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

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

January 2017

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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. Newly-enacted Legislation

1. Digital Assets (Signed 9/26/16 – L. 2016, c. 354)

The wide use of digital assets has created an urgent need for legislation dealing with the administration of these assets upon the death or incapacity of the user. As a practical matter, there should be no difference between a fiduciary's ability to gain access to information from an online bank or other Internet-based business and the fiduciary's ability to gain access to information from a business with a brick and mortar building. This measure would amend the EPTL to restore control of the disposition of digital assets back to the individual and removes such power from the service provider.

This measure gives fiduciaries authority to gain access to, manage, distribute and copy or delete digital assets. It addresses four types of fiduciaries, namely: a personal representative (executor or administrator) of a decedent's estate; a guardian of a ward or protected person; an agent acting pursuant to a power of attorney; and a trustee.

In the past, where property was mostly in tangible form, there was little doubt of its ownership and control. Indeed, the law recognizes that when a property owner dies or becomes unable to manage his or her property, such owner may appoint a fiduciary to manage the property. The role of a fiduciary subsumes the duty of loyalty, care and confidentiality. The system has worked well throughout our history. This measure does not break new legal ground, but merely applies the laws governing fiduciaries to a new type of property.

Service providers protect themselves by requiring a user to agree to a Terms of Service ("TOS") agreement prior to creating an online account. In the absence of state laws dealing with the disposition of digital assets, individuals will likely be subject to the service provider's TOS if it has a policy regarding the transfer or disposal of the account and its content. Some service providers have a policy that indicates what will happen upon the death of a user, but most have no explicit policy.

In addition, there are federal laws that criminalize, or penalize, the unauthorized access of computers and digital accounts and prohibit most service providers from disclosing account information to anyone without the user's consent. These laws include the Electronic Computer Privacy Act (the "ECPA"); the Stored Communications Act (the "SCA"), which is part of the ECPA, and the Computer Fraud and Abuse Act ("CFAA"). The CFAA prohibits unauthorized access to computers and protects against anyone who "intentionally accesses a computer without authorization or exceeds authorized access." The SCA contains two relevant prohibitions. First, the SCA makes it a crime for anyone to "intentionally access without authorization a facility through which an electronic communication service is provided" as well as to "intentionally exceed an authorization to access that facility." Second, the SCA prohibits an electronic communications service from knowingly divulging the contents of a communication that is stored by or maintained on that service unless disclosure is made "to an addressee or intended recipient of such communication or an agent of such addressee or intended recipient" or "with

the lawful consent of the originator or an addressee or intended recipient of such communication."

The SCA is often the basis on which service providers refuse to release the contents of a deceased user's account. In addition to federal privacy laws, there are state privacy laws. All fifty states, including New York, have enacted criminal laws penalizing unauthorized access to computer systems. Consequently, without legislation, many service providers will likely continue to refuse to provide access or to release content upon the death or incapacity of a user on the basis of privacy concerns or for fear of facing certain liability.

This measure is based largely on a proposal from the Uniform Law Commission namely RUFADAA (Revised Uniform Fiduciary Access to Digital Assets Act) which is a compromise designed to address the serious problems outlined above and, as well, the concerns of the service providers and civil libertarians. The only changes from such act are those necessary to conform it to existing New York law.

The text of this measure, which took effect on 9/26/16, is as follows:

AN ACT to amend the estates, powers and trusts law, in relation to the administration of digital assets

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 article 13-A to read as follows:

ARTICLE 13-A

ADMINISTRATION OF DIGITAL ASSETS

SUMMARY OF ARTICLE

PART 1. Definitions

Section 13-A-1. Definitions.

PART 2. APPLICABILTIY, PROCEDURE FOR DISCLOSURE, USER DIRECTIONS

Section 13-A-2.1. Applicability.

PART 1. DEFINITIONS

§13-A-1. Definitions. In this article the following terms shall have the following meanings:

(a) "Account" means an arrangement under a terms-of-service agreement in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(b) "Agent" means a person granted authority to act as attorney-in-fact for the principal under a power of attorney and includes the original agent or any co-agent or successor agent.

(c) "Carries" means engages in the transmission of an electronic communication.

(d) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(e) "Content of an electronic communication" means information concerning the substance or meaning of the communication which:

(1) has been sent or received by a user;

(2) is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and

(3) is not readily accessible to the public.

