

Ten Tips For Handling Complex Probate (With Forms)

by James W. Martin



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It's difficult but not impossible, and there is a lot to be said for taking a methodical approach.

HERE ARE 10 practice pointers for handling the legal aspects of administering estates and trusts of persons who died leaving multiple assets, substantial debt, feuding families, or other complicating factors for their trustees and personal representatives to sort out. Ripped from 30 years of probate and trust law experience, these tips apply legal concepts and procedures, as well as technology, to assist the lawyer in simplifying and managing probate and trust administration in these difficult cases.

1. Identify The Client

This is really pretty simple. One client at a time is all a lawyer can usually handle. Simultaneously representing two or more clients creates its own complications. However, when someone dies, it is common for a number of relatives to want to meet with the lawyer. This is dangerous. Attorney-client privilege may be lost by meeting in the company of persons who turn out not to be clients. The soon-to-be-non-clients may impart confidential information to the lawyer, which later creates a conflict of interest. Therefore, it is best for the lawyer to sort out who will be the client before the first meeting, and, preferably, during the first phone call or email.

The preferred client is the one who:

- Is capable of paying the attorney's fee;
- Has authority to act as personal representative ("PR") or trustee;
- Is not already guilty of wrongdoing; and
- Appears willing to seek and accept the attorney's advice.

This factual assessment is best made during the initial conference or soon thereafter. Sometimes, potential clients do not pass this test. If they do not, it is best to refer them to the Lawyer Referral Service.

Some lawyers seem to forget that in some states, such as Florida, the lawyer represents the PR and not the "estate," not the beneficiaries, not the creditors, and not any other interested persons. Beneficiaries frequently misunderstand this and require numerous letters reminding them that they should obtain their own separate counsel because the PR's attorney represents only the PR. It is best to encourage beneficiaries to obtain separate counsel early in the probate process. It will make the job of the PR's attorney much easier because the beneficiary's lawyer will explain the process to the beneficiary. It is easier to keep a learned lawyer informed than to keep a non-lawyer beneficiary informed.

An engagement letter or fee contract should be entered into between the lawyer and PR confirming the terms of engagement, signed by the benefi-

ciaries, and filed in the probate court file. A sample form of fee contract appears as Appendix 1 at the end of this article.

2. Establish Client's Base Of Authority

In complex cases, clients are frequently anxious to get to work. There are assets to deal with, problems to tackle, bills to pay, and enemies to defend or attack. The lawyer must remind the client of the need for authority. This means being appointed PR by the probate court. Acting before appointment is fraught with risk. Therefore, filing a petition for probate administration should be the first step the lawyer takes to establish the client's base of authority.

It might also be necessary to be appointed PR by probate courts in other states where the decedent owned real property. For example, if the decedent's domicile was Florida, then the Florida probate proceeding should be filed first, being the domiciliary proceeding. If the decedent's domicile was not Florida, a Florida ancillary probate proceeding must be filed. Probate is ineffective as to real estate located in other states (probate is an in rem proceeding).

In addition, establishing the client's base of authority might require assuming the position of successor trustee of one or more living trusts, or even land trusts. In complex cases, this might require filing a petition for appointment of successor trustee with the court. A sample form of acceptance by successor trustee appears as Appendix 2.

3. Start The Clocks

There are three clocks to start immediately after the court enters the order admitting the will to probate and appointing the PR:

🕒 **Clock #1:** Publish notice to creditors. In many states, such as Florida, this gets the creditor claims period running for creditors who are not reasonably ascertainable.

🕒 **Clock #2:** Serve notice of administration on all beneficiaries named in the will and on all persons who would take if that will and all wills failed (intestate heirs and beneficiaries of prior wills). In many states, this gets the time period running for will contests and PR appointment contests;

🕒 **Clock #3:** Serve notice to creditors on all reasonably ascertainable creditors. This gets the time period running for the most troublesome creditors: those who are reasonably ascertainable. Thorough search for these persons may take much effort, including reviewing bank account registers going back a year. (See David T. Smith and Robert M. Winick, *Known or Ascertainable Estate Creditors: The Pope Decision*, 62 Fla. Bar J. 66 (Oct. 1988).) Service by FedEx, UPS, etc., is the author's preferred method of service because it is reliable, it is quick, and it provides proof of delivery the next day. Be sure to file proof of service with the clerk of court.

