

**Report of the
Surrogate's Court
Advisory Committee**

to the Chief Administrative Judge of the
Courts of the State of New York

January 2019



TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	3
II. Legislation.....	4
A. New Measures	
1. New York Uniform Directed Trust Act (EPTL Part 9 [new], EPTL 7-2.10 [new]).....	4
B. Modified Measures	
1. Commissions of Donees of a Power in Trust Including Donees of a Power During Minority (SCPA 2306, 2307, 2308, 2309, 2312 and 2313).....	28
C. Previously Endorsed Measures	
1. Computation and Allocation of Commissions of Trustees of Charitable Trusts (SCPA 2308, 2309, 2312).....	67
2. The Revocatory Effect of Divorce and Relatives of a Former Spouse (EPTL 5-1.4(g)).....	73
3. Pour-Over Wills and Trusts (EPTL 3-3.7(a)).....	75
4. The Power to Adjust and Capital Gains Taxes (EPTL 11-A-4.4).	81
5. The Attorney-Client Privilege Extended to a Lifetime Trustee (CPLR 4503(a)).....	85
6. Surrogate’s Discretion to Appoint a Guardian Under Articles 17 and 17-A (SCPA §707(1)(d)).....	87
7. Incorporation by Reference, as a Testamentary Trust (EPTL 3-3.7(e)).....	88

8. Payment of Attorney’s Fees in Wrongful Death Actions (EPTL 5-4.6(a)(2)).....	91
9. Renunciation of Specific Compensation in Favor of Statutory Commissions (SCPA 2307(5)(b), 2308(11) and 2309(10)).....	93
10. Notice of Proceedings to Determine Validity and Enforceability of Claims (SCPA 1809).....	98
11. Disqualification of a Tenant by the Entirety (EPTL 4-1.7).....	100
12. Disqualification of a Surviving Spouse (EPTL 5-1.2(a)).....	102
13. Legitimacy of Children Born to a Married Couple Using Assisted-Reproduction Techniques (DRL 73).....	105
14. The Effect on Inheritance Rights of Adoption by an Unrelated Person (DRL 117 EPTL 2-1.3(a)(1)).....	109
III. Future Matters.....	110

I. Introduction

The Surrogate's Court Advisory Committee is one of the Committees established pursuant to section 212(1)(q) of the Judiciary Law by the Chief Administrator of the Courts to assist in the execution of the functions of his office. The Committee annually recommends to the Chief Administrator proposals related to the Estates, Powers and Trusts Law, the Surrogate's Court Procedure Act and legal issues involving the practice and procedure of the Surrogate's Courts. These recommendations are based on the Committee's own studies, examination of decisional law and suggestions received from the bench and bar. In addition to recommending its own annual legislative program, the Committee reviews and comments on other pending legislative measures concerning estates, trusts and other matters (*e.g.*, adoptions, guardianships) that are within the subject matter jurisdiction of the Surrogate's Courts.

In this report, the Committee sets forth its legislative proposals and the other projects that are being undertaken. As part of its effort to focus its work on areas which would be of benefit to the Legislature, courts, bar and litigants, the Committee welcomes comments and suggestions. Inquiries should be submitted to:

Hon. Renee R. Roth, Chair
Surrogate's Court Advisory Committee
Office of Court Administration
25 Beaver Street, Suite 1170
New York, New York 10004

II. Legislation

A. New Measures

1. New York Uniform Directed Trust Act (EPTL Part 9 [new], EPTL 7-2.10 [new])

This measure is designed to provide comprehensive rules in the directed trust area and provide rules for excluded co-trustees.

Section 1 of the bill adds a new Part 9 to Article 7 of the Estates, Powers and Trusts Law, which is entitled “New York Uniform Directed Trust Act.”

Section 7-9.1 of the Estates, Powers and Trusts Law establishes the short title of this Part as the New York Uniform Directed Trust Act.

Section 7-9.2 of the Estates, Powers and Trusts Law adds new definitions for implementing the provisions of this Part, including definitions of a directed trust, directed trustee, power of direction, and trust director.

Section 7-9.3 of the Estates, Powers and Trusts Law states that this Part applies to trusts that have their principal place of administration in New York, subject to certain limitations. It also clarifies that the terms of a trust may designate by certain ways the principal place of administration.

Section 7-9.4 of the Estates, Powers and Trusts Law makes clear that the common law of trusts and principles of equity may supplement this Part.

Section 7-9.5 of the Estates, Powers and Trusts Law defines “power of appointment” by referencing the definition in EPTL section 10-3.1(a). This section further provides that this Part does not apply to persons with certain powers, including, but not limited to, a power of appointment, a power to remove and replace trustees or trust directors, certain powers to affect beneficial interests, and certain powers held in a nonfiduciary capacity. Additionally, this section provides that a power granted to a person which would otherwise be a power of appointment shall instead constitute a power of direction if the terms of the trust impose fiduciary duties on the exercise of such power.

Section 7-9.6 of the Estates, Powers and Trusts Law provides illustrative examples of powers which may be granted to a trust director in the terms of a trust, including the powers to direct investments, amend or decant a trust, and change the law governing the

trust. It also provides examples of further powers that a trust director may exercise in conjunction with a power of direction. The section also states that unless the terms of a trust provide otherwise, trust directors with joint powers must act by majority decision.

Section 7-9.7 of the Estates, Powers and Trusts Law imposes on trust directors the same limitations applicable to trustees with respect to distributions of income and principal as set forth in EPTL section 10-10.1.

Section 7-9.8 of the Estates, Powers and Trusts Law provides that a trust director has the same duties and liabilities that a trustee with the same powers as the trust director would have and further clarifies that these duties and liabilities may be varied to the same extent such duties and liabilities of a trustee could be varied.

Section 7-9.8-A of the Estates, Powers and Trusts Law provides that the terms of the trust, whether lifetime or testamentary, extends the principles of existing EPTL Section 11-1.7 to trust directors.

Section 7-9.9 of the Estates, Powers and Trusts Law provides that a directed trustee is not liable for losses resulting from taking reasonable steps to comply with a trust director's exercise or nonexercise of a power of direction. It also provides that a directed trustee must not comply with such exercise or nonexercise of a power of direction to the extent such compliance would constitute willful misconduct.

Section 7-9.10 of the Estates, Powers and Trusts Law provides as a default rule that, subject to Section 7-9.11, trustees and trust directors are required to exchange information to the extent such information is reasonably related to their powers or duties, and further provides that, absent willful misconduct, neither trustees nor trust directors will be liable for a breach of trust resulting from reliance on the information so provided.

Section 7-9.11 of the Estates, Powers and Trusts Law provides that trustees and trust directors do not have an affirmative duty to monitor the other, nor to inform any other party that such trustee or trust director might have acted differently, unless the terms of the trust provide otherwise.

Section 7-9.12 of the Estates, Powers and Trusts Law provides that an action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee.

Section 7-9.13 of the Estates, Powers and Trusts Law provides that in an action against a trust director for breach of trust, the director may assert the same defenses as a trustee could assert in an action for breach of trust against the trustee.

Section 7-9.14 of the Estates, Powers and Trusts Law provides that by accepting an appointment as trust director of a trust which is subject to this Part, the trust director submits to personal jurisdiction in New York courts.

Section 7-9.15 of the Estates, Powers and Trusts Law sets forth the ways in which a trust director may accept such directorship, including by complying with the method for acceptance set forth in the trust. This section also provides that persons designated as a trust director may reject such designation, and that a failure to accept such designation within a reasonable time shall be deemed to be a rejection.

Section 7-9.16 of the Estates, Powers and Trusts Law provides that trust directors (other than certain health-care professionals) and trustees are entitled to reasonable compensation, and that the reasonableness of such compensation is reviewable by the court upon application by a person interested in the trust.

Section 7-9.17 of the Estates, Powers and Trusts Law provides that a trust director will only be required to give bond if either the court finds that such bond is needed to protect the interests of the beneficiaries, or bond is required by the terms of the trust and the court has not dispensed with such requirement. It further provides that a trust company, as defined by Banking Law section 2(2), will not be required to give a bond unless expressly required by the terms of the trust.

Section 7-9.18 of the Estates, Powers and Trusts Law provides that vacancies in a trust directorship need not be filled unless required or authorized by the terms of the trust, and further provides an order of priority for filling such vacancies.

Section 7-9.19 of the Estates, Powers and Trusts Law provides that trust directors may resign upon 30 giving days' notice or with approval of the court.

Section 7-9.20 of the Estates, Powers and Trusts Law provides that, in addition to the methods prescribed in the trust, a settlor, trust director or beneficiary may request the court to remove a trust director, and further provides that a trust director may be removed by the court on its own initiative.

Section 7-9.21 of the Estates, Powers and Trusts Law provides that in applying and construing this Part, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the Uniform Directed Trust Act.

Section 7-9.22 of the Estates, Powers and Trusts Law provides that if any provisions of this Part are held invalid, such invalidity shall not affect the other provisions or applications of this Part.

Section 7-9.23 of the Estates, Powers and Trusts Law sets forth that the effective date for Part 9 of EPTL Article 7 is 180 days after enactment. However, any trust created from the date of enactment and before the effective date may incorporate by reference Part 9 and Part 9 shall apply to such trust as if the trust were created on or after the effective date.

Section 2 of this measure adds a new section 7-2.10 of the Estates, Powers and Trusts Law that allows a settlor to confer upon a co-trustee the power to direct another co-trustee; absent willful misconduct, the excluded trustee will have no liability for loss nor will the excluded trustee have any duties with respect to the authority conferred on the directing trustee. Section 2 also allows the trust terms to provide that a co-trustee has the exclusive authority to take certain actions to the exclusion of another co-trustee; the excluded trustee will have no responsibilities for the actions of the co-trustee having such exclusive authority who alone has sole responsibility.

Section 3 of this measure provides the effective date provision for section 2. Section 2 is effective 180 days after enactment, but a trust created during that 180-day period may make the trust subject to section 7-2.10 of the Estates, Powers and Trusts Law.

The adoption of the New York Uniform Directed Trust Act gives New York residents the option of creating a directed trust, which is available under the law of other states, using New York trustees and New York law and allows the same option to out of state residents who wish to use New York trustees. The adoption of section 7-2.10 of the Estates, Powers and Trusts Law also expands the options for trust governance that can be used by New York residents and out of state residents who wish to use New York trustees, and together with the directed trust provision increases the desirability of New York as a venue for trust creation and administration.

This measure, which would have no fiscal impact on the State, would take effect 180 days after enactment, except that the terms of trusts created during the 180-day period may make the trust subject to either new Part 9 or to section 7-2.10 of the Estates, Powers and Trusts Law by express reference to the respective part or section.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to directed trusts and

excluded co-trustees

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

Section 1. The estates, powers and trusts law is amended by adding a new part 9 to article 7 to read as follows:

PART 9. New York Uniform Directed Trust Act

§ 7-9.1. Short title. This part may be cited as the New York uniform directed trust act.

§ 7-9.2. Definitions. In this part:

(1) “Breach of trust” means a violation by a trust director or trustee of a duty imposed on that trust director or trustee by the terms of the trust, this part, or law of this state other than this part.

(2) “Directed trust” means a trust for which the terms of the trust grant a power of direction.

(3) “Directed trustee” means a trustee that is subject to a trust director’s power of direction.

(4) “Person” means a person as defined by section 1-2.12.

(5) “Power of direction” means a power over a trust granted to a person by the terms of the trust to the extent the power is exercisable while the person is not then serving as a trustee. The term includes a power over the investment, management, or

distribution of trust property or other matters of trust administration. The term excludes the powers described in section 7-9.5.

(6) “Settlor” means the person, including the testator, who

(a) initially transfers property of the person to a trustee; or

(b) declares as the owner of property that the person holds identifiable property as trustee; or

(c) exercises a power of appointment in favor of a trustee, where the terms of such trust are created in connection with the exercise of the power of appointment, including the exercise by a trustee of a discretionary power in favor of a trustee.

For purposes of this subdivision, if a person authorized to act on behalf of a person acts with respect to property owned by that person, the person owning the property shall be deemed to have taken the action.

(7) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(8) “Terms of a trust” means

(a) except as otherwise provided in paragraph (b), the manifestation of the settlor’s intent regarding a trust’s provisions as:

(i) expressed in the trust instrument; or

(ii) established by other evidence that would be admissible in a judicial proceeding; or

(b) the trust's provisions as established, determined, or amended by:

(i) a trustee or trust director in accord with applicable law; or

(ii) court order; or

(iii) a nonjudicial settlement agreement.

(9) "Trust," unless otherwise provided, means a lifetime trust and a testamentary trust but does not include a resulting trust.

(10) "Trust contributor" means

(a) a settlor, as defined by subdivision (6), other than a person who exercises, or who is considered to exercise, a special power of appointment in favor of a trustee; or

(b) a person who transfers or is deemed to transfer property owned by that person to the trustee of an existing trust, except to the extent another person has the power to revoke or has a non-lapsing power of withdrawal over the transferred property.

For purposes of paragraph (b):

(i) The exercise of a presently exercisable general power of appointment is deemed to be a transfer of property owned by the powerholder, and

(ii) a person is deemed to transfer property owned by that person if the person's fiduciary actually transfers the property to, or exercises a power of appointment in favor of, a trustee; or

(c) if more than one person contributes property to the trustee of an existing trust, each person is the trust contributor of the portion of the trust property attributable to that person's contribution, except to the extent another person has the power to revoke or has a non-lapsing power of withdrawal over that portion.

(11) "Trust director" means a person that is granted a power of direction by the terms of a trust to the extent the power is exercisable while the person is not serving as a trustee. The person is a trust director whether or not the terms of the trust refer to the person as a trust director and whether or not the person is a beneficiary, settlor or trust contributor (other than a settlor) of the trust.