(f) "Court" means the court in this state having jurisdiction in matters relating to the content of this article.

(g) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(h) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(i) "Digital asset" means an electronic record in which an individual has a right or

interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(j) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(k) "Electronic communication" has the meaning set forth in 18 U.S.C. section 2510(12), as amended.

(l) "Electronic communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(m) "Fiduciary" includes an executor, preliminary executor, administrator, temporary administrator, voluntary administrator, personal representative, guardian, agent, or trustee. This term includes the successor to any fiduciary.

(n) "Guardian" means a person who has been appointed as a guardian by a court of this state pursuant to the surrogate's court procedure act or the mental hygiene law.

(o) "Information" means data, metadata, Internet protocol address, user login information, text, images, videos, sounds, codes, computer programs, software, databases, or similar intelligence of any nature.

(p) "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(q) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity, board and the state.

(r) "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

(s) "Principal" means an individual who grants authority to an agent in a power of attorney.

(t) "Protective order" means an order appointing a guardian or another order related to management of a ward's property.

(u) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(v) "Remote computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. section 2510(14), as amended.

(w) "Terms of service agreement" means an agreement that controls the relationship between a user and a custodian.

(x) "Trustee" includes an original additional, and successor trustee, and a co-trustee.

(y) "User" means a person that has an account with a custodian.

(z) "Ward" means an individual for whom a guardian has been appointed by a court of this state pursuant to the surrogate's court procedure act or the mental hygiene law. The term includes an individual for whom an application of guardianship is pending.

PART 2. APPLICABILITY; PROCEDURE FOR DISCLOSURE; USER DIRECTIONS

§13-A-2.1. Applicability

(a) This article applies to:

(1) a fiduciary acting under a will, trust or power of attorney executed before, on, or after the effective date of this article;

(2) an executor, administrator or personal representative acting for a decedent who died before, on, or after the effective date of this article;

(3) a guardianship proceeding commenced before, on, or after the effective date of this article; and

(4) a trustee acting under a trust created before, on, or after the effective date of this article.

(b) This article applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(c) This article does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

§13-A-2.2. User direction for disclosure of digital assets

(a) A user may use an online tool to direct the custodian to disclose or not to disclose to a designated recipient some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(b) If a user has not used an online tool to give direction under paragraph (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under paragraph (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

§13-A-2.3. Terms-of-service agreement.

(a) This article does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(b) This article does not give a fiduciary or a designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(c) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under section 13-A-2.2.

§13-A-2.4. Procedure for disclosing digital assets.

(a) When disclosing digital assets of a user under this article, the custodian may at its sole discretion:

(1) grant a fiduciary or designated recipient full access to the user's account;

(2) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(3) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(b) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this article.

(c) A custodian need not disclose under this article a digital asset deleted by a user.

(d) If a user directs or a fiduciary requests a custodian to disclose under this article some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of

the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

(1) a subset limited by date of the user's digital assets;

(2) all of the user's digital assets to the fiduciary or designated recipient;

(3) none of the user's digital assets; or

(4) all of the user's digital assets to the court for review in camera.

PART 3. DISCLOSURE OF DIGITAL ASSETS TO FIDUCIARY

§13-A-3.1. Disclosure of content of electronic communications of deceased user.

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the executor, administrator or personal representative of the estate of the user the content of an electronic communication sent or received by the user if the executor, administrator or representative gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the death certificate of the user;

(c) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small estate affidavit or court order;

(d) unless the user provided direction using an online tool, a copy of the user's will, trust, or other record evidencing the user's consent to disclosure of the content of electronic communications; and

(e) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(2) evidence linking the account to the user; or

(3) a finding by the court that:

(A) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (1);

(B) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. section 2701 et seq., as amended, 47 U.S.C. section 222, as amended, or other applicable law;

(C) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(D) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

§13-A-3.2. Disclosure of other digital assets of deceased user.

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the executor, administrator or personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the executor, administrator or personal representative gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the death certificate of the user;

(c) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small estate affidavit or court order; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier

assigned by the custodian to identify the user's account;

(2) evidence linking the account to the user;

(3) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or

(4) a finding by the court that:

(A) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (1); or

(B) disclosure of the user's digital assets is reasonably necessary for administration of the estate.

