary within a reasonable time, the court may postpone the application from

time to time and authorize the fiduciary to enter into possession of the property, to receive the rents thereof and to apply the net rents as directed by the court.

§ 1906. Trial and determination of debts, claims and expenses; statute of limitations

1. If any claim, debt, demand, charge, or expense set forth in the petition presented prior to an application for judicial settlement, or set forth in the account or presented on the judicial settlement is objected to by any party to the proceeding whose interest will be affected by its allowance or disallowance the claim, debt, demand, charge or expense shall be determined, notwithstanding its admission or allowance by the fiduciary.

2. Where a defense arises under the statute of limitations as to any item so admitted or allowed it shall be deemed to be rejected by the fiduciary at the time of the objection and the time between its presentation or the commencement of an action where it was not presented and the time of such objection shall not be a part of the time limited in this act for commencing an action thereon.

§ 1907. Order determining disposition of real property

1. Upon the return of process the court shall inquire into the facts, the value of the property and the best manner and time of disposition.

2. The court may direct the disposition of all or part of the real property, describing it.

3. The order may determine whether the property shall be sold at public or private sale and may fix the manner, terms and conditions thereof.

4. Where a contract for the disposition of the property accompanies

the petition, the order may direct disposition in accordance with its terms or any modification thereof.

5. If the court finds that it is not necessary to dispose of the real property or of any part thereof it may nevertheless determine the rights and interests of the parties and direct a conveyance to them in confirmation of their title or transferring the property to them in full or partial satisfaction of their distributive share.

6. If the order is made in the course of an accounting proceeding, the court shall adjourn a judicial settlement to await the proceedings taken under the order.

§ 1908. Order in which parcels shall be sold

If the sale of real property is necessary for the purposes set forth in 1902, subdivisions 1, 2, 3 or 4 and the decedent dies seized of more than one distinct parcel, the following rules must be observed in determining the order of sale:

1. Property of which the decedent died intestate shall be sold before property which the decedent devised.

2. Property of which the decedent died intestate and which has not been conveyed by the distributees shall be sold before property which has been conveyed by them.

3. Property devised by the residuary clause in the will shall be sold before property which has been specifically devised.

4. When two or more parcels have been devised to the same person or group of persons, parcels which have not been conveyed by the devisees shall be sold before property which has been conveyed by them.

5. When one parcel has been devised to one person or group and another parcel has been devised to another person or group both parcels shall be

equally subject to sale notwithstanding that one parcel may have been conveyed.

§ 1909. Rights of the parties to be determined; unknowns

1. Where an order is made directing the sale of the real property for distribution or directing the transfer thereof to a spouse or beneficiary the court may fix and determine the rights and interests of the respective parties in the order, or may postpone the determination until the final judicial settlement of the accounts of the fiduciary.

2. If a party entitled to an estate or interest in the property is made a party as a person unknown the court must provide for the protection of his rights, as far as may be, as if he were known and had appeared.

§ 1910. Bond of fiduciary

1. In any case where the court directs disposition of the property it may direct the fiduciary to furnish such bond as it may require to insure the execution of the order and the accounting by the fiduciary of all moneys received.

2. The court may require a bond notwithstanding that the will authorized an executor to serve without bond.

3. The court may dispense with a bond or require a bond in a reduced amount on condition that the proceeds of the disposition be deposited with a specified bank or trust company, subject to the further order of the court.

§ 1911. Order to be executed and report made

1. The fiduciary shall thereupon execute the order, subject to the approval of the court, and make a report of his proceedings thereunder.

2. The court may confirm or reject the disposition, extend the order to other parcels or require a re-execution of the order upon such terms and on such conditions as it may direct and it may relieve a purchaser from his purchase or compel specific performance of the agreement by both the purchaser or the fiduciary in any case where such relief might be granted by the supreme court, on such terms as justice shall require.

3. If the contract for the disposition of the property was annexed to the petition and approved by the order, the fiduciary may execute a deed without further order and no confirmation of the sale is required.

4. No decree of distribution or payment of the proceeds of the disposition shall be made in a proceeding commenced within 3 months from the grant of letters until the time for the presentation of claims as fixed by a published notice has expired or 7 months have expired since letters were issued to the original fiduciary and until all known creditors and persons interested who are not parties to the proceeding have been brought in or have appeared.

§ 1912. Effect of death of fiduciary

1. In the event of the death, removal or disqualification of all of the fiduciaries before the granting of an order directing disposition of the real property their successor must be substituted and the proceeding shall continue by or against the successor.

2. In the event of such death, removal or disqualification after the granting of the order but before the complete execution thereof the successor must proceed without further order to complete all unfinished matters as were required of his predecessors.

3. The successor must give such security for the performance of his duties as the court may require.

4. If no successor is appointed the court may make an order authorizing the fiduciary of the last surviving fiduciary, on giving such security as the court may require, to continue the proceeding or to complete all unfinished matters as were required of the fiduciary.

§ 1913. Conclusiveness of mortgage, lease, conveyance or release executed pursuant to order

The mortgage, lease, conveyance or release made pursuant to an order granted as provided in this article shall bind the remainders and reversions as well as the immediate or future or trust interests in the real property and shall be valid and effectual against all persons under disability, absentees, internees and persons not in being having estates or interests vested or contingent for life or in trust or in reversion or remainder in said real property or in the proceeds of the sale thereof and against all other persons so interested or having such estates or interests who shall by acknowledged instrument consent to such order or who have been made parties to such proceedings or who are not entitled to notice thereof as provided in this article.

§ 1914. Execution of the order; decree of judicial settlement

1. When the order has been fully executed the fiduciary shall file, on or before the adjourned day of the judicial settlement, a supplemental account setting forth his proceedings under the order, the amount of the proceeds of the disposition and his expenses incurred thereunder.

2. The court shall thereupon continue and complete the judicial settlement and make such disposition of the funds in the hands of the fiduciary as justice shall require.

§ 1915. Allowance on bid to spouse, beneficiary or creditor purchasing

1. If upon a sale a spouse, beneficiary or creditor of the decedent becomes the purchaser of any of the decedent's real property the court may, upon his application, direct the amount of his elective share, legacy, distributive share or claim, as the case may be, to be allowed, in the first instance, upon the purchase price and such purchaser shall be required to pay only the balance at the time of the sale.

2. If the proceeds of the decedent's real property shall be insufficient to satisfy the cost and expenses of administration and the debts and funeral expenses of the decedent, the purchasing spouse, beneficiary or creditor shall be allowed and credited upon the judicial settlement of the accounts of the fiduciary only the amount he may be entitled to receive upon his elective share, legacy, distributive share or claim and shall then pay the difference between the amount originally allowed and amount he is entitled to receive.

3. If any purchaser has credit on his bid as above provided no deed shall be delivered to him until the judicial settlement of the accounts of the fiduciary and not until he shall have paid the entire amount required under the provisions of this section.

§ 1916. Provision for payment of undetermined claims and debts not yet due

If any claim remains undetermined at the making of the decree or any debt is not yet due and the person holding it does not consent to its present payment, the decree shall direct that sufficient funds be retained by the fiduciary to meet the claim or demand when determined or when payable and provide for the distribution of any surplus of the amount so retained.

§ 1917. Effect of conveyance of decedent's interest under contract

1. A conveyance of the decedent's interest in all the real property held by him under a contract for the purchase thereof operates as an assignment of the contract to the purchaser and vests in him, his distributees and assigns, all the right, title and interest of all the persons entitled at the time of the sale in and to the decedent's interest in the real property.

2. A conveyance of the decedent's interest in a part only of the real property held under such a contract transfers to the purchaser, his distributees and assigns all the decedent's right, title and interest in and to the part so sold.

3. Upon fully complying with the contract the purchaser, his distributees or assigns has the same right to enforce performance thereof with respect to the part conveyed to him and the fiduciary or his assignee has the same right to enforce performance with respect to the residue as the decedent would have had if he were living.

4. Any title acquired by the fiduciary, or his assignee, with respect to the part not sold must be held in trust for the use of the persons entitled to the decedent's interest, subject to the dower or curtesy, if any, of the spouse.

§ 1918. Right of life tenant to be considered in disposition; distribution of moneys realized.

1. Where any party to the proceeding has an existing or inchoate right of dower or curtesy or where any party to the proceeding has a tendancy by dower or curtesy or an estate for life or for years in the real property the court must determine whether the interests of all the parties will be better protected or a more advantageous disposition can be made of the real property by including the disposition of such right or interest and if the court shall so determine there may be included in the order a direction that such right or interest be included in the disposition.

2. The provisions of law in relation to the right of dower, curtesy and estates for life, or for years or future or other interests in actions for the partition of real estate, so far as the same may be

applicable, shall govern and control the distribution of moneys realized on such disposition which shall belong to the owner of such right of dower or curtesy, or tenant for life, or for years or future or other interests.

§ 1919. Restitution from assets subsequently discovered

Where a decree has been made for the application of the proceeds of real property as prescribed in this article and assets which should have been applied thereto are afterward discovered or for any other reason money or other personal property of the decedent, which should have been applied thereto, afterward comes to the hands of the fiduciary, legatee or distributee, the devisee or other person aggrieved may maintain a proceeding in the court to procure reimbursement therefrom.

§ 1920. Disposition of surplus in action to enforce mortgage or other lien

1. Where real property liable to be disposed of as prescribed in this act is sold in an action or special proceeding, or otherwise, to enforce a mortgage or other lien thereon which accrued during the decedent's lifetime the surplus money must be paid into the surrogate's court having jurisdiction to issue letters upon the estate of the decedent, in the following cases:

(a) Where 18 months have not elapsed since the date when letters were issued to the original fiduciary.

(b) Where a proceeding for the disposition of the real property of the decedent or for a judicial settlement of the accounts of the fiduciary has been commenced within 18 months from the date of the issuance of such letters and is still pending.

(c) Where no such letters have been issued and 2 years have not elapsed since the death of the decedent.

2. Money paid into the surrogate's court as herein provided, pursuant to any direction of another court may be paid out to the fiduciary of

the decedent, as directed by an order of the surrogate's court, to be accounted for by him upon the judicial settlement of his accounts or in a special proceeding brought for that purpose in the surrogate's court an order may be entered directing distribution to the persons entitled thereto if 18 months have elapsed since letters were issued to the original fiduciary upon the estate of the decedent or if no such letters have been issued 2 years have elapsed since the death of the decedent.

§ 1921. Conveyance of real property by fiduciary to vendee of contract of sale made by decedent

1. Where a decedent dies seized of real property after he has made a contract for the conveyance thereof remaining unexecuted at his death his fiduciary or successor may make a deed reciting the contract and conveying the real property.

2. The vendor's fiduciary, distributees, devisees or assigns may file a petition praying for the confirmation of the conveyance, or the vendee, his fiduciary, distributees, devisees or assigns, for a decree that it be made or delivered, or the vendor's fiduciary may pray for like relief in a petition for the judicial settlement of his account, but no proceeding pursuant to this section shall be required in any case for the sole purpose of perfecting title to real property and any such conveyance heretofore made by a fiduciary of a decedent is ratified and confirmed.

3. In a proceeding pursuant to this section the court shall have jurisdiction to adjudicate the amount remaining payable under the terms of any such contract and the respective rights of the parties.

4. In any case process shall issue to all persons interested and the court shall make such decree or order as justice shall require.

§ 1922. Conclusive presumption after 10 years.

An action or proceeding to set aside any disposition of the real property of a decedent pursuant to an order granted under this article or under article 13 of the surrogate's court act by reason of lack of jurisdiction over any person interested in the estate or by reason of any other defect in the procedure must be brought within 10 years after the date of the order or within 1 year after the effective date of this article, whichever date is later. After the lapse of such period the presumption that the order was regular in all respects and that the court had jurisdiction of all persons interested in the estate becomes conclusive.

§ 1923. Fiduciary of a decedent to notify local assessor of disposition

Whenever the fiduciary of a decedent or his successor shall direct, or take part in or discover that his decedent's real property or any interest therein has been transferred at or following such decedent's death, he shall forthwith investigate and discover the nature of such transfer and file a written notice of such disposition or transfer with the local assessing officer and the local tax office of the locality wherein such property is located. Such notice shall contain the name and last known legal address of the decedent, the location and legal description of the property, if known, and the name and address of the transferee.

ARTICLE 20

PROCEEDING TO OPEN SAFE DEPOSIT BOX

Section

§ 2001. Definition

When used in this article the term fiduciary includes, where no fiduciary has been appointed, any person in actual or constructive possession of any property required to be included in the gross estate or the New York gross estate of the decedent as determined under article 10-c or article 26 of the tax law.

§ 2003. Opening safe deposit box

1. When it appears to the court by petition that a person, firm or corporation has in its possession or under its control papers of a decedent of whose estate the court has jurisdiction or that the decedent has leased from them a safe deposit box and that such papers or safe deposit box may contain a will of the decedent, a deed to a burial plot in which the decedent is to be interred or a policy of insurance issued in the name of the decedent and payable to a designated beneficiary, it may make an order ex parte directing such person, firm or corporation to permit a person named in the order to examine the papers or safe deposit box and to make an inventory of the papers or of the contents of the safe deposit box in the presence of an authorized employee or agent of such person, firm or corporation, and if a paper purporting to be a will of the decedent, a deed to the burial plot or a policy of insurance be found to deliver the will to the clerk of the court, personally or by registered mail as directed by the court or the deed to the person designated in the order or the policy of insurance to the beneficiary named therein. The clerk shall furnish a receipt upon delivery to him of the will.

2. Notwithstanding any provisions of subdivision one of this section, a safe deposit company, trust company, bank, corporation, firm or other person, having in its possession, or under its control one or more safe deposit boxes shall permit an individual or individuals each of whom being a joint lessee with the decedent of said safe deposit box or boxes, or a deputy authorized by the decedent to have access to said safe deposit box or boxes, to examine and make copies of, in the presence and under the supervision of an officer of the company, bank, corporation or firm, any paper or papers found in said safe deposit box or boxes bearing upon the desire of the deceased as to the disposal of his remains, or deed to a cemetery plot, or proof of membership in a

burial society. For purposes of this subdivision, the term "deputy" shall mean the person who had access to the decedent's safe deposit box or boxes and to the contents thereof on the last day of decedent's life. After copies have been made of the paper or papers described in this subdivision, the original paper or papers shall be resealed in the safe deposit box or boxes and such officer shall certify that such papers have been resealed and file such certification with the surrogate's court.

ARTICLE 21

MISCELLANEOUS PROCEEDINGS

Section

§ 2101. General provisions

Unless otherwise indicated

1. All proceedings under this article and all proceedings within the jurisdiction of the court under 202

(a) May be commenced by a fiduciary, creditor or person interested.

(b) May be entertained by the court or may be reserved for determination in an accounting or other proceeding or the court may decline to entertain the proceeding. All proceedings shall be deemed entertained unless rejected by the court in writing within 15 days of submission.

(c) Shall be commenced by petition, or any other pleading directed by the court, stating the jurisdictional facts and the facts applicable to the particular relief sought.

2. The jurisdiction of the court over the proceeding shall be deemed to continue until a decree or order therein is fully satisfied.

3. If the petition or other pleading is entertained service of process shall be made upon all persons interested in the proceeding and upon such other persons as directed by the court except that in any proceeding against a fiduciary under 2102 service shall be made only upon the fiduciary unless the court otherwise directs.

4. In any such proceeding the court may grant appropriate relief, grant or deny the relief in whole or in part upon such terms as it deems proper and make such decree or order as justice shall require and may require a refunding bond.

§ 2102. Proceedings for relief against a fiduciary

A proceeding may be commenced to require a fiduciary:

1. To supply information concerning the assets or affairs of an estate relevant to the interest of the petitioner when the fiduciary has failed after request made upon him in writing therefor.

2. To set apart and turn over exempt property to which a spouse or child is entitled or if it has been lost, injured or disposed of to pay the value thereof or the amount of injury thereto.

3. After reservation for the payment of the expenses of administration to pay the reasonable funeral expenses of a decedent if there are funds available for such payment.

4. To pay a claim which has been allowed, to deliver a specific bequest or property to a person entitled thereto or to pay a legacy, distributive share, interest in a trust or a claim for an administration expense, and when a trustee is unable to deliver personal property to the person entitled, to pay the value thereof.

5. To pay in advance to any beneficiary of an estate all or part of any beneficial interest to which he is entitled when the property of the estate applicable to the payment of debts, legacies and expenses exceeds by at least one-third the amount of all known claims, legacies having priority and beneficial interests of the same class and the beneficiary needs such payment for his support or education or of his family.

6. To comply with such directions as the court may make whenever two or more fiduciaries disagree with respect to any issue affecting the estate.

§ 2103. Proceeding by fiduciary to discover property withheld or obtain information

1. A fiduciary may present to the court which has jurisdiction over the estate a petition showing on knowledge or information and belief that any property as defined in 103 or the proceeds or value thereof which should be paid or delivered to him is

(a) in the possession or control of a person who withholds it from him, whether possession or control was obtained prior to creation of the estate or subsequent thereto or

(b) within the knowledge or information of a person who refuses to impart knowledge or information he may have concerning it or to disclose any other fact which will aid the petitioner in making discovery of the property or

(c) he has reason to believe, in the possession or control of a person described in subparagraph (a) of this subdivision or within the knowledge or information of a person described in subparagraph (b) of this subdivision and praying that an inquiry be had respecting it and that the respondent be ordered to attend and be examined accordingly and to deliver the property if in his control.

The petition may be accompanied by an affidavit or other written evidence to support it.

2. "Property" as used in this section shall include any and all personal or real property in which decedent had any interest, including choses in action, money deposited and all property rights of the depositor consequent on the deposit of money by a decedent, grantor or fiduciary or for his account with any authorized banking organization in respect of which the depositary claims no beneficial interest other than its proper costs, fees or expenses.

3. If the court be satisfied there are reasonable grounds for the examination it must make an order accordingly. If the petition does not pray for an inquiry or examination, the court may issue a citation to the person alleged to be in possession or control of the property to show cause why he should not deliver such property or its proceeds or value.

4. If it appear at any time that a person other than the respondent claims any interest in the property or the proceeds or value thereof the court may issue a citation to such person to show cause why he should not deliver the property if in his control or the proceeds or value thereof and why the court should not determine ownership and right to possession of such property.

5. Service of any order for attendance and examination of any person must be made by delivery of a certified copy thereof to the person or persons therein named and the payment or tender to each of the sum required to be paid to a witness as a subpoena fee.

§ 2104. Inquiry; trial and decree

1. Upon the return of the order, whether or not the respondent answers, the petitioner may examine him with respect to the allegations of the petition. If it appears thereon that an issue of title to any property as defined in 103 or the proceeds or value thereof is raised, if he has not theretofore done so, the respondent shall be directed to serve and file an answer accordingly, but the examination, if directed by the court, shall continue. When an issue of title is raised that issue shall be tried as a litigated issue.

2. Any claim of title to or the right to the possession of any property of the decedent or the estate must be made by verified answer.

3. If the possession of the property be denied, proof of that issue may be presented by any party. The court may in an appropriate case make an interim decree directing the delivery of property not claimed by verified answer and continue the proceeding for determination of any litigated issue.

