Report of the Surrogate's Court Advisory Committee

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

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TABLE OF CONTENTS

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 her in the execution of the functions of her 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:

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Surrogate's Court Advisory Committee
Office of Court Administration
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II. Legislation

A. New Measures

1. Estate Tax Treatment of Dispositions To a Non-citizen Surviving Spouse (Tax L. § 951(c)(new))

The Committee recommends that the Tax Law be amended to reduce the expense and clarify the procedure to obtain a marital deduction for a disposition to a non-citizen surviving spouse where no federal estate tax return is required. Under §2056(d) of the Internal Revenue Code, an estate is not entitled to a marital deduction for bequests to a non-U.S. citizen surviving spouse, unless the bequest passes to a qualified domestic trust ("QDT"), as defined in IRC §2056A. That section provides generally that when the QDT terminates or distributes principal to the surviving spouse, a tax is imposed equal to the estate tax that would have been imposed if the value of the distributed property had been added to the original decedent's taxable estate. In essence, this ensures that the marital deduction will cause a deferral of estate tax, rather than a complete elimination, if the surviving spouse is not subject to U.S. estate tax at his or her death. However, there is no corresponding New York tax imposed on the termination of a QDT or distribution of principal from a QDT.

Because the New York estate tax imposed by Tax Law §952 is based entirely on what the federal state death tax credit would be if it were still in existence, it is essentially based on the size of the federal taxable estate. If a federal estate tax return is required, the taxable estate shown on that return is used in computing the New York tax. However, if no federal estate tax return is required, then the New York estate tax is based on the taxable estate computed on a hypothetical federal return prepared for and filed with the New York estate tax return. With the current federal applicable exclusion amount of $55,000,000 (contrasted with the effective New York exemption of $1,000,000), there are a significant number of estates that are required to file a New York estate tax return but not a federal estate tax return. Furthermore, for decedents dying in 2010, no estates were required to file a federal return.

For estates required to file a New York estate tax return but not a federal estate tax return, where the surviving spouse is not a U.S. citizen, it is necessary for all dispositions to the spouse to be via a QDT in order to qualify for the federal marital deduction on the hypothetical federal estate tax return and thus reduce the hypothetical federal taxable estate and, ultimately, the New York estate tax. This requirement imposes a substantial burden on estates and non-citizen surviving spouses, inasmuch as the QDT requirements in IRC §2055A are cumbersome and frequently require that a U.S. bank be a trustee. Because no New York tax is imposed on the QDT termination or distributions, there is no New York purpose served by requiring the property to be placed in a QDT. In fact the QDT may be terminated and distributed to the surviving spouse almost immediately. The only consequence of the QDT requirement is the incurring of significant legal expense and administrative costs, particularly where a bank is trustee.

The Committee's proposed amendment simply provides that, if no federal estate tax return is required, it is not necessary that a QDT be created in order to obtain, on the hypothetical federal estate tax return, a marital deduction for a disposition to a surviving spouse who is not a U.S. citizen.

Proposal:

AN ACT to amend the tax law, in relation to the estate tax treatment of dispositions to surviving spouses who are not United States citizens

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

Section 1. Section 951 of the tax law is amended by adding a new subdivision (c) to read as follows:

(c) Disposition to surviving spouse who is not a United States citizen. In the case of an estate where a federal estate tax return is not required for federal estate tax purposes, a disposition to a surviving spouse that would qualify for the federal estate tax marital deduction under section 2056 of the internal revenue code if not for the limitation imposed by subsection (d)(1) of such section shall nonetheless be treated as qualifying for the federal estate tax marital deduction for purposes of computing the tax imposed by section 952 of the tax law, without requiring that such disposition pass to the surviving spouse in a qualified domestic trust as required for federal purposes by internal revenue code section 2056(d092).

§ 2. This act shall take effect immediately and shall apply to the estates of decedents dying on or after January 1, 2010.