§13-A-3.3. Disclosure of content of electronic communications of principal.

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;

(c) an affidavit in which the affiant attests that the copy is an accurate copy of the original power of attorney and that, to the best of the affiant's knowledge, the power remains in effect; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(2) evidence linking the account to the principal.

§13-A-3.4. Disclosure of other digital assets of principal.

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the power of attorney that gives the agent specific authority over digital assets or general authority to act on behalf of the principal;

(c) an affidavit in which the affiant attests that the copy is an accurate copy of the original power of attorney and that, to the best of the affiant's knowledge, the power remains effect; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(2) evidence linking the account to the principal.

§13-A-3.5. Disclosure of digital assets held in trust when trustee is original user.

Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

§13-A-3.6. Disclosure of contents of electronic communications held in trust when trustee not original user.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the trust instrument that includes consent to disclosure of the content of electronic communications to the trustee;

(c) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(2) evidence linking the account to the trust.

§13-A-3.7. Disclosure of other digital assets held in trust when trustee not original user.

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the trust instrument;

(c) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or

(2) evidence linking the account to the trust.

§13-A-3.8. Disclosure of digital assets to guardian of ward.

(a) After an opportunity for a hearing concerning the appointment or authority of a guardian, the court may grant a guardian access to the digital assets of a ward.

(b) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian the catalogue of electronic communications sent or received by a ward and any digital assets, other than the content of electronic communications, in which the ward has a right or interest if the ward gives the custodian:

(1) a written request for disclosure in physical or electronic form;

(2) a certified copy of the court order that gives the guardian authority over the digital assets of the ward; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the ward; or

(B) evidence linking the account to the ward.

(c) A guardian with general authority to manage the assets of a ward may request a custodian of the digital assets of the ward to suspend or terminate an account of the ward for

good cause. A request made under this section must be accompanied by a certified copy of the court order giving the guardian authority over the ward's property.

PART 4. FIDUCIARY DUTY AND AUTHORITY, COMPLIANCE AND IMMUNITY

§13-A-4.1. Fiduciary duty and authority.

(a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:

(1) the duty of care;

(2) the duty of loyalty; and

(3) the duty of confidentiality.

(b) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:

(1) except as otherwise provided in section 13-A-2.2, is subject to the applicable terms of service;

(2) is subject to other applicable law, including copyright law;

(3) in the case of a fiduciary, is limited by the scope of the fiduciary's duties; and

(4) may not be used to impersonate the user.

(c) A fiduciary with authority over the property of a decedent, ward, principal, or settlor has the right to access any digital asset in which the decedent, ward, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, ward, principal, or settlor for the purpose of applicable computer fraud and unauthorized computer access laws, including this state's law on unauthorized computer access.

(e) A fiduciary with authority over the tangible, personal property of a decedent, ward, principal, or settlor:

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for the purpose of computer fraud and unauthorized-computer access laws, including this state's law on unauthorized computer access.

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(1) if the user is deceased, a copy of the death certificate of the user;

(2) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small estate affidavit or court order, court order, power of attorney, or trust giving the fiduciary authority over the account; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in item (A).

§13-A-4.2. Custodian compliance and immunity.

(a) Not later than sixty days after receipt of the information required under sections 13-A-3.1 through 13-A-4.1, a custodian shall comply with a request under this article from a fiduciary

or designated recipient to disclose digital assets or terminate an account. If the custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under paragraph (a) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. section 2702, as amended.

(c) A custodian may notify the user that a request for disclosure or to terminate an account was made under this article.

(d) A custodian may deny a request under this article from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(e) This article does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this article to obtain a court order which:

(1) specifies that an account belongs to the ward or principal;

(2) specifies that there is sufficient consent from the ward or principal to support the requested disclosure; and

(3) contains a finding required by law other than this article.

(f) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this article.

PART 5. MISCELLANEOUS PROVISIONS

§13-A-5.1. Relation to electronic signature in global and national commerce act.

This article modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. section 7001 et seq., but does not modify, limit, or supersede

section 101(c) of such act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. section 7003(b).

§13-A-5.2. Severability.

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

§2. This act shall take effect immediately.