Why start the clocks ASAP? It is important for the PR to determine the interested persons in the estate as soon as possible so that the PR can obtain consent of interested persons on major decisions that arise in complex probate very early on. This means determining who are the creditors and beneficiaries of the estate up front in the probate process. This reduces the likelihood of an interested person attacking an act of the PR taken before the PR identified all interested persons.

4. Prepare The Pleadings Index

Like the A-Team, the lawyer handling complex probate needs a good plan. That means making checklists, lots of them. The first and most important checklist is the pleadings index. Every probate has two sets of pleadings: those that were filed and those that will be filed. The pleadings index lists them all, but separates them, with those already filed on the top and those to be filed on the bottom. As pleadings are filed, they move from the bottom of the list to the top.

The pleadings index contains the case caption as the top of the page, just like a court pleading, so

it is handy place from which to copy the caption when drafting.

It also contains a list of significant dates: 60 days for the inventory, four months for statement regarding creditors, one year for petition for discharge.

Thus, the pleadings index is a one-stop source to view the case status at a glance. A sample appears as Appendix 3 at the end of this article.

5. Assemble The Team

The lawyer handling complex probate needs help, lots of help. Here's a starter:

- Financial: CPA, tax attorney, bank;
- Valuation: MAI real estate appraiser, personal property appraiser, business appraiser;
- Sales: Real estate agent, securities broker;
- Co-counsel: Trial lawyer, environmental lawyer, real estate lawyer, business lawyer.

It is wise early in a law practice to create a list of professionals to call upon in time of need: a referral list. Being able to call upon someone you know will allow you to ask for favors: quick response, answers to quick questions, whether your strategies make sense.

Referral lists should include more than contact information: area of practice, date, who referred, case names, background. This will add context to your referral list.

When you meet lawyers from other counties and states, find out what they do and add them to your list for future reference. It might be 10 years before you need them, but when you do, they might make all the difference in your case.

Be sure to keep your team informed. Don't leave anyone out of the loop. When sending emails, include your entire team. Set up a distribution list in Outlook Contacts so that one click adds all their email addresses.

Don't forget to call on your team. They know more about their fields than you do; that's why they are on your team. If they don't, change play-

ers. Send your team members engagement letters requiring them to keep your communications confidential and within the attorney-client and work product privileges. A sample form appears as Appendix 4.

6. Answer Before You Are Asked

As a fiduciary, the PR should provide an interested person with information about the estate and its administration on reasonable request in writing. This means the PR can wait for beneficiaries and creditors to ask for information before providing it.

There is a basic truth in complex probate: you can't have too many friends. Friendships are based on trust and credibility. You create this with beneficiaries and creditors by giving them information: lots of information, timely information, accurate information, credible information, useful information.

The PR should act like the newspaper: be the first to tell the readers what's new, what's interesting, what's important.

And like newspapers, the PR should separate editorial comments from the facts. This means making it clear when something communicated is based on fact and when it is an opinion or estimate.

Another tip: newspapers don't make predictions. Neither should the PR. A beneficiary who was given an estimate for his share never remembers it was an estimate and subject to taxes and administration expenses.

Keep beneficiaries informed. Answer questions before they are asked. But don't speculate.

7. Prepare Regular Accountings

Probate rules in some states require only a final accounting, not interim accountings. But interim accountings should be used for two reasons already listed above: starting the clock and answering before being asked.

Every state has a limitations period for objections to accountings. For example, in Florida interested persons have 30 days after service to object to an accounting. An objection not timely filed is deemed abandoned. The accounting must be served along with a notice informing the recipient of this deadline. Banks send customers monthly statements of their checking accounts in order to flush out any problems quickly. The same applies to complex probate. The sooner the PR knows of an objection to something reported on the accounting, the better. Monthly accountings in some probates make a lot of sense; in others, quarterly accountings accomplish the purpose.

The same applies to trust accountings, but the deadline for objections in Florida is six months instead of 30 days. If the trustee only sends an annual accounting, the risk of a transaction being objected to can run a full 18 months from the date of the transaction. This can be reduced to seven months by sending monthly trust account accountings.