4. If it appears that the petitioner is entitled to the possession of any property the decree shall direct delivery thereof to him or if the property shall have been disposed of or diverted the decree may direct the payment of the proceeds or the value of the property or may impress a trust upon the proceeds or make any determination which the supreme court might decree in following trust property or funds.

5. If it be determined that the petitioner is not entitled to the property or the proceeds or value thereof the court may determine the respective interests of the other claimants thereto.

6. If during the proceeding, other than a trial of issues raised by answer, a respondent is examined concerning any personal communication or transaction between himself and the decedent such examination shall not be deemed to be a waiver of the provisions of CPLR 4519.

§ 2105. Proceeding to compel delivery of property by a fiduciary which is claimed by another or others

1. A person having a claim to property as defined in 103 or the proceeds thereof alleged to be in the possession of or under the control of a fiduciary may present to the court which has jurisdiction over the estate a petition showing the facts and praying that the fiduciary be required to show cause why he should not be required to deliver the property or the proceeds thereof.

2. Process shall issue accordingly to the fiduciary.

3. Upon return of process the court must hear the proofs of the parties, determine the issues, and if claim shall have been made to the property or the proceeds thereof by a person or persons other than the fiduciary, the court shall determine the respective interests of the parties in the property or the proceeds or value thereof and make a decree accordingly.

§ 2106. Proceeding for compromise of controversies between claimants to property or estates where interests of persons under disability or not in being are affected

1. Where the interests of persons under disability or not in being are or may be affected

(a) A fiduciary may petition for authorization to compromise any controversy between different claimants to the estate or property or portions thereof under administration in accordance with an agreement to which all parties in being claiming an interest in the estate affected by the agreement shall be parties in person or by guardian or committee.

(b) The proponent or any party to a probate proceeding may petition to adjust by compromise any controversy existing or which may arise between the persons claiming under any will alleged to have been made by the decedent and any persons claiming as distributees of decedent or claiming to be entitled to a right of election or claiming pursuant to an agreement with the decedent or otherwise, in accordance with an agreement to which all such persons as are interested shall be parties, provided that persons named as executors to whom letters have not issued and persons whose interests are not affected by the proposed compromise are not required to be made parties.

2. A person under disability or a person not in being who has a future contingent interest is a necessary party and shall be represented by a guardian ad litem unless in the case of a person under disability his guardian, committee or conservator shall appear in his behalf. The guardian, committee or conservator so appearing or the guardian ad litem may execute in behalf of the person for whom he appears all proper instruments necessary to effect any compromise approved by the court.

3. If by the terms of the compromise money or property is directed to be held for the benefit of a person under disability or a person not in being it may in a proper case be deposited in court subject to the order of the court.

4. An agreement of compromise made as herein provided if found by the court to be just and reasonable shall be valid and binding upon the interests of persons under disability, persons not in being and all parties to the agreement.

5. An application for the approval of a compromise hereunder must be made by verified petition or, if made in a pending proceeding, by verified supplemental petition, which shall show the provisions of any instruments or documents under which claim is made to the property or estate in controversy, all facts concerning the identity and claims of the parties to the controversy, the possible contingent interests of persons not in being and the necessity for the approval of the compromise.

6. The court may entertain the application prior to the execution of the proposed compromise agreement by all the parties required to execute it and may permit its execution after the commencement of the proceeding by any person interested.

7. The court shall inquire into the facts and make such order or decree as justice shall require in any proceeding.

§ 2107. Court may direct as to value, manner and time of sale of property and give advice and direction in extraordinary circumstances

1. Whenever the value of property of an estate is uncertain or dependent upon the time and manner of sale thereof a fiduciary may apply by petition to the court for advice and direction as to the propriety, price, manner and time of sale thereof.

2. The court may entertain applications by a fiduciary to advise and direct in other extraordinary circumstances such as complex valuation issues, or tax elections, or where there is conflict among interested parties, but need not entertain jurisdiction if to do so would be merely to substitute the court's judgment for that of the fiduciary.

3. A substantial compliance with the authorization so given shall relieve the fiduciary from any objection that the estate suffered a loss on account of the action taken under court advice and direction.

§ 2108. Proceeding by fiduciary for continuation of a business

A fiduciary may petition for the continuation of a business other than a profession, of which decedent or the person whose estate is being administered was sole owner and it is desired to continue it for the best interests of the estate; provided, however, that a fiduciary may petition for the continuation of a deceased dentist's practice for a period not to exceed eight months, if such practice is continued by a person licensed to practice dentistry in this state. In such proceeding:

1. If the petition be entertained the court may make an intermediate order without notice authorizing continuance of the business pending the return of process and final decree.

2. Any respondent may serve and file an answer within 8 days after the return of process or such further time as the court directs. After inquiring into the facts and hearing the parties, if the court is satisfied the best interests of the estate require the continuation of the business, it may make a decree accordingly.

3. The decree may provide such restrictions, conditions or requirements and such incidental relief, including a direction or permission for incorporation of the business, as the court may order.

4. Whenever a fiduciary shall be authorized under this section to continue a business in other than corporate form the decree shall provide for the extent of the liability of the assets of the business and the assets of the estate apart from the assets of the business for debts and other liabilities arising out of its continuance. The court may make such directions in this regard as it deems advisable in the circumstances. The decree shall further provide for the period of time for continuance.

5. If under a decree granted under this section a fiduciary shall continue and carry on a business other than in corporate form he shall file a certificate of doing business under an assumed name pursuant to the provisions of section one hundred thirty of the general business law. The certificate shall include in addition to the other matters required by that section a statement showing the fiduciary capacity in which he is conducting and carrying on the business and the extent to which the debts and other liabilities incurred in the continuance are to be chargeable to the assets of the estate as provided in the decree. The fiduciary shall be relieved of personal liability if acting within the authority granted and having filed the certificate above provided,

but shall be liable only in a fiduciary capacity. Any person having a claim, demand or cause of action arising out of or in connection with the conduct of the business after the filing of the certificate above provided shall thereafter be limited in the payment or satisfaction of such claim, demand or cause of action to such assets as are made available for the payment or satisfaction of debts and liabilities in the decree, provided, however, that nothing herein contained shall relieve the fiduciary from personal liability for the consequences of his own wrongful act or negligence in the continuance of the business and provided further that nothing herein contained shall render ineffectual any provision in a will or other instrument directing or permitting the continuance of a business.

6. Unless otherwise provided in the decree all funds collected and received in continuing and carrying on the business of a decedent shall at all times be kept separate and apart from the funds in the hands of the fiduciary forming part of the general assets of the estate as a whole.

7. Notwithstanding the foregoing provisions, any creditor or person interested may at any time apply to the court for an order requiring the fiduciary to discontinue and wind up the business and the court may thereupon make such order as to it appears for the best interests of the estate, the creditors and all persons interested.

§ 2109. Money paid into court and securities taken; how disposed of

The provisions of CPLR 2601 to 2608 inclusive shall be applicable to property paid into court pursuant to an order or decree of this court.

§ 2110. Compensation of attorneys

1. At any time during the administration of an estate and irrespective of the pendency of a particular proceeding, the court is authorized to fix and determine the compensation of an attorney for services rendered to a fiduciary or to a devisee, legatee, distributee or any person interested or of an attorney who has rendered legal services in connection with the performance of his duties as a fiduciary or in proceedings to compel the delivery of papers or funds in the hands of an attorney.

2. The proceeding shall be instituted by petition of a fiduciary of the estate or a person interested or an attorney who has rendered services. The court may direct payment therefor from the estate generally or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested.

3. In any event that any such attorney has already received or been paid an amount in excess of the fair value of his services as thus determined the court is authorized to direct him to refund the excess.

4. In any proceeding under this act or the estates, powers and trusts law in which the court determines the compensation of an attorney, the court shall consider the time and value of services performed by a person who is not an attorney, provided such services are performed under the supervision of an attorney and would, if performed by an attorney, be considered by the court in determining the attorney's compensation.

§ 2111. Ex parte application for advance payment of fees of an attorney-fiduciary or guardian ad litem

1. At any time during the administration of an estate and irrespective of the pendency of a particular proceeding an attorney of this state who is a fiduciary, or guardian ad litem may present to the court from which his or her letters or appointment issued a petition praying that he or she be permitted to receive a sum on account of his or her compensation for legal services theretofore rendered to the estate or to the person under disability. No notice of the application shall be required, except that in the case of a guardian ad litem notice shall be given to any attorney or person who has appeared in the proceeding for which the guardian ad litem seeks an allowance. If the application be entertained, the court may award a sum on account of compensation or make such other order, if any, as justice shall require. The total expenses of the application shall be borne by the petitioner personally.

2. An attorney who is a fiduciary may take advances on account of compensation for legal services rendered to the estate, without application to the court if he shall have at least one co-fiduciary who is not rendering legal services to the estate and all co-fiduciaries have consented to such payment on account or if the instrument under which the attorney is acting permits him to take such payments on account in advance of the settlement of the account.

3. In all cases where any such payment on account of legal services has been taken by an attorney his or her account must disclose the fact and the amount of such payment.

4. The compensation of an attorney for legal services awarded or taken under this section may include compensation for the time and value of services performed by a person who is not an attorney, provided such services are performed under the supervision of an attorney and would, if performed by an attorney, be compensable under this section.

§ 2112. Compensation of persons acting under powers of attorney or other instruments

1. At any time during the administration of an estate and irrespective of the pendency of a particular proceeding the court is authorized either on its own initiative or on application by the fiduciary or a person interested to fix and determine the compensation, charges and expenses of a person acting under a power of attorney or other instrument described in EPTL 13-2.3 for services rendered to his principal, and to review and determine the validity and reasonableness of any such compensation, charge or expense, whether or not it has been fixed previously by agreement.

2. In the event any such person has already received or been paid a sum in excess of the fair and reasonable value of his services, charges and expenses as determined by the court the latter is authorized to direct him to refund the excess. A proceeding therefor may be commenced by the court on its own initiative or by the petition of a person interested.

3. Nothing contained herein shall be deemed to authorize the practice of law by an attorney in fact or other person acting under an instrument described in EPTL 13-2.3 who is not an attorney of this state.

§ 2113. Proof or probate of heirship

1. Where a person seized in fee of real property within the state dies intestate or without devising his real property, his distributees or any of them or any person deriving title from or through such distributees or any of them may present either to the court which has jurisdiction of the estate or to the court of a county where the real property or any part thereof is situated, a petition describing the property and showing the interest or share of the petitioner and of each distributee of the decedent in the property and praying for a decree establishing the right of inheritance thereto and that all the distributees of the decedent be required to show cause why the prayer of the petition should not be granted. Process must issue accordingly.

2. Upon the return of process the court must hear the allegations and proofs of the parties and determine the issues raised. The petitioner must establish

(a) The fact of the decedent's death.
(b) His domicile at the time thereof.
(c) His intestacy, either generally or as to the real property.
(d) His distributees entitled to inherit the property.
(e) The name, age, domicile and relationship to the decedent, of each, and
(f) The interest or share of each in the property.

3. The decree determining the issues shall be recorded by the petitioner in the office of the county clerk or the register, as the case may be, of each county in which the real property is situate, as prescribed by law for recording a deed.

§ 2114. Review of compensation of corporate trustee

1. At any time during the administration of a testamentary or lifetime trust and irrespective of the pendency of a particular proceeding, the court may review the reasonableness of the compensation determined by the corporate trustee for the trustee's own services. Any corporate trustee who has received excessive compensation from a trust may be ordered to make appropriate refunds.

2. A proceeding may be instituted by petition of a corporate trustee of the trust or any person interested in the trust. No accounting shall be required in such proceeding.

3. No trustee shall be liable or accountable for any commissions paid to another trustee hereunder which a court orders to be refunded to the trust or any person interested in the trust.

§ 2115. Review of costs of delegation by trustee

1. At any time during the administration of a trust and irrespective of the pendency of a particular proceeding, the court with jurisdiction of the trust may review the reasonableness of the costs of a delegation by the trustee under section 11-2.3 of the estates, powers and trusts law and under section 554 of the not-for-profit corporation law.

2. A proceeding may be instituted by petition of the trustee or any person interested in the trust. No accounting shall be required in such proceeding.

3. The court shall grant such relief as it deems appropriate under the

circumstances.

4. The terms "trust" and "trustee" as used in this section are defined in section 11-2.3 of the estates, powers and trusts law.

ARTICLE 22

ACCOUNTING

§ 2201. Accountability of legal life tenant or fiduciary, committee or conservator of legal life tenant

Every right granted by this article to or against a testamentary trustee and the fiduciary, committee of a testamentary trustee or conservator shall apply to a similar proceeding by or against a legal life tenant and by or against the fiduciary, committee or conservator of a legal life tenant.

§ 2202. Recording or filing instruments settling accounts in part or in whole

There may be recorded or filed in the court any instrument settling an account in whole or in part executed by one or more fiduciaries and one or more legatees, devisees, distributees, beneficiaries, creditors or infants who have attained majority or in the case of an infant, incompetent or conservatee whose legacy, distributive share, beneficial interest or claim has been paid, by the guardian, committee or conservator of his property or the person receiving payment. Every such instrument to be recorded shall be acknowledged and if recorded, the record thereof, or a certified copy of the record or instrument shall be presumptive evidence of the contents of such instrument and its due execution.

§ 2203. Decree on filing instruments approving accounts

1. A fiduciary may present to the court a petition showing the names and post-office addresses of all persons interested, that all taxes have been paid or that no taxes were due and that the petitioner has fully accounted and made full disclosure in writing of his administration of the estate to all persons who would be required to be served with process in a proceeding under section twenty-two hundred ten of this article and praying for a decree releasing and discharging the petitioner.

2. The petition shall also show

(a) in the case of a fiduciary other than a testamentary trustee, guardian or lifetime trustee either that his letters have been revoked or that he has been removed or that the time for creditors to present claims has expired and that all known debts of the decedent and administration expenses have been paid,

(b) in the case of a trustee whether or not the trust has been fully executed,

(c) in the case of a guardian either that the infant has reached his majority or has died.

3. The petitioner shall also file with the petition acknowledged instruments executed by all the persons who would be required to be served with process in a proceeding under section twenty-two hundred ten of this article or in the case of an infant, incompetent or conservatee whose legacy, distributive share or claim has been paid, by the guardian, committee or conservator of his property or person receiving payment, approving the account of the petitioner and releasing and discharging the petitioner.

4. The court may thereupon make a decree releasing and discharging the petitioner and the sureties on his bond, if any, from any further liability to all persons interested.

§ 2204. Judicial settlement where recovery has been had in negligence action

1. Where a judgment or compromise of a cause of action has been obtained and the proceeds are ready to be paid over and where the recovery is not an asset of the decedent's estate but goes by special provision of law to designated persons or classes of persons, the fiduciary may at any time file a petition for the judicial settlement of his account relating to the proceeds and upon the return of process or upon the waiver of all persons interested, if adult and competent, the court may take and settle his account and direct payment to the parties entitled according to their respective rights and interests and upon filing receipts for the payments the party paying the money and the fiduciary shall be discharged from all further liability as to such cause of action and the proceeds.

2. Where such recovery has been had and the amount thereof paid to the fiduciary, he may in like manner have a judicial settlement of his account relating to such proceeds at any time and a decree made discharging him from all further liability concerning it.

§ 2205. Compulsory account and related relief on a court's own initiative or on petition; who may petition

1. In the manner provided in this section and in section 2206, the court may at any time, upon it appearing that it is for the best interests of the estate, make an order (a) requiring a fiduciary to file an intermediate or final account within such time and in such manner as directed by it, (b) suspending a fiduciary who being duly cited to account neglects to appear on the return of process without showing a satisfactory excuse therefore, or who fails to file an account within such time and in such manner as directed by the court, (c) appointing an eligible person to succeed a fiduciary whose letters have been suspended, (d) fixing a trial date for a hearing on the removal of a fiduciary whose letters have been suspended, (e) fixing a trial date to take and state an account on behalf of a fiduciary who fails to file such account or procure its settlement, and (f) granting such other and further relief as the court may direct.

2. The court may make an order as provided in subdivision one of this section either on its own initiative or on the petition of:

(a) a creditor, or

(b) a person interested, or

(c) a public administrator or county treasurer, or

(d) any person in behalf of an infant or child born after the making of the will when interested in the estate, or

(e) the fiduciary of a deceased person interested, or

(f) a surety on the bond of the fiduciary required to account, or

(g) a successor fiduciary or remaining fiduciary where letters of the predecessor or co-fiduciary have been revoked or the predecessor or co-fiduciary has been removed, or

(h) a co-fiduciary after he or she has filed his or her account and a petition for its judicial settlement, or

(i) the attorney-general of the state where any part of the estate may escheat to the state of New York.

§ 2206. Compulsory account and related relief; proceedings thereupon

1. A petition to compel an account made pursuant to 2205 may request multiple relief (a) pursuant to 711 and 719 to suspend and/or remove a fiduciary who fails to appear on the return date of process or fails to file an account within such time and in such manner as directed by the court; (b) to appoint, immediately, an eligible person to succeed a fiduciary whose letters have been suspended or revoked; and (c) to take and state an account on behalf of a fiduciary who fails to account and procure its settlement.

2. On the presentation of a petition made pursuant to 2205 or when so directed by the court, process, including a summary statement of any proposed stated account, shall issue to the fiduciary accordingly and on the return thereof if the fiduciary fails to appear or to file an

account or to show good cause to the contrary or to present a petition as prescribed in 2208 the court may by order direct the fiduciary to account within the time and in the manner directed by the court, to cause process to issue requiring all persons necessary to be served under 2210 to show cause why the account should not be judicially settled, cause such process to be served upon such persons and that the fiduciary attend before the court from time to time for the purpose of the settlement of the account. In addition, the order may (a) immediately suspend the letters of a fiduciary who fails to appear on the return date of process or who fails to file an account within such time and in such manner as directed by the court, (b) immediately appoint an eligible person to succeed a fiduciary whose letters are suspended, (c) schedule a hearing for the modification or revocation of the letters of a fiduciary whose letters are suspended, and (d) schedule a hearing to take and state an account on behalf of a fiduciary who fails to file an account and procure its settlement. Such order shall also direct the issuance of supplemental process to such persons entitled to notice on an application to suspend, modify or revoke a fiduciary's letters, to appoint a successor fiduciary or to settle a fiduciary's account.

3. The pendency of a proceeding against a fiduciary to compel an accounting does not preclude the fiduciary from presenting a petition as prescribed in 2208. If such petition is presented on or before the return of process as prescribed herein, process issued thereon need not be directed to the petitioner who compelled the accounting, and the two proceedings must be consolidated.

4. After hearing the proofs of the parties the court may take and state the account and make such order or decree as justice shall require, notwithstanding the failure or refusal of the fiduciary to file such account and procure its settlement.

§ 2207. Accounting by fiduciary of deceased fiduciary, committee of incompetent fiduciary, or conservator of conservatee fiduciary

1. Where a fiduciary dies the court has the same jurisdiction upon the petition of any person required to be served upon a voluntary judicial settlement of the account of the deceased fiduciary to compel the fiduciary of the deceased fiduciary to account which it would have against the deceased fiduciary.