(12) "Trustee" means a person who has accepted an appointment as trustee or has been issued letters of trusteeship. "Trustee" includes an original, additional, and successor trustee, and a co-trustee.

(13) "Willful misconduct" means intentional wrongdoing, not mere negligence, gross negligence or recklessness, and "wrongdoing" means malicious conduct or conduct designed to defraud or seek an unconscionable advantage.

§ 7-9.3. Application; principal place of administration.

(a) This part applies to a trust, whenever created, that has its principal place of administration in this state, subject to the following rules:

(1) If the trust was created before the effective date of this part, this part applies only to a decision or action occurring on or after the effective date of this part.

(2) If the principal place of administration of the trust is changed to this state on or after the effective date of this part, this part applies only to a decision or action occurring on or after the date of the change.

(b) Without precluding other means to establish a sufficient connection with the designated jurisdiction in a directed trust, terms of the trust which designate the principal place of administration of the trust are valid and controlling if:

(1) a trustee's usual place of business is located in or a trustee is a resident of the designated jurisdiction; or

(2) a trust director's usual place of business is located in or a trust director is a resident of the designated jurisdiction; or

(3) all or part of the administration occurs in the designated jurisdiction.

§ 7-9.4. Common law of trusts; principles of equity.

The common law of trusts and principles of equity supplement this part, except to the extent modified by this part or another statute of this state.

§ 7-9.5. Exclusions.

(a) In this section, "power of appointment" means a power of appointment as defined by section 10-3.1(a).

(b) This part does not apply to a person who has a:

(1) power of appointment;

(2) power to appoint or remove a trustee or trust director;

(3) power of a trust contributor over a trust to the extent the trust contributor has a power to revoke the trust;

(4) power of a beneficiary over a trust to the extent the exercise or nonexercise of the power affects the beneficial interest of:

(A) the beneficiary; or

(B) another beneficiary represented by the beneficiary under SCPA 315 with respect to the exercise or nonexercise of the power; or

(5) power over a trust if:

(A) the terms of the trust provide that the power is held in a nonfiduciary capacity;

and

(B) the power must be held in a nonfiduciary capacity to achieve the trust contributor's tax objectives under the United States Internal Revenue Code of 1986, as amended, and regulations issued thereunder, as amended.

(c) A power granted to a person by the terms of the trust that would otherwise be a power of appointment is a power of direction if the terms of the trust impose fiduciary duties on that person's exercise of the power.

§ 7-9.6. Powers of trust director.

(a) The terms of a trust may grant to a trust director one or more powers of direction. Such powers, the listing of which is not exclusive but illustrative, may include a power to:

(1) direct investments;

(2) adjust between principal and income or convert to a unitrust;

(3) modify, reform, terminate, or decant a trust;

(4) direct a trustee's or another trust director's delegation of a trustee's or other trust director's powers;

(5) change the principal place of administration, situs, or governing law of the trust;

(6) ascertain the happening of an event that affects the administration of the trust;

(7) determine the capacity of a trustee, settlor, trust director, or beneficiary of the trust;

(8) determine the compensation to be paid to a trustee or trust director;

(9) prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust;

(10) grant or withhold permission before a trustee or another trust director may exercise a power of the trustee or other trust director;

(11) release a trustee or another trust director from liability for an action proposed or previously taken by the trustee or other trust director;

(12) authorize loans to trust beneficiaries;

(13) guarantee loans made by trust beneficiaries;

(14) enforce a trust for pets pursuant to section 7-8.1; or

(15) enforce a non-charitable trust without an ascertainable beneficiary.

(b) For purposes of paragraph (a)(1), unless the terms of the trust provide otherwise, the power to direct investments means with respect to all of the trust's investments (or, if applicable, to investments specified in the governing instrument), the power to direct the retention, purchase, sale, exchange, tender or other transaction or decision affecting the ownership thereof or rights therein (including the powers to borrow and lend for investment purposes), to direct the exercise of all management, control and voting powers related directly or indirectly to such investments (including, without limitation, nonpublicly traded investments), to direct the selection of custodians or subcustodians other than the trustee, the selection and compensation of, and delegation to, investments advisers, managers or other investment providers, and with respect to nonpublicly traded investments, the valuation thereof.

(c) Unless the terms of a trust provide otherwise, a trust director may exercise any further power appropriate to the exercise or nonexercise of a power of direction granted to the trust director under paragraph (a). Such further powers, the listing of which is not exclusive but illustrative, may include a power to:

(1) incur reasonable costs and direct indemnification for those costs; or

(2) make a report or accounting to a beneficiary or other interested party; or

(3) direct a trustee to issue a certification of trust; or

(4) prosecute, defend, or join an action, claim, or judicial proceeding relating to a trust; or

(5) employ a professional to assist or advise the trust director in the exercise or non-exercise or the trust director's powers; or

(6) delegate the trust director's power to an agent without liability for the actions of the agent provided the trust director exercises reasonable care, skill, and caution in:

(A) selecting an agent suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the agent;

(B) establishing the scope and terms of the delegation, consistent with the purposes of the governing instrument;

(C) periodically reviewing the agent's exercise of the delegated function and compliance with the scope and terms of the delegation.

(D) taking any appropriate action based on the trustee's review; and

(E) controlling the overall cost by reason of the delegation.

(7) prosecute, defend, or join an action, claim, or judicial proceeding pertaining to the trust where appropriate under the circumstances to the trust director's exercise or non-exercise of the trust director's power of direction.

(d) Unless the terms of a trust provide otherwise, trust directors with joint powers must act by majority decision.

§ 7-9.7. Limitations on powers of trust director.

A trust director having the power either to direct the trustee to make a discretionary distribution of principal or income to the trust director as a beneficiary or to

consent to such a distribution is subject to the provisions of section 10-10.1 (other than the last sentence thereof) as if for purposes of that section the trust director were a trustee having the power to make a discretionary distribution to the trustee as beneficiary.

§ 7-9.8. General duties and liabilities of trust director.

(a) Subject to paragraph (b):

(1) the trust director has the same duties and the same liabilities that a trustee would have if the power of direction authorized under the terms of the trust or any further power under section 7-9.6(c) was held by a trustee. If the power is held jointly with a trustee or another trust director, the rules applicable to co-trustees shall also apply to the trust director; and

(2) the terms of the trust may vary the trust director's duties or liabilities to the same extent the terms of the trust could vary the duties or liabilities of a trustee.

(b) Unless the terms of a trust provide otherwise, if a trust director is licensed, certified, or otherwise authorized or permitted by law other than this part to provide health care in the ordinary course of the trust director's business or practice of a profession, to the extent the trust director acts in that capacity, the trust director has no duty or liability under this part and section 7-9.16 shall not apply.

(c) The terms of a trust may impose a duty or liability on a trust director in addition to the duties and liabilities under this section.

(d) Cross reference. See sections 7-9.10(b) (duty to provide information to directed trustee) and 7-9.11(b) (no duty to monitor, inform, or advise).

§ 7-9.8-A. Limitations on powers and immunities of trust director

(a) The attempted grant to a trust director or to the successor of a trust director, of any of the following enumerated powers or immunities is contrary to public policy:

(1) The exoneration of such trust director from liability for failure to exercise reasonable care, diligence and prudence.

(2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.

(b) The attempted grant in any trust of any power or immunity in contravention of the terms of this section shall be void but shall not be deemed to render such trust invalid as a whole, and the remaining terms of the lifetime trust shall, so far as possible, remain effective.

(c) Any person interested in a trust may contest the validity of any purported grant of any power of immunity within the purview of this section without diminishing or affecting adversely his or her interest in the trust, any provision in the terms of the trust to the contrary notwithstanding.

§ 7-9.9. Duties and liabilities of directed trustee with respect to power of direction.

(a) Subject to paragraph (b), a directed trustee must take reasonable action to comply with a trust director's exercise or nonexercise of a power of direction or a further power under section 7-9.6(c) and, notwithstanding section 11-1.7, the directed trustee is not liable for any loss resulting directly or indirectly from any action taken pursuant to

such exercise of a power of direction or any action not taken pursuant to the nonexercise of a power of direction.

(b) A directed trustee must not comply with a trust director's exercise or nonexercise of a power of direction or further power under section 7-9.6(c) to the extent that by complying the directed trustee would engage in willful misconduct.

(c) A directed trustee that has reasonable doubt about its duty not to engage in willful misconduct may timely petition the court for instructions or present the issue in a pending proceeding.

(d) The terms of a trust may impose a duty or liability on a directed trustee in addition to the duties and liabilities under this section.

(e) Cross reference. See sections 7-9.10(a)(duty to provide information to trust director) and 7-9.11(a)(no duty to monitor, inform, or advise).

§ 7-9.10. Duty to provide information to trust director or trustee.

(a) Unless the terms of a trust provide otherwise, and subject to section 7-9.11, a trustee shall provide information to a trust director to the extent the information is reasonably related both to:

(1) the powers or duties of the trustee; and

(2) the powers or duties of the trust director.

(b) Unless the terms of a trust provide otherwise, and subject to section 7-9.11, a trust director shall provide information to a trustee or another trust director to the extent the information is reasonably related both to:

(1) the powers or duties of the trust director; and

(2) the powers or duties of the trustee or other trust director.

(c) Notwithstanding section 11-1.7, a trustee that acts in reliance on information provided by a trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trustee engages in willful misconduct.

(d) Notwithstanding section 11-1.7, a trust director that acts in reliance on information provided by a trustee or another trust director is not liable for a breach of trust to the extent the breach resulted from the reliance, unless by so acting the trust director engages in willful misconduct.

§ 7-9.11. No duty to monitor, inform, or advise.

(a) Unless the terms of a trust provide otherwise:

(1) a trustee does not have a duty to:

(A) monitor a trust director; or

(B) inform or give advice to a settlor, trust contributor (other than a settlor), beneficiary, trustee, or trust director concerning an instance in which the trustee might have acted differently than the trust director; and

(2) by taking an action described in subparagraph (1), a trustee does not assume the duty excluded by subparagraph (1).

(b) Unless the terms of a trust provide otherwise:

(1) a trust director does not have a duty to:

(A) monitor a trustee or another trust director; or

(B) inform or give advice to a settlor, trust contributor (other than a settlor), beneficiary, trustee, or another trust director concerning an instance in which the trust director might have acted differently than a trustee or another trust director; and

(2) by taking an action described in subparagraph (1), a trust director does not assume the duty excluded by subparagraph (1).

§ 7-9.12. Limitation of action against trust director.

An action against a trust director for breach of trust must be commenced within the same limitation period as an action for breach of trust against a trustee.

§ 7-9.13. Defenses in action against trust director. In an action against a trust director for breach of trust, the trust director may assert the same defenses as a trustee could assert in an action for breach of trust against the trustee.

§ 7-9.14. Jurisdiction over trust director.

(a) By accepting appointment as a trust director of a trust subject to this part, the trust director submits to the personal jurisdiction of the courts of this state regarding any matter related to a power or duty of the trust director.

(b) This section does not preclude other methods of obtaining jurisdiction over a trust director.

§ 7-9.15. Accepting or declining the position of trust director.

(a) A person designated as trust director accepts the position of trust director:

(1) by substantially complying with a method of acceptance provided in the terms of the trust; or

(2) if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by exercising powers or performing duties as trust director, or otherwise indicating acceptance of the position of trust director.

(b) A person designated as trust director who has not yet accepted the directorship may reject the position of trust director. A designated trust director of a lifetime trust who does not accept the position of trust director within a reasonable time after knowing of the designation and knowing of the occurrence of the event that makes the designation effective is deemed to have rejected the position of trust director.

§ 7-9.16. Compensation. Unless the terms of a trust provide otherwise, the trust director, other than one described in section 7-9.8(b), and the directed trustee shall be entitled to such compensation as may be reasonable, to be paid pursuant to the provisions of SCPA 2312(5), and the court, upon application of a person interested in the trust, may review the reasonableness of such compensation. This section supersedes any other compensation provision in the SCPA.

§ 7-9.17. Trust director's bond.

(a) Except as provided by paragraph (c), a trust director shall give bond to secure performance of the trust director's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(b) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(c) A trust company, as defined by banking law section 2(2), 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 need not give a bond unless a bond is expressly required of the trust company or bank by the terms of the trust.

§ 7-9.18. Vacancy in the position of trust director; appointment of successor.

(a) A vacancy in the position of trust director occurs if:

(1) a person designated as trust director rejects the position of trust director;

(2) a person designated as trust director cannot be identified or does not exist;

(3) a trust director resigns;

(4) a trust director is disqualified or removed;

(5) a trust director dies;

(6) a guardian is appointed for an individual serving as trust director; or

(7) the terms of the trust so provides.

(b) A vacancy in the position of trust director shall be filled only if expressly required by the terms of the trust, or if the terms of the trust expressly provide that trustees, other trust directors, or other persons may fill the vacancy in their discretion. If the terms of the trust do not expressly require that a vacancy be filled, and there is no other trust director then serving that is authorized to exercise the same power of direction as that held by the trust director that is no longer serving, the trustee or co-trustee is authorized to exercise the power or powers authorized by that power of direction.

(c) A vacancy in the position of trust director of a noncharitable trust that is required to be filled must be filled in the following order of priority:

(1) by a person designated in the terms of the trust to act as successor trust director;

(2) by a person appointed by unanimous agreement of the qualified beneficiaries;

or

(3) by a person appointed by the court.