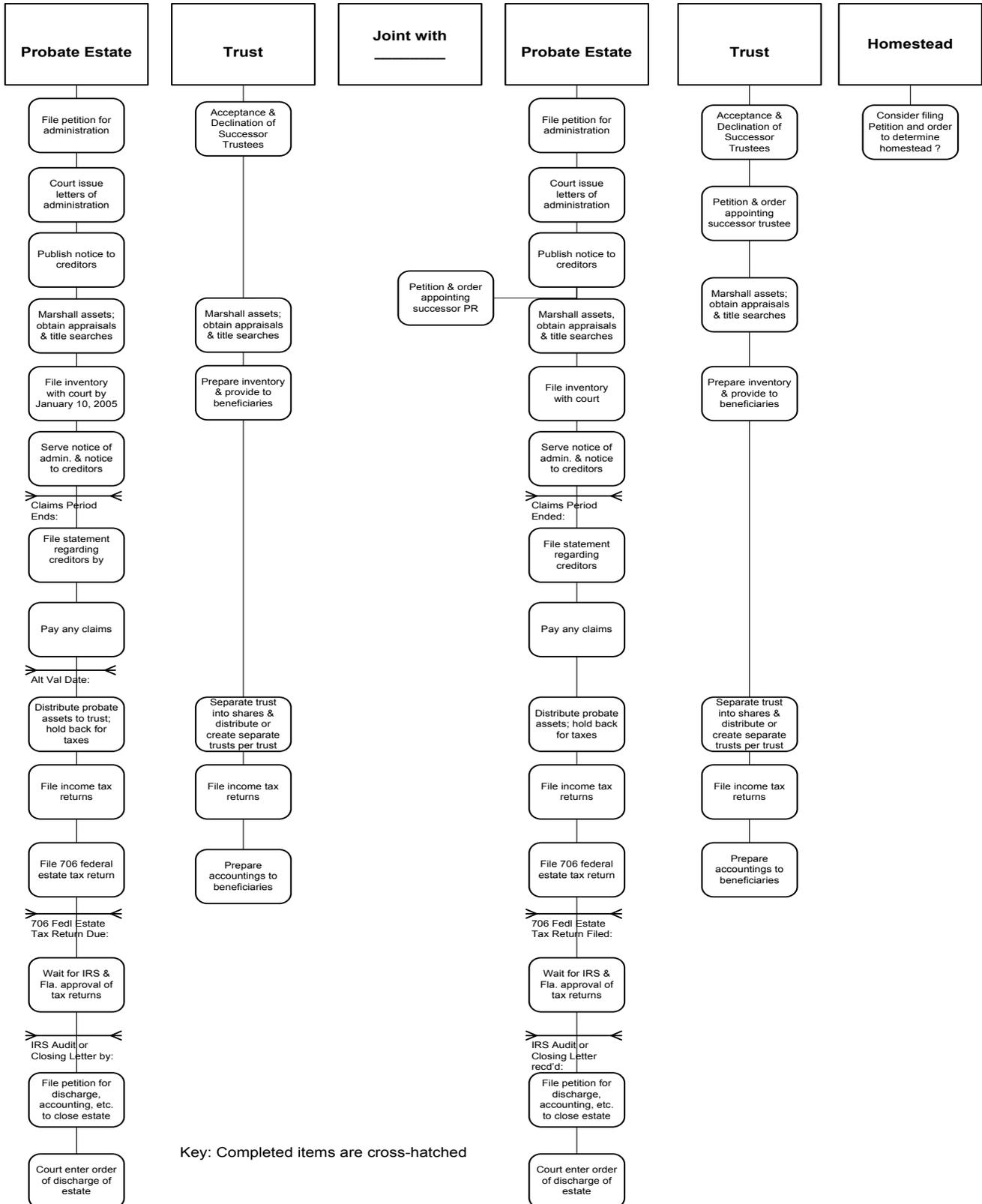
Trust accountings must also include a notice of the deadline. A sample form appears as Appendix 5.