2. A fiduciary of a deceased fiduciary may voluntarily account for the acts and doings of the deceased fiduciary and for the property of the estate which had come into the possession of the latter, whether or not such property has come into the hands of the fiduciary of the deceased fiduciary, provided however, that the fiduciary of the deceased fiduciary shall not be accountable for such property except to the extent that he shall have assets of the estate of the deceased fiduciary.

3. On the death of a fiduciary while an accounting by or against him as such is pending before the court, the court may continue the proceeding where his fiduciary or successor has voluntarily made himself a party thereto or has been brought in by process, and proceed with the accounting and determine all questions and grant any relief which the court would have power to determine or grant in case such fiduciary had not died or in case the fiduciary of the deceased fiduciary had voluntarily petitioned for an accounting as provided in this section.

4. On a petition filed by a fiduciary of a deceased fiduciary there shall be brought in the persons who would be necessary parties to a proceeding commenced by the deceased fiduciary for a judicial settlement of his accounts and also if a successor of the deceased fiduciary has been appointed, such successor or his fiduciary.

5. If upon the accounting the court finds that there can be a distribution in whole or in part to the parties entitled thereto it may make a decree accordingly and may also therein direct payment and delivery of the balance of the estate by the fiduciary of the deceased fiduciary upon such terms and security as it deems proper. For the purpose of payment and distribution the fiduciary of the deceased fiduciary shall have all the powers and duties of the deceased

fiduciary.

6. Upon the settlement of the account the court may allow to the fiduciary of the deceased fiduciary reasonable compensation for any service rendered by him to the estate accounted for. The compensation so allowed plus any commissions retained by the deceased fiduciary or payable to his estate shall in no event exceed a full commission under 2307, 2308 or 2309, whichever section is applicable to the type of the deceased fiduciary.

7. The court may grant to the fiduciary of a deceased fiduciary all of the rights and powers of the deceased fiduciary, subject to all of the duties and liabilities of such deceased fiduciary.

8. Every right granted by this section to or against the fiduciary of a deceased fiduciary shall apply to a similar proceeding by or against the committee of an incompetent fiduciary or the conservator of a conservatee fiduciary.

§ 2208. Voluntary account; who may petition

In any of the following cases a fiduciary may present to the court his account and a petition praying that his account be judicially settled and that all necessary and proper parties be required to show cause why such settlement should not be had:

1. By a fiduciary other than a guardian or trustee,
(a) Where the time for presentation of claims as fixed by a published notice has expired or 7 months have expired since letters were issued to the original fiduciary.
(b) Where his letters have been revoked.
(c) Where the court at any time within 6 months after the issuance of letters to the original fiduciary entertains an application by the fiduciary for the judicial settlement of his account and it appears from the petition or account that a disposition of the decedent's real property will be necessary for any of the purposes specified in 1902.

(d) Where his account has not been judicially settled within 1 year preceding the application therefor and the application is entertained.

2. By a guardian,
(a) Where a petition for a compulsory judicial settlement of his account may be presented by any other person.
(b) Where he has expended all of the estate of the infant and the court deems it proper that he should be discharged.

3. By a trustee,
(a) Where one or more distinct and separate trusts created by the will or lifetime trust instrument have been or are ready to be executed.
(b) Where his account has not been judicially settled within 1 year preceding the application therefor and the court entertains the application.

§ 2209. Affidavit to account

To each account filed in the court, as prescribed in this article, must be appended the affidavit of the accounting party to the effect that the account contains according to the best of his knowledge and belief a true statement of all his receipts and disbursements on account of the estate and of all money or other property belonging to the estate which have come into his hands or been received by any other person by his order or authority for his use and that he does not know of any error or omission in the account to the prejudice of any creditor of, or person interested in, the estate.

§ 2210. Voluntary account; process

Upon a voluntary judicial settlement of the account of a fiduciary process must issue to:

1. All unpaid creditors or persons claiming to be creditors of the decedent.

2. The surety on his bond, if any.

3. All cofiduciaries who do not join in the petition.

4. The successor, if one has been appointed, in a case where the petitioner has been removed or his letters have been revoked, and if no successor has been appointed, all persons interested who are required to receive process under this section.

5. The attorney general where he is required to be given notice of an accounting proceeding pursuant to clause (D) of subparagraph one of paragraph (e) of section 8-1.4 of the estates, powers and trusts law, or where the decedent, infant or beneficiary died intestate as to any part of the estate leaving one or more unknown distributees or one or more distributees whose whereabouts are unknown.

6. The distributees where the decedent, infant or beneficiary died intestate as to any property, except those who by acknowledged release appear to have been paid.

7. All devisees, all trustees of any trust created by the will or the lifetime trust instrument and all legatees except those who by acknowledged release appear to be paid and if any such be an infant, incompetent or conservatee whose legacy or claim has been paid, such release shall be executed by the guardian, committee of his property and if payment has been made to an infant, incompetent or conservatee under the provisions of 2220, or EPTL 7-4.8 or 11-1.1, such release shall be executed by the person to whom payment was made.

8. In the case of a guardian process shall also issue to the infant.

9. In the case of a trustee process shall also issue to all persons who are entitled absolutely or contingently by the terms of the will, lifetime trust instrument or by operation of law to share in the estate.

10. Where an accounting fiduciary accounts to himself in a separate

capacity as the fiduciary of a deceased beneficiary of the estate, or as trustee or as guardian of an infant beneficiary, or as the committee of an incompetent, or as the conservator of a conservatee it shall not be sufficient to issue process to or obtain the appearance of the accounting party in such separate capacity only, but in addition process shall issue to all persons interested in the estate of the deceased beneficiary, the infant, the incompetent, the conservatee or the trust of which the accounting party is trustee. The provisions of this subdivision shall not apply where the accounting fiduciary has in said separate capacity one or more co-fiduciaries who are not his co-fiduciaries in his accounting capacity.

11. Where any person to whom process is required to issue has died process shall issue to his fiduciary and if none has been appointed to all persons interested in the estate of the deceased as distributees, nominated fiduciaries or named as legatees or devisees under any will of the deceased filed in the court.

12. In any case the court may, for good cause shown, dispense with the service of process on any person provided the value of his interest in the estate does not exceed $500. Where service of process upon such person has been dispensed with the decree setting the account shall not be conclusive against him unless he shall before the entry of the decree appear in the proceeding, waive the issuance or service of the process or be served therewith.

13. Notwithstanding any other provision of this section to the contrary, whenever the accounting party is the public administrator, county treasurer or county officer succeeding to the duties of county treasurer, where the beneficiaries are unknown, and there are no known claimants as beneficiary, and where it appears that the value of the interests of all beneficiaries in the estate does not exceed two thousand five hundred dollars, the court may dispense with service of process on beneficiaries. In such case the attorney general must be cited and may make any objection to the account that could be made by any beneficiary. The decree to be entered shall be binding upon any person who shall ultimately be determined to be entitled to share in the

estate.

14. The provisions of section three hundred fifteen shall apply to a proceeding under this section.

§ 2211. Voluntary account; proceedings thereupon

1. On the return of process issued as prescribed in the preceding section the court must take the account, hear the proofs of the parties respecting it and make such order or decree as justice shall require.

2. The fiduciary may be examined under oath by any party to the proceeding either before or after filing objections, if any, to the account, as to any matter relating to his or her administration of the estate. The party conducting such examination shall be entitled to all rights granted under article thirty-one of the civil practice law and rules with respect to document discovery, regardless of whether such examination takes place before or after such party files objections.

§ 2212. Accounting for profit and loss

No profit shall be made by a fiduciary by the increase nor shall he sustain any loss by the decrease or loss without his fault of any part of the estate, but he shall be charged with the increase and credited for the decrease or loss on the settlement of his accounts.

§ 2213. Accounting for claim for funeral expenses

1. If upon any accounting it shall appear that a fiduciary has failed to pay a claim for funeral expenses, the amount of which has been fixed by the court as provided in 2101 and 2102 or upon the accounting, he shall not be credited with the payment of any debt or claim against the decedent until the claim for funeral expenses has been paid, but such claim shall not be paid before the expenses of administration are paid.

2. In any accounting the claim for funeral expenses shall be separate and apart from the claim for expenses of administration.

§ 2214. Property of estate to be delivered on order

1. The court has jurisdiction to compel a fiduciary or the fiduciary or successor of any deceased fiduciary at any time to deliver any of the property of the estate which has come into his possession or is under his control and if it be delivered over after a decree must allow such credit upon the decree as justice shall require.

2. The court has jurisdiction when a fiduciary has died, absconded, become incompetent, has been removed or his letters have been revoked to direct him or any person, firm or corporation having possession or control of any property belonging to the estate to deliver it to the court or a successor appointed by the court or as directed by the decree made pursuant to 2207 or CPLR 2510.

§ 2215. Decree for payment and distribution

1. Where an account is judicially settled as prescribed in this article and any part of the estate remains and is ready to be distributed the decree must direct the payment and distribution therefrom of the shares of the persons entitled thereto, except that no decree of distribution shall be made in an accounting proceeding in which there has been a disposition of real property pursuant to article 19 commenced within 6 months from the grant of letters until time for the presentation of claims as fixed by a published notice has expired or 7 months have expired since letters were first issued and if there be creditors who were not served with process upon the petition for accounting, until supplemental process shall have issued to them.

2. The court may award to a surviving spouse or child the same relief as to set-off of exempt property which may be awarded in such person's

favor on a petition presented as prescribed in 2102.

3. If any creditor or person interested has received estate assets in excess of the amount determined on the settlement of the account to be due him the court is authorized to direct in the decree repayment by him of the excess to the fiduciary of the estate or otherwise as justice shall require and the exercise of such power by the court heretofore is confirmed.

§ 2216. Distribution in kind

At any time during the administration of an estate or upon an accounting the court may direct the conveyance of any unsold realty or the delivery of any unsold chattel or the assignment of any uncollected demand or any other personal property to a party or parties entitled to payment or distribution, in lieu of the money value of the property at the fair market value at the date of distribution.

§ 2217. When money or property may be retained

1. In any of the following cases the decree must direct that a sum sufficient to satisfy a debt or claim or the proportion to which it is entitled, together with the probable amount of the interest and costs, or that any personal property the right to which is in controversy, be retained in the hands of the accounting party or be deposited in a bank or trust company, subject to the order of the court, or be paid into the court for the purpose of being applied to the payment of the debt or claim or to the satisfaction of any judgment recovered and that so much thereof as is not needed for such purposes be afterwards distributed:

(a) Where an admitted debt of the decedent, ascertainable in amount, is not yet due and the creditor will not presently accept payment with a rebate of interest, or

(b) Where a claim for a debt, ascertainable in amount, but not yet due has been disputed or rejected, or

(c) Where an action is pending between the fiduciary and a person claiming to be a creditor of the decedent, or

(d) Where on the judicial settlement of the account of a trustee a controversy respecting the right of a party to share in the estate or other personal property held by the trustee has not been determined.

2. Upon the determination of the debt or claim or the right to the personal property any party may present a petition to the court praying for directions as to the disposition of the moneys or property retained.

§ 2218. Deposit in court for benefit of legatee, distributee or beneficiary. 1. (a) Where it shall appear that a noncitizen legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such noncitizen would otherwise be entitled shall be paid into court for the benefit of said noncitizen or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.

(b) Any assignment of a fund which is required to be deposited pursuant to the provisions of paragraph one (a) of this section shall not be effective to confer upon the assignee any greater right to the delivery of the fund than the assignor would otherwise enjoy.

2. Where it shall appear that a beneficiary would not have the benefit or use or control of the money or other property due him or where other special circumstances make it desirable that such payment should be withheld the decree may direct that such money or property be paid into court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

2-a. Where it appears to the court that the laws of a foreign country or sovereignty effectively deny a New York state resident beneficiary legatee or distributee of the benefit, use or control of money or other property, a decree issued in a matter concerning the right of a resident of such foreign country or sovereignty to the benefit, use or control of money or other property with a situs in New York state may direct that such money or property be paid into the court for the benefit of the beneficiary or the person or persons who may thereafter appear entitled thereto. The money or property so paid into the court shall be paid out only upon order of the court or pursuant to the order or judgment of a court of competent jurisdiction.

3. In any such proceeding where it is uncertain that a noncitizen beneficiary or fiduciary not residing within the United States, the District of Columbia, the Commonwealth of Puerto Rico or a territory or possession of the United States would have the benefit or use or control of the money or property due him the burden of proving that the noncitizen beneficiary will receive the benefit or use or control of the money or property due him or her shall be upon him or her or the person claiming from, through or under him or her.

4. Nothwithstanding any laws of inheritance or descent and distribution of any state or territory of the United States, and notwithstanding similar laws of foreign countries or sovereignties, such states or territories of the United States or foreign countries or sovereignties may not claim for themselves, as heirs or distributees or by any other theory of inheritance, any funds whose situs is in this state and which have been deposited pursuant to the laws of the state of New York for the benefit of any distributee, heir, legatee or owner of said funds, whether known or unknown, or for any person whose whereabouts are unknown.

§ 2219. Adjustment of advancements

Where there is a surplus of personal property to be distributed and the advancement as provided in EPTL 2-1.5 consisted of personal property or where a deficiency in the adjustment of an advancement of real property is chargeable on personal property, the decree for distribution in the court must adjust all the advances which have not been previously adjusted by a court of competent jurisdiction and if any person to be affected by the decree is not a party to the proceeding the court must cause him to be brought in by supplemental process.

§ 2220. Payment of share of infant, incompetent or conservatee or person under disability

1. Where an infant, incompetent, conservatee, or person under disability is entitled to money or property as beneficiary of an estate or to the proceeds of any action brought as prescribed in EPTL 5-4.1 or to the proceeds of a settlement of a cause of action for personal injuries, the decree or order shall direct that it be paid or delivered to the guardian, committee or conservator of the property of such person upon the filing of sufficient security, except as provided in EPTL 7-4.9 or 11-1.1, unless the money or property payable or deliverable to the infant, incompetent, or conservatee, or person under disability does not exceed in value $10,000, in which case the decree or order may order it to be paid or delivered to a parent of such person or to some competent adult with whom such person resides or who has some interest in such person's welfare, for the use and benefit of such person.

2. If the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive pursuant to section 29.23 of the mental hygiene law, the decree or order may order it to be paid to such director for use as provided in that section.

3. If there be no guardian, committee or conservator of the property the decree or order may provide that the sum payable to the infant, incompetent or person under substantial impairment within the meaning of the conservatorship provisions of article seventy-seven of the mental hygiene law not disposed of as above be paid into the court or the court may order that money constituting any part of the property be deposited in one or more specified insured banks or trust companies or be invested

in one or more specified accounts in insured savings and loan associations subject to withdrawal only upon order of the court, except that no court order shall be required to pay over to the infant who has attained the age of eighteen years all moneys so held unless the depository is in receipt of an order from a court of competent jurisdiction directing it to withhold such payment beyond the infant's eighteenth birthday.

4. If money or property is payable or deliverable under subdivision one of this section to a person under disability as defined in article seventy-seven of the mental hygiene law, the court may pursuant to such article appoint a conservator provided that: the person under the disability resides within the county in which the proceeding is pending; no guardian, committee or conservator has been appointed by the supreme court or county court; and the money or property is to be paid or delivered to the conservator.

5. If any proceeds payable to an infant, incompetent or person under disability pursuant to this section are proposed to be paid by way of a structured settlement, which shall include any settlement whose terms contain provisions for the payment of funds on an installment basis, the court may approve such settlement, provided that, with respect to future installment payments, the court may order that each party liable for such payments shall fund such payments, in an amount necessary to assure the future payments, in the form of an annuity contract executed by a qualified insurer and approved by the superintendent of financial services pursuant to articles fifty-A and fifty-B of the civil practice law and rules.

§ 2221. Payment of legacy or distributive share to foreign fiduciary

1. Where a beneficiary of an estate is entitled to money or property within the jurisdiction of the court and such beneficiary is a non-domiciliary infant, incompetent, conservatee or decedent, payment or delivery thereof may be directed by the court to the fiduciary, committee or conservator, by whatever title such foreign fiduciary may be designated, of the property or estate of the non-domiciliary infant, incompetent, conservatee or decedent, upon proof satisfactory to the court that the foreign fiduciary is entitled to receive such money or property in accordance with the terms and conditions of EPTL 13-3.4 and that the fiduciary, committee or conservator has filed at the domicile security sufficient to cover such payment or delivery or that no security is required at the domicile of the beneficiary. In the case of a deceased beneficiary there shall be submitted proof that he has no known creditors within this state.

2. The court may direct such payment or delivery in a decree judicially settling the account of a fiduciary or in an order entered upon the application of the fiduciary holding such money or property for distribution or of the foreign fiduciary, committee or conservator.

§ 2222. Legacy or distributive share payable to unknown person to be paid to comptroller

1. Where the person entitled to a legacy or distributive share is unknown the decree must direct the fiduciary to pay the amount thereof to the comptroller of the state for the benefit of the person or persons who may thereafter appear to be entitled thereto.

The decree must also direct that such payment be accompanied by a copy of the decree, certified by the clerk of the court to be a true copy of the original on file in his office. The fee for such certification shall be deemed a necessary and proper disbursement, to be charged against and deducted from said legacy or distributive share prior to payment of same to the comptroller, said disbursement to be paid or credited to the person making the same, as the surrogate in said decree may direct.

2. The court or the supreme court upon the petition of a person claiming to be so entitled and upon at least 14 days' notice, accompanied with a copy of the petition, to the attorney general, the state comptroller and the public administrator of the county or if there be none, the county treasurer, may by a reference or by directing the

trial of an issue by a jury or otherwise, ascertain the rights of the persons interested and grant an order directing the payment of any money which appears to be due to the claimant, but without interest and after deducting all expenses incurred by the state with respect thereto.

3. The comptroller upon the production of a certified copy of the order must draw his warrant upon the abandoned property fund for the amount therein directed to be paid payable to the person entitled thereto.

4. At any time prior to the granting of an order therein notice of the claim, accompanied with a copy of the petition, shall be given by the petitioner to such persons and in such manner as directed by the court.

§ 2222-a. Notice of legacy or distributive share payable to incarcerated individual or prisoner

Where the legatee, distributee or beneficiary is an incarcerated individual serving a sentence of imprisonment with the state department of corrections and community supervision or a prisoner confined at a local correctional facility, the court shall give prompt written notice to the office of victim services, and at the same time direct that no payment be made to such incarcerated individual or prisoner for a period of thirty days following the date of entry of the order containing such direction.

§ 2223. Funds paid into court

1. Where it appears that the whereabouts of any legatee, distributee, creditor or other person entitled to payment from the estate is unknown the decree must direct the fiduciary to pay into court the legacy, distributive share or money due such person which is not paid to the person entitled thereto within such time as directed by the court, which shall, however, be not later than 6 months from the time when the decree is made or when the legacy, distributive share or money is payable by the terms of the decree.

2. If at the expiration of 6 months after the making of the decree it is shown to the court that payment of the legacy, distributive share or money cannot be made to the person entitled thereto, an order may be made directing the payment thereof into court.

3. The money so paid into court can be paid out only by the order of the court or a court of competent jurisdiction.

4. Except in the counties wholly within the city of New York, if the amount payable does not exceed $50 a county treasurer may pay it without a court order to the person entitled thereto.