2. Exemption for Benefit of Family (EPTL 5-3.1(a)(6) & (b))

Section 5-3.1 of the Estates, Powers and Trusts Law provides that, where a person dies leaving a surviving spouse or children under 21, certain property belonging to such decedent must be exempted from his or her estate assets and, instead, vest in and be set off to the surviving spouse or, if there be none, to his or her children under 21. This exempted property includes money up to $25,000 (subject to certain limitations). This statute was recently updated and modernized for the first time since 1992. L. 2010, c. 437. Chapter 437 amended section 5-3.1 by expanding some of the articles of personal property to be exempted, deleting some of the items that were previously exempted and increasing the value of all of the items referenced therein.

However, since enactment, a question has been raised regarding the type of assets that may be used in computing the $25,000 set off in paragraph six. When the changes to this paragraph were made, the phrase "or other personal property" was eliminated and language to include cash and cash equivalents was added. The purpose of the revision was to give the surviving spouse or children the means to pay their immediate expenses during the settlement of the estate. The sponsor's memorandum clearly stated that: "Liquid assets, rather than personal property, is the intent of this subsection." However, the eliminated term "or other personal property" was construed to include shares of stock owned by the decedent. To clarify that stock is still included in the class of assets comprising paragraph six, this measure adds the language "marketable securities" to the other assets listed in this section. The Committee also proposes a simple clarifying technical amendment to paragraph (b).

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to exemptions for the benefit of the family

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

Section 1. Subparagraph (6) of paragraph (a) of section 5-3.1 of the estates, powers and trusts law, as amended by chapter 437 of the laws of 2010, is amended to read as follows:

(6) Money including but not limited to cash, checking, savings and money market accounts, certificates of deposit or equivalents thereof, and marketable securities, not exceeding in value twenty-five thousand dollars, reduced by the excess value, if any, of acquired items

referred to in subparagraphs (1), (2), (3) and (5) of this paragraph. However, where assets are insufficient to pay the reasonable funeral expenses of the decedent, the personal representative must first apply such money to defray any deficiency in such expenses.

§2. Paragraph (b) of section 5-3.1 of the estates, powers and trusts law, as amended by chapter 595 of the laws of 1992, is amended to read as follows:

(b) No allowance shall be made in money or other property if the items of property described in subparagraph (1), (2), (3) or [(4)] <u>(5) of paragraph (a)</u> are not in existence when the decedent dies.

3. Resolving a Conflict Regarding the Anti-Lapse Statute and a Gift to the Testator's "Issue" (EPTL 3-3.3)

The Committee proposes this measure to resolve a conflict between EPTL 3-3.3, the anti-lapse statute, and EPTL 2-1.2, which requires that a disposition to "issue" is to be distributed to them by "representation" as that term is defined in EPTL 1-2.16.

The conflict involves a gift to the testator's "issue": "I give the residue of my estate to my issue." Under EPTL 2-1.2 the issue must take "by representation", which is defined in EPTL 1-2.16 to be what is usually called "per capita in each generation": the initial division of the property is made at the eldest generation in which someone is living and every person entitled to take in each subsequent generation takes an equal share. Assume that at the time the will is executed the testator has living issue: two children, B and C; each of whom have two children (GC 2,3,4 and 5) and a child of child A who is dead (GC 1). The first problem arises because of the language in EPTL 3-3.3 which excludes from the operation of the statute surviving issue of an ancestor who died before execution of the will. It could be argued, albeit unfairly, that GC 1 should receive nothing if he or she survives the testator because A was dead at the time the will was executed. The second problem arises when B has another child (GC 6), B dies before the testator and B's three children (GC 4, 5 and 6) survive the testator. Do these three children of B divide among themselves B's share of the residuary estate by operation of EPTL 3-3.3 or do they take in their own right as issue of the testator? If the former (and assuming that C survives the testator, as does GC 1 who is entitled to take), they each take 1/9 of the residuary estate (1/3 x 1/3); if the latter, the take 1/6 each; that is, they divide the 1/3 that is set aside for A's descendants and the 1/3 set aside for B's descendants equally (1/4 x 2/3 = 2/12=1/6).