(d) A vacancy in the position of trust director of a charitable trust that is required to be filled must be filled in the following order of priority:

(1) by a person designated in the terms of the trust to act as successor trust director;

(2) by a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust if the attorney general concurs in the selection; or

(3) by a person appointed by the court.

§ 7-9.19. Resignation of trust director.

(a) Unless the terms of a trust provide otherwise, a trust director may resign:

(1) upon giving at least 30 days' notice to (A) the trust contributor, all co-trustees and all other trust directors in the case of a revocable trust or (B) the qualified beneficiaries, all co-trustees and all other trust directors, in the case of any other trust; or

(2) with the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trust director and of any sureties on the trust director's bond for acts or omissions of the trust director are not discharged or affected by the trust director's resignation.

§ 7-9.20. Removal of trust director.

(a) In addition to any provision for removal in the trust instrument, the settlor, a trustee, director or a beneficiary may request the court to remove a trust director or a trust director may be removed by the court on its own initiative.

(b) The court may remove a trust director if:

(1) the trust director has committed a serious breach of trust;

(2) lack of cooperation among co-trust directors substantially impairs the administration of the trust;

(3) because of unfitness, unwillingness, or persistent failure of the trust director to effectively exercise the power of direction held by the trust director the court determines that removal of the trust director best serves the interests of the beneficiaries; or

(4) there has been a substantial change of circumstances or removal is requested by all of the qualified beneficiaries, provided that the court finds that removal of the trust director best serves the interests of all of the beneficiaries and is not inconsistent with the purposes of the trust, and a suitable co-trust director or successor trust director is available.

(c) Pending a final decision on a request to remove a trust director, or in lieu of or in addition to removing a trust director the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries.

§ 7-9.21. Uniformity of application and construction. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 7-9.22. Severability clause. If any provision of this part or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part which can be given effect without the invalid provision or application, and to this end the provisions of this part are severable.

§ 7-9.23. Effective date. This part takes effect 180 days after it becomes law and applies to all trusts created on or after that date, provided, however, that any trust created on or after the date this part becomes a law may by express reference in the terms of the trust to part 9 of the estates, powers and trusts law make the trust subject to part 9 as if the trust were created on or after the effective date of this part.

§ 2. The estates, powers and trusts Law is amended by adding a new section 7-2.10 to read as follows:

§ 7-2.10. Excluded co-trustee. (a) Notwithstanding section 11-1.7, if the terms of the trust confer upon a co-trustee, to the exclusion of another co-trustee, the power to take certain actions with respect to the trust, including the power to direct or prevent certain actions of the trustees, the duties and liabilities of the excluded trustee are as follows:

(1) If the terms of the trust confer upon the co-trustee the power to direct certain actions of the excluded trustee, the excluded trustee must act in accordance with the direction shall have no duty to act in the absence of such direction and is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from compliance with the direction unless compliance with the direction constitutes willful misconduct on the part of the directed co-trustee;

(2) If the terms of the trust confer upon the co-trustee exclusive authority to exercise any power, the excluded trustee is not liable, individually or as a fiduciary, for any loss resulting directly or indirectly from the action taken by the co-trustee in the exercise of the power; and

(3) The excluded trustee has no duty to monitor the conduct of the co-trustee, provide advice to the co-trustee or consult with or request directions from the co-trustee. The excluded trustee is not required to give notice to any beneficiary of any action taken or not taken by the co-trustee whether or not the excluded trustee agrees with the result. Administrative actions taken by the excluded trustee for the purpose of implementing directions of the co-trustee, including confirming that the directions of the co-trustee have been carried out, do not constitute monitoring of the co-trustee nor do they constitute participation in decisions within the scope of the co-trustee's authority.

(b) The co-trustee holding the power to take certain actions with respect to the trust shall be liable to the beneficiaries with respect to the exercise of the power as if the excluded trustee were not in office and shall have the exclusive obligation to account to

the beneficiaries and defend any action brought by the beneficiaries with respect to the exercise of the power.

§ 3. Effective date. Section 2 shall take effect 180 days after it becomes a law and shall apply to all trusts created on or after that date, provided, however, that any trust created on or after Part 9 becomes a law and before the effective date of section 2 may by express reference in the terms of the trust to section 7-2.10 of the estates, powers and trusts law make the trust subject to section 7-2.10 as if the trust were created on or after the effective date of section 2.

B. Modified Measures

1. Commissions of Donees of a Power in Trust Including Donees of a Power During Minority (SCPA 2306, 2307, 2308, 2309, 2312 and 2313)

The Committee recommends an amendment to the SCPA to create rules governing the commissions of donees of powers in trust, including donees of powers during minority, identical to the existing rules governing commissions of trustees.

The concept of a “power in trust” is long established in New York law and were given great importance by the Revised Statutes enacted in 1829-1830. Under those statutes, trusts could be created for only limited purposes and failed attempts to create trusts created instead powers in trust in the purported trustees. Current law in EPTL 10-3.1(b) refers to “a power during minority to manage property vested in an infant” as one of the powers which is not a power of appointment but to which the provisions of Article 10 generally apply. Such a donee is included in the definition of “fiduciary” in the EPTL (EPTL 2-1.7) and in the SCPA (103(21)) (both referring to “donee of a power during minority”).

It is clear, however, that donees of a power in trust are not limited to donees holding the power during the minority of the beneficiary. Although the express statutory references to powers in trust refer only to powers to manage property vested in an infant, EPTL 10-10.1, which expressly retains as the law of New York the common law of powers except as modified by Article 10, the statement by the Bennett Commission that

this provision does not invalidate other powers not specifically mentioned¹, and case law² clearly indicate that a power in trust to manage property vested in an incapacitated person does exist under New York law.

The question of compensation of such donees of the various powers to manage property belonging to others is not clearly answered by our statutes. *Matter of Chase Manhattan Bank (Golding)*³ authorized advance payment of commissions under SCPA 2311 to a corporate trustee acting as donee of a power to manage property during minority under a lifetime trust. The court also ordered that the calculation of commissions was to be made under SCPA 2307 which governs payments to fiduciaries other than trustees because the donee was not a trustee. The court did suggest that commissions would more appropriately be calculated under SCPA 2308 and 2309, which govern commissions of trustees. Today SCPA 2312 governing the commissions of corporate trustees would be relevant to the compensation of corporate donees.

The amendments to the SCPA make the provisions applicable to trustees' commissions applicable to all donees of powers to manage property whether during minority or vested in an incapacitated person or of any other sort, with one exception. Under New York law, a failed attempt to appoint by will an individual to be the guardian of the property of an infant result in the nominated person being a donee of a power to manage property during minority. Under SCPA 1714, this donee "has all the rights and duties of a guardian and shall be entitled to receive the commissions allowed to a guardian." Donees governed by SCPA 1714 are excluded from the changes made by this proposal.

The specific sections of the SCPA to be amended are 2308, 2309, and 2312 governing trustees' commissions, thus codifying *Chase Manhattan Bank (Golding)* and extending its holding to other donees of a powers in trust, and 2313 dealing with multiple commissions of executors or trustees under wills and lifetime trusts established after August 31, 1993.⁴

¹ 4th Report of Temporary State Comm. on Modernization, Revision and Simplification of Law of Estates, Fourth Report, N.Y. Legis. Doc., 1965, No. 19, at 24.

² See *Matter of Schaper*, 151 Misc.2d 923, 574 N.Y.S.2d 137 (Sur. Ct. New York County 1991).

³ 129 Misc.2d 952, 494 N.Y.S.2d 660 (Sur. Ct. New York County 1985).

⁴ The proposed amendments deal only with the computation of commissions and do not deal with the question of jurisdiction over donees of powers created in lifetime trusts that was at the heart of the question in *Matter of Chase Manhattan Bank (Golding)*. Codifying that part of the holding requires changing the phrase "from which his letters issued" with the phrase "the court having jurisdiction over the estate or trust" in SCPA 2011 which, as the opinion in *Matter of Chase Manhattan Bank (Golding)* points out, is the meaning of the phrase under CPLR 8005. Such an amendment is beyond the remit of this project.

The amendments to SCPA 2308, 2309, and 2312 use the language “donee of a power to in trust” in order to make sure that every sort of power in trust that could still exist under the common law is included in the new provisions. Each section has also been amended to make it clear that the new language includes donees of powers during minority. The phrase “donee of a power in trust” has been added to every reference to “trustee” except in those provisions dealing with trustees of charitable trusts and those providing for the transition from the previous rules governing commissions. Because donees of a power in trust will be entitled to trustees’ commissions only from the enactment of these amendments, the transition rules are not relevant. The term “property subject to the power in trust” has been used as the equivalent of “trust property” and the term “calendar year” has been added to references to “trust year” because the property subject to the power does indeed belong to the beneficiary of the power, the items of income and deduction attributable to it would be included in the beneficiary’s gross income reported on form 1040 and the tax year would indeed be the calendar year. Finally, consideration should be given to making the amendments applicable to donees of powers during minority and of other powers in trust effective on January 1 of the year following their enactment, thus making transition rules unnecessary.

Proposal:

AN ACT to amend the surrogate’s court procedure act, in relation to the commissions of donees of a power in trust, including donees of a power during minority

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Section 2306 of the surrogate’s court procedure act is amended to read as follows:

§ 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 section 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.

§ 2. The opening paragraph of subdivision 1 of section 2307 of the surrogate's court procedure act, as amended by chapter 474 of the laws of 1994, is amended to read as follows:

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:

§ 3. Section 2308 of the surrogate's court procedure act, the section heading and subdivision 1 as amended by chapter 503 of the laws of 1980, paragraph (c) of subdivision 1 as added by chapter 376 of the laws of 2001, subdivision 2 as amended by chapter 654 of the laws of 1993, subdivision 3 as amended by chapter 243 of the laws of 2001, subdivision 4, 6, 7 and paragraph (d) of subdivision 9, as amended and subdivision

12 as added by chapter 237 of the laws of 1978, paragraph (a) of subdivision 5 as amended and subdivision 13 as added by such chapter 936 of the laws of 1984, paragraphs (a) and (b) of subdivision 6, as amended by chapter 245 of the laws of 1991, and subdivision 8 as amended by chapter 685 of the laws of 1967, is amended to read as follows:

§ 2308. Commissions of trustees, donees of powers 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 a 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 1½ per cent;

(3) all sums of principal or property subject to the power in trust above \$12,000 at the rate of 1¼ 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 otherwise explicitly provides, the annual commissions allowed by subdivision two of this section shall be payable one-third from the income of the trust or 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 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 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 after the termination of a life use or uses the trustee shall be entitled to and may retain commissions from income in an amount annually equal to 6 per cent of income collected in each year.

(b) In the case of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses the trustee shall not be entitled to any commission from 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 a 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 a 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 a 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 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 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 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 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 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 pursuant to this subdivision 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 pursuant to this subdivision 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 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 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 the donees of a power in trust over property having a value of \$400,000 or more, of a trust or to the 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 the 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 a 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.

(c) Notwithstanding any provisions of paragraphs (a) and (b) of this subdivision to the contrary, if during the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses or during the continuance of such a trust after the termination of a life use or uses, 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 commission 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; provided however, if during the continuance of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses created prior to April 1, 1948, 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 commission allowed under subdivision 5 to a sole trustee unless there are more than 3, in which case the commission to which 3 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 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 ½ 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 or donee of a power in 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 or to the principal of the property subject to the power in trust shall be deemed a separate trust or separate fund subject to the power in trust for purposes of this subdivision and the trustee or donee of the power in trust shall be entitled to commissions in respect thereof at the rates and according to the terms and provisions of subdivisions 1 and 2 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 or 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.

§ 4. Section 2309 of the surrogate’s court procedure act, the section heading and subdivision 1 as amended by chapter 503 of the laws of 1980, subdivision 2 as amended by chapter 64 of the laws of 1993, subdivision 3 as amended by chapter 243 of the laws of 2001, paragraph (a) of subdivision 5 as amended and subdivision 11 as added by

chapter 936 of the laws of 1984, subdivisions 6 and 7 as amended by chapter 303 of the law of 1976, paragraphs (a) and (b) of subdivision 6 as amended by chapter 245 of the laws of 1991, and the opening paragraphs of paragraphs (a) and (b) of subdivision 6 as amended by chapter 514 of the laws of 1993, is amended to read as follows:

§ 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 inter 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 subdivision 2 shall be payable one-third from the income of the trust or property subject to the power in trust and two-thirds from the principal of the trust or 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 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 after the termination of a life use or uses the trustee shall be entitled to and may retain commissions from income in an amount annually equal to 6 per cent of income collected in each year.

(b) In the case of a trust created solely for public, religious, charitable, scientific, literary, educational or fraternal uses the trustee shall not be entitled to any commission from 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 [or], 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 [the trustees] 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 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) Subject to section 2313 regarding multiple commissions of executors [or], 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 the donees of a power in trust over property having a value of \$400,000 or more, or of a

trust or to the 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 the 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 year 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 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 per cent 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 is 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 [per cent] percent of the first \$2,500 of such income distributed during the administration of the trust and 1 [per cent] 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, but does not mean 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.

§ 5. Section 2312 of the surrogate’s court procedure act as added by chapter 936 of the laws of 1984, subdivision 2, 3, 7, 9 and paragraphs (d) and (e) of subdivision 10 as amended by chapter 511 of the laws of 1987, paragraph (b) of subdivision 4 as amended by chapter 245 of the laws of 1991, and subdivision 5 as amended by chapter 243 of the laws of 2001, is amended to read as follows:

§ 2312. Commissions of corporate trustees, including when acting as donees of powers during minority or donees of powers 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 after the termination of a life use or uses a corporate trustee shall be entitled to and may retain commissions from income in

accordance with the provisions of subdivision 1 or 2 hereof, 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 from 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 but not a donee of a power during minority with the rights and duties of a guardian under section 1714 of this chapter.