5. The state comptroller may institute any necessary proceeding before the court to compel the deposit of such moneys in court which have not been paid over or deposited after the expiration of 6 months or the expiration of such shorter period as directed by the court.

6. Where a sum of money in excess of $250 has been paid into court and subsequently paid to the state comptroller as abandoned property pursuant to paragraph (a) of subdivision 1 of section 600 of the abandoned property law an order for the payment of such money from the abandoned property fund shall be made by the court only upon notice to the state comptroller, to all persons who have made claim thereto and to such other persons as directed by the court.

§ 2224. Id.; where beneficiary's name or whereabouts is unknown

1. Where it appears to the satisfaction of the court that the name or whereabouts of any person interested in the estate as a beneficiary or assignee cannot be ascertained after the exercise of due diligence and that the value of such person's interest in the estate does not exceed the sum of $1,000, the court may direct by order or decree the fiduciary to pay the amount of such person's interest into the court for the benefit of the person or persons who may thereafter appear to be

entitled thereto.

2. Upon making the payment as provided above the fiduciary shall be discharged from all futher liability as to the amount paid into court. The order or decree may be granted on the petition of a fiduciary.

3. Notice of the application therefor shall be given to the persons and in the manner directed by the court or the court may dispense therewith.

4. The money so paid into court as above provided may be paid out only by the order of the court or pursuant to an order or judgment of a court of competent jurisdiction.

5. Except in the counties wholly within the city of New York, if the amount payable does not exceed $50 a county treasurer may pay it without a court order to the person entitled thereto.

§ 2225. Determination of distributees, devisees, legatees, beneficiaries and distributive and beneficial shares

In any proceeding where the court is required to determine the distributees entitled to share in the estate under EPTL 4-1.1, or where a devisee, legatee or a beneficiary of a will or trust subject to the jurisdiction of the court is entitled to money or property upon the occurrence of a specified event, the petition may request the court as incidental thereto to adjudge that (a) a person who might otherwise be a distributee, devisee, legatee or beneficiary is dead or (b) that no distributees, devisees, legatees or beneficiaries other than those stated in the record exists. Citation shall issue to the person named and to unknown distributees or to unknown devisees, legatees or beneficiaries, if any. For the purposes of this section, a "specified event" shall be the time specified in the will or lifetime trust for the determination of the identity of the devisee, legatee, beneficiary or members of a class thereof entitled to share in the estate or trust property.

(a) If it is established to the satisfaction of the court that a person who would be a distributee, or a devisee, legatee or beneficiary upon the occurrence of a specified event, has not been heard from for a period of at least three years since the death of the decedent, or since the occurrence of such event, as the case may be, that a diligent search has been made to discover evidence that such person is still living, and that no such evidence has been found, the court may make a determination that such person is presumed dead and that he or she predeceased the decedent without issue or that such devisee, legatee or beneficiary is presumed to have died prior to the occurrence of such event and that such person died prior thereto without issue other than those issues stated in the record.

(b) If it appears to the satisfaction of the court that diligent and exhaustive efforts have been made from all available sources to ascertain the existence of distributees, or members of a class of devisees, legatees or beneficiaries, that at least three years have elapsed since the death of the decedent, or since the occurrence of the specified event upon which such class is finally determined, as the case may be, that the parties before the court know of no distributees of the decedent, or of such legatees, devisees or beneficiaries, other than those stated in the record, and that no claim to a share in the estate or trust has been made by any person whose relationship or existence has not been established in the record, the court may make a determination that no distributee of the decedent or class of distributees exists, or that no such devisee, legatee or beneficiary, or members of a class of legatees, devisees or beneficiaries exists, other than those whose status is established in the record before the court.

(c) Upon making the findings under subdivision (a) or (b) of this section, the court may direct distribution of the assets to those distributees or to those devisees, legatees and beneficiaries whose relationship or present existence has been established in the record before the court.

§ 2226. Rights of alleged decedent upon return

If letters shall issue upon the estate of an alleged decedent and if

thereafter the person alleged to be dead shall return he or she shall on demand receive the property then in the hands of the fiduciary after reserve for any unpaid administration charges and shall have only the further rights to compel an accounting on the part of his or her fiduciary and to enforce the decree made thereon. His or her fiduciary shall not be liable for moneys or assets disbursed or delivered by him or her in good faith and the person alleged to be dead may not, upon his or her return, review any matter or recover any property embraced in any account of his or her fiduciary which may have been finally settled by decree entered prior to the date when his or her fiduciary shall have had actual notice that he or she is still living.

§ 2227. Summary statement

Each decree whereby an account is judicially settled must contain in the body thereof a summary statement of the account as settled or must refer to such summary, which must be recorded.

ARTICLE 23

COSTS, ALLOWANCES AND COMMISSIONS

§ 2301. Costs, general

1. Costs and allowances in the court shall be awarded solely in accordance with this article and shall include all disbursements of the party awarded costs which might be taxed in the supreme court.

2. Any award for costs or an allowance is in all instances discretionary with the court. The amount allowed must be fixed by the court and inserted in the decree or order.

3. All costs taxed and any allowance granted to reimburse a party in part or in whole for counsel fees or other expenses necessarily paid or incurred shall be awarded to the party but the whole or any part thereof may be made payable to an attorney rendering services to the party in the proceeding or on the appeal, except as otherwise provided in subdivision 8 of the succeeding section.

4. Except where special provision is otherwise made by law costs or an allowance may be made payable by any party personally or out of the assets of the estate or out of the share or interest of any person or from both in such proportion as directed by the court and justice requires.

5. In any proceeding the court may direct that the grant of costs or an allowance be reserved for supplemental decree to be entered after the

time to appeal has expired or if an appeal be taken, after final determination of the appeal.

§ 2302. Award of costs and allowances

1. Upon a motion the court may award costs to any party in such amount as it determines not exceeding $20 to each party, except in counties within the City of New York, where such amount shall not exceed $40.

2. Upon rendering a decree or in granting or denying an application to vacate a decree the court may award as costs such sum as it deems reasonable to the petitioner and to any other party who has succeeded in whole or in part in a contest or whose attorney, in the absence of a contest, has rendered services of substantial benefit to him, her or it, or to the estate, not exceeding

(a) in counties within the City of New York:

(i) $100 where there has not been a contest, or

(ii) $300 where there has been a contest and $300 for each day, less one, necessarily occupied in the trial or hearing and in addition $100 for each day necessarily occupied in preparing therefore and $100 additional if a motion for a new trial is granted.

(b) in all other counties:

(i) $50 where there has not been a contest, or

(ii) $150 where there has been a contest and $150 for each day, less one, necessarily occupied in the trial or hearing and in addition $50 for each day necessarily occupied in preparing therefore and $50 additional if a motion for a new trial is granted.

3. In a contested probate proceeding:

(a) Costs payable out of the estate or otherwise may be awarded (1) to an unsuccessful contestant only if he, she or it be a guardian ad litem or guardian, committee or conservator of a person under disability; (2) to an unsuccessful proponent named as executor in the will when propounded by him, her or it in good faith as the last will of the decedent; and (3) to a person named as executor in a prior will on file in the court that is not admitted to probate when such person participates in the proceeding in good faith. Such nominated executor, guardian ad litem, guardian, committee or conservator, whether successful or not may be awarded costs and an allowance in such sum as the court deems reasonable for his, her or its counsel fees and other expenses incurred in the contest or attempt to sustain the will. The court may direct that such costs and allowances in whole or in part be payable by an unsuccessful contestant except that an award of the successful proponent's counsel's fees may only be allowed where the court finds that the contest was brought in bad faith or was frivolous.

(b) Either before or after the decree granting probate the court may order that a copy of the minutes of the trial be furnished to a contestant for the purposes of appeal and charge the expense thereof initially to the estate if satisfied that the contest is in good faith. If the contestant be unsuccessful upon the appeal and he, she or it is not the guardian of an infant, the committee of an incompetent, the conservator of a conservatee or a guardian ad litem he, she or it shall refund to the estate any amount so paid by the estate for the minutes.

4. In a proceeding for probate of a will when the public administrator or county treasurer has been directed to probate a will or continue the proceedings for the probate thereof, the court may award to either of them such sum as it deems reasonable for his, her or its counsel fees and other expenses necessarily incurred therein.

5. After appeal, pursuant to the direction of the appellate court the court may award a fiduciary such sum as it deems reasonable for counsel fees and other expenses necessarily incurred on the appeal.

6. In a proceeding to construe a will or after appeal in such a proceeding, pursuant to the direction of the appellate court the court may award to a fiduciary or any party to the proceeding such sum as it deems reasonable for his, her or its counsel fees and other expenses necessarily incurred in the proceeding or on the appeal.

7. Upon a final or intermediate judicial settlement a fiduciary may be awarded for his, her or its expenses and counsel fees such sum as the

court deems reasonable not exceeding:

(a) within the counties of the City of New York: $100 for each day necessarily occupied in preparing the account and in drawing, entering and executing the decree. Any sum so awarded may be in addition to any costs, allowances or commissions otherwise authorized and awarded by the court.

(b) in all other counties: $ 50 for each day necessarily occupied in preparing the account and in drawing, entering and executing the decree. Any sum so awarded may be in addition to any costs, allowances or commissions otherwise authorized and awarded by the court.

8. In a proceeding for disposition of real property a fiduciary may be awarded out of the proceeds of sale his, her or its commissions and such sum as the court deems reasonable for counsel fees and expenses necessarily incurred in the proceeding.

§ 2303. Security for costs

1. In any proceeding in which an issue is raised by answer or objection by or on behalf of a non-domiciliary against the proponent of a will or a fiduciary or where the probate of a will has been tried before a jury which has disagreed, the court may require the person or persons raising such issue to give security for costs upon motion made by the proponent or fiduciary.

2. Security for costs may be required from any non-domiciliary who is the petitioner in any proceeding, provided the court finds that security is necessary for the protection of the estate.

3. If any party fails to comply with an order requiring him to give security for costs the court, upon the application of any interested party who might resort to the security if furnished, may make an order or decree dismissing the objections, answer or petition of the party in default.

§ 2304. Costs of appeal

1. The appellate court may award costs of the appeal as follows:

(a) Upon an appeal in a proceeding to construe a will, to any party to the appeal.

(b) Upon an appeal in any other proceeding, to any party who

(i) has succeeded therein in whole or in part, or

(ii) has participated therein as a fiduciary, guardian ad litem, guardian, committee or conservator of a person under disability, or

(iii) is named as an executor in a paper propounded by him in good faith as the will of the decedent.

2. The court may direct that the costs shall abide the event of a new trial or of the subsequent proceedings in the surrogate's court.

3. Costs may be made payable out of the estate, or if awarded to a successful party, personally by the unsuccessful party, as directed by the appellate court or if such direction be not given, as directed by the court.

4. Costs of an appeal awarded in the court shall be pursuant to CPLR 8203 and 8204.

§ 2305. Fees of appraisers

An appraiser is entitled in addition to his actual expenses, to a sum to be fixed by the court for his services in making the appraisal. He shall file with the court an affidavit showing the nature and extent of his services, and expenses if any, and the sums payable therefor shall be taxed by the court and paid by the fiduciary.

§ 2306. Annual statements to be furnished to beneficiaries

Any trustee, donee of a power during minority or donee of a power in trust who is not required to furnish annual statements under either 2308 or 2309 because he or she has not retained annual commissions shall nevertheless be required to furnish the annual statements referred to in those sections to any beneficiary receiving income or any person interested in the principal of the trust who shall request such statements, or in the case of a power during minority or of a power in trust, to the beneficiary of the power in trust, or to a person to whom a payment not exceeding $10,000 could be made under subdivision 1 of section 2220 of this chapter.

§ 2307. Commissions of fiduciaries other than trustees

1. Except as otherwise provided in paragraph (f) of this subdivision on the settlement of the account of any fiduciary other than a trustee, a donee of a power during minority or a donee of a power in trust, the court must allow to him or her the reasonable and necessary expenses actually paid by him or her and if he or she be an attorney of this state and shall have rendered legal services in connection with his or her official duties, such compensation for his or her legal services as appear to the court to be just and reasonable and in addition thereto it must allow to the fiduciary for his or her services as fiduciary, and if there be more than one, apportion among them according to the services rendered by them respectively the following commissions:

(a) For receiving and paying out all sums of money not exceeding $100,000 at the rate of 5 percent.

(b) For receiving and paying out any additional sums not exceeding $200,000 at the rate of 4 percent.

(c) For receiving and paying out any additional sums not exceeding $700,000 at the rate of 3 percent.

(d) For receiving and paying out any additional sums not exceeding $4,000,000 at the rate of 2 1/2 percent.

(e) For receiving and paying out all sums above $5,000,000 at the rate of 2 percent.

(f) If the will makes provisions for specific rates or amounts of commissions for a corporate executor, or, if a corporate executor has agreed to accept specific rates or amounts of commissions, or, if the will provides that a corporate executor shall receive commissions as provided or stipulated in the corporate executor's published schedule of fees in effect at such time or times such commissions become payable, including a stipulated minimum commission and asset base for calculating such commissions, a corporate executor shall be entitled to be compensated in accordance with such provisions, agreement or schedule, as the case may be, even though such provisions, agreement or schedule are not executed in accordance with the provisions required for wills and are not attested as required for the recording of deeds in this state.

Such commission shall be computed separately for receiving and for paying out sums of money, at one-half the statutory rates for receiving and at one-half the statutory rates for paying out sums of money.

2. The value of any property, to be determined in such manner as directed by the court and the increment thereof, received, distributed or delivered, shall be considered as money in computing commissions. But this shall not apply in case of: (a) a specific legacy or devise; or (b) the recovery of awards from the September eleventh victim compensation fund of two thousand one established pursuant to title IV of the federal air transportation safety and system stabilization act, public law 107-42, as amended, which awards shall be valued at zero for purposes of this section. Whenever any portion of the dividends, interest or rent payable to a fiduciary other than a trustee is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been received and paid out.

3. In addition to the compensation hereinbefore provided the court may allow to the guardian of the person a sum of money to be fixed by it and paid by the guardian of the property out of the funds in his hands as compensation for services of the guardian of the person up to the time of the allowance.

4. If a guardian is required to receive income and pay it over and files an annual account as required by 1719 of all his receipts and disbursements, he shall be allowed and may retain the same commission on the amount of income so accounted for as he would be allowed upon

principal on a judicial settlement. If the guardian fails to file an annual account as required by 1719 the guardian, notwithstanding his failure to retain in full each year the commissions on income herein prescribed, may be allowed upon the judicial settlement of his account any commissions due and theretofore uncollected by him provided that on such settlement there is then on hand income sufficient for that purpose derived from the estate during the respective years for which further commissions are claimed. If the income on hand for any given year is insufficient to pay the uncollected commissions on the income of that year the deficiency shall not be supplied from income on hand in respect of any other year.

5. Subject to 2313 regarding multiple commissions of executors or trustees under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the gross value of the principal of the estate accounted for amounts to $300,000 or more each fiduciary is entitled to the full compensation on principal and income allowed herein to a sole fiduciary unless there be more than 3, in which case the compensation to which 3 would be entitled must be apportioned among them according to the services rendered by them respectively unless the fiduciaries shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. If the gross value of the principal of the estate accounted for is:

(a) less than $100,000 and there is more than 1 fiduciary the full compensation for receiving and paying out principal and income allowed herein to a sole fiduciary must be apportioned among them according to the services rendered by them respectively, or

(b) $100,000 or more but less than $300,000 each fiduciary is entitled to the full compensation for receiving and paying out principal and income allowed herein to a sole fiduciary unless there are more than 2 fiduciaries in which case the full compensation for receiving and paying out principal and income allowed herein to 2 fiduciaries must be apportioned among them according to the services rendered by them respectively,

unless the fiduciaries shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. Where the will provides a specific compensation to a fiduciary other than a trustee he is not entitled to any allowance for his services unless by an instrument filed with the court within 4 months from the date of his letters he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters of administration are issued to a person who has previously been appointed a temporary administrator, he is entitled to a total compensation equal to the compensation allowed for the full administration of the estate by a fiduciary acting in a single capacity only. Such total compensation shall be payable in such proportions and upon such accounting as shall be fixed by the court settling the account of the person holding successive or different letters but no paying out commissions shall be allowed except upon such sums as shall actually have been paid out at the time of the respective decrees for debts, expenses of administration or to beneficiaries.

6. Where a fiduciary is for any reason entitled or required to collect the rents of and manage real property he shall be allowed and may retain for such services 5 per cent of the gross rents collected therefrom in addition to the commissions herein provided, but there shall be only one such additional commission regardless of the number of fiduciaries. In the event there are 2 or more fiduciaries the additional commission herein provided for must be apportioned among them according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

7. A fiduciary other than a trustee who has been acting prior to July 1, 1956 shall be entitled to have commissions on principal and income theretofore received by him computed, allowed and paid under the methods and at the rates set forth herein, except as follows:

(a) If prior to July 1, 1956 a fiduciary other than a trustee has been allowed or has retained commissions for receiving and paying out any item of principal or income he shall be entitled to no further commissions on the item.

(b) If prior to July 1, 1956 a fiduciary other than a trustee has been allowed or has retained any commissions on any item of principal or income received but not paid out by him he shall be entitled to no further commissions for receiving the item.

§ 2307-a. Commissions of attorney-executor

1. Disclosure. When an attorney prepares a will to be proved in the courts of this state and such attorney, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney is therein an executor-designee, the testator shall be informed prior to the execution of the will that:

(a) subject to limited statutory exceptions, any person, including the testator's spouse, child, friend or associate, or an attorney, is eligible to serve as an executor;

(b) absent an agreement to the contrary, any person, including an attorney, who serves as an executor is entitled to receive an executor's statutory commissions;

(c) absent execution of a disclosure acknowledgment, the attorney who prepared the will, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney, who serves as an executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive; and

(d) if such attorney or an affiliated attorney renders legal services in connection with the executor's official duties, such attorney or a then affiliated attorney is entitled to receive just and reasonable compensation for such legal services, in addition to the executor's statutory commissions.

2. Testator's written acknowledgment of disclosure. An acknowledgment by the testator of the disclosure required by subdivision one of this section must be set forth in a writing executed by the testator in the presence of at least one witness other than the executor-designee. Such writing, which must be separate from the will, but which may be annexed to the will, and which may be executed prior to, concurrently with or subsequently to a will in which an attorney, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney is an

executor-designee and must be filed in the proceeding for the issuance of letters testamentary to the executor-designee.

3. Models of acknowledgment of disclosure. The following are models of the testator's written acknowledgment of disclosure:

(a) When set forth in a writing executed prior to or concurrently with a will:

Prior to signing my will, I was informed that:

(i) subject to limited statutory exceptions, any person, including my spouse, my child, a friend or associate, or an attorney, is eligible to serve as my executor;

(ii) absent an agreement to the contrary, any person, including an attorney, who serves as an executor for me is entitled to receive statutory commissions for executorial services rendered to my estate;

(iii) absent execution of this disclosure acknowledgment, the attorney who prepared the will, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney, who serves as an executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive; and

(iv) if such attorney serves as my executor, and he or she or another attorney affiliated with such attorney renders legal services in connection with the executor's official duties, he or she is entitled to receive just and reasonable compensation for those legal services, in addition to the commissions to which an executor is entitled.

