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## Spring Cleaning – Time To Review and Renew

Tax season is over!  
Spring has FINALLY sprung!  
It's time to “review and renew.”

Each spring, we at Berwitz & DiTata LLP encourage our clients, friends and “would be” friends to focus on estate planning, refresh those resolutions and stop procrastinating. We call it our annual “Review and Renew” program.

**If you have never created an estate plan, now is the time.**

Although estate planning is rarely a topic people look forward to addressing, we are dedicated to helping clients identify and implement their estate planning objectives with ease and efficiency. We believe that our success is founded on this fundamental commitment to communicate with our clients in a caring and responsive manner. Those who have met with us in a one-on-one consultation know that we believe that everyone can benefit from estate planning regardless of personal income or net worth. Everyone has concerns regarding the future. For

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## Guardianship – Different Strokes For Different Folks

Generally speaking, guardianship is a legal relationship, authorized by a Court, under which one person, the “guardian,” has the right and duty to care for another, the “ward,” and/or their property. In New York, there are three (3) different types of guardianship proceedings, each suited to a different set of circumstances.

Article 17 of the Surrogate's Court Procedure Act outlines the process for the appointment of a guardian for a minor, a child under the age of 18.



While parents are considered the natural guardians, if a child's parents pass away or the child becomes the owner of significant assets, whether through a settlement, an inheritance or otherwise, the Court will appoint a guardian and, if there are assets, oversee the management of assets

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## Mistakes Executors Make

Executors are bound by a bewildering array of responsibilities and duties. There is no official training manual, at least not one designed for the public, and they are often challenged by the conflicting demands of the job. Here are some common pitfalls that executors should avoid.

**Failing to read, understand and follow the terms of the Will**

The Will is the governing document for an estate administration. Despite this fact, some executors view the Will as a “guideline.” Others may administer the estate based on their own interpretation of what the testator “really wanted” or on what they *think* the Will means, without a clear

understanding of either its terms, such as “issue,” “per stirpes” or “in specie,” or what duties and powers they are authorized or obliged to exercise.

**Not properly protecting estate assets**

One of the first duties of an executor is to locate and safeguard estate assets. Failing to identify an estate asset or to ensure proper protection (taking care of an ongoing

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## Mistakes Executors Make

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business; collecting rents; raising rents where appropriate; securing adequate insurance coverage; changing locks; securing pets) can result in losses to an estate and claims against the negligent or careless executor. One of the major problems an executor may face occurs when one beneficiary resides in or occupies property belonging to the estate that is to be distributed to others or sold. The executor not only has a duty to protect the property against damage or destruction by the inhabitant but must also take appropriate steps to secure the property and even evict the resident!

### Improperly dealing with personal effects

All too often, executors ignore what the Will says about the personal effects of the decedent and distribute them as they believe the testator would have intended. Unusual or unique assets, artwork, wine, firearms, for example, each present their own challenges. They must be collected, valued, preserved and effectively handled.

### Not communicating with beneficiaries

An executor may be doing everything well and in a timely manner, but if he fails to keep the beneficiaries apprised, he's likely to run into problems. Estate administration can be very complex and can, legitimately, take time. No news is generally interpreted as bad news and often results in annoyed and anxious beneficiaries.

### Undue delay in meeting estate obligations

All too often, executors procrastinate or fail to meet deadlines and guidelines. Tax and other estate liabilities may be subject to strict deadlines. Many states also impose standards regarding the timing of distributions and the general progress of an estate administration.

### Not prudently investing assets

Once the assets of the estate have been collected, the executor has a duty to prudently invest them. Many Wills provide instructions concerning the executor's power to invest. Investing your own money is one thing; investing another's is a very different matter. An executor must always act in the best interests of the beneficiaries but sometimes beneficiaries of different classes have very different interests. As an example, a Will may establish a lifetime trust for the benefit of a surviving spouse and direct payment of income for life. The balance will then be distributed to others. The spouse may want the executor to invest in order to maximize income whereas the residuary beneficiaries may want to limit income and maximize growth. An executor must invest in a manner which is fair to both classes of beneficiaries.

### Making distributions too soon

Executors must first account for the liabilities of the estate: the decedent's debts, the expenses of the last illness, the funeral costs, estate and income taxes. While beneficiaries are interested in collecting their inheritance, the executor must first

ensure that all of the assets of the estate have been collected and all of the liabilities paid. Rushing to accommodate the beneficiaries commonly results in mistakes, both in over and underpayment.

### Making improper distributions

It's pretty difficult to make an error when the Will says "pay \$10,000 to my sister Elizabeth if she survives me." It is more challenging to make accurate distributions when the "residue" (or net estate) is to be paid to a number of beneficiaries in unequal shares or where assets will be distributed not only in cash but "in kind."