§ 6. Section 2313 of the surrogate's court procedure act, as amended by chapter 471 of the laws of 1995, is amended to read as follows:

§ 2313. Multiple commissions of executors [or], trustees, donees of powers during minority, or donees of powers 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 do this [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 trust⁵ 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, but this section does not apply to a donee of a power during minority with the rights and duties of a guardian under section 1714 of this chapter.

§ 7. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law.

C. Previously Endorsed Measures

1. Computation and Allocation of Commissions of Trustees of Charitable Trusts (SCPA 2308, 2309, 2312)

This measure would amend sections 2308, 2309 and 2312 of the SCPA to provide that an individual trustee of a wholly charitable trust would receive commissions at the same rates as an individual trustee of a non-charitable trust, with a reduced rate of 80% of the rates for a non-charitable trust with a principal value of up to \$20,000,000, and a reduced rate of 50% on the principal value in excess of \$20,000,000, and to make other clarifications to existing law affecting wholly charitable trusts and split interest trusts as described herein.

There currently is a difference under current law in the manner in which trustees of wholly charitable trusts and trustees of non-charitable trusts are compensated. Under current law (in the SCPA, section 2309(5) and others, a trustee of a wholly charitable trust is entitled to 6% of the annual income collected as compensation, while a trustee of

⁵ Donees of a power during minority are included in the definition of “fiduciary” in SCPA 103(21).

a non-charitable trust is entitled to compensation at the rate of \$10.50 per \$1,000 (or major fraction thereof) on the first \$400,000 of principal, \$4.50 per \$1,000 (or major fraction thereof) on the next \$600,000 of principal and \$3.00 per \$1,000 (or major fraction thereof) on all additional principal. Therefore, if a non-charitable trust has \$1,000,000 of assets, the trustee's annual commissions would amount to \$6,900, regardless of how much income was collected during the year. Meanwhile, if a wholly charitable trust has \$1,000,000 of assets that generates \$1,000 of income throughout the year, then the trustee will be entitled to only \$600 for his or her annual commissions.

Such a discrepancy in compensation is unwarranted considering that the duties of the trustee of a wholly charitable trust and those of the trustee of a non-charitable trust are comparable. A trustee of a private trust must devote time and effort in dealing with beneficiaries and analyzing their financial needs and responsibilities. Similarly, a trustee of a wholly charitable trust must devote comparable time and energy analyzing grant requests and exercising due diligence with respect to charitable grantees. In either case, the trustee has traditional fiduciary responsibility for administering the trust faithfully and competently. The private trustee is accountable to the beneficiaries while the charitable trustee is accountable to not only the charities but also the Internal Revenue Service and the Charities Bureau of the New York Attorney General 's Office.

The existing compensation structure is also at odds with modern trust administration. Under the total return concept embodied in the prudent investor rule, the existing compensation structure for a trustee of a wholly charitable trust creates a potential conflict of interest. Although investments with a significant capital gain component may be the most appropriate trust investment under the prudent investor rule, a trustee of a wholly charitable trust has personal incentive to maximize the income component of the investment return. An incentive to maximize income seems particularly inappropriate because most trusts do not base their charitable distributions on trust income, as discussed in the following paragraph. Furthermore, if a trustee of a wholly charitable trust does faithfully invest using prudent investor principles as required by applicable law, his or her trustee commissions will in most cases be substantially less than the commissions payable to a trustee of a non-charitable trust of similar value, as illustrated above.

There also is a difference in the manner in which trustee commissions are allocated against income and principal the commissions of a trustee of a wholly charitable trust are allocated entirely to income, while the commissions of a trustee of a private trust are payable one-third from income and two-thirds from principal. The allocation of the commissions of a trustee of a wholly charitable trust all to income has inadvertent consequences. By requiring the trustee of the charitable trust to take his or her commission from income, the amount of income available for distribution to the

charitable beneficiaries of certain pre-1969 wholly charitable trusts is substantially reduced (pre-1969 wholly charitable trusts generally provide for public charities to receive the net income of the trust — the proposed change will increase the amounts payable to charities from those trusts).

This measure addresses the need to treat trustees of private trusts and charitable trusts uniformly and to eliminate the disparate treatment of trustees of wholly charitable trusts.

Proposed Amendment: The proposed amendment would implement the following changes:

(1) Annual commissions of individual trustees of wholly charitable trusts will be computed under the same structure as the annual commissions of individual trustees of non-charitable trusts. Therefore, both sets of trustees will be compensated based upon the principal value of the trust, rather than upon income collected. However, there will be an exception that the commission for trustees of wholly charitable trusts on principal up to \$20,000,000 will be reduced by 20% and on any amount in excess of \$20,000,000 such commission would be reduced by 50% to \$1.50 per \$1,000 (or major fraction thereof). Corporate trustees will still be entitled to reasonable compensation at their published rates.

(2) Annual commissions of individual and corporate trustees for charitable trusts will be payable one-third from income and two-thirds from principal. This will increase the amounts of income payable to the charitable beneficiaries of certain wholly charitable trusts.

This measure, which would have no fiscal impact on the State, would take effect immediately and apply to all trusts in existence on or after its effective date; provided that a trustee of a trust in existence on the effective date may continue to take commissions under the prior law until the end of the year in which the act becomes effective.

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to the computation and allocation of the commissions of trustees of charitable trusts; and to the repeal of certain provisions of such law relating thereto

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

Section 1. Paragraphs (a) and (b) of subdivision 5 of section 2308 of the surrogate's court procedure act, paragraph (a) as amended by chapter 936 of the laws of 1984, are amended to read as follows:

(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 [from income in an amount annually equal to 6 per cent of income collected in each year] according to the terms specified in subdivision 2, 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.

(b) In the case of a trust [created solely for public, religious, charitable, scientific, literary, educational or fraternal uses the] 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.

§2. Paragraph (c) of subdivision 6 of section 2308 of the surrogate's court procedure act is REPEALED.

§3. Subdivision 12 of section 2308 of the surrogate's court procedure act, as added by chapter 237 of the laws of 1978, is amended to read as follows:

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 [and], 2 and 5 of this section as though, for purposes of computing commissions of the trustee, income so accumulated was principal.

§4. Subdivision 3 of section 2309 of the surrogate's court procedure act, as amended by chapter 243 of the laws of 2001, is amended to read as follows:

3. Unless the will or lifetime trust instrument otherwise explicitly provides the annual commissions allowed by [subdivision 2] 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 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.

§5. Paragraphs (a) and (b) of subdivision 5 of section 2309 of the surrogate's court procedure act, paragraph (a) as amended by chapter 936 of the laws of 1984, are amended to read as follows:

(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 [from income in an amount annually equal to 6 per cent of income allocated in each year] according to the terms specified in subdivision 2, 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.

(b) In the case of a trust [created solely for public, religious, charitable, scientific, literary, educational or fraternal uses the] described in paragraph (a) of this subdivision, a trustee shall not be entitled to any commission from principal as specified in subdivision 1 for paying out principal.

§6. Paragraphs (a) and (b) of subdivision 3 of section 2312 of the surrogate's court procedure act, as amended by chapter 511 of the laws of 1987, are amended to read as follows:

(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 shall be entitled to and may retain annual commissions [from income] in accordance with the provisions of subdivision 1 or 2 [hereof] of this section, as the case may be, except that the trustee shall not be entitled to a commission for paying out principal.

(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 [from] for paying out principal.

§7. This act shall take effect immediately and shall apply to all trusts in existence on or after such effective date; provided, however that a trustee of a trust in existence on such effective date may elect to continue to take commissions under the law in effect prior to such effective date until December 31 of the year this act takes effect.

2. The Revocatory Effect of Divorce and Relatives of a Former Spouse (EPTL 5-1.4(g))

Present §5-1.4 of the EPTL was added in 2008, on the basis of a study and recommendation of the Surrogate's Court Advisory Committee and the T&E Section of the NYSBA. The primary purpose of that 2008 legislation was to extend the application of former §5-1.4 to non-probate transfers.

The form of the 2008 legislation was adopted substantially verbatim from §2-804 of the 1990 Uniform Probate Code ("UPC"). However, one of the aspects of UPC §2-804 which was not adopted in 2008 (by either this Committee or the T&E Section) was the provision that expanded the revocatory effect of the divorce beyond the divorced spouse of the decedent to include the "relatives" of the divorced spouse of the decedent.

As a result of the recent Fourth Dept. decision in *Estate of Lewis*, 114 A.D.3d 203, 978 N.Y.S.2d 527 (2014), the Committee has considered the issue *de novo*, and recommends the adoption of a rebuttable presumption extending the revocatory effect of divorce to “relatives” of the decedent’s former spouse, unless there is substantial evidence of contrary intent. (The proposal would allow CPLR 4519 evidence but would provide that such evidence would have to be supported by other evidence.)

The Committee considered and rejected the adoption of UPC §2-804 for the following reasons. Under UPC §2-804, divorce revokes dispositions to both former spouses and relatives of former spouses “[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage.” Under our recommendation, this approach would be retained for revocation of dispositions to divorced spouses but the presumed revocatory effect on dispositions to relatives, on the other hand, could be rebutted by any substantial evidence, including evidence which would be inadmissible by virtue of CPLR 4519, provided that such evidence is supported by other proof.

It is the Committee’s judgment that this approach reflects the probable intent of most decedents in connection with dispositions to “relatives” of divorced spouses, but leaves room for the varieties of human experience which might include a contrary intention which was not memorialized in the decedent’s will executed prior to the divorce, such as, for example, a continuing relationship with a step child. The Committee believes that such probable intent is more problematic than the probable intention of such decedents with respect to dispositions to divorced spouses themselves.

It should be noted that the Committee discussed at some length whether evidence admissible on the issue of revocatory intent should include evidence otherwise disqualified under CPLR 4519. Its recommendation to permit such evidence is based on its judgment that (a) the issue of dispositions to relatives of former spouses arises infrequently, (b) that in such infrequent instances excluding CPLR 4519 evidence would, more likely than not, result in a disposition not in harmony with the decedent’s probable intent, and (c) there is a sufficient safeguard against fraud in providing that otherwise excludible CPLR 4519 evidence must be supported by other evidence before there can be “substantial evidence” of contrary intent.

The Committee therefore recommends that a new paragraph (g) be added to EPTL 5-1.4, to provide as follows:

"(g) The revocatory effect of paragraph (a) shall be presumed to apply to a person in any relationship to the divorced individual that was based upon said marriage,

including but not limited to step children, step grandchildren and parents in law, unless there is substantial evidence of the divorced individual's contrary intention. Testimony with regard to such intention shall not be disqualified under CPLR 4519 provided that such testimony is supported by other evidence."

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the revocatory effect of divorce and relatives of a former spouse

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Section 5-1.4 of the estates, powers and trusts law is amended by adding a new paragraph (g) to read as follows:

(g) The revocatory effect of paragraph (a) shall be presumed to apply to a person in any relationship to the divorced individual that was based upon said marriage, including but not limited to stepchildren, stepgrandchildren and parents-in-law, unless there is substantial evidence of the divorced individual's contrary intention. Testimony with regard to such intention shall not be disqualified under CPLR 4519 provided that such testimony is supported by other evidence.

§2. This act shall take effect immediately.

3. Pour-Over Wills and Trusts (EPTL 3-3.7(a))

I. Funding and the "Pour Over" Trust

EPTL 3-3.7, which permits a decedent's will to "pour over" probate assets to a revocable amendable trust, was enacted in 1965 as section 47-g of the Decedent Estate

Law upon the recommendation of the New York Temporary Commission on Estates (the Bennett Commission).

In making its recommendation (which adopted, basically verbatim, the 1960 version of the Uniform Testamentary Additions to Trust Act), the Bennett Commission made it clear that it had (1) specifically considered whether the trust to which the will would pour over had to be funded during lifetime, (2) decided against requiring such funding, and (3) expressed that decision by adopting the language of the Uniform Act that the pour over is valid “regardless of the existence, size or character of the corpus” of the trust.⁶

In 1997, on the recommendation of the EPTL-SCPA Legislative Advisory Committee, the Legislature enacted EPTL 7-1.18, which provides that a lifetime trust is valid only to the extent of the assets successfully transferred to the trust during the lifetime of the settlor. However, in the Fourth Report of the Advisory Committee, recommending the enactment of EPTL 7-1.18, there is nothing to indicate any intention to disturb the Bennett Commission’s decision to permit a pour over to a trust under 3-3.7 even though no assets have been transferred to the trust during the decedent’s lifetime. Indeed, the same chapter of the session laws which enacted 7-1.18 also enacted EPTL 7-1.17 (which sets forth new execution formalities required of a lifetime trust) and amended 3-3.7 to specifically require that these new formalities of 7-1.17 be met, but at the same time omitted any reference whatsoever to the funding requirements of 7-1.18.

All of the above of makes sense when it is recognized that the purpose of 7-1.18 is to make clear that assets are made subject to a lifetime trust only if they have been successfully transferred to the trust during the settlor’s testator’s life, whereas 3-3.7 is concerned, not with the existence of a lifetime trust but rather with the validity of a testamentary transfer of probate assets.