8. Diagram The Assets And Process

A picture, like the one on the next page, says a thousand words...and shows work and progress:

Draft # _____
Date: _____

ESTATE & TRUST PROCESS FOR JOHN & MARY DOE



9. Don't Just Communicate, Collaborate

Complex probate often means there are lots of people, which means there are lots of brains. Trying to get all those brains to fix on one set of documents and act in a consistent and unified manner can be one of the most difficult aspects of a case.

In the olden days, we sent out letters by postal mail with a stack of documents for review by interested persons and their lawyers. The packages took a few days to arrive and some got lost, so we switched to FedEx and couriers for next day delivery. There was still a lot of paper, and we still had the problem of getting many people to focus on many documents.

In either case, if a few weeks went by before the time for further discussion or decision came, the recipients often could not readily find what had been sent to them. This necessitated resending the package and further delay.

Today we have email, and it's a lot faster, but people still lose their emails, or delete them, or they wind up in spam filters. And big document files are often too large for email.

Enter the Web and collaborative Web sites. Here the PR's lawyer can post documents for password-protected secure downloading by interested persons and their lawyers no matter what the size and without taxing email systems. There are many providers; one of the most promising is Microsoft SharePoint 2007.

Guest Tip (Suggested to the Author by Commonwealth Land Title Florida State Counsel Stacy Kalmanson)

When the estate owns real estate, every probate lawyer knows that orders admitting wills to probate, orders determining homestead, and orders approving sale of real property must be recorded in the official land records. Title insurance companies recommend, and often require, that the petitions also be recorded. This includes the petition for administration. The clerk might disagree with record-

ing such documents, but title companies want them recorded for a good reason: title companies search indexes of the official records and often maintain duplicates of filings, but they do not maintain duplicates of probate court files. Title companies often find it difficult to obtain information from old probate files. Having the clerk record all documents relating to real property will make it easier for title companies to do their jobs.

10. Scan, Scan, Scan

The single most useful tip for handling complex probate is this: scan the heck out of everything. Scan every document that comes in and every document that goes out. Scan your incoming mail, your outgoing mail. Scan all email. Scan all pleadings. Scan all surveys. Scan all appraisals. Scan all environmental reports. Scan all evidence:

- If it's paper, scan it. If it's email, print it and scan it. If it's an email attachment, save it, print it, and scan it;
- Create a taxonomy: a consistent way of naming your scanned images. Set up a separate computer file folder for each client with subfolders for letters, memos, documents, drafts, research, pleadings, etc.;
- Name your scans using your taxonomy and the date of the scan;
- Run your scans through an OCR (optical character recognition) program to make your scans full-text searchable;
- Invest in high-speed scanners to scan 50 to 100 pages a minute;
- Create daily backups of your scanned files and save them in alternate on- and off-site locations. (See undergroundvaults.com for storage in a Kansas salt mine 600 feet below ground.)

Read these articles online at www.jamesmartinpa.com: *A Model Electronic File Policy*, *May I Shred My Scanned Paper Files, PDF or TIFF: Which is Better?* Then sit back and reap the reward of your effort: on-screen full-text searchable access to every docu-

ment in your probate case. You might even forget it was complex.

CONCLUSION • Handling complex probate is hard and time-consuming, but not impossible. The methodical application of basic probate law and

procedures is one way to simplify the facts and circumstances that present themselves over the course of the case. A methodical process is what made putting a man on the moon possible and allowed those in control to meet the many crises that arose along the way.

APPENDIX 1 Fee Contract

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA
 PROBATE DIVISION
 UNIFORM CASE NO.: _____
 REFERENCE NO.: _____
 IN RE: ESTATE OF
 _____,
 DECEASED.
 _____/

ATTORNEY'S HOURLY FEE AGREEMENT - PROBATE ESTATE AGREEMENT made on _____, 20____, by _____ as Personal Representative of the Estate of _____, Deceased ("Personal Representative"), and _____, P.A., a Florida professional service corporation ("Attorney").

Whereas, Attorney has undertaken the performance of substantial legal services on behalf of Personal Representative, for which Attorney shall be paid fees and costs, and the Florida Bar's Rules of Professional Conduct encourage attorneys and clients to enter into fee agreements at the commencement of representation in order to avoid the possibility of misunderstandings;

Now therefore, in consideration of their mutual promises stated herein, the parties hereby agree that:

1) Hourly Rates. The Personal Representative has retained Attorney to provide legal services to the Personal Representative during administration of this probate estate in Florida at hourly rates of \$_____ for attorney time and \$_____ for paralegal time for all matters handled by Attorney, including but not limited to ordinary services and extraordinary services.