______________________	______________________
(Witness)	(Testator)
Dated:________________	Dated:____________________

(b) When set forth in a writing executed subsequently to the will:

I, , have designated {my attorney}, , {an attorney affiliated with my attorney} {an employee of my attorney or an affiliated attorney,} {a} {an} {executor} {alternate executor} {co-executor} (delete what is inapplicable) in my will dated ___________________.

Prior to signing my will, I was informed that:

(i) subject to limited statutory exceptions, any person, including my spouse, my child, a friend or associate, or an attorney, is eligible to serve as my executor;

(ii) absent an agreement to the contrary, any person, including an attorney, who serves as an executor for me is entitled to receive statutory commissions for executorial services rendered to my estate;

(iii) absent execution of this disclosure acknowledgment, the attorney who prepared my will, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney, who serves as an executor shall be entitled to one-half the commissions he or she would otherwise be entitled to receive; and

(iv) if such attorney serves as my executor, and he or she or another attorney affiliated with such attorney renders legal services in connection with the executor's official duties, he or she is entitled to receive just and reasonable compensation for those legal services, in addition to the commissions to which an executor is entitled.

______________________	_________________________
(Witness)	(Testator)
Dated:________________	Dated:___________________

4. Compliance. (a) The testator's written acknowledgment of disclosure that conforms or substantially conforms to either model in subdivision 3 of this section shall be deemed compliance with subdivision 2 of this section.

(b) An attorney's compliance with subdivision 2 of this section creates neither the presumption nor the inference:

(i) that the testator's designation of such attorney, a then affiliated attorney, or an employee of such attorney or a then affiliated attorney, as executor, is proper;

(ii) that such attorney has complied with the disciplinary rules of the code of professional responsibility.

5. Effect of absence of acknowledgment. Absent compliance with the requirements of subdivision 2 of this section, the commissions of an attorney, or an employee of the attorney who prepared the will or a then affiliated attorney, who serves as an executor shall be one-half the statutory commissions to which such person as executor would otherwise

be entitled pursuant to sections 2307 and 2313 of this article.

6. Rents. Notwithstanding the provisions of subdivision 5 of this section, the additional commissions to which an attorney, or an employee of the attorney who prepared the will or a then affiliated attorney, who serves as an executor may be entitled pursuant to subdivision 6 of section 2307 shall not be diminished.

7. Time of determination of compliance. A determination of compliance with the requirements of subdivisions 1 and 2 of this section shall be made in a proceeding for the issuance of letters testamentary to an executor-designee to whom subdivision 1 of this section applies.

8. Definitions. For purposes of this section, the words or phrases hereafter shall be construed as follows:

(a) Affiliated attorney. An attorney who, by reason of partnership, share holding, association or other relationship, express or implied, could participate directly or indirectly, with the attorney who prepared the will in fees for legal services rendered.

(b) Executor-designee. A person named in a will or codicil, separately or jointly with one or more persons, as a primary, successor, ancillary, or preliminary executor.

(c) Employee. A person who was employed by the attorney who prepared the will or an affiliated attorney when the will was executed.

9. Application. (a) This section shall apply to wills executed on or after January 1, 1996 and, irrespective of the date of any will, to estates of decedents dying after December 31, 1996.

(b) With respect to wills executed prior to January 1, 1996:

(i) subdivisions 1 and 2 of this section shall not apply if the testator has acknowledged the disclosure required by subdivision 1 of this section in a writing that conforms or substantially conforms to the model in paragraph (b) of subdivision 3 of this section; and

(ii) the court in its discretion may waive application of subdivisions 1 and 2 of this section for good cause shown; good cause shall include, but not be limited to:

(A) a good-faith effort after the enactment of this statute either to make to the testator the disclosure required by subdivision 1 of this section or obtain from the testator a written acknowledgment substantially conforming to that set forth in paragraph (b) of subdivision 3 of this section, or

(B) otherwise establishing to the satisfaction of the court reasonable grounds to excuse the absence of a written acknowledgement substantially conforming to that set forth in paragraph (b) of subdivision 3 of this section; and

(iii) section 4519 of the civil practice law and rules shall not apply.

§ 2308. Commissions of trustees, donees of power during minority and donees of powers in trust under wills of persons dying, or under lifetime trusts created, on or before August 31, 1956

1. On the settlement of the account of any trustee or donee of power in trust under the will of a person dying on or before August 31, 1956, or under a lifetime trust established on or before August 31, 1956, the court must allow him or her his or her reasonable and necessary expenses actually paid by him or her and if he or she be an attorney of this state and shall have rendered legal services in connection with his or her official duties, such compensation for his or her legal services as shall appear to the court to be just and reasonable and in addition thereto it must allow to the trustee or to the donee of the power in trust for his or her services as trustee or donee of the power in trust the following commissions from trust principal or property subject to the power in trust:

(a) For receiving principal or property subject to the power in trust

(1) all sums of money constituting principal or property subject to the power in trust not exceeding $2,000 at the rate of 3 per cent;

(2) all additional sums of principal or property subject to the power in trust not exceeding $10,000 at the rate of 1 1/2 per cent;

(3) all sums of principal or property subject to the power in trust above $12,000 at the rate of 1 1/4 per cent; and

(b) For paying out principal or property subject to the power in trust at the rate of 1 per cent.

(c) Notwithstanding the provisions of section 8 of chapter 237 of the laws of 1978, commissions provided by paragraph (a) of this subdivision for receiving principal or property subject to the power in trust shall not be allowed to a trustee or donee of a power in trust who qualifies to act as such on or after June 5, 1978, and shall not be allowed on additions of property received on or after June 5, 1978; such commissions on any increments in property that are payable by reason of any sale, exchange or liquidation of such property shall be allowed on the lesser of (1) the amount of such increments on the date of sale, exchange or liquidation of such property and (2) the amount of such increments on June 5, 1978; and such commissions on any increments in property that are payable by reason of any distribution of such property shall be allowed on the lesser of (1) the amount of such increments on the date of distribution of such property and (2) the amount of such increments on the effective date of this paragraph.

2. In addition to the commission allowed by subdivision one a trustee or a donee of a power in trust shall be entitled to annual commissions at the following rates:

(a) $10.50 per $1,000 or major fraction thereof on the first $400,000 of principal or property subject to the power in trust;

(b) $4.50 per $1,000 or major fraction thereof on the next $600,000 of principal or property subject to the power in trust; and

(c) $3.00 per $1,000 or major fraction thereof on all additional principal or property subject to the power in trust.

Such annual commissions shall be computed either on the value of the principal of the trust or of the property subject to the power in trust at the end of the period for which the commissions are payable or, at the option of the trustee or of the donee of the power in trust, on the value of the principal of the trust or of the property subject to the power in trust at the beginning of such period, provided that the option elected by the trustee or of the donee of the power in trust for the first period for which such commissions are payable shall be used during the continuance of the trust or of the power in trust and shall be binding on any successor or substitute trustee or trustees or successor or substitute donees of the power in trust. In the case of a trust or power in trust which prior to January 1, 1994 computed annual commissions on the basis of a 12 month period (other than a calendar year), the trustee's or donee's prior election of such 12 month period shall be binding unless, prior to January 1, 1995, the trustee or donee makes a new election to compute annual commissions on the basis of a calendar year either on the value of the principal of the trust or of the property subject to the power in trust at the end of, or at the option of the trustee or donee of the power in trust at the beginning of, the calendar year for which the commissions were payable, which new election shall be used during the remaining continuance of the trust or of the power in trust and shall be binding on any successor or substitute trustee or trustees or donee or donees of the power in trust. The computation shall be made on the basis of a 12 month period but the amount so computed payable to a trustee or donee of a power in trust shall be proportionately reduced or increased for any payments made in partial distribution of the trust or of the property subject to the power in trust or receipt of any additional property into the trust or by the donee of a power in trust within such period and shall be proportionately reduced in any period for which such commissions are payable to the trustee or donee of the power in trust if the period is less than 12 months. For the purpose of computing the annual commissions the value of any principal asset when received by the trust or by the donee of a power in trust shall be the presumptive value of the asset at the beginning and end of the period for which such commissions are payable. In computing the value of the principal of the trust or of the property subject to the power in trust the trustee or the donee of the power in trust may use the presumptive value in respect of any principal asset or may use the actual value of the asset. On the settlement of the account of the trustee or of the donee of a power in trust any person interested may dispute the amount of any commission claimed or retained. The burden of proving that the actual value of any principal asset differs from its presumptive value is upon the trustee, the donee of the power in trust or other person claiming the difference.

3. Unless the will or lifetime trust instrument otherwise explicitly provides, the annual commissions allowed by this section shall be payable one-third from the income of the trust and two-thirds from the

principal of the trust. However, in the case of a trust whose definition of income is governed by section 11-2.4 of the estates, powers and trusts law, such annual commissions shall be payable from the corpus of any such trust after allowance for the annuity or unitrust amounts and shall not be payable out of such annuity or unitrust amount and shall not be payable out of such unitrust amount.

4. The commissions allowed by subdivision 2 may be retained by a trustee or donee of a power in trust provided he or she furnishes annually as of a date not more than 30 days prior to the end of the trust year selected by the trustee or the calendar year, to each beneficiary currently receiving income, and to any other beneficiary interested in the income and to any person interested in the principal of the trust who shall make a demand therefor or to the beneficiary of the power in trust who shall make a demand therefor, a statement showing the principal assets or the property subject to the power in trust on hand on that date, and at least annually or more frequently if the trustee or donee of a power in trust so elects, a statement showing all his or her receipts of income and principal or property subject to the power in trust during the period with respect to which the statement is rendered including the amount of any commissions retained and the basis upon which the commissions were computed. A trustee or donee of a power in trust shall not be deemed to have waived any commissions by reason of his or her failure to retain them at the time when he or she becomes entitled thereto; provided however that commissions from income for any given trust or calendar year shall be allowed and retained only from income derived from the trust or from the property subject to the power in trust during that year and shall not be supplied from income on hand in respect of any other trust or calendar year. If a beneficiary receiving income does not desire to be furnished with any such statement his or her advice to the trustee or to the donee of the power in trust to that effect in writing shall thereafter excuse the trustee or donee of the power in trust from furnishing such statement to the beneficiary unless and until the beneficiary requests such annual statements from the trustee or donee of the power in trust.

5. (a) During the continuance of a trust created solely for public,

religious, charitable, scientific, literary, educational or fraternal uses and during the period of continuance of such a trust established after the termination of a life use or uses the trustee shall be entitled to and may retain annual commissions according to the terms specified in subdivision 2 of this section, but only to the extent of 80 percent of the rates stated therein. Notwithstanding any other provision of law, with respect to any portion of such trust which exceeds a principal value of twenty million dollars, the trustee may only take annual commissions to the extent of 50 percent of the rate specified in paragraph (c) of subdivision 2 of this section.

(b) In the case of a trust described in paragraph (a) of this subdivision, a trustee shall not be entitled to any commission from principal as specified in subdivision 1 of this section for paying out principal.

(c) In the case of such a trust which continues after the termination of a life use or uses the trustee for the period of the measuring life or lives shall be entitled to commissions from income and principal at the rates and according to the terms otherwise provided in this section, except that he or she shall not be entitled to any commissions for paying out any amount of principal.

6. (a) If the gross value of the principal of the trust or of the property subject to the power in trust accounted for amounts to $400,000 or more and there is more than 1 trustee or donee of the power in trust, each trustee or donee of the power in trust is entitled to the full compensation for receiving and paying out principal or property subject to the power in trust allowed herein to a sole trustee or donee of the power in trust unless there are more than 3, in which case the compensation to which 3 would be entitled must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively, unless the trustees or donees of the power in trust shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. If the gross value of the principal of the trust or of the property subject to the power in trust accounted for is:

(i) less than $100,000 and there is more than 1 trustee or donee of the power in trust the full compensation for receiving and paying out principal or property subject to the power in trust allowed herein to a sole trustee or donee of the power in trust must be apportioned among them according to the services rendered by them respectively, or

(ii) $100,000 or more but less than $400,000, each trustee or donee of the power in trust is entitled to the full compensation for receiving and paying out principal or property subject to the power in trust allowed pursuant to this subdivision to a sole trustee or donee of the power in trust unless there are more than 2 trustees or donees of the power in trust in which case the full compensation for paying out principal or property subject to the power in trust allowed pursuant to this subdivision to 2 trustees or donees of the power in trust must be apportioned among them according to the services rendered by them respectively,

unless the trustees or donees of the power in trust shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them.

(b) If the value of the principal of the trust or of the property subject to the power in trust for the purpose of computing the annual commissions allowed by subdivision 2 amounts to $400,000 or more and there is more than one trustee or donee of the power in trust, each trustee or donee of the power in trust is entitled to the full annual commission allowed herein to a sole trustee or donee of the power in trust unless there are more than 3, in which case the annual commissions to which 3 would be entitled must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively, unless the trustees or donees of the power in trust shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. If the value of the principal or of the property subject to the power in trust for the purpose of computing the annual commission allowed by subdivision 2 amounts to:

(i) less than $100,000 and there is more than 1 trustee or donee of the power in trust, the annual commissions from income and the annual commission allowed herein to a sole trustee or donee of the power in trust must be apportioned among the trustees or donee of the power in trust according to the services rendered by them respectively, or

(ii) $100,000 or more but less than $400,000, each trustee or donee of the power in trust is entitled to the full annual commission allowed pursuant to this subdivision to a sole trustee or donee of the power in trust unless there are more than 2 trustees or donees of the power in trust in which case the full annual commissions allowed pursuant to this subdivision to 2 trustees or donees of the power in trust must be apportioned among them according to the services rendered by them respectively,

unless the trustees or donees of the power in trust shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. However, if from a trust or from property subject to a power in trust having a value of $400,000 or more, or if from a trust or from property subject to a power in trust having a value of $100,000 or more but less than $400,000, as the case may be, at the beginning of a trust year or of the calendar year in the case of a power in trust, any payments in partial distribution of the trust or of the property subject to the power in trust shall be made during the trust or calendar year so as to reduce the trust or of the property subject to the power in trust to a value of less than $400,000 or $100,000, as the case may be, at the end of the trust or calendar year, then the annual commission allowed herein shall, on a proportionate basis, be those allowed to a trustee of a trust or to donees of a power in trust over property having a value of $400,000 or more, of a trust or to donees of a power in trust over property having a value of $100,000 or more but less than $400,000, as the case may be, for the period from the beginning of the trust or calendar year to the date of the distribution and shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of either $100,000 or more but less than $400,000 or less than $100,000, as the case may be, for the remainder of the trust or calendar year and the part of such commissions payable from principal and computed from the beginning of the trust or calendar year to the date of distribution shall be charged ratably to the property remaining in the trust and to the property distributed from the trust on the basis of their respective values. Further, if during a trust year or a calendar year in the case of power in trust additional property shall be received into a trust which had a value of less than $100,000 or by a donee of a power in trust the property subject to which had a value of less than $100,000, or into a trust which had a value of $100,000 or more but less than $400,000 or by a donee of a power in trust the property subject to which had a value of $100,000 or more but less than $400,000, as the case may be, at the beginning of the trust or calendar year so that because of the additional property the trust or the property subject to the power in trust shall have a value of $100,000 or more or of $400,000 or more, as the case may be, at the end of the trust or calendar year, then the annual commission allowed herein to the trustee or to the donee of the power in trust shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of less than $100,000, or to trustees of a trust or to donees of the power in trust having a value of $100,000 or more but less than $400,000, as the case may be, for the period from the beginning of the trust or calendar year to the date of the receipt of the additional property and shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of $100,000 or more but less than $400,000, or to trustees of a trust or to donees of a power in trust over property having $400,000 or more, as the case may be, for the remainder of the trust or calendar year.

7. Where a trustee or donee of a power in trust is for any reason entitled or required to collect the rents of and manage real property the net amount of rents collected and not the gross amount shall be used in making computation of commissions allowed by subdivision 5 hereof and in addition to the commissions herein provided he or she shall be allowed and may retain for such services 6 per cent of the gross rents collected, but there shall be only 1 such additional commission regardless of the number of trustees or donees of the power in trust. If there are 2 or more trustees or donees of the power in trust the additional commission herein provided must be apportioned among them according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

8. A trustee who prior to September 1, 1966 shall have received the maximum amount of commissions on principal permitted by subdivision 8 of section 285-a of the surrogate's court act as that subdivision existed prior to that date, shall not be entitled to annual principal commissions for the period from the date when he or she shall receive such maximum and September 1, 1966, but shall be entitled to receive commissions from and after September 1, 1966 at the rates and in the manner provided in this section. A trustee who has become entitled to annual principal commissions pursuant to section 285-a of the surrogate's court act as it existed prior to September 1, 1966, but has not received them, may receive an amount of commissions not in excess of the amount he or she would have been entitled to if he or she had taken such commissions, and be entitled to receive in addition commissions from and after September 1, 1966 at the rates and in the manner provided in that section.

9. A trustee who has been acting prior to July 1, 1956 shall be entitled to have commissions on principal and income theretofore received by him or her computed, allowed and paid under the methods and at the rates set forth herein, except as follows:

(a) If prior to July 1, 1956 a trustee has been allowed or has retained commissions for receiving and paying out or for distributing any item of principal he or she shall be entitled to no further commissions on the item.

(b) If prior to July 1, 1956 a trustee has been allowed or retained commissions on any item of principal received but not paid out or distributed by him or her he or she shall be entitled to no further commissions for receiving the item.

(c) Any trustee who became entitled to an annual principal commission under subdivision 1 (b) of section 285-a of the surrogate's court act as it existed prior to April 1, 1948 and who has not retained such commission may retain an amount equal to one-half of such annual principal commission. A trustee who because of the provisions of subdivision 2 of section 285-a of the surrogate's court act as it existed prior to April 1, 1948 either was not entitled to retain an annual principal commission under subdivision 1 (b) thereof or was required to credit such annual principal commission against his or her commission for receiving principal, may retain an amount equal to 1/2 of such annual principal commission. If a trustee has been allowed by decree or has retained any such annual principal commission one-half the amount thereof shall be deducted from the amount of commissions to which the trustee would otherwise be entitled under the provisions of subdivision 1.

(d) The annual principal commissions allowed by subdivision 3 of this section as it existed on September 1, 1967 shall not be allowed or retained in respect of any trust year ending prior to April 1, 1948, but for any trust year ending on or after April 1, 1948 and prior to July 1, 1956, the annual principal commission which may be allowed or retained shall be computed at the rates in effect on the date such trust year ended.

(e) If prior to July 1, 1956 a trustee has been allowed or has retained commissions on any item of income received and paid out by him or her prior to September 1, 1943 or on any item of income collected by him or her subsequent to September 1, 1943 he or she shall be entitled to no further commission on the item.

10. The value of any property to be determined in such manner as directed by the court and the increment thereof received, distributed or delivered shall be considered as money in making computation of commissions. Whenever any portion of the dividends, interests or rents payable to a trustee or donee of a power in trust is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been collected.