Nevertheless, given that EPTL 7-1.18 was enacted after EPTL 3-3.7 and that 3-3.7 does not specifically reference the transfer requirements of 7-1.18, some have raised a question with respect to the relationship of 3-3.7 and 7-1.18. It is, therefore,

¹ Second Report of the Temporary Commission on Estates (1963)(“Because of the doubts which have been raised by decisions in other states as to whether an unfunded insurance trust is a non-testamentary act and whether a trust with merely nominal assets meets the requirement that one of the elements of a valid trust is a trust res, the Uniform Act in many of the other statutes so provide and it is desirable that such doubts be removed by a specific provision that neither of such facts shall affect the validity of the pour-over [p.312].....It is suggested that a statute validating ‘pour-overs’ to inter vivos trusts should...state that (a) such trust shall include a funded or unfunded life insurance trust although the testator has reserved any part or all of the right of ownership in the insurance contracts, and (b) that the existence, size or character of the corpus of the trust shall not affect its validity”.)

recommended that clarifying legislation be enacted. Specifically, it is proposed that 3-3.7 be clarified by removing the phrase “regardless of the existence, size or character of the corpus”, and inserting, in its place, the phrase “regardless of whether any assets have been transferred to such insurance trust or other trust prior to the death of the testator or testatrix.”

II. Trust Formalities

A second, somewhat related, issue under 3-3.7 was involved in the recent decision of *Matter of D’Elia*, 40 Misc.3d 355, 964 N.Y.S.2d 877 (Surrogate’s Court, Nassau County 2013).

In *D’Elia*, the testator’s will left his residuary estate to a trust of which he was the grantor and his son was the trustee. The testator signed the trust at the same time he signed his will, but his son did not sign the trust until seven days later. The Surrogate held that the pour over failed because the trust had not been executed in compliance with 7-1.17, stating:

“EPTL 3-3.7 permits a testator to make a pour-over bequest to a trust in a will provided that such trust instrument is executed in the manner provided for in 7-1.17, prior to or contemporaneously with the execution of the will, and such trust instrument is identified in such will. ... Here, the trust was signed by the decedent as settlor on March 22, 2011 contemporaneously with or prior to the execution of his purported will. The trustee, however, did not sign the trust agreement until March 29, 2011. Thus, the trust was not in existence at the time the will was signed.”

The result in *D’Elia*, although correct under the letter of 3-3.7 and 7-1.17 as presently written, seems an unduly harsh frustration of the testator’s intent, especially when it is seen that the testator, in simultaneously signing both the will and the trust instrument, had fully performed his own personal role in the required execution formalities.

Moreover, under 3-3.7, both as originally enacted in 1965, as well as at present (*i.e.*, as amended in 1997 to include the requirement of complying with 7-1.17), if (as is often the case) the pour over trust is one in which the testator is both the grantor and the sole trustee, the trust instrument does not have to be signed by anybody other than the testator/grantor/trustee (although it has to be notarized). Thus, if the grantor in *D’Elia* had

been the sole trustee to begin with, the statutes would have been satisfied without his son ever having to sign the trust instrument as trustee.⁷

On the other hand, if, as in *D'Elia*, the testator chooses to name another person as trustee (or co-trustee) of the pour over trust, it is not unreasonable to require that such person also execute the trust instrument, at least prior to the testator's death when the pour over bequest becomes effective.

The Committee, therefore, recommends that 3-3.7 continue to require that in all cases the settlor execute the trust instrument prior to, or contemporaneously with, the execution of the will, but that if a person other than the settlor is named as a trustee, such person must also execute the trust instrument at some point prior to the testator's death.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to testamentary disposition to trustee under, or in accordance with, terms of existing inter vivos trust

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Section 3-3.7 of the estates, powers and trusts law, paragraph (a) as amended by chapter 139 of the laws of 1997 and such section as renumbered by chapter 472 of the laws of 1967, is amended to read as follows:

§3-3.7. Testamentary disposition to trustee under, or in accordance with, terms of existing inter vivos trust. (a) A testator [or testatrix] may by will dispose of or appoint all or any part of [his or her] such testator's estate to a trustee of a trust, the terms of which are evidenced by a written instrument executed by the testator [or testatrix], the testator [or testatrix] and some other person, or some other person, including a trust

⁷ It can also be pointed out that if this had been a testamentary trust rather than a 3-3.7, only the testator's signature would be required.

established for the receipt of the proceeds of an annuity or pure endowment contract, or of a thrift, savings, pension, retirement, death benefit, stock bonus, or profit-sharing plan or system or a funded or unfunded life, group life, industrial life or accident and health insurance trust (although the [settlor] person establishing such trust has reserved any or all rights of ownership of the insurance contracts), regardless of [the existence, size or character of the corpus of such insurance trust or other trust] whether any assets have been transferred to the trust prior to the death of the testator; provided that [such] the trust instrument is identified in the will and is executed by the person establishing the trust prior to or contemporaneously with the execution of the will and, unless such person is the sole trustee, by at least one trustee thereof prior to the death of the testator, in the manner [provided for in 7-1.17, prior to or contemporaneously with the execution of the will, and such trust instrument is identified in such will] required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, in the presence of two witnesses who shall affix their signatures to the trust instrument.

(b) The testamentary disposition or appointment is valid, even though:

(1) The trust instrument is amendable or revocable, or both, provided, however, that the disposition or appointment shall be given effect in accordance with the terms of the trust instrument, including an amendment thereto, as they appear in writing on the date of the testator's death and, where the testator so directs, including amendments to the trust instrument after his or her death, if the instrument evidencing such amendment is

executed and acknowledged in the manner [herein] provided for [executing and acknowledging the instrument which it amends] in paragraph (b) of 7-1.17.

(2) The right is reserved in such trust instrument (A) to exercise any power over any property transferred to or held in the trust or (B) to direct during the lifetime of the [settlor] person establishing the trust or any other person, the persons and organizations to whom or in whose behalf the income shall be paid or the principal distributed.

(3) The trust instrument or any amendment thereto was not executed and attested in accordance with the formalities prescribed by 3-2.1.

(c) The property so disposed of or appointed by will becomes a part of the trust to which it is given, and title thereto vests in the trustee to be administered and disposed of in accordance with the terms of the trust instrument.

(d) Any disposition or appointment to the trustee made by a testator who died prior to the effective date of this section, which would be invalid under the applicable law of this state pre-existing the effective date of this section, shall be construed to create a testamentary trust under and in accordance with the terms of the trust instrument which the testator originally intended should embrace the property disposed of or appointed, as such terms appear in such trust instrument at the date of the testator's death.

(e) A revocation or termination of the trust before the death of the testator shall cause the disposition or appointment to fail unless the testator has made an alternative disposition.

§2. This act shall take effect immediately and apply to all testamentary dispositions to a trustee occurring on or after such effective date.

4. The Power to Adjust and Capital Gains Taxes (EPTL 11-A-4.4)

Recent increases in the tax rates applicable to realized capital gains and the enactment of the new 3.8% tax on undistributed net investment income (which includes realized capital gains) have made it increasingly important that, in order to achieve results which are reasonable and impartial to all beneficiaries, a trustee be able to effectively determine whether the realized capital gains of a trust are taxed to the current beneficiaries or to the trust (*i.e.*, in essence to the remainder beneficiaries).

The short of the matter is that whether the trust or the current beneficiaries are taxed on the capital gains turns on whether such gains are “excluded” vs. “included” in what is called “distributable net income” (DNI) under IRC §643(a). If they are excluded from DNI, they will be taxed to the trust. If they are included in DNI, then amounts distributed (or required to be distributed) to the current beneficiaries will be considered, partially or fully, to “carry out” such gains and cause them to be taxed to such beneficiaries.

The relevant statutory provisions and regulations are as follows:

(a) The statute (unamended since the 1954 Code): §643(a)(3)

(a) Distributable net income

For purposes of this part, the term “distributable net income” means, with respect to any taxable year, the taxable income of the estate or trust computed with the following modifications—

Capital gains and losses

Gains from the sale or exchange of capital assets shall be excluded to the extent that such gains are allocated to corpus and are not (A) paid, credited, or required to be distributed to any beneficiary during the taxable year ..., or

(b) The regulations (last amended in 2004): §1.643(a)-3

(b) Capital gains ...are included in distributable net income to the extent they are, pursuant to the terms of the governing instrument and applicable local law, or pursuant to a reasonable and impartial exercise of discretion by the fiduciary (in accordance with a power granted to the fiduciary by applicable local law or by the governing instrument if not prohibited by applicable local law)—

- (1) *Allocated to income* (but if income under the state statute is defined as, or consists of, a unitrust amount, a discretionary power to allocate gains to income must also be exercised consistently and the amount so allocated may not be greater than the excess of the unitrust amount over the amount of distributable net income determined without regard to this subparagraph §1.643(a)-3(b));
- (2) *Allocated to corpus* but treated consistently by the fiduciary on the trust's books, records, and tax returns as part of a distribution to a beneficiary; or
- (3) *Allocated to corpus* but actually distributed to the beneficiary or utilized by the fiduciary in determining the amount that is distributed or required to be distributed to a beneficiary.

The above regulations, proposed in 2001 and finalized in 2004, were the result of the Treasury's decision to accommodate changes in state laws (spearheaded by New York) designed to facilitate total return investing by trustees.

As stated in the introduction to the proposed and final regulations:

(Proposed)

The prudent investor standard for managing trust assets has been enacted by many states and encourages fiduciaries to adopt an investment strategy designed to maximize the total return on trust assets. Under this investment strategy, trust assets should be invested for total positive return, that is, ordinary income plus appreciation, in order to maximize the value of the trust. Thus, under certain economic circumstances, equities, rather than bonds, would constitute a greater portion of the trust assets than they would under traditional investment standards... To ensure that the income beneficiary is not penalized if a trustee adopts a total return investment strategy, many states have made, or are considering making, revisions to the definitions of income and principal. Some state statutes permit the trustee to make an equitable adjustment between income and principal if necessary to ensure that both the income beneficiary and the remainder beneficiary are treated impartially, based on what is fair and reasonable to all of the beneficiaries. Thus, a receipt of capital gains that previously would have been allocated to principal may be allocated by the trustee to income if necessary to treat both parties impartially. Conversely, a receipt of dividends or interest that previously would have been allocated to income may be allocated by the trustee to principal if necessary to treat both parties impartially. Other states are proposing legislation that would allow the trustee to pay a unitrust amount to the income beneficiary in satisfaction of that beneficiary's right to the income from the trust. This unitrust amount will be a fixed percentage, sometimes

required to be within a range set by state statute, of the fair market value of the trust assets determined annually.

(Final)

The IRS and the Treasury Department recognize that state statutes are in the process of changing traditional concepts of income and principal in response to investment strategies that seek total positive return on trust assets. These statutes are designed to ensure that, when a trust invests in assets that may generate little traditional income (including dividends, interest, and rents), the income and remainder beneficiaries are allocated reasonable amounts of the total return of the trust (including both traditional income and capital appreciation of trust assets) so that both classes of beneficiaries are treated impartially. Some statutes permit the trustee to pay to the person entitled to the income a unitrust amount based on a fixed percentage of the fair market value of the trust assets. Other statutes permit the trustee the discretion to make adjustments between income and principal to treat the beneficiaries impartially. Under the proposed regulations, a trust's definition of income in conformance with applicable state statutes will be respected for federal tax purposes when the state statutes provide for a reasonable apportionment of the total return of the trust.

In New York, total return investing by trustees is facilitated statutorily by the power to adjust provisions of EPTL 11-2.3(b)(5) and the optional unitrust provisions of EPTL 11-2.4.⁸

In addition to these statutes, the provisions of the trust itself may permit total return investing. *E.g.*, a trustee who has unlimited discretion to distribute principal to a beneficiary to whom income must or may be paid is substantially free to invest without regard to the form of return because the power to distribute principal can be used in much the same manner as the power to adjust.

In light of all the above, it is recommended that the New York Principal and Income Act (EPTL Article 11-A) be amended to make clear that, unless the instrument provides otherwise, a trustee has the powers set forth in the regulations which would permit a reasonable and impartial allocation of realized capital gains

⁸ As stated by the Court of Appeals in *In Re Heller*, 6 NY3d 649 (2006), “The Prudent Investor Act encourages investing for total return on a portfolio...The 2001 legislation allows trustees to pursue this strategy uninhibited by a constrained concept of trust accounting income...A trustee investing for a portfolio's total return under the Prudent Investor Act may now adjust principal and income to compensate for the effects of the investment decisions on distribution to income beneficiaries.... Alternatively, the optional unitrust provision lets trustees elect unitrust status for a trust (EPTL 11–2.4), by which income is calculated according to a fixed formula.

to income and thereby permit the trustee to determine the incidence of such gains in a reasonable and impartial manner.

It is therefore proposed that EPTL 11-A-4.4 be amended to read as follows:

§11-A-4.4 Principal receipts

A trustee shall allocate to principal:

(2) money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this part; provided, however, that a trustee may, in a reasonable and impartial exercise of discretion, allocate to income gains from the sale or exchange of a capital asset (as defined in section 1221 of the Internal Revenue Code of 1986, as amended) to the extent that principal is re-characterized as income by the exercise of the power to adjust under 11-2.3(b)(5), and provided further, however, that a trustee who has an unlimited discretionary power to distribute principal may, in a reasonable and impartial exercise of discretion, allocate to income any or all gains from the sale or exchange of a capital asset (as defined in section 1221 of the Internal Revenue Code of 1986, as amended);

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to trust accounting income and principal

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Paragraph (2) of section 11-A-4.4 of the estates, powers and trusts law, as added by chapter 243 of the laws of 2001, is amended to read as follows:

(2) money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this part; provided, however, that a trustee may, in a reasonable and impartial exercise of discretion, allocate to income gains from the sale or exchange of a capital asset (as

defined in section 1221 of the Internal Revenue Code of 1986, as amended) to the extent that principal is re-characterized as income by the exercise of the power to adjust under subparagraph 11-2.3(b)(5), and provided further, however, that a trustee who has an unlimited discretionary power to distribute principal may, in a reasonable and impartial exercise of discretion, allocate to income any or all gains from the sale or exchange of a capital asset (as defined in section 1221 of the Internal Revenue Code of 1986, as amended);

§2. This act shall take effect immediately and shall apply to all trusts, whenever established.