2. Service of Process Upon Limited Partnerships and Limited Liability Companies SCPA 307(5) (Signed 6/1/16, L. 2016, c. 47)

SCPA 307(5) provides for service of process upon "persons other than natural persons," among others, in proceedings filed in Surrogate's Court. Currently, this subdivision directs that, unless the SCPA provides otherwise or the court in a particular proceeding otherwise directs, service of process on a person other than a natural person shall be made in accordance with CPLR 307 (personal service upon the state), 310 (personal service upon a partnership), 311 (personal service upon a corporation or governmental subdivision), and 312 (personal service upon a court, board or commission).

In 1999, the Legislature amended the CPLR to add CPLR 310-a and 311-a to provide for personal service upon a limited partnership (including a limited liability partnership) and upon limited liability companies, respectively. However, at that time, the Legislature did not amend SCPA 307 to make CPLR 310-a and CPLR 311-a applicable to service of process in Surrogate's Court proceedings.

The Surrogate's Court Procedure Act provides explicit and comprehensive directives for effecting service of process in Surrogate's Court proceedings. The absence of a rule, or cross-reference to a rule, for service of process upon a limited liability partnership or a limited liability company is anomalous to the statutory framework and creates a potential source for confusion and uncertainty.

The proposed amendment addresses these concerns by adding the personal service provisions of CPLR 310-a and CPLR 311-a to SCPA 307(5). By doing so, this amendment is consistent with the purpose of the statute to provide clear, definitive direction for service of process on all categories of persons in a Surrogate's Court proceeding.

The text of this measure, which took effect on 6/1/2016, is as follows:

AN ACT to amend the surrogate's court procedure act, in relation to the service of process upon limited liability corporations and limited liability partnerships

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

Section 1. Subdivision 5 of section 307 of the surrogate's court procedure act is amended to read as follows:

5. Service upon an incompetent, conservatee and persons other than natural persons. Unless this act otherwise provides or the court in a given proceeding otherwise directs, CPLR 307, 309 (b), 309 (c), 310, 310-a, 311, 311-a, 312 and 1025 are applicable to service under the foregoing subdivisions of this section.

§2. This act shall take effect immediately.

B. Previously Endorsed Measures

1. 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 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.

§2. This act shall take effect immediately.

2. 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.[1]

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.

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[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".)

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, 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 presently (*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.[2]

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 act 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 established for the receipt of the proceeds of an annuity or pure endowment contract, or

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

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 7-1.17(b).

(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.

3. 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.[3]

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 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:

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[3] 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.

§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 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.

4. 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. 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 retain 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 mentioned[4], and case law[5] 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 powers during minority and powers in trust to manage property vested in an incapacitated person and presumably of any other donees of powers in trust that may exist under New York common law is not clearly answered by our statutes. *Matter of Chase Manhattan Bank (Golding)*[6] authorized

[4] 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.
[5] *See Matter of Schaper*, 151 Misc.2d 923, 574 N.Y.S.2d 137 (Sur. Ct. New York County 1991)
[6] 129 Misc.2d 952, 494 N.Y.S.2d 660 (Sur. Ct. New York County 1985).

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 it would be more appropriate to calculate commissions under SCPA 2308 and 2309, which govern commissions of trustees. Today SCPA 2312, governing the commissions of corporate trustees, must be added to the list of potentially applicable provisions.

This proposal amends the SCPA to make the provisions applicable to trustees' commissions applicable to all donees of powers in trust. The specific sections of the SCPA to be amended are 2306, 2307, 2308, 2309, 2312, and 2313.

The amendments to SCPA 2308, 2309, and 2312 use the language "donee of a power 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.

The amendments have no fiscal impact upon the State and are applicable to donees of powers during minority and of other powers in trust effective on the first day of January next succeeding the date on which it shall have become law, thus avoiding the need for proration of commissions in the initial year of the new regime.

Proposal:

AN ACT to amend the estates, powers and trusts law, 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 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 require 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 one of section two thousand two hundred twenty of this chapter.

§2. The opening unlettered paragraph of subdivision 1 of section 2307 of the surrogate's court procedure act, such subdivision as amended by chapter 514 of the laws of 1993, 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, 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, paragraph (a) of subdivision 5 as amended by chapter 936 of the laws of 1984 and subdivision 13 as added by such chapter, 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 1 ½ per cent;

(3) all sums of principal or property subject to the power in trust above $12,000 at the rate of 1 ¼ per cent; and

(b) For paying out principal or property subject to the power in trust at the rate of 1 percent.

