Training Manual

Preparation of Voluntary Administration Paperwork for VOLS Senior Law Project Clients

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Introduction

About VOLS

Volunteers of Legal Service (VOLS) supports pro bono in order to provide low-income and under-resourced New Yorkers with free, civil legal services. VOLS was founded as a nonprofit organization in 1984, when leaders in the private bar responded to severe federal government budget cuts to legal services. They committed through VOLS to dramatically increase pro bono service in New York City's underserved communities.
Across decades and through crises such as the 1980s HIV/AIDS epidemic, 2008 financial crisis, and COVID-19 pandemic, VOLS' legal services have helped to anchor the safety net in our city. Today, VOLS harnesses the power of New York City's private bar and community-based organizations to provide free, civil legal services through six VOLS law projects and initiatives:

- Childrens Project;
- Immigration Project;
- Incarcerated Mothers Law Project;
- Microenterprise Project
- Senior Law Project
  - La Extensión Comunitaria Para Adultos Mayores;
  - Veterans Initiative; and
- Benefits Law Project.

We serve New Yorkers who are unable to access legal support due to low household income or underserved socioeconomic background. Our legal services are inclusive of age, race, ability, gender and LGBTQIA+ identity, veteran and immigration status.

Overview of Voluntary Administration Paperwork

In the VOLS pro bono library, you will find seven forms that are used in the process of filing for voluntary administration:

1. Affidavit in relation to settlement of small estate under Article 13, SCPA,
2. Family tree affidavit;
3. Heirship/pedigree affidavit;
4. Renunciation of voluntary administration;
5. Due diligence affidavit;
6. Amended affidavit in relation to settlement of small estate under Article 13, SCPA; and
7. Report and account of settlement of estate pursuant to Article 13, SCPA.

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What is Voluntary Administration and Who May File

Voluntary administration is the process of settling a small estate by obtaining access to and distributing a decedent's property. A small estate is one where the value is less than $50,000, where there is no real property that is in the decedent's name alone, and where there is no possibility of a wrongful death or other lawsuit in the future. In calculating the value of a decedent's estate, assets with living beneficiaries (e.g., retirement accounts with living beneficiaries), assets which are jointly owned (e.g., joint bank accounts or jointly held property), and property held in trust are disregarded. The person seeking access to the small estate, if granted such access, is called the **voluntary administrator** and will have the authority to handle the estate. Voluntary administration can be done regardless of whether the decedent left a last will and testament.

If the decedent left a last will and testament, the executor named in the document can apply to be the voluntary administrator. If the executor is unable to do so and an alternate executor is named, then the alternate executor can apply. In such a case, the primary executor will need to sign a renunciation to renounce their rights to petition to be the executor. If the primary executor is deceased, their death certificate will need to be filed. If a death certificate is unable to be obtained, the alternate executor will need to show the court they undertook an exhaustive search to find proof of death – a picture of the grave can sometimes work. If there is no executor or alternate executor who can apply, then the next person who can apply is the sole beneficiary (a beneficiary is one who would receive a part of the estate through a last will and testament) named in the will, followed by any beneficiary, then the closest distributee (one who would inherit in the absence of a last will and testament AKA heir) to the decedent (spouse, followed by adult children, then adult grandchildren, parents, adult siblings, nieces/nephews, aunts/uncles). If the closest distributee is a minor child, they will be unable to apply, and the next closest distributee should be looked to. If the decedent did not leave a will, then the court looks to the priority of the above-noted distributees.

If there is no executor and no distributee available to serve, then the Public Administrator of the decedent's county may administer the estate. The Public Administrator is an agency of New York City. Each county of NYC has its own Public Administrator. The Public Administrator administers estates of NYC residents that would otherwise remain unadministered.

Certain categories of people, even if named as executor in a decedent's last will and testament, are ineligible to serve as voluntary administrator. Such persons include:

- Infants;
- Incompetents;
- A non-domiciliary noncitizen except one who is a foreign guardian, or one who shall serve with one or more co-fiduciaries, at least one of whom is a resident of New York State; and

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- Those who do not possess the qualifications required of a fiduciary (one that acts on behalf of another and must act in that person's best interests) by reason of substance abuse, dishonesty, improvidence, want of understanding, or who are otherwise unfit to serve.

Other categories of people are not automatically barred from serving, though they may be ineligible in the court's discretion. Such persons include those unable to read and write English; and people 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.

Ethical Issues

Client Capacity

It is important to note that capacity is required for the signing of various forms. Capacity is a continuum that can change with time and circumstances. Voluntary choice of a competent adult is a core value and ethic in law, medicine, and other realms of life. The validity and enforceability of these forms require your client, and others completing these forms, to have the capacity to sign each form.