11. Where the will provides a specific compensation to a trustee or donee of a power in trust he or she is not entitled to any other allowances for his or her services.

12. If a trustee of a trust is authorized or required by the terms of the will to accumulate income for any purpose permitted by law, any income so accumulated which is not added to principal of the trust shall be deemed a separate trust for purposes of this subdivision and the

trustee shall be entitled to commissions in respect thereof at the rates and according to the terms and provisions of subdivisions 1, 2 and 5 of this section as though, for purposes of computing commissions of the trustee, income so accumulated was principal.

13. For the purposes of this section, the term "trustee" shall mean any trustee who is not a corporate trustee and the term "donee of a power in trust" shall mean any such donee including a donee of a power during minority who is not a corporate fiduciary of a donee of a power during minority with the rights and duties of a guardian under section 1714 of this chapter provided, however, that as used in subdivision 6 of this section, the term trustee shall include a corporate trustee.

§ 2309. Commissions of trustees, of donees of powers during minority and of donees of powers in trust under wills of persons dying, or lifetime trusts established, after August 31, 1956

1. On the settlement of the account of any trustee or donee of a power in trust under the will of a person dying after August 31, 1956, or under a lifetime trust established after August 31, 1956, the court must allow to him or her his or her reasonable and necessary expenses actually paid by him or her and if he or she be an attorney of this state and shall have rendered legal services in connection with his or her official duties, such compensation for his or her legal services as shall appear to the court to be just and reasonable and in addition thereto it must allow to the trustee or donee of a power in trust for his or her services as trustee or donee of a power in trust a commission from principal or from the property subject to the power in trust, for paying out all sums of money constituting principal or property subject to the power in trust at the rate of 1 per cent.

2. In addition to the commission allowed by subdivision 1 hereof a trustee or donee of a power in trust shall be entitled to annual commissions at the following rates:

(a) $10.50 per $1,000 or major fraction thereof on the first $400,000 of principal or property subject to the power in trust.

(b) $4.50 per $1,000 or major fraction thereof on the next $600,000 of principal or property subject to the power in trust.

(c) $3.00 per $1,000 or major fraction thereof on all additional principal or property subject to the power in trust.

Such annual commissions shall be computed either on the value of the principal of the trust or of the property subject to the power in trust at the end of the period for which the commissions are payable or, at the option of the trustee or donee of the power in trust, on the value of the principal of the trust or of the property subject to the power in trust at the beginning of such period, provided that the option elected by the trustee or donee of the power in trust for the first period for which such commissions are payable shall be used during the continuance of the trust or of the power in trust and shall be binding on any successor or substitute trustee or trustees, donee or donees. In the case of a trust which prior to January 1, 1994 computed annual commissions on the basis of a 12 month period (other than a calendar year), the trustee's prior election of such 12 month period shall be binding unless, prior to January 1, 1995, the trustee makes a new election to compute annual commissions on the basis of a calendar year either on the value of the principal of the trust at the end of, or at the option of the trustee at the beginning of, the calendar year for which the commissions were payable, which new election shall be used during the remaining continuance of the trust and shall be binding on any successor or substitute trustee or trustees. The computation shall be made on the basis of a 12-month period but the amount so computed payable to a trustee shall be proportionately reduced or increased for any payments made in partial distribution of the trust or the receipt of any additional property into the trust within such period and shall be proportionately reduced in any period for which such commissions are payable to the trustee if the period is less than 12 months. For the purpose of computing the annual commissions the value of any principal asset when received by the trust or donee of a power in trust shall be the presumptive value of the asset at the beginning and end of the period for which such commissions are payable. In computing the value of the principal of the trust or of the property subject to the power in trust the trustee or donee of the power in trust may use the presumptive value in respect of any principal asset or may use the actual value of the asset. On the settlement of the account of the trustee or donee of a power in trust any person interested may dispute the amount of any commission claimed or retained. The burden of proving that the actual value of any principal asset or asset subject to the power in trust differs from its presumptive value is upon the trustee or donee of a power in trust or other person claiming the difference.

3. Unless the will or lifetime trust instrument otherwise explicitly provides, the annual commissions allowed by this section shall be payable one-third from the income of the trust and two-thirds from the principal of the trust. However, in the case of a trust whose definition of income is governed by section 11-2.4 of the estates, powers and trusts law or a charitable remainder annuity trust or a charitable remainder unitrust, as defined in section six hundred sixty-four of the Internal Revenue Code of nineteen hundred eighty-six, as amended, such annual commissions shall be payable from the corpus of any such trust after allowance for the annuity or unitrust amounts and shall not be payable out of such annuity or unitrust amounts.

4. The commissions allowed by subdivision 2 may be retained by a trustee provided he or she furnishes annually as of a date no more than 30 days prior to the end of the trust year selected by the trustee, to each beneficiary currently receiving income, and to any other beneficiary interested in the income and to any person interested in the principal of the trust who shall make a demand therefor and by a donee of a power in trust if he or she furnishes annually as of a date no more than 30 days prior to the end of the calendar year to the beneficiary of the power in trust, a statement showing the principal assets on hand on that date, and at least annually or more frequently if the trustee or donee of the power in trust so elects, a statement showing all his or her receipts of income and principal or property subject to the power in trust during the period with respect to which the statement is rendered including the amount of any commissions retained and the basis upon which the commissions were computed. A trustee or donee of a power in trust shall not be deemed to have waived any commissions by reason of his or her failure to retain them at the time when he or she becomes

entitled thereto; provided however that in the case of a trust commissions payable from income for any given trust year shall be allowed and retained only from income derived from the trust during that year and shall not be supplied from income on hand in respect of any other trust year and in the case of property subject to a power in trust commissions payable from income for any given calendar year shall be allowed and retained only from income derived from the property during that year and shall not be supplied from income on hand in respect of any other calendar year. If a beneficiary receiving income does not desire to be furnished with any such statements his or her advice to the trustee or to the donee of the power in trust to that effect in writing shall thereafter excuse the trustee or donee of the power in trust from furnishing such statement to the beneficiary unless and until the beneficiary requests such annual statements from the trustee or donee of the power in trust.

5. (a) During the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses and during the period of continuance of such a trust established after the termination of a life use or uses the trustee shall be entitled to and may retain annual commissions according to the terms specified in subdivision 2 of this section, but only to the extent of 80 percent of the rates stated therein. Notwithstanding any other provision of law, with respect to any portion of such trust which exceeds a principal value of twenty million dollars, the trustee may only take annual commissions to the extent of 50 percent of the rate specified in paragraph (c) of subdivision 2 of this section.

(b) In the case of a trust described in paragraph (a) of this subdivision, a trustee shall not be entitled to any commission from principal as specified in subdivision 1 of this section for paying out principal.

(c) In the case of such a trust which continues after the termination of the measuring life use or uses the trustee for the period of the measuring life use or uses shall be entitled to commissions from income and principal at the rates and according to the terms specified in subdivision 2 and except in respect of principal paid out to a charity or for charitable uses shall be entitled to a commission for distributing all sums of principal at the rate specified in subdivision 1.

6. (a) Subject to section 2313 regarding multiple commissions of executors, trustees, or donees of a power in trust created under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the gross value of the principal of the trust or of the property subject to the power in trust accounted for amounts to $400,000 or more and there is more than 1 trustee or donee each trustee or donee is entitled to the full compensation for paying out principal allowed herein to a sole trustee or donee unless there are more than 3, in which case the compensation to which 3 would be entitled must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. If the gross value of the principal of the trust or of the property subject to the power in trust accounted for is:

(i) less than $100,000 and there is more than 1 trustee or donee of the power in trust, the full compensation for paying out principal allowed herein to a sole trustee or donee of the power in trust must be apportioned among them according to the services rendered by them respectively, or

(ii) $100,000 or more but less than $400,000, each trustee or donee of the power in trust is entitled to the full compensation for paying out principal allowed herein to a sole trustee or donee of the power in trust unless there are more than 2 trustees or donees of the power in trust in which case the full compensation for paying out principal allowed herein to 2 trustees or donees of a power of trust must be apportioned among them according to the services rendered by them respectively, unless the trustees or donees of the power in trust shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them.

(b) Subject to section 2313 regarding multiple commissions of executors, trustees, or donees of a power in trust created under wills of persons dying, or lifetime trusts established, after August 31, 1993, if the value of the principal of the trust or of the property subject to the power in trust for the purpose of computing the annual commissions allowed by subdivision 2 amounts to $400,000 or more and there is more than one trustee or donee of a power in trust each trustee or donee of a power in trust is entitled to the full annual commission allowed herein to a sole trustee or donee of a power in trust unless there are more than 3, in which case the annual commissions to which 3 would be entitled must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively unless the trustees or donees of the power in trust shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. If the value of the principal of the trust or of the property subject to the power in trust for the purpose of computing the annual commission allowed by subdivision 2 amounts to:

(i) less than $100,000 and there is more than 1 trustee or donee of the power in trust, the annual commission allowed herein to a sole trustee or donee of a power in trust must be apportioned among the trustees or donees of the power in trust according to the services rendered by them respectively, or

(ii) $100,000 or more but less than $400,000, each trustee or donee of the power in trust is entitled to the full annual commission allowed herein to a sole trustee or donee of a power in trust unless there are more than 2 trustees or donees of the power in trust in which case the full annual commissions allowed herein to 2 trustees or donees of a power in trust must be apportioned among them according to the services rendered by them respectively, unless the trustees or donees of the power in trust shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full annual commission for any one of them. However, if from a trust or from property subject to a power in trust having a value of $400,000 or more, or if from a trust or from property subject to a power in trust having a value of $100,000, or more but less than $400,000, as the case may be, at the beginning of a trust year or of the calendar year any payments in partial distribution of the trust or of the property subject to the power in trust shall be made during the trust or calendar year so as to reduce the trust or the property subject to the power in trust to a value of less than $400,000 or $100,000, as the case may be, at the end of the trust or calendar year, then the annual commissions allowed herein shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of $400,000 or more, or of a trust or to donees of a power in trust over property having a value of $100,000 or more but less than $400,000, as the case may be, for the period from the beginning of the trust or calendar year to the date of the distribution and shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of either $100,000 or more but less than $400,000 or less than $100,000, as the case may be, for the remainder of the trust or calendar year and the part of such commissions payable from principal and computed from the beginning of the trust or calendar year to the date of distribution shall be charged ratably to the property remaining in the trust or still subject to the power in trust after such distribution and to the property distributed from the trust or to the beneficiary of the power in trust on the basis of their respective values. Further, if during a trust or calendar year additional property shall be received into a trust which had a value of less than $100,000 or by a donee of a power in trust the property subject to which had a value of less than $100,000, or into a trust which had a value of $100,000 or more but less than $400,000 or by a donee of a power in trust the property subject to which had a value of $100,000 or more but less than $400,000, as the case may be, at the beginning of the trust year or calendar year, so that because of the additional property the trust or the property subject to the power in trust has a value of $100,000 or more but less than $400,000, or of $400,000 or more, as the case may be, at the end of the trust or calendar year, then the annual commissions allowed herein to the trustee or to the donee of the power in trust shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of less than $100,000, or to trustees of a trust or to donees of a power in trust over property having a value of $100,000 or more but less than $400,000, as the case may be, for the period from the beginning of the trust or calendar year to the date of the receipt of the additional property and shall, on a proportionate basis, be those allowed to trustees of a trust or to donees of a power in trust over property having a value of $100,000 or more but less than $400,000, or to trustees of a trust or to donees of a power in trust over property having $400,000 or more, as the case may be, for the remainder of the trust or calendar year.

(c) Notwithstanding any provision of paragraphs (a) and (b) of this subdivision to the contrary, if during the continuance of a trust not measured at any time directly or indirectly by a life or lives or during the continuance of a trust after the termination of the measuring life or lives, the annual income of the trust amounts to $4,000 or more and there is more than 1 trustee, each trustee is entitled to the full commissions allowed under subdivision 5 to a sole trustee unless there are more than 2, in which case the commissions to which 2 trustees would be entitled must be apportioned among the trustees according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission to any one of them. If the annual income of the trust amounts to less than $4,000 and there is more than 1 trustee the commissions to which a sole trustee would be entitled under subdivision 5 must be apportioned among the trustees according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

7. Where a trustee or donee of a power in trust is for any reason entitled or required to collect the rents of and manage real property the net amount of rents collected and not the gross amount shall be used in making computation of commissions allowed by subdivision 5 and in addition to the commissions herein provided he or she shall be allowed and may retain for such services 6 percent of the gross rents collected, but there shall be only one such additional commission regardless of the number of trustees or donees of the power in trust. If there are 2 or more trustees or donees of the power in trust the additional commission herein provided for must be apportioned among them according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment.

8. If a trustee or donee of a power in trust is either authorized or

required by the terms of the will to accumulate income for any purpose permitted by law he or she shall be entitled to commissions from the income so accumulated, including income derived from the investment of such accumulated income, at the rate of 2 percent of the first $2,500 of such income distributed during the administration of the trust and 1 percent of all such income distributed in excess of $2,500 and he or she may retain such commissions at the time or times such income is distributed.

9. The value of any property to be determined in such manner as directed by the court and the increment thereof received, distributed or delivered, shall be considered as money in making computation of commissions. Whenever any portion of the dividends, interests or rents payable to a trustee or to a donee of a power in trust is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been collected.

10. Where the will provides a specific compensation for a trustee or for a donee of a power in trust he or she is not entitled to any other allowances for his or her services.

11. For the purposes of this section, the term "trustee" shall mean any trustee who is not a corporate trustee and the term "donee of a power in trust" shall mean any such donee including a donee of a power during minority who is not a corporate fiduciary provided, however, that as used in subdivision 6 of this section, the term trustee shall include a corporate trustee and further provided that the term "property subject to the power in trust" shall include property subject to a power during minority.

§ 2310. Payment on account of commissions

1. At any time during the administration of an estate and irrespective of the pendency of a particular proceeding a fiduciary may present to the court from which his letters issued a petition praying that he be permitted to receive a sum on account of the commissions to which he would be entitled if he were then filing his account and it were judicially settled, which must show the facts upon which the application is founded.

2. If the application be entertained process shall issue to all persons whose rights or interests would be affected by the payment applied for, citing them to show cause why the relief requested be not granted.

3. Upon the return of process the court may award a sum on account of commissions or make such other order or decree, if any, as justice shall require. The payment on account shall not exceed the receiving commissions due the fiduciary, except that the court may award a greater sum where all persons whose rights or interests are affected by the payment are persons under no legal disability and by acknowledged instrument consent thereto.

4. The total expenses of the application shall be borne by the person or persons to whom an award of commissions may be made, or if the application be denied, by the petitioner personally.

5. The order or decree authorizing the payment on account shall require the fiduciary to file a bond in the amount of the payment securing its return if and to the extent the payment is disallowed, except that no such bond shall be required where the fiduciary has already filed a bond pursuant to law or is a corporate fiduciary or where all persons whose rights or interests would be affected by the payment are persons under no legal disability and by acknowledged instrument consent to waive a bond or where the will specifically dispenses with such a bond.

§ 2311. Ex parte application for advance payment of commissions

1. At any time during the administration of an estate and irrespective of the pendency of a particular proceeding a fiduciary may present to the court from which his letters issued a petition praying that he be permitted to receive a sum on account of the commissions to which he would be entitled if he were then filing his account and it were judicially settled, which must show that unless he is allowed such sum on account of commissions he or the estate will be deprived of substantial advantages under the income tax laws of the United States or the state of New York or that he will suffer inconvenience or hardship or that all persons whose rights or interests would be affected by the payment applied for are persons under no legal disability and have by acknowledged instrument consented thereto. No notice of the application shall be required by the court.

2. If the application be entertained the court may award a sum on account of commissions or make such other order or decree, if any, as justice shall require.

3. In all cases where a payment on account of commissions is directed by the court the payment on account shall not exceed the receiving commissions due the fiduciary, except that the court may award a greater sum where all persons whose rights or interests are affected by the payment are persons under no legal disability and by acknowledged instrument consent thereto.

4. The total expenses of the application shall be borne by the fiduciary, by the estate, or shall be apportioned between them in such ratio as the court may determine according to the benefit derived from the payments.

5. The order or decree authorizing the payment on account shall require the fiduciary to file a bond in the amount of the payment securing its return if and to the extent that the payment is disallowed, except that no such bond shall be required where the fiduciary has already filed a bond pursuant to law or is a corporate fiduciary or where all persons whose rights or interests would be affected by the payment are persons under no legal disability and by acknowledged instrument consent to waive a bond or where the will specifically dispenses with such a bond.

§ 2312. Commissions of corporate trustees, including when acting as donees of powers during minority or donees of power in trust

1. If the will or lifetime trust instrument makes provisions for specific rates or amounts of commissions (other than a general reference to commissions allowed by law or words of like import) for a corporate trustee, or, if a corporate trustee has agreed to accept specific rates or amounts of commissions, a corporate trustee, whether as trustee or as donee of a power in trust, including for purposes of this section as donee of a power during minority, created under the provisions of the will or lifetime trust instrument, shall be entitled to be compensated in accordance with such provisions or agreement, as the case may be.

2. For trusts having a principal value of more than four hundred thousand dollars and as donee of a power in trust where the property subject to the power, including for purposes of this section the property subject to a power during minority, has a principal value of more than four hundred thousand dollars and subject to the provisions of subdivision 4 of this section, if the will or lifetime trust instrument does not make provisions for specific rates or amounts of commissions, or, contains only a general reference to commissions allowed by law or words of like import, a corporate trustee shall be entitled to such commissions as may be reasonable, and the court, upon application of a person interested in the trust or in the fund held by the corporate trustee as donee of a power in trust, may review the reasonableness of the commission of such corporate trustee.

3. Subject to the provisions of paragraph (a) of subdivision 4 of this section and regardless of the principal value of the trust: (a) during the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses and during the period of continuance of such a trust established after the termination of a life use or uses a corporate trustee, except as provided in paragraph (b) of this subdivision, shall be entitled to and may retain annual commissions in accordance with the provisions of

subdivision 1 or 2 of this section, as the case may be.

(b) In the case of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses a corporate trustee shall not be entitled to any commission for paying out principal.

(c) In the case of such a trust which continues after the termination of the measuring life use or uses a corporate trustee for the period of the measuring life use or uses shall be entitled to commissions from income and principal according to the provisions of subdivision 1 or 2 hereof, as the case may be, and except in respect of principal paid out to a charity or for charitable uses shall be entitled to a commission for distributing all sums of principal in accordance with the provisions of subdivision 1 or 2 hereof, as the case may be.

4. Notwithstanding anything contained in this chapter, the estates, powers and trusts law or any other provision of law to the contrary,

(a) Except as otherwise provided by paragraph (b) of this subdivision and subdivision three of this section, a corporate trustee of any trust created under will or lifetime trust instrument, or as donee of a power in trust created under will or lifetime instrument, whether in existence on or after the effective date of this section, shall be entitled to receive at least the compensation provided for an individual trustee under subdivisions 1, 2, 5 (but only as trustee), 6, 7 and 12 of section 2308 and subdivisions 1, 2, 5 (but only as trustee), 6, 7 and 8 of section 2309, as the case may be, in effect after the effective date of this section, at the time and in the manner provided by such sections, unless the will or lifetime trust instrument or an agreement between the trustee and the testator or grantor or by the trustee shall provide otherwise.