(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 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 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 provided, however, that as used in subdivision 6 of this section, the term trustee shall

include a corporate trustee, and further provided that the term "property subject to the power in trust" shall include property subject to a power during minority.

§4. Section 2309 of the surrogate's court procedure act 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 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 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 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 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 in 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 of the first $2,500 of such income distributed during the administration of the trust and 1 per cent 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 provided, however, that as used in subdivision 6 of this section, the term trustee shall include a corporate trustee and further provided that the term "property subject to the power in trust" shall include property subject to a power during minority.

§5. Section 2312 of the surrogate's court procedure act, subdivisions 3, 7, 9 and paragraph (d) 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 a 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 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 the 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 and the term "property subject to the power in trust" shall include property subject to a power during minority.

§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 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 trust 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.

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

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 proposal 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 proposed 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 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 and shall apply to all personal representatives as defined by paragraph 2 of subdivision (a) of section 4503 of the civil practice law and rules as amended by section 1 of this act.

6. The Will Exception to the Attorney-Client Privilege Extended to a Lifetime Trust CPLR 4503(b)

The Committee recommends an amendment to CPLR 4503(b) to extend the probate exception to post-death proceedings related to the validity and/or construction of a lifetime trust.

Presently, the statue excludes from protection communications otherwise privileged between the attorney and the client concerning a will's preparation, execution and revocation in a proceeding involving the probate, validity or construction of the will. Disclosure of such communications is necessary when seeking to probate and/or construe the testator's will. The exception applies to wills and undefined related instruments but does not include matters that would tend to disgrace the decedent's memory.

Although the statute does not explicitly apply to communications related to the creation of a lifetime trust, case law has evolved to extend the exception to include trusts. The rationale underlying the probate exception applies equally to lifetime trusts insofar as communications between the attorney and creator as to its preparation and execution may be necessary to determine its validity and/or meaning. Moreover, an amendment will serve to ensure that practitioners and their clients understand that communications related to lifetime trusts may not be protected by the attorney-client privilege after the creator's death. Furthermore, an amendment will provide uniformity in the application of the exception after the death of the testator or creator.

Recently, in *Matter of Leddy*, 2/28/14, NYLJ, 1202658311817, (Surr. Ct. Nassau Co.), the Court permitted a party to examine the attorney draftsman of an amendment to a lifetime trust concerning confidential conversations between him and decedent about the amendment. The court made note of the will exception under CPLR 4503 and the soundness of petitioners' argument that the trust was the functional equivalent of a will. However, the court went on to say it need not determine whether the trust was the functional equivalent of a will thus permitting communications within the will exception. Rather, the court found that the privilege does not apply in a dispute between living

parties as to an interest in property which they claim through the same decedent, citing *Matter of Levinsky*, 23 AD2d 25 (2d Dept 1965) as one authority.

Prior to *Leddy*, reference to extending the will exception to trusts is found in a footnote to *Matter of Arnoff*, 171 Misc. 2d 172 (Surr Ct. 1996), relying upon *Matter of DiScala*, NYLJ, 5/20/86, at 14, col 6. *Arnoff* concerned whether a party had the right to a jury in a contest over the validity of a lifetime trust. (The decision predates the 2003 amendment to SCPA 502 granting such right.) The *Arnoff* court noted the differences between wills and lifetime trusts and determined that such differences are easily resolved in a single trial over the validity of a will (not a pour-over) and trust. The footnote relates to such discussion and provides as follows:

> "CPLR 4503(b) requires disclosure of information as to the preparation And execution or revocation of a will or other relevant instrument that otherwise would violate attorney-client privilege. Although the statute refers to will proceedings, it has been interpreted to include pour-over trusts (citing *DiScala*)."

Following *Arnoff*, two key decisions were rendered wherein the personal representative of an estate was granted the right to waive a privilege. *Mayorga v Tate*, 302 AD2d 11 (2d Dept 2002); *Matter of Colby*, 187 Misc. 2d 695 (Surr. Ct. N.Y. Co. 2001). The underlying rationale is that the personal representative stands in decedent's shoes for all purposes and thus should be authorized to assert or waive the privilege on decedent's behalf. Thereafter, concern was raised that the playing field was no longer level if only the personal representative had the right to waive. He or she could use a privilege as both a sword and shield. The argument resonated with the courts, and the right to waive was extended to other parties by the grant of limited letters of administration to such party. *Matter of Bonner*, 7 Misc 3d 1023(A) (Surr. Ct. Nassau Co. 2005).