Capacity consists of four decision-making abilities: Appreciation, Understanding, Reasoning, and Expressing Choice.[1]

Chronologic age is one of the chief risk factors for developing cognitive impairments. A diagnosis of dementia, brain damage or mental illness may be relevant, but are non-determinative of an individual's actual abilities and functional capacity. Other short-term and long-term factors that can produce signs of incapacity include anxiety, grief, depression, bereavement, pain, side effects of prescription medications, time of day, hearing or vision loss, education level, etc.

Although VOLS has assessed your client's capacity to sign legal documents, because capacity can change over time and circumstances, you should confirm your client's capacity to sign legal documents. If you have any concerns about your client's capacity, Rule 1.14 of the NY Rules of Professional Conduct states:

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[1] Practical tools and techniques have been developed for ascertaining a client's capacity and to guide the practitioner in asking probing and open-ended questions and avoiding questions calling for an acquiescent response. An excellent guide is the "Assessment of Capacity for Everyday Decision-Making" (ACED) developed by Dr. Jason Karlawish, MD and Dr. James Lai, MD, which provides guidelines for a structured conversation/interview with the client, designed to evaluate the four categories of decision-making abilities. See also the ABA/APA's "Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers" (2005). Please also see the 2021 updated version available at [Assessment of Older Adults with Diminished Capcities (apa.org)]

When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall as far as reasonably possible, maintain a conventional relationship with the client....When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Comment #6 to Rule 1.14 of the NY Rules of Professional Conduct says:

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: (i) the client's ability to articulate reasoning leading to a decision; (ii) variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and (iii) the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

If you have concerns about your client's capacity, please contact VOLS.

Cross-Cultural Lawyering

Almost every attorney-client relationship is a cross-cultural one. Culture and cultural awareness play a significant role in communication, problem-solving, and rapport building.

A leading voice on the topic of cross-cultural lawyering is that of CUNY Professor Susan Bryant, who wrote *The Five Habits: Building Cross-Cultural Competence in Lawyers*.[2]
One of the *Five Habits* which Bryant calls "Degrees of Separation & Connection," encourages lawyers to develop an awareness of the similarities and differences between themselves and each client and the impact they may have on the communications between them. Another, called "Parallel Universe Thinking" stems from the idea that cultural norms and practices may result in multiple interpretations of the same actions; this habit focuses on the need to avoid assumptions and consider alternative explanations for clients' words and actions.

Consider the context in which your client is seeking your help.

It is important to remember the context within which your client is seeking these services. Unfortunately, older New Yorkers of limited means often do not have access to the internet at home, and/or they do not have access to and/or knowledge of how to use technological

[2] 8 CLINICAL L. Rev. 33 (2001), by Law Professors Susan Bryant at CUNY and Jean Koh Peters at Yale.

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equipment like a laptop with a webcam, or a smartphone with videoconferencing capability. Some clients use only a landline and/or regular mail to communicate; many of our clients do not use email. Please take this into consideration and remember that your client may not be able to be as communicative with you as a corporate client might. Please familiarize yourself with your client's situation and bear these things in mind through the course of your representation.

Facilitating Proper Execution of Forms

Pro Bono Checklist

The below checklist is a step-by-step guide for you to assist your client:

☐ Visit the VOLS Pro Bono Library and carefully **review** the documents therein, as well as any emails sent to you by VOLS about your client or the decedent. Materials you should review include:

- Form templates;
- This manual ; and
- Any information contained in or attached to emails you receive from VOLS about your client or the decedent.

☐ **Call** your client.

- Introduce yourself to them. Explain that VOLS has placed their case with you and that you are working on preparing their filing forms.
- Obtain any necessary substantive information that you need in order to be able to draft your client's filing.
- Determine if your client is in need of interpretation and/or translation assistance, help with reading the documents, help with signing the documents, and/or a home visit due to limitations on their ability to travel.

☐ **Draft** your client's forms.

Engage in additional conversations with your client as necessary. If your client uses email and they wish to review their filing, send them electronic copies for review. Otherwise, send hard copies to your client for review. Confirm the accuracy of all information contained in each form with your client.

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☐ **Send drafts** of your client's forms to your VOLS Senior Law Project mentor for review and inform as to the details of how your client will sign. After you make edits based on feedback, please send final versions for final review.

☐ **Finalize** and print your client's forms.

We recommend in-office signing as the best option. But if your client is signing outside of your presence due to COVID or another reason, mail or email your client's forms to them along with a cover letter that also contains explicit instructions as far as where your client and others should sign. If your client was listed as requiring a home visit, these same steps are useful as you prepare for the home signing.