(b) A corporate trustee shall, in addition to the compensation permitted by the provisions of paragraph (a) of this subdivision, be entitled to annual commissions at the rate of not more than $12.35 per thousand or major fraction thereof, in lieu of the annual commissions provided under paragraph (a) of this subdivision, on trusts having a principal value of not more than four hundred thousand dollars and shall be entitled to annual commissions at the same rate as donee of a power in trust where the property subject to the power has a principal value of not more than four hundred thousand dollars, and such annual commissions shall be deemed reasonable compensation, unless the will or lifetime trust instrument or an agreement between the corporate trustee and the testator or grantor or by the corporate trustee shall provide otherwise. A corporate trustee shall be entitled to receive such commissions from time to time during the trust or calendar year and shall otherwise be governed by the provisions of sections 2308 and 2309, as the case may be, in effect from time to time.

5. Unless the will or lifetime trust instrument expressly provides otherwise, the commissions allowable by subdivision 1, 2 or 4 hereof, as the case may be, shall be payable one-third from the income of the trust or from the income of the property subject to the power in trust and two-thirds from the principal of the trust or from the property subject to the power in trust. However, in the case of a trust whose definition of income is governed by section 11-2.4 of the estates, powers and trusts law or a charitable remainder annuity trust or a charitable remainder unitrust, as defined in section six hundred sixty-four of the Internal Revenue Code of nineteen hundred eighty-six, as amended, such commissions shall be payable from the principal of any such trust after allowance for the annuity or unitrust amounts and shall not be payable out of such annuity or unitrust amounts.

6. The commissions allowed by subdivision 1, 2 or 4 thereof, as the case may be, may be retained, at any time or from time to time during the year in which such commissions are earned, by a corporate trustee, provided it furnishes annually as of a date no more than 30 days prior to the end of the year selected by the corporate trustee, to each beneficiary currently receiving income, and to any other beneficiary interested in the income and to any person interested in the principal of the trust who shall make a demand therefor, and, when acting as donee of a power in trust, to the beneficiary of the power in trust, a statement showing the principal assets or assets subject to the power in trust on hand on that date, and at least annually or more frequently if the trustee so elects, a statement showing all his or her receipts of income and principal or of property subject to the power in trust during the period with respect to which the statement is rendered including the

amount of any commissions retained and the basis upon which the commissions were computed. A corporate trustee shall not be deemed to have waived any commissions by reason of its failure to retain them at the time when it becomes entitled thereto; provided however that commissions payable from income for any such year shall be allowed and retained only from income derived from the trust during such year and shall not be supplied from income on hand in respect of any other year. If a beneficiary receiving income or a beneficiary of a power in trust of which the corporate trustee is donee does not desire to be furnished with any such statements his or her advice to the trustee to that effect in writing shall thereafter excuse the corporate trustee from furnishing such statements to the beneficiary unless and until the beneficiary requests such annual statements from the trustee. Upon enactment of, and subject to subdivision 1 of this section, a corporate trustee shall continue to receive commissions in the manner provided for a trustee or when acting as donee of a power in trust in the manner provided for a donee of a power in trust under sections 2308 and 2309, as the case may be, in effect immediately before the effective date of this section until the end of the then current trust or calendar year, and thereafter, a corporate trustee may receive commissions in accordance with the provisions of subdivision 2 or 4 of this section. A corporate trustee shall not change from the commissions provided for by subdivision 2 or 4 of this section, as the case may be, during a trust's calendar or fiscal year or the calendar year in the case of a power in trust but a corporate trustee may change from the commissions provided for by subdivision 2 to the commissions provided for by subdivision 4 of this section, or vice versa, only at the beginning of a calendar or fiscal year of a trust or a calendar year in the case of a power in trust, as the case may be.

7. On the settlement of the account of any trustee or donee of a power in trust under a will or lifetime trust instrument, in addition to the commissions provided for by this section, the court must allow to the corporate trustee including a corporate trustee acting as donee of a power in trust the corporate trustee's reasonable and necessary expenses actually paid by the trustee.

8. The value of any property to be determined in such manner as directed by the court and the increment thereof received, distributed or delivered, shall be considered as money in making computation of commissions. Whenever any portion of the dividends, interests, rents or other income payable to a trustee or donee of a power in trust is required by any law of the United States or other governmental unit to be withheld by the person paying it for income tax purposes, the amount so withheld shall be deemed to have been collected.

9. A trustee who prior to September 1, 1966 shall have received the maximum amount of commissions on principal permitted by subdivision 8 of section 285-a of the surrogate's court act as that subdivision existed prior to that date, shall not be entitled to annual principal commissions for the period from the date when he or she shall have received such maximum to September 1, 1966, but shall be entitled to receive commissions from and after September 1, 1966 at the rates and in the manner provided in section 2308 as in effect immediately before enactment of this section. A trustee who is entitled to annual principal commissions pursuant to section 285-a of the surrogate's court act as it existed prior to September 1, 1966, but has not received them, may receive an amount of commissions not in excess of the amount he or she would have been entitled to if he or she had taken such commissions, and be entitled to receive in addition commissions from and after September 1, 1966 at the rates and in the manner provided in section 285-a of this act.

10. A trustee who has been acting prior to July 1, 1956 shall be entitled to have commissions on principal and income theretofore received by him or her computed, allowed and paid under the methods and at the rates set forth herein, except as follows:

(a) If prior to July 1, 1956 a trustee has been allowed or has retained commissions for receiving and paying out or for distributing any item of principal he or she shall be entitled to no further commissions on the item.

(b) If prior to July 1, 1956 a trustee has been allowed or retained commissions on any item of principal received but not paid out or distributed by him or her he or she shall be entitled to no further commissions for receiving the item.

(c) Any trustee who became entitled to an annual principal commission under subdivision 1 (b) of section 285-a of the surrogate's court act as it existed prior to April 1, 1948 and who has not retained such commission may retain an amount equal to one-half of such annual principal commission. A trustee who because of the provisions of subdivision 2 of section 285-a of the surrogate's court act as it existed prior to April 1, 1948 either was not entitled to retain an annual principal commission under subdivision 1 (b) thereof or was required to credit such annual principal commission against his or her commission for receiving principal, may retain an amount equal to one-half of such annual principal commission. If a trustee has been allowed by decree or has retained any such annual principal commission one-half the amount thereof shall be deducted from the amount of commissions to which the trustee would otherwise be entitled under the provisions of subdivision 1 of surrogate's court procedure act section 2308.

(d) The annual principal commissions allowed by subdivision 3 of surrogate's court procedure act section 2308 as it existed on September 1, 1967 shall not be allowed by decree or retained in respect of any trust year ending prior to April 1, 1948, but for any trust year ending on or after April 1, 1948 and prior to July 1, 1956, the annual principal commission which may be allowed by decree or retained shall be computed at the rates in effect on the date such trust year ended.

(e) If prior to July 1, 1956 a trustee has been allowed by decree or has retained commissions on any item of income received and paid out by him or her prior to September 1, 1943 or on any item of income received by him or her subsequent to September 1, 1943 he or she shall be entitled to no further commission on the item.

(f) For purposes of this section, the term "donee of a power in trust" shall mean any such donee including a donee of a power during minority who is a corporate fiduciary and the term "property subject to the power in trust" shall include property subject to a power during minority.

§ 2313. Multiple commissions of executors or trustees, donees of powers during minority, or donees of power in trust under wills of

persons dying, or lifetime trusts established, after August 31, 1993

With respect to wills of persons dying, or lifetime trusts established, after August 31, 1993, if there are more than two executors or trustees, donees of a power during minority, or donees of a power in trust, no more than two commissions shall be allowed unless the decedent or creator has specifically provided otherwise in a signed writing, and the compensation thus allowable must be apportioned among the fiduciaries or donees of the power in trust according to the services rendered by them respectively unless they shall have agreed in writing among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them.

ARTICLE 24

COURT FEES

Section

§ 2401. Fees in the surrogate's court; general provisions

1. In the surrogate's court fees for service, filing and other matters shall be as provided in this article to the exclusion of other statutory provisions unless expressly stated to the contrary.

2. The clerk of each surrogate's court shall charge and receive for the services and matters herein set forth the fees indicated in this article which shall be payable in advance.

3. All fees shall be the property of the county unless otherwise provided by law.

4. Unless specifically indicated no fee is chargeable for motions made in a pending proceeding or for ex parte applications.

5. The fees in the surrogate's court of each county of the state shall be the amount specified in the rate column for the service or matter indicated.

6. Notwithstanding any other provision of law to the contrary, no filing fees payable pursuant to the provisions of this section and section twenty-four hundred two of this article shall be required in any matter relating to the estates or affairs of persons missing or deceased as a result of the terrorist attacks of September eleventh, two thousand one.

§ 2402. Fees. Amount of

1. Probate. Upon filing a petition to commence a proceeding for probate of a will the fee shall be as shown by the following schedule computed initially upon the gross estate passing by will as stated in the petition; provided however that in a proceeding for ancillary probate of a will the fee shall be computed only upon the property within the state passing under such will and provided that in all cases if the value of the estate so passing as subsequently shown by a tax return filed under article twenty six of the tax law, by a proceeding under such article, by any proceeding in surrogate's court involving such estate, or by such papers or documents in connection with such estate as court rules may require to be filed with the court, exceeds the value originally stated and upon which the fee was paid, then an additional probate fee shall be immediately payable. Such additional fee shall be the difference between the fee based on the value subsequently shown and the fee which was initially paid. In the event that the value of the estate so passing as subsequently shown is less than the value originally stated and upon which the fee was paid, then a refund shall be made which shall be the difference between the fee initially paid and the fee based on the actual value subsequently shown.

The fee paid in a probate or ancillary probate proceeding includes all charges except if probate be contested, fees as required for filing objections, demand for jury trial or for filing note of issue shall be payable.

2. Administration. Upon filing a petition to commence a proceeding for administration in intestacy the fee shall be as shown by the following schedule based initially upon the gross estate passing by intestacy as stated in the petition; provided however that if the value of the estate so passing as subsequently shown by a tax return filed under article twenty-six of the tax law, by a proceeding under such article, by any proceeding in surrogate's court involving such estate, or by such papers or documents in connection with such estate as court rules may require to be filed with the court, exceeds the value originally stated and upon which the fee was paid, then an additional fee shall be immediately payable. Such additional fee shall be the difference between the fee based on the value subsequently shown and the fee which was initially paid. In the event that the value of the estate so passing as subsequently shown is less than the value originally stated and upon which the fee was paid, then a refund shall be made which shall be the difference between the fee initially paid and the fee based on the actual value subsequently shown.

3. Accounting. (a) Upon filing a petition to commence a proceeding for an accounting the fee shall be as shown by the following schedule based on the gross value of assets accounted for including principal and income. Where more than one account is filed under a single petition the fee shall be based separately on the gross value of each separate fund or trust accounted for.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, upon filing a petition to commence an accounting proceeding for a lifetime trust or upon filing a petition for an accounting in a conservatorship proceeding, the fee shall be the same as that which is payable in the supreme court pursuant to section eight thousand eighteen of the civil practice law and rules.

4. Instruments settling accounts. For filing an instrument which

releases and discharges a fiduciary but does not contain any statement of account, no fee shall be charged. For recording any such instrument, the fee shall be six dollars per page or part thereof. Upon filing or recording an instrument pursuant to section 2202, the fee shall be as shown by the following schedule based on the gross value of assets accounted for including principal and income, and such fee shall include the filing or recording of such instrument. If separate instruments executed by several beneficiaries release and discharge the same fiduciary or fiduciaries and settle in whole or in the part one and the same account, only a single fee shall be charged for the filing or recording of all such instruments.

5. Decree approving accounts. Upon filing a petition pursuant to section 2203, the fee shall be as shown by the following schedule based on the gross value of assets accounted for including principal and income. In the event no values are shown in the petition and related instruments the fee shall be as shown by the following schedule based on the estate of the decedent as shown in the estate tax return filed under article 26 of the tax law or a proceeding under such article.

6. Other proceedings. In proceedings not otherwise provided in this act the fee shall be according to the following schedule based on the value of the subject matter.

7. The fee schedule for subdivision 1 through 7 inclusive is as follows:

Value of Estate or Subject Matter	Fee Rate
Less than $10,000	$ 45.00
10,000 but under 20,000	75.00
20,000 but under 50,000	215.00
50,000 but under 100,000	280.00
100,000 but under 250,000	420.00
250,000 but under 500,000	625.00
500,000 and over	1,250.00

8. (a) For filing a petition to commence the following proceedings, the fee shall be as indicated:

SCPA		Fee Rate
607	To punish respondent for contempt	$30.00
711	Suspend, modify, revoke letters or remove a fiduciary other than a custodian or guardian	75.00
711	Suspend, modify, revoke letters or remove a custodian or guardian	30.00
715	Application of fiduciary to resign	30.00
717	Suspend powers-fiduciary in war	30.00
1401	Compel production of will	20.00
1420	Construction of will	75.00
1421	Determination of right of election	75.00
1502	Appointment of trustee	45.00
1508	Release against state	50.00
1703	Appointment of guardian	20.00
2003	Open safe deposit box	20.00
2102	Proceedings against a fiduciary	20.00
2103	Proceedings by fiduciary to discover property	75.00
2107	Advice and directions	75.00
2108	Continue business	45.00
2114	Review corporate trustee compensation	10.00
2205	Petition to compel fiduciary to account	30.00
EPTL		
7-4.6	Appointment of successor custodian	20.00

(b) For filing a petition to commence a proceeding for the appointment of a trustee of a lifetime trust or for the appointment of a conservator, the fee shall be the same as that which is payable in the supreme court pursuant to section eight thousand eighteen of the civil practice law and rules.

9. For filing:

		Fee Rate
(i)	a demand for trial by jury in any proceeding, SCPA 502	$150.00
(ii)	objections to the probate of a will SCPA 1410	150.00
(iii)	a note of issue in any proceeding	45.00
(iv)	objection or answer in any action or proceeding other than probate	75.00

(v) a will for safekeeping pursuant to section 2507 of this act except that the court in any county may reduce or dispense with such fee 45.00

(vi) a bond, including any additional bond:

less than $10,000 .... 20.00

$10,000 and over 30.00

10. For furnishing a transcript of a decree $20.00

11. For a certificate of letters evidencing that the appointment of a fiduciary is still in full force and effect $6.00

12. (a) For making and certifying or comparing and certifying a copy of a will or any paper on file or recorded in his office: .... $6.00 pg.

(b) Authenticating the same, additional: $20.00

13. For searching and certifying to any record for which search is made: $30.00 for under 25 years

$90.00 for over 25 years

14. (a) For producing papers, documents, books of record on file in his office under a subpoena duces tecum, for use within the county where the office of the court is situated: $30.00

(b) For use in any other county, such fee to be paid for each day or part thereof that the messenger is detailed from the office and to be in addition to mileage fee and the necessary expenses of the messenger. The clerk of the court shall not be required to make any collection or return of the money so paid for expenses: .... $.30

15. For recording:

(a) any instrument, decree or other paper which is required by law to be recorded: $8.00 per pg.

or part $16.00 minimum

(b) for filing an authenticated copy of a foreign will: $8.00 per pg.

$64.00 minimum

(c) for taxing bill of costs: $15.00

16. No fee shall be charged:

(a) for filing objections of a guardian ad litem, or of a respondent in a proceeding brought pursuant to section three hundred eighty-four-b of the social services law

(b) for filing the annual account of a guardian

(c) for any certificate or certified copy of a paper required to be filed with the United States Veterans Administration

(d) for filing a petition in a proceeding for filing an additional bond, to reduce the penalty of a bond or substitute a new bond or discharge any bond when no accounting is required

(e) in respect to the proceedings for the appointment of a fiduciary when the appointment is made solely for the purpose of collecting bounty, arrears of pay, prize money, pension dues or other dues or gratuities due from the federal or state government for services of an infant or of a decedent formerly or now in the military or naval services of the United States or to collect the proceeds of a war risk insurance policy.

(f) to or received from the state of New York or any public agency of the state or any civil subdivision or agency thereof or with respect to a social services official when taking any proceeding with respect to the estate of a person who was a recipient of benefits from social services.

(g) or received for the filing of a petition for an order granting funds for the maintenance or other proper needs of any infant nor for any certificate or any certified copy of the order on such an application.

17. The fee charged herein for the filing of a petition shall include the recording of any decree made in that proceeding which is required by law to be recorded and shall include the recording of any letters required by law to be recorded.

§ 2403. Fees of court reporter in surrogate's court

Except where otherwise agreed or when special provision is otherwise made by statute a court reporter is entitled for a copy fully written out from his stenographic notes of the testimony required to be made in any proceeding for the record of the court to 20 cents for each folio and the court may order that the fees therefor be paid out of the estate to which the proceeding relates.

§ 2404. Expenses

Where upon the application of any party the surrogate or any of the personnel of the court goes to a place other than the court in order to take testimony or to produce records or for any purpose required by law, the person so going shall be paid by such party his actual and necessary expenses.

ARTICLE 25

RECORDS AND RECORDING

§ 2501. Records to be kept by court; general requirements

1. The clerk of the court shall keep a record of and be responsible for the proper indexing, filing or recording, as the case may be, collating, arranging, restoring and preserving of all records, documents, books, maps, instruments and other matter specified in this article or by other requirement of law heretofore or hereafter deposited, filed or recorded, of all matters specified by this article or by other requirement of law.

2. He shall upon payment of the fees required by law exemplify or certify all records and papers filed or recorded and shall search and certify as to records or papers in custody of the court or that they cannot be found.

3. Records shall be kept by means of record books, cards, files or any other system, process, form or combination thereof, as may be prescribed by CPLR 9703 or directed by the court together with such appropriate index or reference system, and such topic, item or other subdivision or arrangement as deemed appropriate or convenient. When the clerk is directed to keep a record book it may be kept by one or more of the methods prescribed as may be currently utilized by the court for the purpose.

4. The expense of keeping the records required by law to be kept shall be a charge upon the county, state or other governmental unit or agency providing funds for administration of the court as may be provided by law.

5. When filing is required the paper filed shall be entered in the proper minute book, and date of filing with fee, if any, noted on the paper.

6. When recording of a paper is required an accurate copy thereof shall be made of the complete content of the paper by entry at length in a record book in plain and legible handwriting or by printing or typewriting or photographic or microphotographic or other process or any combination thereof or by making a record in any other form or process which provides or will produce an accurate copy of the paper.

7. Records and papers which are sealed and withheld from public inspection as required by law or directed by the court shall thereafter be opened only to the extent as may be authorized by the court.

8. All books and records other than those sealed are open to inspection of any person at reasonable times.

9. Records and papers relating to a proceeding and entered in the minute book shall be preserved as permanent records of the court, except as disposition is authorized by section 89 of the judiciary law.

§ 2502. Books to be kept by clerk

The clerk shall keep and maintain:

1. A record book properly indexed in which shall be entered a description of every proceeding with proper entries under each denoting the papers filed, orders and decrees made and the steps taken therein, with the dates of filing and recording the several papers in the proceeding.