5. The Attorney-Client Privilege Extended to a Lifetime Trustee (CPLR 4503(a))

CPLR 4503 (a) does not presently extend the attorney-client privilege to lifetime trustees. The omission was an oversight which the Committee's proposed amendment corrects.

In August 2002, CPLR 4503(a) was amended to protect from disclosure confidential communications between a fiduciary and his or her attorney. The purpose of the amendment was to overturn a line of cases that had carved out a "fiduciary" exception to the attorney-client privilege. The amendment codified three changes to the attorney-client privilege: (1) that confidential communications between a fiduciary and his or her attorney are protected; (2) that no waiver may be found by virtue of the relationship between the fiduciary and beneficiary(ies); and (3) that absent a retainer, a beneficiary shall not be treated as the client of the fiduciary's attorney. The amendment references personal representatives as the persons protected, even where preliminary or temporary letters issue, and extends to a guardian appointed for an incapacitated person under MHL Article 81 where the appointing judge has so provided.

Due to an omission, lifetime trustees were not included within the definition of "personal representative." There was and is no reason to exclude a lifetime trustee from the protection of the attorney-client privilege. Given the increasing use of lifetime trusts

by New Yorkers, the need to amend the statute is compelling. The proposal simply includes “lifetime trustees” in the definition of fiduciaries to whom the privilege applies.

Additionally, the proposed measure makes clear that a fiduciary does not waive the privilege by merely asserting he or she relied upon the advice of counsel when acting in such capacity. The effect of asserting the privilege is best left to a court’s determination in light of the facts and circumstances before it.

The measure would amend CPLR 4503(a)(2)(A) and 4503(a)(2)(B) to include lifetime trustees in the definition of fiduciaries to whom the attorney-client privilege applies and to provide that a fiduciary’s assertion of the privilege by itself shall not constitute a waiver.

Proposal:

AN ACT to amend the civil practice law and rules, in relation to the privilege between a personal representative and the attorney to lifetime trustees

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Paragraph 2 of subdivision (a) of section 4503 of the civil practice law and rules, as added by chapter 430 of the laws of 2002, is amended to read as follows:

2. Personal representatives. (A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:

(i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; [and]

(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the

privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client; and

(iii) The fiduciary's testimony that he or she has relied on the attorney's advice shall not by itself constitute such a waiver.

(B) For purposes of this paragraph, "personal representative" shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator, lifetime trustee or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate's court procedure act, and (ii) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; "beneficiary" shall have the meaning set forth in subdivision eight of section one hundred three of the surrogate's court procedure act and "estate" shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate's court procedure act.

§2. This act shall take effect immediately.

6. Surrogate's Discretion to Appoint a Guardian Under Articles 17 and 17-A (SCPA §707(1)(d))

The Committee recommends this measure to grant discretion to the Surrogate

regarding the issuance of letters to be a fiduciary. Under existing law, a person who has been convicted of a felony may not be appointed as a guardian for the person or property of an infant under Article 17 or of a person under a disability under Article 17-A even though the infant or disabled person resides with that person and there is no other person who is willing to undertake the duties of a guardian. This legislation grants discretion to the court to appoint a felon as the guardian of an infant or disabled person where the court finds that it is in the best interest of that infant or a disabled person.

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to the issuance of letters to be a fiduciary

The People of the State of New York, represented in Senate and Assembly do

enact as follows:

Section 1. Paragraph (d) of subdivision (1) of section 707 of the surrogate's court procedure act is amended to read as follows:

(d) a felon; except, in the court's discretion, a felon may be appointed a guardian or co-guardian in any proceeding under either article 17 or 17-A of this act

§2. This act shall take effect immediately; provided, however, that it shall apply only to the estates of decedents who shall have died on or after such effective date.

**7. Incorporation by Reference, as a Testamentary Trust
(EPTL 3-3.7(e))**

The Committee recommends this measure to permit a testator to incorporate into a will, as a testamentary trust, the provisions of a preexisting *inter vivos* trust that has terminated or been revoked prior to the testator's death by someone other than the testator. This measure would allow the disposition of probate property according to the terms of the trust without having to repeat the terms of the trust in the will.

EPTL 3-3.7, the "pour-over" statute, permits a testator to dispose of or appoint by will all or part of his or her estate ("pour-over assets") to the trustee of an existing trust,

including one that is amendable or revocable or both (“receptacle trust”). However, paragraph (e) provides that the revocation or termination of the receptacle trust before the testator’s death will cause the disposition or appointment “to fail, unless the testator has made an alternative disposition.” Because pour-over wills customarily provide for the disposition of the testator’s entire probate estate or residuary estate to the trustee of an *inter vivos* trust created by himself or herself or by another person (*see, e.g., Matter of Sackler*, 145 Misc.2d 950 [Nassau Co. 1989]; *Matter of Pozarny*, 177 Misc.2d752 [Kings Co.2002]), it is imperative that the testator provide for an alternative disposition in the event that the pour-over fails because the receptacle trust is not in existence at the testator’s death. The alternative is distribution in intestacy (EPTL 4-1.1) of the pour-over assets.

Many different circumstances may cause a receptacle trust to terminate or be revoked, the situation governed by paragraph (e). A trust for the testator’s grandchildren may terminate and be distributed outright when they become 30 years of age. Or the trust for the testator’s aunt, created by the testator’s spouse, may be revoked without the testator’s knowledge. Or a discretionary *inter vivos* trust may be exhausted for the support or benefit of the beneficiaries. Or the trust may have been terminated for tax or other reasons, inadvertently or unknowingly, jeopardizing the original estate plan.

To deal with these possibilities, attorneys often provide for an alternative testamentary trust with dispositions identical to those of the revoked receptacle trust. However, without the benefit of the proposed amendment, it is necessary to recite in the will all of the dispositive and other essential terms of the revoked trust in order to foreclose an argument by intestate takers or contingent beneficiaries that the provisions of the revoked trust cannot be “incorporated by reference.” The rule prohibiting incorporations by reference was stated succinctly in *Booth v. the Baptist Church of Christ* (126 NY 215, 247-248 [1891]): “It is unquestionably the law of this state that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument.”

However, the rule prohibiting incorporation by reference “will not be carried to ‘a dryly logical extreme.’” In *Matter of Rausch* (258 NY 327, 331 [1932]), decided long before the enactment of EPTL 3-3.7, the testator gave one-fifth of his residuary estate to the corporate trustee of an *inter vivos* trust to be disposed of under the trust agreement “which agreement is hereby made part of this my will.” The Appellate Division had determined that the rule forbidding the incorporation of unattested documents had been violated and that the testator had died intestate as to that one-fifth of the residue. Finding that the disposition to the trustee was simply an enlargement of the subject matter of an existing trust, Judge Cardozo rejected the reasoning of the court below that this could not be done unless the terms of the deed of trust were repeated in the will.

In spite of the reasoning and holding in *Rausch*, whether the terms of a receptacle trust that has terminated or been revoked before the death of the testator can be incorporated by reference to create a testamentary trust may raise issues of first impression. For this reason, as noted above, careful attorneys drafting pour-over wills for their clients repeat in the will all of the terms of the receptacle trust. The result is often an instrument of discouraging length and complexity. The proposed amendment to paragraph (e) would enable the testator to create a testamentary trust as an alternative disposition without undue repetition and prolixity.

The proposed measure accomplishes that end by amending paragraph (e) of EPTL 3-3.7 to allow the testator, by an express direction, to create a testamentary trust to hold or dispose of the pour-over assets by simply incorporating by reference the terms of the revoked or terminated receptacle trust. Because revocation of the receptacle trust by the testator himself or herself is most likely an indication that the disposition in the will to the trust is intended to fail, the amendment's application is limited to termination of the trust and revocation by someone other than the testator. Specifically, the amendment allows the testator to expressly direct in the will that should the receptacle trust terminate or be revoked under EPTL 7-1.17(b) by someone other than the testator, the disposition in the will to the trust does not fail but is a disposition to a testamentary trust with terms identical to the revoked trust. The provision is not applicable to a receptacle trust that has been amended rather than revoked; EPTL 7-1.17(b) applies to "any amendment or revocation," clearly showing that the two are different concepts and that one is not the other.

Under the proposed amendment, the possibility of fraud is not a concern. EPTL 3-3.7 requires that the receptacle trust be in writing, executed in accordance with EPTL 7-1.17 and be in existence and identified by the will at its execution. Amendment or revocation of the trust would also be subject to EPTL 7-1.17. Thus, the terms of the trust instrument that are incorporated by reference in the will would be capable of validation, thereby eliminating the opportunity for fraud as to the terms of the testamentary trust.

This measure, which would have no fiscal impact upon the State, would apply to pending or future proceedings involving the interpretation of wills or instruments exercising a power of appointment made by a testator who died on or after the effective date of EPTL 3-3.7.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to pour-over trusts

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

Section 1. Paragraph (e) of section 3-3.7 of the estates, powers and trusts law, as added by chapter 952 of the laws of 1966, is amended to read as follows:

(e) A revocation or termination of the trust before the death of the testator shall cause the disposition or appointment to fail, unless the testator has made an alternative disposition; provided, however, that the testator may, by express direction, provide that, should the trust terminate or be revoked other than by the testator or testatrix under section 7-1.17(b) or by provision of the testator or testatrix's will under section 7-1.16, the disposition or appointment of all or part of his or her estate to such terminated or revoked trust shall be deemed to create a testamentary trust under and in accordance with the terms of such terminated or revoked trust at the time of the execution of the will or, if the testator so directs, including amendments made thereto prior to such termination or revocation, and such testamentary trust and the dispositions of income and principal thereunder shall be valid even though the terms of such terminated or revoked trust are not recited in the will.

§2. This act shall take effect immediately; provided, however, that it shall apply only to the estates of decedents who shall have died on or after such effective date.

8. Payment of Attorney's Fees in Wrongful Death Actions (EPTL 5-4.6(a)(2))

The Committee recommends this measure to amend EPTL 5-4.6 in relation to payment of attorney's fees in the Supreme Court in wrongful death actions. This measure would help ensure that distributees expeditiously receive settlement proceeds.

EPTL Article 5, Part 4 provides for the rights of a decedent's family members when a wrongful act, neglect or default causes the decedent's death. Insofar as the right to recover damages for wrongful death is statutory, the Part sets forth the procedural and substantive guidelines for such an action. It specifically provides that either the court in which the wrongful death action is brought or the Surrogate's Court which issued letters to the estate fiduciary may determine how any damages recovered, either after trial or by settlement, are to be distributed; and the reasonable expenses, including attorney's fees, incurred in bringing the action.

Prior to October 2005, after approving an application by the estate representative to compromise a wrongful death action, the court in which the action was brought typically deferred to Surrogate's Court in determining how the settlement should be distributed. In those circumstances, Surrogate's Court also fixed the reasonable expenses, including attorney's fees, of the action or settlement. Payment of settlement proceeds awaited approval of the compromise by the Surrogate's Court.

Effective November 1, 2005, EPTL 5-4.6 was amended to provide for settling defendant(s) to more expeditiously pay settlement proceeds into an interest-bearing escrow account, and to require an estate fiduciary to immediately pay certain court-approved expenses. *See* L. 2005, c. 719. Court-approved attorney's fees and disbursements incurred in prosecuting the wrongful death action may be paid only upon an attorney's submission to the trial court of proof that a petition for allocation and distribution of the settlement proceeds has been filed in Surrogate's Court.

One goal of the legislation was to reduce the hardships incurred by professionals and businesses resulting from the delay in receiving payment for their services to the estate. Requiring the attorney to prove that a petition for allocation and distribution has been filed in Surrogate's Court before he or she could receive payment of attorney's fees and disbursements ensures that the attorney will diligently represent the estate.

The filing of a petition for allocation and distribution in Surrogate's Court, however, does not necessarily ensure that the estate distributees will expeditiously receive settlement proceeds. Counsel's failure to obtain jurisdiction over the necessary parties in a timely fashion or to prosecute the proceeding diligently often significantly delays payment of those proceeds.

The proposed amendment addresses this concern by providing for an additional precondition to the payment of attorney's fees and disbursements incurred in prosecuting the wrongful death action. The amendment would require the attorney to submit an

affirmation to the trial court stating that jurisdiction has been obtained over all necessary parties in the Surrogate's Court proceeding.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the payment of attorney's fees in a proceeding to compromise an action for wrongful act, neglect or default causing the death of a decedent

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Subparagraph (2) of paragraph (a) of section 5-4.6 of the estates, powers and trusts law is amended to read as follows:

(2) All attorney's fees approved by the court for the prosecution of the action for wrongful act, neglect or default, inclusive of all disbursements, shall be immediately payable from the escrow account upon submission to the trial court of proof of filing of a petition for allocation and distribution in the surrogate's court on behalf of the decedent's estate and an affirmation by the attorney seeking immediate payment of such attorney's fees that jurisdiction has been obtained over all necessary parties in the proceeding for allocation and distribution filed in the surrogate's court.

§2. This act shall take effect immediately.

9. Renunciation of Specific Compensation in Favor of Statutory Commissions (SCPA 2307(5)(b), 2308(11) and 2309(10))

The Committee recommends this measure to prevent a fiduciary from avoiding a will's directive that he or she receive specific compensation in lieu of statutory commissions. The measure would require that where a will provides for specific

compensation, the fiduciary who elects to serve is not entitled to any other allowances for his or her services as fiduciary.