☐ **Schedule a signing** at which you will be present to notarize. If you are not a notary, make sure a notary is available to notarize. This signing can take place at your firm or at your client's home, or at another mutually agreed-upon location. Your client should leave this meeting with their executed affidavit in relation to settlement of small estate under Article 13, SCPA in hand. They should also leave with the filled-out family tree affidavit (if required), renunciation of voluntary administration (if required) and heirship/pedigree affidavit, or, if you are notarizing another's signature on these documents as a convenience to the client, with those forms executed as well. While you are not required to provide executed copies to VOLS, we appreciate you sending them over so that we can review them and any possible errors in execution can be promptly corrected.

☐ **Congratulate yourself** for providing such a necessary service to a New Yorker with limited resources and please reach out to VOLS when you are ready to take on another case.

Notarization Requirements

Each document required for voluntary administration requires notarization. Notarization must happen in real time. It is preferable for you, if you are a notary, or someone else from your firm who is a notary, to notarize the document your client will be signing. If you are not a notary and are unable to obtain someone from your firm who is, you may have the client have the document notarized on their own using a local notary. Clients who live far away from your firm may also prefer to visit a notary local to them. Notaries can be found at banks, UPS stores, and pharmacies, and are allowed to charge a fee up to $2. There are also mobile notaries who travel to the homes of people requiring a notarization, though they are allowed to charge what they wish and can be quite costly. Four of the documents (family tree affidavit, heirship/pedigree affidavit, renunciation of voluntary administration, and due diligence affidavit) require a person other than your client to sign in front of a notary. You are not required to meet with such people,

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however, as a convenience to the client, you may do so to help them with the notarization of these documents.

Affidavit in Relation to Settlement of Small Estate Under Article 13, SCPA

Your client must sign a form titled affidavit in relation to settlement of small estate under Article 13, SCPA. It requires information about your client and information about the decedent, including their distributees (see EPTL 4-1.1), their beneficiaries, their items of personal property and their values, and their liabilities and their amounts.

When typing in the client's or decedent's address, if the client is unhoused or the decedent was unhoused, type "unhoused". If the client or the decedent was in a nursing home for a long time and no longer had a residence to which they planned to return, you may put the address and county of the nursing home. If they kept their residence in the community, the residence is their domicile.

When listing items of personal property, if the value of an account is unknown and cannot be obtained until obtaining certificates of voluntary administration, write "Certificate to obtain information from [name of institution]" under "Item of Personal Property" and "No value" under "Value of Item". If your client is unable to access the decedent's apartment, such as when the police seal off an apartment after a person dies or when a landlord denies entry, write "To gain access and obtain contents at: [address]" under "Item of Personal Property" and an estimation of the worth of the contents of the apartment under "Value of Item" (unless the decedent had any expensive pieces, this amount will likely be relatively low). If the decedent left a safe deposit box, write "To obtain contents of [name of bank] safe deposit box: [contents of box]" under "Item of Personal Property" and an estimation of the worth of the contents under "Value of Item".

When listing the decedent's liabilities, include liabilities such as unpaid credit card bills, medical bills, utilities, and any funeral bill (check if the client has a stamped paid receipt of the funeral bill). If the amount owed to a creditor is unknown, write "To be determined" under "Amount Owed".

As you are only assisting the client with the preparation of the small estate paperwork, you should not complete the section at the bottom of the last page which calls for the information for the attorney. Rather, you should include a paper with all the paperwork stating "An attorney licensed to practice in New York State, affiliated with [your firm name], assisted in the preparation of these documents on a pro bono basis. Neither the firm nor the attorney is entering an appearance on behalf of this party."

Family Tree Affidavit

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The family tree affidavit may or may not need to be completed. If the decedent has only one distributee or if the distributees are grandparents, aunts/uncles, or cousins, this affidavit must be completed. It must be completed by someone who knows the decedent's family tree, has no financial interest in the decedent's estate, and is not the only distributee, or the only distributee's spouse or child. The person signing the form should complete only as much of the form as required. If there are no relatives in a section, type "none". If a person's date of death is unknown, indicate whether that person predeceased the decedent by typing "predeceased" or post-deceased the decedent by writing "post-deceased".

Note the lines starting with "**STOP**". The sections following should only be completed according to the instructions on the form.

If the decedent has more than one distributee, and those distributees do not include grandparents, aunts/uncles, or cousins, then this affidavit does not need to be completed.