These questions arise because EPTL 3-3.3(a)(3) makes the anti-lapse statute applicable to a gift to the testator's issue "as a class." This application makes sense if the class is a single generation class ("I give $100,000 to my brothers and sisters" or I devise Blackacre to my children") but not if the class is a multi-generational class to which distribution is made by representation under EPTL 2-1.2. The proposal addresses the problem by eliminating from the operation of the anti-lapse statute any gift to a multi-generational class, which of course carries with it the implied condition that a class member must survive to the time of distribution of the property involved. In fact, there is an argument that the implied requirement of survival should be sufficient to override the anti-lapse statute as an indication that the will "provides otherwise," and the proposal insures that result by statute.

The Committee notes that the Uniform Probate Code anti-lapse statute, which requires an express gift over in case of the death of the "devisee" to override the anti-lapse statute, excludes from its operation any class gift to "issue," "descendants,""heirs of the body,""heirs,""next of kin,""relatives,"or "family""or a class described by language of similar import" thus preserving for such class gift the survival to time of distribution condition. (UPC §2-603(b)(2)) A similar exclusion from EPTL 3-3.3 would eliminate this particular conflict.

The second issue addressed by the proposal deals with the lapse of a disposition of a future estate. Assume that the testator's residuary clause creates a testamentary trust, income to the surviving spouse for life, remainder "to my children." At the time the testator executes the will there are three living children, A, B and C, and no predeceased children. At the time of the testator's death one of the children is dead and that child's two children (GC 1and GC 2), survive the testator. At the surviving G spouse's death B, C, GC 1 and C 2 are all alive. Do the grandchildren take 1/3 of the trust property or do B and C take 1/2 each under EPTL 2-1.15? The proposal makes clear that the grandchildren take what their parent would have had, that is, the anti-lapse statute does indeed apply.

The proposal does not apply to a future estate subject to a condition precedent of surviving the testator just as with a gift of a present estate, nor, under the provisions previously discussed, apply to a remainder given to a multi-generational class.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the disposition to issue or brothers or sisters of testator not to lapse and the application to class dispositions

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

Section 1. Paragraph (a) of section 3-3.3 of the estates, powers and trusts law is amended to read as follows:

(a) Unless the will whenever executed provides otherwise:

(1) Instruments executed prior to September first, nineteen hundred ninety-two. Whenever a testamentary disposition including a disposition of a future estate other than a future estate subject to a condition precedent of surviving the testator is made to [the issue or to a brother or sister of the testator,] a beneficiary who is one of the testator's issue or a brother or sister, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, [per stirpes] by representation.

(2) Instruments executed on or after September first, nineteen hundred ninety-two. Whenever a testamentary disposition including a disposition of a future estate other than a future estate subject to a condition precedent of surviving the testator is made to [the] a beneficiary who is one of the testator's issue or [to] a brother or sister [of the testator], and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, by representation.

(3) The provisions of subparagraphs (1) and (2) apply to a disposition made [to issue, brothers or sisters as a class] in the form of a class gift other than a disposition to "issue,""descendants,""heirs of the body,""heirs,""next-of-kin,""relatives," or "family," or a class described by language of similar import, as if the disposition were made to the beneficiaries by their individual names, except that no benefit shall be conferred hereunder upon the surviving issue of an ancestor who dies before the execution of the will in which the disposition to the class was made.

§ 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.

4. Elimination of Obsolete Bond Requirement
(Judiciary Law § 184(3))

The Committee recommends the repeal of subdivision three of section one hundred eighty-four of the Judiciary Law as obsolete, unnecessary and a possible source of mischief and misunderstanding. This bond requirement of Surrogates and County Judges is obsolete. The function of a surety under this statute has been superseded for all purposes by the State, commencing when Surrogates became State officers in 1977, when the State took over the expenses of all courts of the Unified Court System except the town and village courts. While Surrogates are deemed "local officers" for purposes of filing of oaths of office based upon the definitions in section 2 of the Public Officers Law, they are "state officers" for purposes of filing of the undertaking as it is the State that is fiscally responsible for the acts of Surrogates and is the body "authorized to require the undertaking". See Public Officers Law § 11(2). As to State officers, the State Comptroller may waive the filing of any undertaking, blanket or individual, as the State has become a self-insurer. Public Officers Law, § 11(4). The Comptroller has waived the filing of undertakings by Surrogates and County Judges and so Surrogates and County Judges are not required to filed undertakings. The responsibility for his or her individual obligation in the course of his or her official duties to apply and pay over monies and effects as shall come into his or her hands in the execution of his or her office has been assumed by the state under the Public Officers Law.