Under present law there is an unwarranted discrepancy between the provisions of the Surrogate's Court Procedure Act governing the compensation of executors and those governing the compensation of trustees.

On the one hand, with respect to executors, section 2307 provides that "Where the will provides a specific compensation to a fiduciary other than a trustee he is not entitled to any allowances for his services unless by an instrument filed with the court within four months from the date of his letters he renounces the specific compensations."

On the other hand, with respect to individual trustees (both testamentary trustees and trustees of lifetime trusts) sections 2308 and 2309 both provide that "Where the will provides a specific compensation to a trustee he is not entitled to any other allowances for his services." Similarly, with respect to corporate trustees, section 2312 provides that "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 shall be entitled to be compensated in accordance with such provisions or agreement, as the case may be."

As a result of this discrepancy, executors have been held to have the right to renounce "specific compensation" and take statutory commission, even where the statutory commissions were larger than the "specific compensation" (*see Matter of Carlisle*, 142 Misc 2d 657, 659-660 [NY Co. 1989], *aff'd sub nom Butler v Mander*, 159 AD2d 379 [1st Dept 1990]). Trustees, on the other hand, are prohibited from exercising such right (*see Estate of Hillman*, 2/28/96 NYLJ at 29).

The proposed measure would eliminate the discrepancy between section 2307 and sections 2308, 2309 and 2312.

On the basis of the legislative history, it appears that the discrepancy is the result of an oversight that occurred in 1948 when the predecessors of sections 2308 and 2309 were amended to remove the right of a trustee to renounce "specific compensation." This 1948 amendment was a minor part of a bill which (1) substantially revised the treatment of trustees' commissions but (2) was not at all concerned with executors (*see L. 1948, c. 694*). The legislative history was set forth by Surrogate Bloom in *Hillman*, *supra*, as follows:

"... [U]nlike SCPA §2307, SCPA §2309 does not provide for the

renunciation of a specific bequest in favor of the statutory commission where trustees are concerned.

“This was not always the case. Prior to 1948, testamentary trustees could renounce specific compensation in a will and take instead the statutory commission, just as executors, administrators and guardians could (*see, e.g.*, SCA §285, Commissions of executor, administrator, guardian or testamentary trustee [L. 1923, c. 649]; *see also, Matter of Larney*, 148 Misc 871, 872; *Matter of Bolton*, 143 Misc 769, 771). Even when the SCA was amended in 1943 and §285-a was added [L. 1943, c. 694], thus separating the provisions for the commissions of the other fiduciaries (executors, administrators and guardians [§285]) from those of the testamentary trustee, subsection (7) of §285-a still permitted a trustee to timely renounce (within four months) a specific bequest in favor of the statutory commission.

“In 1948, however, the original SCA §285-a was repealed and a new §285-a was added [L. 1948, c. 582]. For the first time, subsection (11) of the statute treated trustees differently from other fiduciaries in that it prohibited them from renouncing specific compensation in favor of the statutory commission. It stated in full that ‘[w]here the will provides a specific compensation to a trustee, he is not entitled to any other allowances for his services.’ In its Report No. 280 included in the bill jacket for L. 1948, c. 582, the Committee on the Surrogate’s Court of the New York County Lawyers Association commented that although subdivision (11) of the proposed law was among those “requiring further serious consideration by the legislature,” it was approving the new law anyway because it “over[came] so many of the objections of the existing law” (at p. 8). The Committee on State Legislation for the New York State Bar Association merely pointed out the “material difference” between subdivision 7 of the old SCA §285-a and subdivision (11) of the proposed law, *i.e.*, the extinction of the right of renunciation of specific compensation, without offering further comment (at p. 48).

“The language employed in 1948 was repeated in 1956 in both SCA §285-a (11), pertinent to trustees’ commissions under wills of persons dying, or under lifetime trusts created, on or before August 31, 1956, and in §SCA 285-b (10), added by L. 1956, c. 931, and pertinent to trustees’ commissions under wills of persons dying, etc., after August 31, 1956. Finally, the same language was repeated in 1966 when the comparable sections of the current statute, SCPA §§2308 and 2309, were enacted

(L. 1966, c. 953, effective September 1, 1967). Thus, in its present form, a trustee nominated after August 31, 1956, as here, must accept the specific compensation provided by the will or renounce his appointment entirely (SCPA §2309 (10)).”

Also, there appears to be no reason that the rule applied to trustees in sections 2308, 2309 and 2312 should not also apply to executors under section 2307. The rule applied to trustees is essentially a default rule. Like other default rules, it is ultimately subject to the principle that specific provisions of the will or trust instrument are determinative. Thus, for example, if the will said that “My executor shall receive no compensation under this will or under section 2307,” the executor would have to serve without compensation or not serve at all (*see* cases discussed in *Carlisle*, *supra*).

In amending the predecessors of sections 2308 and 2309 in 1948, the Legislature was adopting the view that most testators who provided “specific compensation” to a trustee would not want such trustee to get any more compensation for serving as trustee. Thus, as with other default statutes (*see e.g.* EPTL 3-3.3 or 5-1.4), a will that provides “specific compensation” to a trustee was being legislatively construed — in this case as saying “and no more, no matter what.” There does not appear to be any reason that the Legislature would interpret a provision for specific compensation to an executor any differently.

It is therefore proposed that section 2307 be amended to conform it with sections 2308, 2309 and 2312. (The proposal also incorporates a technical amendment to sections 2308 and 2309 to clarify that those statutes apply where the provision for “specific compensation” is contained in a lifetime trust instrument.)

Under this measure, if a testator or a grantor of a lifetime trust provides “specific compensation” to a fiduciary (including an executor, testamentary trustee or trustee of a lifetime trust):

(1) The fiduciary would not receive both the “specific compensation” and statutory commissions; and

(2) The fiduciary would not receive statutory commissions, even if the fiduciary renounces the “specific compensation.”

This measure also recognizes that since a fiduciary may renounce (in whole or in part) the “specific compensation” provided for in a will or trust, the fiduciary may effectively (although not formally) take the lesser of the specific compensation or the

statutory commissions where the statutory commissions are less than the specific compensation.

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to compensation of certain fiduciaries

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Paragraph (b) of subdivision 5 of section 2307 of the surrogate's court procedure act, such subdivision as amended by section 56 of chapter 514 of the laws of 1993, is amended to read as follows:

(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 or she, is not entitled to any other allowance for his or her 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 or she 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.

§2. Subdivision 11 of section 2308 of the surrogate's court procedure act, as added by chapter 953 of the laws of 1966, is amended to read as follows:

11. Where the will or lifetime trust provides a specific compensation to a trustee, he or she is not entitled to any other [allowances] allowance for his or her services.

§3. Subdivision 10 of section 2309 of the surrogate's court procedure act, as added by chapter 953 of the laws of 1966, is amended to read as follows:

10. Where the will or lifetime trust provides a specific compensation for a trustee, he or she is not entitled to any other [allowances] allowance for his or her services.

§4. This act shall take effect immediately; provided, however, that section 1 of this act shall apply only to the estates of persons dying on or after such effective date.

10. Notice of Proceedings to Determine Validity and Enforceability of Claims (SCPA 1809)

The Committee recommends this measure to reduce unduly burdensome notice requirements in proceedings to determine the validity and enforceability of claims. By

limiting the necessary parties to the claimant and the fiduciary, unless the court directs otherwise, the expense of serving process on all beneficiaries can be eliminated, to the benefit of the estate.

By far, the vast majority of creditor claims are resolved without judicial intervention. Executors and administrators routinely settle such claims as part of their day-to-day responsibilities of administering an estate. They do so without court approval and often without the consent or knowledge of the estate's beneficiaries. It is anomalous, then, that the procedure for adjudicating claims should include the estate's beneficiaries as interested and necessary parties. SCPA 1809(2) requires that notice be given to such beneficiaries if the contested claim exceeds the lesser of \$10,000.00 or 25% of the estate.

The notice provisions of SCPA 1809(2) serve to compound the expense of litigation without providing a corresponding benefit to the estate. Beneficiaries often have little or no knowledge of the claim and their presence can be counterproductive should one or more seek to substitute their judgment for that of the fiduciary.

This proposal would limit the necessary parties in a proceeding to determine the validity or enforceability of a claim to the claimant and the fiduciary unless the court, in its discretion, directs otherwise. In doing so, this proposal would conform the notice provisions of SCPA 1809 with the notice provisions of SCPA 2101(3) applicable to the corollary proceedings for adjudicating administration expenses set forth in SCPA 2102(4).

Finally, this proposal eliminates the grace period of eight days from the return day to serve and file an answer. The practice has few corollaries in the Surrogate's Court Procedure Act and is contrary to the general practice of filing responsive pleadings on the return day of process or on such subsequent day as directed by the court.

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to the notice requirements in a proceeding to determine the validity and enforceability of claims

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Subdivision 2 of section 1809 of the surrogate's court procedure act, as amended by chapter 514 of the laws of 1993, is amended to read as follows:

2. If the petition be entertained process shall issue only 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] unless the court directs otherwise. The answer[, if] shall be filed on or before the return day of process or on such subsequent day as directed by the court. If filed by the claimant, the answer 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 or she may, within 5 days from the service upon him or her 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.

§2. This act shall take effect immediately and shall apply to all proceedings to determine the validity and enforceability of claims commenced on or after such effective date.

11. Disqualification of a Tenant by the Entirety (EPTL 4-1.7)

Modified slightly to clarify the nature of the excluded property, this measure would add a new section 4-1.7 to the Estates, Powers and Trusts Law (EPTL) to disqualify a person who holds property as a tenant by the entirety with his or her spouse from receiving any share in such property or monies derived therefrom where he or she is convicted of murder in the first or second degree, or manslaughter in the first or second degree, of his or her spouse. He or she may, however, receive any fractional portion of property contributed by him or her from his or her separate property, except that such convicted spouse shall not be entitled to more than the value of a life estate in one-half of such property held as tenant by the entirety.

In New York, it has been long held that one who wrongfully takes the life of another is not permitted to profit thereby (*see Riggs v. Palmer*, 115 NY 506, 511 [1889]). A conviction of a person for any crime, however, does not work a forfeiture of any property, real or personal, or any right or interest therein (*see Civil Rights Law §79-b*).

In *Matter of Hawkin's Estate* (213 NYS2d 188 [Queens Co. 1961]), the court recognized that a surviving tenant who murdered her spouse may not enlarge her interest in the property held as tenants by the entirety as a result of the homicide. However, it further decided that the surviving spouse was entitled to the commuted value of the net income of one-half of the property for her life-expectancy, based upon former section 512 of the Penal Law, which was the forfeiture statute. This holding was continued in *Matter of Pinnock* (83 Misc.2d 233 [Bronx Co. 1975]), *Matter of Busacca* (102 Misc.2d 567 [Nassau Co. 1980]) and *Matter of Nicpon's Estate* (102 Misc.2d 619 [Erie Co. 1980]).

This holding was held to be a "legal fiction" and was rejected by the court in *Citibank v. Goldberg* (178 Misc.2d 287 [Sup. Ct. Nassau Co. 1998]). That court held that the intentional slaying of a spouse by the other acts as a voluntary repudiation of the essence of an ownership by the entirety, thereby alienating the surviving spouse from any interest in the property. The court further held that section 79-b of the Civil Rights Law never addressed shared interests in property, or the creation of new and different interests from those that existed at the time of the crime (accord *Matter of the Estate of Mary Mathew*, NYLJ, April 26, 1999, p. 32 [Rockland Co.], rev'd 270 AD2d 416 [2nd Dept 2000]).

This proposed addition to the EPTL would not allow anyone to inherit or succeed to property as the result of his or her own wrongful act, but would entitle the convicted spouse to his or her fractional portion of separate property contributed by him or her. Furthermore, this is consistent with present section 4-1.6 of the EPTL, which provides that if one joint tenant of a bank account is convicted of murder of the other joint tenant, the murderer forfeits all rights in the account except those monies he or she contributed to the account.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the disqualification of tenants by the entirety in certain instances

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. The estates, powers and trusts law is amended by adding a new section 4-1.7 to read as follows:

§4-1.7. Disqualification of tenant by the entirety in certain instances.

Notwithstanding any other provision of law to the contrary, a tenant by the entirety in real property or in a cooperative apartment as defined in paragraph (c) of section 6-2.2 of this chapter where the spouses resided or any residences of the spouses, who is convicted of murder in the second degree as defined in section 125.25 of the penal law, or murder in the first degree as defined in section 125.27 of the penal law, or manslaughter in the first degree as defined in subdivision one or two of section 125.20 of the penal law or manslaughter in the second degree as defined in subdivision one of section 125.15 of the penal law of the other spouse, shall not be entitled to any share in such real property or monies derived therefrom, except for any fractional portion thereof contributed by the convicted spouse from his or her separate property as defined by paragraph d of subdivision one of part B of section two hundred thirty-six of the domestic relations law, except that such convicted spouse shall not be entitled to more than the value of a life estate in one-half of such property held as tenant by the entirety or monies derived therefrom.

§2. This act shall take effect immediately.

12. Disqualification of a Surviving Spouse (EPTL 5-1.2(a))

The Committee recommends that section 5-1.2(a) of the EPTL be amended to disqualify as surviving spouse's persons who for a prolonged period prior to a decedent's death were married to the decedent in name only.