Heirship/Pedigree Affidavit

The heirship/pedigree affidavit, while similar to the family tree affidavit, is required in all estate proceedings. This form should be completed by anyone who knows the decedent's family tree, and if done by a distributee, where the distributee is up to the level of niece/nephew (i.e., no closer in relation than niece/nephew). This person must have known the decedent for at least ten years, and in some counties, at least twenty years. From the level of grandparents, aunts/uncles, or cousins, that person must have no financial interest in the estate, and must not be the only distributee, or the only distributee's spouse or child. The person signing the form should complete only as much of the form as required. If there are no relatives in a section, type "none". If a person's date of death is unknown, indicate whether that person predeceased the decedent by typing "predeceased" or post-deceased the decedent by writing "post-deceased".

Note the lines starting with "**STOP**". The sections following should only be completed according to the instructions on the form.

Renunciation of Voluntary Administration

If your client is not first in line to petition for voluntary administration, and the person/s prioritized in relation to your client does not want to or cannot administer the estate, then such person will need to sign a renunciation of voluntary administration. Such a person will need to sign this renunciation in front of a notary, and it will need to be filed with the court along with the rest of the voluntary administration paperwork.

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Due Diligence Affidavit

Sometimes your client may not know, and may be unable to obtain, certain information, such as the full name of someone who must be listed on the family tree or heirship/pedigree affidavit. Or, the decedent may have been survived by either only one distributee or distributees who are grandparents, aunts, uncles, first cousins, or first cousins once removed. In either of these cases, it should be checked with the Surrogate's Court as to whether a due diligence affidavit will be required.

In this affidavit, information must be provided on the distributees, descendants, and/or family members that is known based upon a diligent search of the decedent's assets and related searches. This is important because accurate and complete information about the estate must be provided to the Surrogate's Court so that the voluntary administrator can avoid legal disputes, and because the voluntary administrator must ensure that beneficiaries/distributees receive their rightful share of the estate.

The due diligence affidavit must be completed by an uninterested person, e.g., someone who will not receive a share of the decedent's estate. Unless otherwise allowed by the court, if only one distributee survived the decedent, proof may not be given by the spouse or children or the distributee.

The person completing this affidavit must submit proof as to how each such distributee is related to the decedent and that no other people of the same or a nearer degree of relationship survived the decedent. The proof shall include as an exhibit a family tree, table, or diagram, except no such table or diagram shall be required if the distributee is the spouse or only child of the decedent.

If the affiant alleges that any of the distributees or others required to be cited are unknown, or that the names and addresses of some people who are or may be distributees are unknown, the affiant must submit an affidavit showing that they have used due diligence in endeavoring to ascertain the identity, names, and addresses of all such people. It must indicate the results obtained from among the following:

- Examined the decedent's personal belongings, including address books, cell phone, calendar, or anything that would give the affiant access to the decedent's contact list;
- Spoken to the decedent's relatives, neighbors, friends, former business associates and employers, and anywhere where the decedent may have banked;
- Sent a simple letter to the last known address of any missing distributees, which can be as simple as "Dear [distributee], [decedent] died. If [decedent] is related to you, please call us because you may have an interest in [decedent's] estate";
- Conducted an online search or an ancestry search. Also, checked the phone book for people with similar names to the people sought after; and
- In cases where the names of the next of kin are known but their addresses are unknown, written to the DMV and Board of Elections of the state or county of the last-known address.

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The court may accept, in lieu of the above, an affidavit by the decedent setting forth the effort that they made to ascertain relatives.

The affidavit of due diligence should also include exhibits, which should be:

- Copies of the decedent's address book;
- Addresses saved in the decedent's phone;
- Google searches;
- Ancestry searches;
- Census records;
- Copies of the Social Security Death Index;
- Copies of any letters written to the potential distributees;
- Copies of the envelope used to mail the letters; and
- Any and all other correspondence.

The affiant must then sign the affidavit in front of a notary and file it with the Surrogate's Court along with the other paperwork. The Court may request additional information or documentation.

Amended Affidavit in Relation to Settlement of Small Estate Under Article 13, SCPA

If, after becoming appointed voluntary administrator, your client discovers that there is personal property in addition to what was listed on the filed affidavit in relation to settlement of small estate under Article 13, SCPA, and the value of the estate still is less than $50,000, they will need to complete an amended affidavit in relation to settlement of small estate under Article 13, SCPA and file it with the court. This form requires information on the dates of the original and any amended affidavits, the date of the appointment as voluntary administrator, the additional items of personal property not listed on the original affidavit along with their values, and the number of additional certificates of voluntary administration required to handle these new items.