Today, it is common practice for courts to grant limited or temporary letters to enable a non-fiduciary party to waive a privilege. It has been used extensively where a party seeks to obtain medical records and the personal representative has refused to execute a HIPAA form. However, the decisions do not restrict the grant of letters to such situation. Presumably, a court could issue limited or temporary letters for the purpose of waiving the attorney-client privilege concerning communications about a lifetime trust.

It is noted that concerns with protecting the privacy of trusts have been considered. Such concerns appear to be mooted by case law. Ensuring clarity as to the situations where a communication is protected and uniformity in the application of the privilege and waiver are necessary objectives.

In conclusion, given the clear trend toward full disclosure of information related to the preparation and execution of wills and trusts, and to ensure a level playing field in such proceedings, it is recommended that CPLR 4503(b) be amended to extend the probate exception to lifetime trusts after the creator's death.

Proposal:

AN ACT to amend the civil practice law and rules, in relation to the will exception to the attorney-client privilege

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

Section 1. Subdivision (b) of section 4503 of the civil practice law and rules is amended to read as follows:

(b) [Wills and revocable trusts.] In any action involving the probate, validity or construction of a will or, after the [grantor's] death[, a revocable] of the creator the validity and construction of a lifetime trust, an attorney or [his] an attorney's employee shall be required to disclose information as to the preparation, execution or revocation of [any will] such instrument or other relevant instrument, but he or she shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

§2. This act shall take effect immediately.

7. 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 an 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.

8. 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.

9. 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.

10. 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 enunciation 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 as 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.

11. 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.

12. 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 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.

13. 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 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 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 such effective date.

14. 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.

15. 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 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. Amendments to Regulations

1. Omission or Redaction of Confidential Personal Information; Public Access to Certain Filings (22 NYCRR 207.64 (Amended Effective 3/1/2016)

The Surrogate's Court Advisory Committee examined anew the issue of public access to Surrogate Court records containing personal and financial information. The Committee analyzed the experience to date under the current secure filing rule in the Surrogate's Courts (22 NYCRR 207.64). Also, the Committee considered the newly adopted rule for the NY Supreme & County Courts - Civil (22 NYCRR 202.5(e)), which requires the redaction of certain confidential personal information. Surrogate's Court records are permeated with sensitive personal information, some of which is already protected under various provisions of state and federal law. The Committee sought to balance the need for public access to records in the Surrogate's Court and the risk of exposing personal and financial information contained in court records to identity theft or other illegal scheme.

Proceedings in Surrogate's Court are exempt from the NY Supreme & County Court Rule 202.5(e). Recognizing that a redaction rule reduces the potential for misuse of the court's records for illegal purposes, the Committee proposed an amendment to rule 207.64 to adopt a narrower approach by requiring redaction of certain confidential personal information. While similar to the civil court rule 202.5(e), the definitions and procedures proposed here are also tailored to the distinctive nature of documents and practice in the Surrogate's Court.

Recognizing also that certain files contain sensitive information necessary for the routine identification of and service upon necessary parties in proceedings in Surrogate's Court, the Committee further recommended that public view of these files be limited by practical necessity. This proposal amends rule 207.64 to require that the court clerk shall not permit a copy of specified types of such court documents to be viewed or taken by any person except by certain persons interested in the proceeding. These documents are: all papers and documents in proceedings instituted pursuant to SCPA Articles 17 and 17A; death certificates; tax returns; firearms inventory and categories of documents already protected under other provisions of law.

With respect to these documents the proposed amendments to the rule allow access without the need for court permission to: a party to the proceeding or the attorney or counsel to a party to the proceeding; the Public Administrator or counsel thereto; counsel of any Federal, State or local governmental agency or court personnel or by order of the court or written permission of the Surrogate or Chief Clerk of the court.