Proposal:

AN ACT to amend the judiciary law, in relation to the repeal of the requirement of an undertaking by a surrogate or a county judge

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

Section one. Subdivision 3 of section one hundred eighty-four of the judiciary law, is REPEALED.

§ 2. This act shall take effect immediately.

5. Accountings in Small Estates (SCPA 1213(2)(c))

The Committee believes that an amendment of the SCPA 1213(2)(c) is necessary to lighten the burden on small estates and allow informal accountings where the gross estate is valued at up to $30,000.

Presently, SCPA Article 11, governing the Public Administrators within the City of New York, is in conformity with the jurisdictional limit under SCPA Article 13 (presently $30,000) for purposes of acting without formal letters [SCPA 1115(1)] and filing informal accountings [SCPA 1123(2)(e)]. Accordingly, if in the future the small estate limit is increased above $30,000, these two provisions will increase automatically with them.

Article 12, governing the Public Administrators and Treasurers outside the City of New York, authorizes these Public Administrators to act without formal letters where the gross assets of the estate meet the Article 13 $30,000. jurisdictional limit [SCPA 1213(2)(c)]. However, the Article 12 accounting provisions only permit informal accountings where the gross estate value does not exceed $5,000. The current provisions unduly burden these small estates with assets between $5,000 and $30,000 because where there are unknown distributees the law requires publication of the accounting citation and the appointment of a guardian ad litem. The Committee recommends the amendment of SCPA 1213(2)(c) by adding language "is less than that as defined as a small estate in subdivision 1 of section 1301 of this act" and deleting the present $5,000 limit. Thus this Article 12 language would be in conformance with the jurisdictional limit under Article 13, allowing informal accountings where the gross estate value is up to $30,000. The amendment would remove the burden on these extremely small estates and avoid the need for further amendment to Article 12 if the jurisdictional limits of Article 13 are increased.

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to the general powers of public administrators

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

Section one. Paragraph (c) of subdivision 2 of section 1213 of the surrogate's court procedure act is amended to read as follows:

(c) File in the court after the expiration of 7 months from the time he or she commences to act as fiduciary of the estate an informatory account in estates in which the gross value of the

assets accounted for is less than [$5,000] that as defined as a small estate in subdivision 1 of section 1301 of this act and a copy of such account shall be mailed by certified mail, return receipt requested, to each of the persons entitled to receive process upon an accounting proceeding provided the names and addresses of such persons be known to him or her. Unless objection or claim be properly filed in the court within 30 days from mailing such account a final decree settling his or her account may be entered without further notice or proceedings and with the same effect as in an accounting proceeding and he or she shall be entitled to the commissions, costs and allowances allowed him or her by the court in the decree.

§ 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.

B. Previously Endorsed Measures

1. Payment of Attorneys 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 attorneys 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 attorneys 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 attorneys 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 attorneys 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 attorneys 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 attorneys 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 attorneys 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 attorneys 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 attorneys 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.

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

The Committee recommends this measure to permit a testator to incorporate in a will, as a testamentary trust, the provisions of a preexisting inter vivos trust that has been revoked or terminated prior to the testator's death. This measure would allow the terms of the trust to remain valid even if not explicitly repeated 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 inter vivos trust 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." The proposed measure would amend 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 trust.

Under the proposed amendment, the possibility of fraud would not be of concern. EPTL 3-3.7 requires that the receptacle trust be 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.

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. 2d 752 [Kings Co. 2002]. For this reason, if intestacy is to be avoided, it is imperative that the testator provide for an alternative disposition in the event that the pour-over is found invalid.

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 cover such eventualities, attorneys often provide for an alternative testamentary trust with dispositions similar to those of the revoked inter vivos 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's 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, to that extent, the testator had died intestate. Finding that the legacy 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.

The 1967 enactment of EPTL 3-3.7 statutorily validated the pour-over of estate assets by will to a properly executed inter vivos trust that was in existence both at the date of the testator's will and at the testator's death.[1]

However, whether the terms of a trust that has been terminated or 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, without the enactment of the proposed amendment of paragraph (e), the better practice would require repetition of all of the terms of the terminated or revoked trust in the text of the will. The proposed amendment to paragraph (e) would enable the testator to create a testamentary trust as an alternate disposition without undue repetition and prolixity.