As with the original affidavit, as you are only assisting the client with the preparation of the small estate paperwork, you should not complete the section at the bottom of the last page which calls for the information for the attorney. Rather, you should include a paper with this form stating "An attorney licensed to practice in New York State, affiliated with [your firm name], assisted in the preparation of this document on a pro bono basis. Neither the firm nor the attorney is entering an appearance on behalf of this party."

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Filing Process

The following is needed to file for voluntary administration: affidavit in relation to settlement of small estate, family tree affidavit (if needed), heirship/pedigree affidavit, renunciation of voluntary administration (if needed), original death certificate (which can be obtained through www.vitalcheck.com at $15 each plus a processing fee), copy of marriage certificate (if your client is the surviving spouse of the decedent), NYPD property voucher (if there is one), a $1 filing fee (payable by cash or money order), copy of the funeral bill (if there is one), and the original and one copy of the last will and testament (if there is a will, please note that when making a copy of the will, **the staple/s in the original will must not be removed** – this could possibly invalidate the will). An affidavit of attesting witnesses, AKA self-proving affidavit, should accompany the will. If one was not completed, the will witnesses will need to be found to complete one. If this is not possible, the will will need to be "proven" in other ways. Affirmations will need to be prepared to dispense with the attesting witnesses. If a witness is dead, proof of death must be provided. If a witness cannot be located, steps taken to locate the witness must be shown. If a witness is incompetent, proof of incompetence must be shown. You should prepare a letter for your client telling them what they will need to file with the court after their paperwork is completed.

The client will then file the paperwork in the Surrogate's Court of the county in which the decedent was domiciled. Below is the information for the Small Estates departments of the Surrogate's Courts of NYC:

New York County – 646-386-5005 – administration_general@nycourts.gov – 31 Chambers St., New York, NY 10007

Kings County – 347-404-9690 – KingSurr-Admin@nycourts.gov – 2 Johnson St., Brooklyn, NY 11201

Queens County – clerk's office phone: 718-298-0500 – qnssurr-admin@nycourts.gov – 88-11 Sutphin Blvd., Jamaica, NY 11435

Bronx County – 718-618-2309 – 851 Grand Concourse, Bronx, NY 10451

Richmond County – help center phone: 718-675-8508 – help center email: richsurrhelpctr@nycourts.gov – 18 Richmond Terrace, Staten Island, NY 10301

What Happens After Certificates of Voluntary Administration are Received

After submission of the paperwork to the Surrogate's Court, the judge will decide whether your client qualifies to be the voluntary administrator. Assuming they do, the court will issue certificates of voluntary administration (either by mail or by pick-up at the court), and they will become the voluntary administrator of the decedent's estate. They receive one certificate of voluntary administration for each item listed in the submitted paperwork (certificates are $6

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each), which they then present to the proper entity to complete a task that needs to be completed. It is their job to obtain the decedent's property, open an estate account to deposit all monies belonging to the estate, pay any debts or expenses, and distribute what is left to the beneficiaries of the last will and testament or the decedent's heirs.

Report and Account of Settlement of Estate Pursuant to Article 13, SCPA

Upon completion of these duties, the voluntary administrator lastly needs to close out the estate. They do so by filing a report and account in settlement of estate pursuant to Article 13, SCPA with the Surrogate's Court, along with receipts or canceled checks showing the payment of expenses of administration, disbursements, or distributions. VOLS does not expect you to assist with this report and account, nor with anything else beyond the above-noted paperwork. Please remind the client of this to manage their expectations. This template may be given to the client if, for some reason, the Court will not give it to them.

Issues That May Arise During the Process

During the voluntary administration process, certain issues may arise that are not already noted above.

If it is discovered that the estate's value is greater than $50,000 and/or that there is real property in the decedent's name alone, then the estate cannot be handled via the process of voluntary administration. Either the process of probate (if there was a last will and testament) or the process of administration (if there was no will) will need to happen. VOLS does not assist with either process. The client will either need to do this on their own or retain a private attorney on their own.

If a beneficiary (if the decedent passed with a last will and testament) or heir (if the decedent passed without a will) of the decedent post-deceases the decedent, then an estate will need to be opened for such person, as this person's estate will be entitled to take in the decedent's estate. If such person passed in NYC, left a small estate, and was at least 60 years old (unless your client is at least 60 years old, in which case they may be any age), and your client is permitted to petition to be the voluntary administrator for this person, you may assist your client with the voluntary administration paperwork to open an estate for this person. If affidavits were already submitted to the court by your client prior to such person post-deceasing the decedent, the affidavits listing this person will need to be re-done reflecting their death.

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