The Committee also proposed that the rule be amended to include the requirement that the standard for the grant of such permission in a contested matter shall be the same as required under 22 NYCRR 216.1 and applicable law. The amendment adds language to clarify that the rule shall not preclude disclosure or copying of any index of filings maintained by the court. Further, any determination by the court regarding access to any filings may be the subject of an appropriate motion for clarification or reconsideration.

Proposal:

207.64. Omission or Redaction of Confidential Personal Information; Public Access to Certain Filings

(a) Omission or Redaction of Confidential Personal Information.

(1) Except as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information ("CPI") means:

i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof; and

ii. other than in a proceeding under Article 13 of the SCPA, a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof.

(2) The court sua sponte or on motion by any person may order a party to remove CPI from papers or to resubmit a paper with such information redacted; order the clerk to

seal the papers or a portion thereof containing CPI in accordance with the requirement of 22 NYCRR §216.1 that any sealing be no broader than necessary to protect the CPI; for good cause permit the inclusion of CPI in papers; order a party to file an unredacted copy under seal for in camera review; or determine that information in a particular action is not confidential. The court shall consider the pro se status of any party in granting relief pursuant to this provision.

(3) Where a person submitting a paper to a court for filing believes in good faith that the inclusion of the full CPI described in Paragraph (1) of this subdivision is material and necessary to the adjudication of the proceeding before the court, he or she may apply to the court for leave to serve and file, together with a paper in which such information has been set forth in abbreviated form, a confidential affidavit or affirmation setting forth the same information in unabbreviated form, appropriately referenced to the page or pages of the paper at which the abbreviated form appears.

(4) When served with objections or a request for an inquiry or examination under SCPA 2211 or 1404 that specifies a request for particular unredacted documents previously filed in the proceeding with respect to which the objection or request for inquiry or examination relates, the party who originally served and filed the redacted document shall serve (but not file) an unredacted version upon all parties interested in the proceeding or such portion of it to which the objection or request for inquiry or examination relates.

(b) Public Access to Certain Filings. The officers, clerks and employees of the court shall not permit a copy of any of the following documents to be viewed or taken by any other person than a party to the proceeding, or the attorney or counsel to a party to the proceeding, the Public Administrator or counsel thereto, counsel for any Federal, State or local governmental agency, or court personnel, or by order of the court or written permission of the Surrogate or Chief Clerk of the court. The standard for the grant of such permission in a contested matter shall be the same as required under 22 NYCRR 216.1 and applicable law:

(1) all papers and documents in proceedings instituted pursuant to Articles 17 or 17-A of the SCPA;

(2) death certificates;

(3) tax returns;

(4) [documents containing social security numbers;

(5)] Firearms Inventory; and

[(6) Inventory of Assets]

(5) Documents containing information protected from disclosure under other provisions of Federal or State law such as HIPAA for medical information, job protected services reports, material obtained from a state mental hygiene facility under MHL 33.13, and records involving alcohol or other substance abuse under 42 CFR 2.64. These examples are not intended to be exclusive.

This rule shall not preclude disclosure or copying of any index of filings maintained by the court. Any determination by the court regarding access to any filings may be the subject of an appropriate motion for clarification or reconsideration.

2. The Inventory of Assets (22 NYCRR 207.20) (Amended effective 3/1/2016)

The Surrogate's Court Advisory Committee recommends the repeal of §207.20 of the Uniform Court Rules (22 NYCRR 207.20), the adoption of a new rule 207.20 "Inventory of Assets," and the creation of a new "Inventory of Assets" form as provided herein.

The proposal is necessitated by recent changes to various court rules and statutes which are designed to protect asset information from disclosure to non-parties. It is well documented that the increased use of the internet for financial transactions has resulted in a corresponding increase in identity theft. Various rules have been implemented which limit public access to personal financial information by use of redacting legal documents and restricting access to files. Presently, the asset information and inventory form require the fiduciary to disclose detailed account numbers and values for all of decedent's assets.

Additionally, there has been increasing concern within the bar with the extent of disclosure required by the present form and the likelihood that otherwise private information may be revealed following its filing. Although the current uniform court rule provides for the filing of an estate tax return in lieu of the inventory of assets, and that such return shall be protected from disclosure, attorneys nevertheless have found that such information has been disclosed. The new rule eliminates the filing of estate tax returns which contains information valuable to identify thieves, such as the decedent's Social Security number and bank account numbers. Moreover, particular concern has been raised with the need to reveal detailed information about non-testamentary assets and assets held in living trusts. But for the filing of the inventory, such information would not be filed with the court.