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

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[1] Moreover, EPTL 3-3.7(d) validated dispositions or appointments to the trustee of an inter vivos trust made by testators who died prior to the effective date of this section by simply providing that such disposition or appointment "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." In other words, in the case of testators who died prior to the effective date of the statute, EPTL 3-3.7(d) created a testamentary trust by incorporating the terms of the intended receptacle trust.

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 inter vivos 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 the disposition or appointment of all or part of his or her estate to such revoked or terminated trust shall be deemed to create a testamentary trust under and in accordance with the terms of such inter vivos trust at the time of the execution of the will or, if the testator so directs, including amendments made thereto prior to such revocation or termination, and such testamentary trust and the dispositions of income and principal thereunder shall be valid even though the terms of such inter vivos 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.

3. Renunciation of Specific Compensation in Favor of Statutory Commissions (SCPA 2307(5)(b); 2308(11); 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 a 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 procedures 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.

4. 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 8 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.

5. 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 entireness, 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 the 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 © 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.

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

The Committee recommends that section 5-1.2(a) of the Estates, Powers and Trusts Law be amended to disqualify as surviving spouses 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) of the Estates, Powers and Trusts Law by adding a subparagraph 7 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 5 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 7 of section 5-1.2(a).

The proposed amendment would take effect immediately and apply to the estates of decedents dying on or after its effective date.

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 that 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 its effective date.

7. 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.[2] 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.[3] 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,[4] 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

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[2] For example, under EPTL 4-1.2(a)(2)(D), a father's non-marital child would be considered a legitimate child so that the child and the child's issue would inherit from the child's father and the child's paternal kindred if, inter alia "a blood genetic marker test had been administered to the father which together with other available evidence establishes paternity by clear and convincing evidence."

[3] Under EPTL 2-1.3(a)(2), 5-3.2 and 6-5.7, children of the donor-biological parent born after his or her death may have certain rights.

[4] See also, Chapter 12, "Determining Parental Rights and Possibilities," pp. 327-334.

> 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 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, natural 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.

8. 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 Estates, Powers and Trusts Law, to ensure that, where an adoptive child continues to reside with the natural parent, as in 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. Recommendations for Amendment to Certain Regulations

1. The Filing of a Citation Reciting that Objections Have Been Filed (22 NYCRR § 207.26)

Section 1411 of the Surrogate's Court Procedure Act was amended in 1997 to authorize a proponent of a will or, where a proponent does not act, any other party, to file a citation reciting that objections have been filed. The companion court rule to SCPA 1411 is section 207.26 of the Surrogate's Court Rules (22 NYCRR § 207.26), which provides for the issuance of a citation upon the filing of objections. The Committee has considered the statute and the court rule and believes that § 202.26 was not amended in 1997 to reflect the change to SCPA 1411.

The court rule continues the former practice, which requires the proponent to file a petition for an order directing service of notice of objections filed. Additionally, the statute and rule are not consistent with respect to the timing by which a party must act. The Committee recommends that § 207.26(b) be amended as follows to comport with SCPA 1411.

Proposal:

§ 202.26 Contested probate; notice of objections filed.

(b) [Whenever objections are filed] Within thirty days of the filing of objections, the proponent shall [promptly] present a [petition for and procure an order directing service of notice of objections filed when required by] citation in accordance with section 1411 of the SCPA [1411]. If the proponent fails to timely present such [petition] citation or, having presented it, fails to [procure such order or to give the notice prescribed in such section within five days after the return date of the citation or when objections are filed, whichever is later,] objectant or any other party may present such [petition and order and cause such notice to be serviced] citation to be served pursuant thereto.

2. Service of Orders, Decrees and Judgments Upon an Attorney by Overnight Delivery (22 NYCRR 207.37(c)(1))

The Committee proposes the amendment of section 207.37(c)(1) of the Surrogate's Court Rules (22 NYCRR 207.37(c)(1)) to provide for service of orders, decrees and judgments upon an attorney by overnight delivery service in accordance with CPLR 2103(b)(6).