### Missing or overlooking a beneficiary

This error can result from simple carelessness or a failure to properly interpret the language of the Will. For instance, in most jurisdictions, a gift to "children" or "issue" includes children born outside of a marriage. It is not unusual that executors will fail to properly identify all of the members of a class of beneficiaries.

### Improper delegation of duties

As a general rule, executors are expected to personally discharge their duties. This does not mean that they should not hire help. They are permitted, and even encouraged, to engage counsel, accountants, investigators, investment advisors and others to help them complete the work but they should not allow an overly zealous co-executor to dominate and they must take an active role the administration process. At Berwitz & DiTata LLP we are skilled at guiding executors through these land mines and ensuring a smooth, efficient and effective estate administration.



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instance: How can I avoid probate or the dissipation of my assets to estate taxes? How can I avoid losing control of my assets if I become disabled? How do I protect myself and my family from devastating nursing home costs? Can assets still be protected if a loved one is already in a nursing home? How can I protect my minor children? How can I protect my disabled child or the assets that he or she may one day inherit? In designing strategies to effectuate our clients' goals, we offer detailed advice and a

high level of technical expertise. Now is the time to achieve estate planning peace of mind! Ask those questions, explore the options, get it done.

**If you created your estate plan, or reviewed it last, more than 3 years ago - now is the time.**

Are your documents up to date? Have there been changes in the law or in your life that should now be considered? The documents that address the needs of a single person are frequently insufficient when he or she marries. If a couple has children, the appointment of a guardian should be a key factor in estate planning. Those documents that were created when the kids were small may no longer reflect their parents' wishes now that the kids have grown and flown. Indeed, once your child reaches the age of 18, he or she should have a valid and enforceable Health Care Proxy empowering you or

another to make health care decisions. The "sandwich generation" is discovering that the joy and responsibility of raising children is all too frequently overshadowed by the illness of parents. The need for estate planning takes on new meaning as one approaches retirement and, if illness threatens, timing becomes more critical. Lifetime changes affect estate planning. Even if you can't conceive that the changes in your life may have an impact on your estate planning documents, an estate planning review is a vital element to ensuring that your wishes will be accomplished.

Because Berwitz & DiTata LLP understands the importance of keeping the plan current, we offer our clients a unique value-added component: a complimentary three-year review. For those who have not yet retained our services, there is a nominal fee to review your plan. Let us help you realize your estate planning objectives.

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until the child reaches 18, when the assets are turned over to the child.

Article 17-A of the Surrogate's Court Procedure Act concerns the appointment of a guardian for individuals who are mentally retarded or developmentally disabled. Often, parents of a child that is disabled assume that they will continue to make decisions on the child's behalf even after the child reaches 18. However, in New York, everyone who

turns 18 is automatically presumed to be legally competent to make decisions for themselves. In order to secure the legal authority to make decisions, or continue making decisions, for a mentally retarded or developmentally disabled person who is 18 years of age or older, a guardianship proceeding is required. Parents or family members should consider seeking appointment as guardian if a family member has a disability that interferes with decision making abilities. For example, a child who has difficulty communicating basic wants and needs is a good candidate for this type of guardianship.

How does one go about becoming a 17-A guardian? Article 17-A guardianship is handled by the Surrogate's Court. If the disabled person is under 18, the proceeding is brought in the county where the guardian lives. If the disabled person is over 18, his or her home county is used. The proposed guardian must file a petition that is supported by medical forms which must be completed by either two physicians or a physician and psychologist. The doctors must certify that the disabled person needs a guardian. When a parent/family member applies for guardianship, a standby guardian

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can also be selected. A standby guardian is able to automatically take over guardianship duties if the guardian dies or becomes incapacitated. The standby guardian can make decisions immediately, but must go to the court within sixty (60) days to request permanent guardianship status.

When does one seek 17-A guardianship? Ideally, guardianship should be established prior to age 18. A proceeding under Article 17-A typically takes several months to complete. Therefore, it is recom-

mended that families start the guardianship process one year prior to the 18th birthday.

Article 81 of the Mental Hygiene Law addresses the particulars of the type of guardianship that is generally considered to be appropriate when an individual who *had been* competent now suffers from cognitive or functional limitations that interfere with his or her ability to manage their own affairs, perhaps as the result of an accident, illness or the aging process. Guardianship under the Mental Hygiene Law is sought in the Supreme Court of the county in which the disabled person resides. Because this type of guardianship is so different from the others, we will devote more time to it in our next issue of “A Step Ahead.”

### Would You Like To Read About It Here?

We at Berwitz & DiTata LLP are proud of our newsletter and hope that each issue brings our clients and friends insightful and timely information. We endeavor to write articles geared to your interests and concerns. We would be happy to receive your feedback. More importantly, if you have a question or would like us to address a particular topic, please call and let us know. We will try to include it in one of our next issues. Just call or drop us a line.

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