The committee considered whether the filing of the inventory continues to serve an important purpose. Court personnel find the availability of the inventory useful when a person interested in an estate seeks general information about decedent's assets. The proposed inventory and court rule are designed to provide such persons with a snapshot of the estate's assets which should be sufficient to determine whether an investigation is warranted.

The proposed new court rule and Inventory of Assets form seek to balance these concerns. In lieu of setting forth detailed financial information, the fiduciary shall be required to set forth the gross value for each asset type by a category. Where the "value" or "amount" is required to be reported, such value or amount shall be reported as being within one of the following categories: Category **A**-under $10,000; Category **B**-$10,000 to under $20,000; Category **C**-$20,000 to under $50,000; Category **D**-$50,000 to under $100,000; Category **E**-$100,000 to under $250,000; Category **F**-$250,000 to under $500,000; Category **G**-$500,000 or over. These categories are the same as those provided for determining the amount of the filing fee when seeking probate of a will or letters of administration. The reporting individual shall indicate the category by letter only for each type of probate asset.

Rule Proposal:

22 NYCRR 207.20 is hereby repealed.
22 NYCRR 207.20 is hereby adopted (New):

Section 207.20 Inventory of assets.

(a) The fiduciary or the attorney of record shall furnish the court with an Inventory of Assets form which identifies the following:

(1) those assets that either were owned by the decedent individually, including those in which the decedent had an partial interest, or were payable or transferrable to the decedent's estate, by indicating the total value thereof by letter only for one of the following categories: **A**-under $10,000; **B**-$10,000 to under $20,000; **C**-$20,000 to under $50,000; **D**-$50,000 to under $100,000; **E**-$100,000 to under $250,000; **F**-$250,000 to under $500,000; **G**-$500,000 or over; and

(2) those assets held in trust; those assets over which the decedent had the power to designate a beneficiary; jointly owned property; and all other non-probate property of the decedent by checking yes or no.

(b) The Inventory of Assets form shall be filed with the court within nine months of the date letters issued to the fiduciary or as the court otherwise directs.

(c) In the event the Inventory of Assets is not filed, the court may refuse to issue certificates, may revoke the letters and may refuse to issue new ones until such list has been filed and the fees paid as provided in SCPA 2402. Failure to file such list of assets may also constitute grounds for disallowance of commissions or legal fees.

(d) If any additional filing fees are due, they shall be paid to the court at the time of the submission of the inventory.

IV. New Forms

1. Adult Adoption Forms (New forms effective 2/19/2016)

The Committee reviewed adult adoption procedures and determined that specific, uniform forms will simplify and streamline adult adoptions. Accordingly, the Committee recommended approval of new Adult Adoption forms.

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2. Inventory of Assets Form (New form effective 3/1/2016)

The Committee recommended the adoption of a revised Inventory of Assets form to reflect the amendments to Rule 207.20 that were effective March 1. 2016.

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V. Future Matters

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

1. 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.

2. 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.

3. 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.

4. 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.

5. 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.

6. 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.

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. The Proposed New York Uniform Trust Code (UTC).
2. The computation of trustee commissions.
3. A trustee's power to appoint under a special needs trust as to quality of life or professional healthcare advisor.
4. The need for court approval to move assets out of state, especially with respect to intangible assets that exist only in cyberspace.
5. The temporary assignment of Surrogate' Court judges outside New York City to other Surrogate's Courts outside New York City.
6. Creation of a statutory living will.
7. 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.

8. Extension of the time frame for exercising the right of election.
9. Voluntary administration of small estates by designees or personal representatives of distributees.
10. Protecting the elderly from the undue influence of unscrupulous persons who have insinuated themselves into relationships of a confidential nature.
11. Fiduciaries who become cognitively impaired.
12. Protection of beneficiaries of bank-run mutual funds, via periodic accountings and other possible procedures.
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.
20. The use of e-filing in Surrogate's Court and related issues.
21. An estate fiduciary's access to the decedent's digital assets.
22. Guardianship of people with intellectual and developmental disabilities.
23. Postmortem protection for the right of publicity.

Respectfully submitted,

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