2) Bills. Fees shall be billed by Attorney and paid by the Personal Representative out of the assets of the Estate on a twice-monthly basis. Costs incurred for copies, postage, FedEx, Westlaw, filing fees, and other items shall also be billed and paid twice-monthly.

3) Other Lawyers. Attorney may advise the Personal Representative to engage other lawyers to provide legal services to Personal Representative for certain matters, in which case the determination and billing of fees and costs for such other lawyers may differ from this agreement and be agreed upon in a separate agreement.

4) No Statutory Percentage Fees. The parties agree that the provisions of this Fee Agreement (legal fees based on hourly rates plus reimbursement of costs) vary from the provisions of the applicable stat-

utes and case law and that Attorney will not charge fees based upon a percentage of the assets or income of this probate estate. Attorney has provided Personal Representative a copy of Florida Statutes Section 733.6171.

5) Fee Proceedings. If the matter of fees and costs is submitted to the Court for review or determination at any time by Attorney, Personal Representative, any interested person or other person, then fees and costs incurred by Attorney for such proceeding shall be billed by Attorney to Personal Representative and shall be paid for such fee proceeding on the same basis as other fees under this Agreement. In addition, attorneys testifying as expert witnesses on the matter of fees shall be entitled to fees at their usual hourly rates, which shall be paid out of the estate.

6) Joint Representation. The parties agree that Attorney represents _____ in _____ capacity as Personal Representative of this Estate and in _____ capacity as Trustee of the _____ Trust Agreement created by _____, which trust is sole residuary beneficiary of this Estate. The parties understand that there is a potential conflict of interest that arises from representation of one person who is acting in multiple roles. They understand that a conflict might arise such that Attorney would not be able to represent _____ in one or more of these roles, in which case _____ would need to obtain a separate attorney to advise and represent _____ in that role. The Personal Representative, trustee and interested persons are encouraged to engage their own separate lawyers before signing, consenting to, or not objecting to this agreement if they desire legal advice concerning this agreement. Attorney cannot provide legal advice regarding the probate estate to anyone other than _____.

Under penalties of perjury, we declare that we have read the foregoing, and the facts alleged are true, to the best of our knowledge and belief.

[Signature Lines for Attorney, Client, Beneficiaries, etc.]

APPENDIX 2

Acceptance Of Trust By Successor Trustee

ACCEPTANCE BY SUCCESSOR TRUSTEE OF _____ TRUST DATED _____
(WITH COPIES OF TRUST DOCUMENTS)

WHEREAS, _____, as Grantor, and _____, as Trustee, created the _____ TRUST AGREEMENT on _____ (hereinafter called the "Trust") and therein named _____ as Successor Co-Trustees of said Trust to serve upon the death of _____; and

WHEREAS, said _____ died on _____, and _____ died on _____, both as residents of Pinellas County, Florida; and

NOW THEREFORE, the undersigned _____ hereby accepts the position of Successor Trustee of the Trust in place of _____ and hereby accepts the trust imposed by said Trust and hereby agrees to serve as Successor Trustee upon the terms and conditions set forth in the Trust.

The undersigned does hereby represent, to the best of the undersigned's knowledge and belief, that: (a) the foregoing are true and correct statements; (b) the Trust is still in full force and effect and has not been revoked; (c) the _____ Amendment of the Trust Agreement dated _____ is the last amend-

ment to the Trust; and (d) the undersigned is the only Trustee of the Trust at this time and is the current Trustee of the Trust.

The undersigned hereby certifies that the following attached hereto are true and correct copies of the originals thereof:

- 1) _____ TRUST AGREEMENT dated _____
- 2) _____ AMENDMENT OF THE TRUST AGREEMENT dated _____

DATED this _____ day of _____, 20____.