Section 207.37(c)(1) presently provides for service of orders, judgments and decrees by: (i) personal service not less than five days before the day of settlement; and (ii) by mail not less than ten days before the date of settlement. Overnight delivery is not authorized under the current court rule. Overnight delivery has become a common method of service for attorneys. Inclusion of such service in the court rule is easily accomplished by a simple amendment adding

a new subdivision (iii) to the rule to include service b y overnight delivery as provided under CPLR 2103(b)(6). The time period is measured as the time set forth on the delivery plus one day as prescribed by CPLR 2103(b)(6) and would read as follows: "(iii) by overnight delivery not less than six days before the date of settlement."

Proposal:

§ 207.37(c)(1). Submission of orders, judgments and decrees for signature

(c)(1) When settlement of an order or judgement is directed by the court, a copy of the proposed order or judgment with notice of settlement, returnable at the office of the clerk of the part in which the order or judgment was granted, or before the judge if the court has so directed or if the clerk is unavailable, shall be served on all parties either:

(i) by personal service not less than five days before the day of settlement; [or]

(ii) by mail not less than ten days before the date of settlement;or

(iii) by overnight delivery not less than six days before the date of settlement.

IV. Future Matters

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

1. SCPA 707(1)(d) Guardians and Felony Convictions

This measure would harmonize SCPA 707(1)(d) with the provisions of DRL §115-d (3-a(b)) which gives the Court discretion to grant a petition for certification as an adoptive parent under some circumstances where the petitioner is a convicted felon.

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 2308, 2309 and 2312 Charitable Trust Commissions

This measure would amend the SCPA to provide for the computation of annual charitable trust commissions on the same basis as commissions on non-charitable trusts, *i.e.*, based on principal rather than income collected. Under this measure, annual commissions on charitable trusts would be permitted at the same rate as on non-charitable trusts, except that the rate payable on principal in excess of $10 million would be set at $1.50 per $1,000. A trustee would not be

entitled to commissions for paying out principal, except for 1% upon termination. Annual commissions would be payable from principal.

7. 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.

8. SCPA 2313 — Multiple Commissions

This measure would remove the present restriction on the number of commissions (two) that can be allowed for executors or trustees. The measure would eliminate statutory inconsistencies and benefit the estate planning process.

9. SCPA 2108 — Answers in Proceedings by Fiduciary for Continuation of a Business

This measure would amend SCPA 2108 to require that an answer in a proceeding by a fiduciary for continuation of a business be filed by the return date of the petition, or at such subsequent time as the court may direct. This measure would bring the procedure in this type of proceeding into conformity within general Surrogate's Court practice.

In addition to the above legislation, the Committee is also studying proposals related to:

1. Competing charitable interests.

2. The need for court approval to move assets out of state, especially with respect to intangible assets that exist only in cyberspace.

3. The temporary assignment of Surrogate' Court judges outside New York City to other Surrogate's Courts outside New York City.

4. Creation of a statutory living will.

5. Authorizing appointment of attorneys to carry out duties of public administrator in counties where chief fiscal officers are presently required to carry out such duties.

6. Post-conceived child's ability to take.

7. Extension of the time frame for exercising the right of election.

8. Voluntary administration of small estates by designees or personal representatives of distributees.

9. Protecting the elderly from the undue influence of unscrupulous persons who have insinuated themselves into relationships of a confidential nature.

10. Fiduciaries who become cognitively impaired.

11. Protection of beneficiaries of bank-run mutual funds, via periodic accountings and other possible procedures.

12. Identity theft and Surrogate's Court records, particularly with respect to electronic access to court databases.

13. Revision of the time frame under Uniform Rule 207.25 for completion of proof by a party seeking to establish kinship in an accounting proceeding.

14. Gift-giving powers of attorney.

15. Awarding interest on pecuniary legacies when not paid by a reasonable date.

16. The elimination of obsolete Uniform Rules.

17. The tax treatment of capital gains in untrusty distributions.

18. Statutory rates of compensation for attorneys.

19. The use of attorney-certified death certificates in voluntary administrations.

Respectfully submitted,

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