This measure would amend section 5-1.2(a) by adding a subparagraph seven to provide for the disqualification of a person as the decedent's surviving spouse if the decedent and the survivor had lived separate and apart for a period of at least one year prior to the decedent's death and the total time that they lived separate and apart exceeded the total time that they cohabited as spouses. Disqualification under such circumstances will not occur, however, if the survivor can show any one of the following: the reason that the couple lived separate and apart was due to an illness or injury which required that one or both spouses be cared for in a facility; that the survivor departed from the marital abode because the decedent had abused the survivor or another member of the marital household; or that, as a result of voluntary, contractual or court-ordered support, an economic relationship continued between the spouses notwithstanding their separation. The survivor will be allowed to testify about communications or transactions with the decedent even though such testimony would otherwise be barred by CPLR 4519 because the survivor might be the only person who can establish that the separation was caused by abuse or that the decedent voluntarily provided support.

This measure is intended to preclude “laughing” surviving spouses, *i.e.*, those who for a prolonged period of time prior to the decedent's death were married to the decedent in name only, from being unjustly enriched by having the right to take an intestate share of the decedent's estate under section 4-1.1 of the EPTL or an elective share under sections 5-1.1 or 5-1.1-A of the EPTL. As is the case with all other disqualifications under section 5-1.2, these “laughing” spouses would also be disqualified under sections 5-1.3, 5-3.1 and 5-4.4.

Under present law, a spouse would not be disqualified under EPTL 5-1.2 if both spouses had consented to their separation one week after their marriage and they continued to live separate and apart until the decedent died 70 years after they had separated. The reason that this would not constitute a disqualification on the grounds of abandonment under subdivision five is because there can be no abandonment if the departure was with the consent of the other spouse (*see Schine v. Schine*, 31 NY2d 113 [1972]; *Solomon v. Solomon*, 290 NY 337 [1943]; *Matter of Maiden*, 284 NY 429 [1940]). Furthermore, it is very difficult for the estate to prove that the departure was other than consensual because death has sealed the decedent's lips and there frequently is no one else who witnessed the events leading to the departure.

The public policy supporting the amendment is that, if the surviving spouse was willing to live for a prolonged period of time prior to the decedent's death without having had anything whatsoever to do with the decedent, the survivor should also be willing to do without any rights to the decedent's property after the decedent's death. The disqualification only applies to spouses who voluntarily had nothing to do with the

decedent for a prolonged period of time. There is no disqualification if the separation was caused by abuse, or the need of at least one of the spouses to be cared for in a facility due to injury or illness. There is also no disqualification where, after the separation, there was voluntary, contractual or court-ordered support. This measure will result in reduced litigation because, in numerous cases where there is presently a question of whether an abandonment can be established under EPTL 5-1.2(a)(5), it will now be clear that the spouse is disqualified under the new subparagraph seven of section 5-1.2(a).

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to disqualification as a surviving spouse

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Paragraph (a) of section 5-1.2 of the estates, powers and trusts law is amended by adding a new subparagraph (7) to read as follows:

(7) The survivor and the decedent have continuously lived separate and apart for a period of at least one year prior to the date of the decedent's death and the total time that they have lived separate and apart exceeds the total time that they cohabited as a married couple, unless the survivor can establish any one of the following: the reason that the parties lived separate and apart was due to illness or injury which required one or both of the spouses to need the care of a facility; or the survivor was actually receiving support from, or paying support to, the decedent or was entitled to receive support from the decedent pursuant to court order or agreement; or that the abuse of the decedent towards the survivor or another member of the household was the reason that the survivor stopped cohabiting with the decedent. For the purpose of this subparagraph, the court may accept

such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

§2. This act shall take effect immediately and shall apply to the estates of decedents dying on or after such effective date.

13. Legitimacy of Children Born to a Married Couple Using Assisted-Reproduction Techniques (DRL 73)

Section 73 of the Domestic Relations Law recognizes the legitimacy of children born to married couples by means of artificial insemination. The Committee recommends that section 73 be amended to extend such recognition to children who are born to married couples by more advanced means of assisted reproduction, such as *in vitro* fertilization.

Section 73 of the Domestic Relations Law now provides that “[a]ny child born to a married woman by means of artificial insemination . . . [by a licensed physician] . . . with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes.” Thus, a child conceived by a married woman with the sperm of a person other than her husband would nevertheless be the husband’s legitimate, natural child if the procedures required by section 73 were followed.

Recent advances in medical technology, however, have expanded the methods and opportunities for married infertile couples to have children by new techniques of assisted reproduction, including *in vitro* fertilization (IVF) and gamete intrafallopian transfer (GIFT) that may involve donated gametes (sperm, eggs) or embryos (fertilized eggs). Use of donated semen and eggs could raise issues of the rights, duties and responsibilities of the donor (biological parent) under our present laws. Moreover, cryopreservation allows frozen gametes or frozen embryos to be implanted in a married woman for this purpose even after the death of the donors. Accordingly, it is imperative that DRL 73 include children born by any method of assisted reproduction now in use or developed in the future, so that these children will be deemed the legitimate, natural children of the wife and her consenting husband, regardless of whether their own or donated gametes or embryos are used.

After an intensive, comprehensive examination of assisted reproduction, the New York State Task Force on Life and the Law, appointed by executive order in 1985, issued

its report, Assisted Reproductive Technologies, Analysis and Recommendations for Public Policy in April 1998, recommending, inter alia, at p. xxvi that:

“New York’s Domestic Relations Law should be amended to provide that when a married woman undergoes any assisted reproductive procedure using donor semen, the woman’s husband is the legal father of any child who results, provided the procedure was performed by a licensed physician with the husband’s consent.

* * *

“New York law should provide that a woman who gives birth to a child is the child’s legal mother, even if the child was not conceived with the woman’s egg.”

The proposed amendment to DRL 73 would provide that a married woman and her consenting husband would be deemed the natural parents of the child for all purposes, whether the child resulted from semen, egg or embryo donated by persons then living or who have died. Such child and his or her issue would also be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for purposes of intestacy and class designations in wills or other instruments.

The proposal would also clarify that the donor or donors of the genetic material (and their families) would be relieved of all parental duties and responsibilities and would have no rights over the child or to receive property from or through such child by intestacy or class designations in wills or other instruments.

The term “class designations in wills or other instruments” will be broadly defined to include, unless otherwise provided in the disposing instrument, a class designation under a will, trust indenture, deed, an instrument exercising a power of appointment, a beneficiary designation or contractual arrangement with respect to the disposition of a bank or brokerage account, insurance, pension, retirement plan, stock bonus or profit-sharing plan or any other instrument disposing of real or personal property.

The Committee believes that the public policy of the State of New York strongly supports the desire of infertile married couples to have children, using any available technique of assisted reproduction, and recognizing these children as the natural children of the married woman and her husband by operation of law. Conversely, the donor or donors of genetic materials and their families would be divested of any rights, duties or responsibilities with respect to such children.

The proposal would apply to children described in section 73 of the Domestic Relations Law whether born by artificial insemination, *in vitro* fertilization or any other technique of assisted reproduction before, on or after the effective date of the act.

Proposal:

AN ACT to amend the domestic relations law, in relation to children born to a married couple by any means of assisted reproduction

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

Section 1. Section 73 of the domestic relations law, as amended by chapter 303 of the laws of 1974, subdivision 1 as amended by chapter 305 of the laws of 2008, is amended to read as follows:

73. Legitimacy of children born by [artificial insemination] assisted reproduction.

1. Any child born to a married woman by means of artificial insemination, in vitro fertilization or any other technique of assisted reproduction, whether with the genetic material of the woman and her husband or with genetic material donated by others, performed in accordance with the laws of the jurisdiction where such assisted reproduction occurs by persons duly authorized to practice medicine or by any other person or persons under the supervision of a person duly authorized to practice medicine, and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes. Such child and his or her issue shall be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for all

purposes, including without limitation the right to receive real and personal property by intestacy and class designations in wills or other instruments, and such child and his or her issue shall have no rights to receive real and personal property from and through the donor or donors of genetic material and their respective kindred by any means, including without limitation intestacy and class designations in wills or other instruments.

2. The donor or donors of genetic material shall be relieved of all parental duties toward and of all responsibilities for such child, and the donor or donors and their respective kindred shall have no rights to receive real and personal property from and through such child by any means, including without limitation by intestacy and class designations in wills or other instruments.

3. The phrase “class designations in wills or other instruments” shall include without limitation unless otherwise provided in the disposing instrument, a class designation under a will, trust instrument, deed, an instrument exercising a power of appointment, a beneficiary designation or contractual arrangement with respect to the disposition of a bank or brokerage account, insurance, pension, retirement plan, stock bonus or profit-sharing plan, or any other instrument disposing of real or personal property.

4. The [aforesaid] written consent required by subdivision one shall be executed and acknowledged before or at any time after the birth of the child by both the husband and the wife and the physician who performs the technique (or if the physician has died or is unavailable, any person who assisted the physician) or the person who performed

the technique under the supervision of the physician, who shall certify in writing that he or she had rendered the service at the time, date and place set forth in the certification.

§2. This act shall take effect immediately and shall apply to any child, whenever he or she is born.

14. The Effect on Inheritance Rights of Adoption by an Unrelated Person (DRL 117; EPTL 2-1.3(a)(1))

This measure would amend section 117 of the Domestic Relations Law and section 2-1.3(a)(1) of the EPTL to ensure that, where an adoptive child continues to reside with the natural parent, as is the case in step-parent adoptions and adoptions pursuant to *Matter of Jacob* and *Matter of Dana* (86 N.Y.2d 651 [1995]), such adoptive child is not penalized by losing inheritance rights either from his or her natural parent(s) under EPTL 4-1.1 or from a lifetime or testamentary disposition from his or her natural family as a member of a class under EPTL 2-1.3. This amendment takes no position on the policy issues discussed in the above-cited cases.

Proposal:

AN ACT to amend the domestic relations law and the estates, powers and trusts law, in relation to the effect of an adoption by an unrelated person

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

Section 1. Section 117 of the domestic relations law is amended by adding a new subdivision 4 to read as follows:

4. Notwithstanding subdivisions one and two of this section, if a parent having custody of a child consents that the child be adopted by an unrelated adult who resides with such parent, after the making of an order of adoption the consenting parent shall

retain all parental duties and responsibilities and all rights with respect to such child, and neither such consent nor the order of adoption shall affect:

(a) the rights of such child to inheritance and succession from and through either natural parent; or

(b) the right of the child and his or her issue to take under any wills or lifetime instruments executed by either natural parent or natural relatives of either natural parent.

§2. Subparagraph (1) of paragraph (a) of section 2-1.3 of the estates, powers and trusts law, as amended by chapter 248 of the laws of 1990, is amended to read as follows:

(1) Adopted children and their issue in their adoptive relationship. The rights of adopted children and their issue to receive a disposition under wills and lifetime instruments as a member of such class of persons based upon their birth relationship shall be governed by the provisions of [subdivision] subdivisions two and four of section one hundred seventeen of the domestic relations law.

§3. This act shall take effect immediately and shall apply to adoptions on or after such effective date, to estates of decedents dying on or after such effective date and to wills and lifetime instruments whenever executed.

III. Future Matters

The Committee is drafting legislation in a number of areas. Among the matters being addressed are:

1. EPTL 8-1.1; SCPA 2107(2) Competing Charitable Interests

This measure would amend EPTL 8-1.1 and SCPA 2107(2) in regard to informing charities of a potential conflict when the Court is presented with multiple conflicting positions among competing charitable interests.

2. EPTL 11-1.7 Exoneration Clauses

This measure would amend EPTL 11-1.7 to extend the prohibition on general exoneration clauses in wills and testamentary trusts to *inter vivos* trusts and powers of attorney.

3. Uniform Rule 207.13 Guardian Ad Litem Expenses

This amendment to the Uniform Rules would permit reimbursement of a guardian *ad litem*'s expenses on an interim basis, so that zealous representation of a ward need not be compromised by financial hardship.

4. SCPA 209(8) Failure to Prosecute

This measure would amend SCPA 209(8) to specifically authorize the court to dismiss proceedings for failure to prosecute where parties other than the petitioner are responsible for the non-prosecution of the matter. While the present statute permits such dismissals based on a petitioner's inaction, the measure would recognize the use of the same remedy where any other party, such as an objectant, fails to proceed diligently.

5. Uniform Rule 207.29 Attorney's Authority to Settle

This amendment to the Uniform Rules would require at a court conference the presence of an attorney or other person authorized to enter into a binding settlement. Under this rule, similar to one that presently exists in the Supreme Court, a party would be foreclosed from reneging upon a settlement agreement.

6. SCPA 2110 Charging Attorney's Fees Against a Frivolous Objectant

This measure would amend SCPA 2110 to allow attorney's fees incurred in defending against a frivolous objection to be charged against a beneficiary's share.

7. SCPA 2313 Multiple Commissions

18. Statutory rates of compensation for attorneys.
19. The use of attorney-certified death certificates in voluntary administrations.
20. The use of e-filing in Surrogate's Court and related issues.
21. Guardianship of people with intellectual and developmental disabilities.
22. Postmortem protection for the right of publicity.
23. Electronic wills.

Respectfully submitted,

Hon. Renee R. Roth, Chair

Rozlyn Anderson, Esq.
Hon. John Czygier
T. Randolph Harris, Esq.
Hon. Lee Holzman
Andrea Hyde, Esq.
Prof. Kenneth Joyce
Hon. Peter J. Kelly
Prof. William LaPiana
Hon. Margarita Lopez Torres
Richard Miller, Esq.
Hon. Acea M. Mosey
John Reddy, Esq.
Jonathan J. Rikoon, Esq.
Lydia Romer, Esq.
Joshua Rubenstein, Esq.
Joseph Samulski, Esq.
Charles Scott, Esq.
Hon. Vincent W. Versaci
Ronald J. Weiss, Esq.
Michele Lippa Gartner, Esq., Counsel