2. Such other record books, properly indexed, as may be necessary or convenient to record at length any documents required by law to be recorded.

3. A court and trust fund register in which shall be entered a reference to any proceeding in which a decree or order directs a deposit of money, the date thereof, the amount thereof, the amount so deposited, any receipt therefor and the name of the person to and for whom the deposit is made.

4. A record book, properly indexed, with proper entries denoting the name and file number of the estate and the date of filing any informal account or any release pursuant to 2202.

5. Such other books as the chief administrator of the courts in each department or the court in each county may direct to be kept.

§ 2504. Wills to be retained after probate; exceptions

1. A written will which has been admitted to probate must remain in the court, except where the will is on file in a court or public office of another state or country under the laws of which it cannot be removed.

2. When it appears that the laws of another jurisdiction require the production of an original will before the provisions thereof become effective in such jurisdiction the court may cause any original will on file in its office to be sent to any court which, or to any officer of such jurisdiction who, under the laws thereof, is empowered to receive the will for probate, or may deliver the will to any person interested in the probate thereof in such jurisdiction or to his fiduciary in such manner and upon such terms as it deems proper for the preservation of the will and the protection of other parties interested in the estate.

3. In the case of a joint will which has been admitted to probate in this state the court of such county may under such terms as it deems proper transmit the original joint will to the surrogate's court of any other county in this state for probate as the will of any other signer thereof. It shall be the duty of the court of such other county to keep a true copy thereof in its office and thereafter to return the original will to the surrogate's court of the county of original probate.

§ 2505. Transmission of wills of non-domiciliaries and domiciliaries of another county before probate

Whenever it appears that an instrument purporting to be a will is on file or is in safekeeping and no proceeding for the probate thereof is pending and that the maker of such instrument at the time of his death was domiciled elsewhere, either within or without the state, the court, upon such notice as it may think proper, may cause the instrument to be sent to any court or officer of this state or other jurisdiction of decedent's domicile entitled under the laws thereof to receive it or to any person in this or any other jurisdiction interested in the probate of the instrument. The instrument may also be sent to any court or officer in this state or other jurisdiction in which the maker left real or personal property. Delivery is to be made in such manner and upon such terms as the court deems proper for the preservation of the instrument and for the protection of parties interested in the estate of the maker thereof.

§ 2506. Recording wills proved within the state

1. A certified copy of a will of real property admitted to probate in any court of competent jurisdiction of the state must be recorded in the office of the county clerk or register as the case requires of any county in which real property of the testator is situated, upon the request of any person interested.

2. The fiduciary under a will of real property must cause a certified copy thereof to be recorded in each county where real property of the testator is situate, other than the county of the testator's domicile, within 20 days after letters are issued to him.

3. An exemplification of the record of such a will from any court where recorded either before or after this chapter takes effect may be in like manner recorded in the office of the clerk or register of any county.

§ 2507. Reception of wills for safekeeping

1. The court of any county upon being paid the fees allowed therefor by law shall receive and deposit in the court any will of a domiciliary of the county which any person shall deliver to it for that purpose and shall give a written receipt therefor to the person depositing it. An attesting witness to any will may make and sign an affidavit before any officer authorized to administer oaths setting forth such facts as he would be required to testify to in order to prove the will. The affidavit may be written upon the will or on some paper securely attached thereto and may be filed for safekeeping with the will to which it relates. There may also be filed with the will affidavits of certified medical examiners, under the provisions of the mental hygiene law, certifying that the maker of the will was of sound mind at the time of its execution, together with any facts supporting such opinion.

2. The will shall be enclosed in a sealed wrapper so that the contents thereof cannot be read and shall have endorsed thereon the name of the testator, his domicile, and the day, month and year when delivered and shall not on any pretext whatever be opened, read or examined until delivered to a person entitled to it as hereinafter directed.

3. The will shall be delivered only

(a) to the testator in person or

(b) upon his written order duly proved by the oath of the testator which shall be duly acknowledged or

(c) after his death to the persons named in the endorsement on the wrapper of the will, if such endorsement be made thereon or

(d) if there be no such endorsement or if it has been deposited with any other officer than a surrogate, then to the surrogate's court of the county.

4. If the will shall have been deposited with a surrogate's court or shall have been delivered to it as above prescribed the court after the death of the testator shall publicly open and examine the will and make known the contents thereof and shall file it in the court, there to remain until it shall have been duly proved, if capable of proof, and then to be delivered to the person entitled to the custody thereof or until required by the authority of some competent court to produce the same in such court.

§ 2508. Filing of will of decedent. The court of any county may receive and file the will of any decedent domiciled in that county at the date of death which any person shall deliver, without payment of fee. A record of the receipt and filing thereof shall be made by the clerk and the will shall remain on file subject to the further order of the court.

§ 2509. Firearms inventory

Whenever, by regulation, rule or statute, a fiduciary or attorney of record must file a list of assets constituting a decedent's estate, such list must include a particularized description of every firearm, shotgun and rifle, as such terms are defined in section 265.00 of the penal law, that are part of such estate. Such list must be filed with the surrogate's court in the county in which the estate proceeding, if any, is pending and a copy must be filed with the division of criminal justice services.

ARTICLE 26

THE SURROGATE'S COURT AND ITS OFFICERS

Section

§ 2601. When court open; terms and sessions

1. The court is always open for the transaction of any business within its powers and jurisdiction.

2. The judge of a surrogate's court may appoint and may alter the times and places of transacting any business which may come before it and designate terms and sessions for trials, hearings, chamber business and other business of the court.

3. The court, in a county where the judge of the county court is also a judge of the surrogate's court, may be held at the time and place at which the county court is held and the jury in attendance may constitute the jury for the trial of any issue arising in the surrogate's court.

§ 2602. Terms of courts and powers of judges in counties having more than one judge of the surrogate's court.

1. In any county having more than 1 judge of the surrogate's court

(a) all of the powers conferred by law upon a judge of the surrogate's court may be exercised by either of such judges;

(b) the disability of a judge or his illness or absence from the county after his decision upon any matter in an action or proceeding before him shall not affect the validity of such decision and the other judge may give effect thereto and make and sign an appropriate order or decree based thereon having the same force and effect as if made by the judge making the decision.

2. In any such county the judges must

(a) appoint and may alter the times of holding terms and sessions of that court for the trial of proceedings in which there is a right to trial by jury;

(b) appoint and may alter the times of holding terms and sessions of that court for the disposition of all other business;

(c) prescribe the duration of such terms and assign the judge to preside and attend at the terms and sessions so appointed.

3. In the county of New York the appointment of such terms must be published in two newspapers published in the city of New York during or

before the first week in January in each year.

§ 2603. Surrogate and acting surrogate

1. The judge of the surrogate's court may be designated as the surrogate. He may sign any paper wherever he may be at any time.

2. Where the county judge is also a judge of the surrogate's court he shall be designated as such without any addition referring to his office as county judge.

3. Where a judicial officer other than the judge of the surrogate's court acts as a judge of the surrogate's court in a case prescribed by law, he may be designated as "surrogate", notwithstanding his official title.

4. No person other than the one who holds such office on the effective date of this act may serve in the office of judge of the surrogate's court unless he or she has been admitted to practice law in the state of New York for at least 10 years as of the date he or she commences the duties of office.

§ 2604. Disqualification of judge

1. In addition to his general disqualifications as a judicial officer, a judge of the surrogate's court is also disqualified.

(a) from acting upon an application for the probate of a will where he is an attesting witness or is necessarily examined or to be examined as a witness,

(b) where he files a certificate that his relations to the parties or subject matter is such that it is improper for him to act.

2. An objection to the power of a judge of the surrogate's court to act based upon a disqualification is waived by an adult party unless it is taken at or before the joinder of issue by that party or, where an

issue is not framed, at or before the submission of the matter to the court.

§ 2605. Chief clerk, deputy chief clerk and other personnel of the courts unless otherwise provided for a particular county

1. Chief clerk. By written order filed and recorded in his office, which he may in like manner revoke at pleasure, a surrogate shall appoint a chief clerk of the surrogate's court, who shall be and shall perform all duties of the clerk of the surrogate's court.

2. Deputy chief clerk. In any county containing a city of the second class and in any county having a population over 500,000 the surrogate shall, and in any other county the surrogate may, in like manner appoint a deputy chief clerk of the surrogate's court. In counties under 500,000 the surrogate may designate one of the clerks of the court to act as deputy chief clerk of the court in addition to other duties.

3. Temporary chief clerk of the court. Should the chief clerk or deputy chief clerk be absent or unable to act or if the office be vacant the surrogate may designate any law assistant or other clerk to serve temporarily as chief clerk or deputy chief clerk of the court.

4. Oath and bond. Each chief clerk and deputy chief clerk shall, before entering upon the performance of his duties, take the constitutional oath of office and shall file it with the county clerk of the county together with a bond in the sum of $50,000 approved by the surrogate conditioned for the faithful performance of his duties.

5. Other personnel. Within the appropriation therefor made by the county board of supervisors each surrogate may likewise appoint and remove such law assistants, clerks, court reporters and such attendants, messengers and other court officers and employees as necessary, including temporary court attendants and other personnel.

Court attendants and officers whose duty shall be to attend terms and sessions of court as required and perform such services as the surrogate directs shall possess all the powers of an officer designated by the sheriff to attend upon the court.

§ 2606. Chief clerk and deputy chief clerk of the surrogate's court and other personnel in Bronx, Kings, New York, Queens and Richmond counties

1. The judge of the surrogate's court in the counties of Bronx, Kings, New York, Queens and Richmond counties may severally appoint and remove a chief clerk of the court, a deputy chief clerk and such law assistants, clerks, court reporters and other officers and employees as necessary.

2. The chief clerk shall also be and shall perform all duties of the clerk of the surrogate's court.

3. Each chief clerk and deputy chief clerk of the court shall, before entering upon the performance of his duties, take the constitutional oath of office and file the same with the county clerk, together with a bond in the sum of $50,000 approved by the surrogate conditioned on the faithful performance of the duties of his office.

4. Should the chief clerk or deputy chief clerk be absent or unable to act or if the office be vacant the surrogate may designate any law assistant or other clerk to serve temporarily as chief clerk or deputy chief clerk of the court.

5. Each surrogate may appoint and remove such attendants, messengers and court officers to attend terms and sessions of court and perform such duties as required. Such officers shall have all the powers of officers designated by sheriffs to attend upon courts of record.

6. The compensation of all court personnel in the surrogate's court of each county, notwithstanding any other provisions of law, shall be fixed by the respective surrogates upon approval of the state administrator

and shall be a city charge provided that the final determination of the estimate of annual financial needs of the court shall be made as provided by article 7-a of the judiciary law and section 29 of article 6 of the Constitution. The proper appropriating body shall annually appropriate the necessary funds for such compensation and other expenses of the court.

§ 2607. Court reporters

1. Each surrogate may appoint and at pleasure remove one or more court reporters for the court, whose compensation shall be determined and paid in the same manner as salaries of clerks in the court.

2. The court reporter appointed to serve in the surrogate's court may with approval of the surrogate be designated to perform duties in another court and the court reporter of another court with approval of the judge thereof may be designated to serve in the surrogate's court. The provisions of the judiciary law apply to court reporters in the court.

3. Whenever the service of a court reporter is required and no regular court reporter is available, or he is sick, absent or unable to act, or whenever a trial or hearing requires additional reportorial services, a surrogate may appoint one or more temporary court reporters to serve in an action or proceeding to be paid a reasonable compensation certified by the surrogate which shall be a charge upon the city or county and paid as other expense of the court.

§ 2608. Expenses of surrogate or clerk

Where, upon the application of any party, the judge or clerk of the surrogate's court goes to a place other than the court in order to take testimony, he shall be paid by such party his actual and necessary expenses.

§ 2609. Powers of chief clerk and other officers of the surrogate's court

1. The chief clerk and deputy chief clerk of the surrogate's court may exercise, concurrently with the surrogate, the following powers:

(a) To certify and sign, issue or seal in the name of the clerk

(i) any papers or records of the court,

(ii) any process to which a party is entitled as of course,

(iii) any letters or other mandate of the court.

(b) To adjourn to a definite time, not exceeding 30 days, any matter, when the surrogate is absent from his office or unable by reason of other engagements to attend thereto.

(c) In any proceeding of which the court has jurisdiction, to administer oaths, take acknowledgments of deeds and all other written instruments and certify the same at any place within or without the state.

(d) With the approval of the surrogate or surrogates of the county to authorize or deputize one or more of the other clerks of the court, to sign his name and exercise such of the other powers conferred upon him by this section as he shall designate. The surrogate may prohibit the chief clerk or deputy chief clerk from exercising any powers specified in this subdivision but the prohibition does not affect the validity of any act of the clerk done in disregard of the prohibition.

2. In addition to the powers above enumerated, to take proof of a will, unless objections to probate of such will have been filed and are pending at such time.

3. The surrogate or surrogates in their discretion respectively may

(a) Designate the chief clerk, one of the other clerks, a law assistant or any assistant, to take and report the testimony in any proceeding, but without authority to pass upon the issue therein. The person so designated shall have the power to administer oaths to the persons testifying in such proceeding. Whenever the person so designated goes to a place other than the surrogate's office his actual and necessary expenses shall be paid by the party seeking the testimony and the chief clerk of the court shall not be required to make any collection or return of the money so paid.

(b) Authorize and deputize in writing the chief clerk, one or more other clerks, law assistants or other assistants to sign the name of the respective surrogate to decrees in uncontested proceedings for administration, for the probate of a will or for the appointment of a general guardian of the person or property of an infant, upon a written decision duly filed by the surrogate and authorize and deputize any such officer or employee to sign in his name orders on applications to open safe deposit boxes. Any decree or order signed by such officer or employee pursuant to the designation shall be valid and binding as if signed by the surrogate.

4. Where service upon a respondent is made by personal delivery of process to the chief clerk of the court designated pursuant to 307 the chief clerk shall mail such process to respondent at the address indicated by him in such designation or if not so designated, at the address last indicated by him on the records of the court.

5. Whenever the testimony is taken by commission or by any disclosure device or an attesting witness is examined under 1404, the court may direct that the commission issue to the chief clerk, deputy chief clerk or a law assistant and that the disclosure be held under the supervision of one of such persons.

6. The signature of the chief clerk upon a certificate of letters of any kind or a certificate of comparison or of a search may be a facsimile, imprinted, stamped, photographed or engraved thereon.

§ 2610. Commissioner of records of surrogate's court, New York county; appointment; salary; duties

1. The surrogates of New York county shall appoint a commissioner of records. The commissioner shall appoint, subject to the prior approval of the surrogates, subordinates to assist him in the performance of his duties. The salary of the commissioner and his subordinates shall be fixed by the surrogates and shall be paid out of appropriations therefor made by the city of New York.

2. The commissioner shall examine into the arrangement and condition of the records, wills, documents, books and papers deposited or filed in the office of the surrogate's court of the county of New York and into the condition and sufficiency of the indices thereof. He shall collate and arrange the same in such manner as may be necessary for their restoration and preservation and shall take such steps as may be necessary to provide convenient references thereto and for the examination and use as the public interest and convenience may require. He shall cause copies thereof to be made whenever by reason of age, use, exposure, or any casualty such copies shall in his judgment be necessary and after the copy has been compared with the original it shall be certified by the commissioner and shall thereafter be admitted in evidence and shall be considered for all other purposes with the same effect as the original. The original shall be placed in a suitable enclosure by the commissioner and shall be preserved, properly endorsed and indexed for such examination as may be directed by an order of the court in any action or proceeding in which the accuracy of the copy may be questioned. His duties shall be performed under such conditions and regulations as may be approved by the surrogates and in a manner which shall permit the examination and use of the records, wills, documents, books, papers and indices as the public interest and convenience may require.

3. The office of commissioner of records of the surrogate's court of New York county shall terminate upon the completion of the duties in this section prescribed.

§ 2611. Other court matters

1. Each surrogate may establish and organize within the court such departments and divisions as deemed necessary and advisable to effectively perform the various phases of work of the court including accounting, administration, adoption, guardianship, law, probate, special proceedings and such other departments and divisions as serve the needs of the court.

2. Each surrogate may assign, reassign and change at pleasure the personnel of the court to one or more departments or divisions of the court and specify the duties and responsibilities of all court personnel.

3. The court may have such auxiliary services as will serve its purpose and are within its authorized appropriation or otherwise made available to it and may utilize the auxiliary services and agencies available to any court of record.

ARTICLE 27

APPEALS

Section

§ 2701. Appeal; general applicability of CPLR.

1. Except as otherwise provided in this act either expressly or by necessary implication all of those provisions of the CPLR which govern appeals generally, CPLR article 55, and appeals to the appellate division from judgments and orders of the supreme court, CPLR article 57, and such other CPLR provisions as are relevant in conjunction with such appeals shall be applicable to appeals from decrees and orders of this court. For such purpose the following terms as used in the CPLR shall have the meanings ascribed:

(a) "Action" shall mean "proceeding";
(b) "Judgment" shall mean "decree";
(c) "Plaintiff" shall mean "petitioner" or "applicant"; and
(d) "Defendant" shall mean "respondent".

2. In the event a verdict was not returned an appeal may be taken from

an order denying a motion for the direction of judgment.

§ 2702. Proceedings upon remittitur.

Remittitur from the appellate court to this court shall also be as provided in the CPLR, except that any decree or order to be entered in this court upon the remittitur shall be as directed by the court.

ARTICLE 28

REPEAL; SAVINGS CLAUSE; EFFECTIVE DATE

Section

§ 2801. Repeal of surrogate's court act.

Chapter 928 of the laws of 1920, entitled "An act in relation to surrogates and the practice and procedure in surrogate's courts" and all acts amendatory thereof and supplemental thereto, constituting the surrogate's court act, as heretofore in effect, are hereby repealed.

§ 2802. Pending and subsequent actions and proceedings

This act shall apply to all actions and proceedings hereafter commenced. It shall also apply to all further proceedings in pending actions and proceedings except to the extent that the court determines that the application in a particular pending action or proceeding would not be feasible or would work injustice, in which event the former procedure applies. Proceedings pursuant to law in an action or proceeding taken prior to the time this act takes effect shall not be rendered ineffectual or impaired by this act.

§ 2803. Reference to surrogate's court act

This act shall succeed the surrogate's court act and shall be deemed substituted therefor throughout the statutes and rules of the state. Reference in any statute or rule to a particular provision of the surrogate's court act or to any part thereof shall, insofar as practicable, be deemed to refer to:

1. Such provision of this act or part thereof as replaces the prior provision or part thereof or

2. Such practice as replaces that of the prior provision or part thereof, whether the practice is supplied by statute other than this act or by authority other than statute, if the prior provision or part thereof is not superseded by a specific provision of this act.

§ 2804. Effect of unconstitutionality in part

If any clause, sentence, paragraph, subdivision, section or part of this chapter shall be adjudged by any court of competent jurisdiction to be invalid, such judgment, decree or order shall not affect, impair or invalidate the remainder thereof but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment, decree or order shall have been rendered.

§ 2805. Effective date

This act shall take effect September first, nineteen hundred sixty-seven.