STATE OF FLORIDA
COUNTY OF PINELLAS

The foregoing instrument was acknowledged before me this _____ day of _____, 20____, by

_____.

Notary Public-State of Florida:

sign _____
print _____

Personally Known _____; OR Produced Identification _____

Type of Identification Produced: _____

Affix Seal Below:

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

PROBATE DIVISION

UNIFORM CASE NO.: _____

REFERENCE NO.: _____

IN RE: ESTATE OF

DECEASED.

_____/

- Date of Death: _____
- Letters Issued: _____
- Date of 1st Publication Notice Creditors: _____
- Inventory Due: _____
- Date Claims Period Ends: _____
- Statement Regarding Creditors Due: _____
- Objection to Claims Due: _____
- 706 Due: _____
- Petition for Discharge Due: _____
- SSN: _____
- Tax ID: _____
- Judge: _____
- Judge's phone #: _____
- Judge's fax #: _____
- JA: _____

APPENDIX 3

Pleadings Index

Date Filed

1. Certificate of Death
 2. Last Will and Testament
 3. Petition for Administration
 4. If not self-proving, one of following:
 - __ Oath of Witness to Will
 - __ Proof of Will
 5. One of following:
 - __ Oath of Personal Representative, Designation of Resident Agent, and Acceptance
 - __ Oath of Corporate Personal Representative
 6. One of following:
 - __ Bond of Personal Representative
 - __ Petition to Waive Bond (use its order instead of above order admitting)
 - __ Pending:
 7. Order Admitting Will to Probate, Setting Bond and Appointing Personal Representative
 8. Letters of Administration
 9. Attorney's Hourly Fee Agreement
- Later:
10. Notice of Administration
 11. Notice to Creditors
 12. Proof of Publication of Notice to Creditors
 13. Proof of Service of Notice of Administration
 14. Proof of Service of Notice to Creditors
 15. Inventory
 16. Proof of Service of Inventory
 17. Statement Regarding Creditors
 18. Notice of Federal Estate Tax Return Due
 19. Notice of Trust
 20. Notice of Ancillary Administration
 21. Notice of Civil Action
 22. Personal Representative's Proof of Claim
 23. Petition for Determination of Homestead
 24. Petition for Exempt Property
 25. Petition for Family Allowance
 26. Statement of Claim
 27. Satisfaction and Release of Claim
 28. Objection to Claim
 29. Disclaimer
 30. IRS closing letter

31. Florida DOR Closing Letter
32. Affidavit of No Florida Estate Tax Due DR-312
33. Waiver of Compensation by Personal Representative
34. Petition for Discharge (Full Waiver)
35. Waiver of Accounting, Consent to and Waiver of Service of Petition for Discharge, Final Receipt of Beneficiary, and Consent to Discharge
36. Final Accounting
37. Receipt
38. Consent to Discharge and Accounting
39. Order of Final Discharge

APPENDIX 4

Confidentiality Letter

Confidential Attorney-Client, Accountant-Client and Work Product Privileged Communication
 John Doe, CPA
 100 Main Street
 Anytown FL

Re: Estate of Larry Moe, Deceased

Dear John:

On behalf of our client _____, in her capacity as Personal Representative of the Estate of _____, this confirms your engagement as CPA to provide accounting and tax advice and to prepare tax returns. Please note that your client is the Personal Representative and not the estate and not the beneficiaries or creditors of the estate. All of your communications with the Personal Representative and with this office must be kept confidential and within the attorney-client, accountant-client and work product privileges. Please send me and our client your engagement letter with hourly rates for approval of our client along with a list of tax returns you intend to prepare. Thank you.

Very truly yours,

APPENDIX 5

Limitations Notice

LIMITATION NOTICE FOR _____ ACCOUNTING

To: _____

YOU ARE NOTIFIED for and on behalf of _____, as Trustee of the _____ TRUST, that the following have been filed in this Court by _____, true copies of which accompany this Notice:

_____ Accounting of Trustee (_____ through _____)

An action for breach of trust based on matters disclosed in a trust accounting or other written report of the Trustee may be subject to a six month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney. (The undersigned attorney is not your attorney; he is attorney for the Trustee.)

_____ Dated _____, _____

John Doe, Esq.

100 Main Street

St. Petersburg, FL 33701

(727) _____

Fla. Bar No. _____; SPN # _____

Attorney for Trustee

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