Report of the Surrogate's Court Advisory Committee

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

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TABLE OF CONTENTS

I. Introduction

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

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

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Surrogate's Court Advisory Committee
Office of Court Administration
25 Beaver Street, Suite 1170
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II. Legislation

A. Previously Endorsed Measures

1. Inheritance by a Non-Marital Child (EPTL 4-1.2(a))

The Committee recommends this measure to amend EPTL 4-1.2(a) to clarify the way a non-marital child can establish status to inherit from his or her father. The measure would resolve a split in the appellate courts, which was remedied, in part, by a recent decision, *Matter of Poldrugovaz* (50 AD3d 117 [2d Dept 2008]), and would also settle decisional law by establishing two different methods of proof, both using the same clear and convincing evidence standard.

Under section 4-1.2(a)(2) a non-marital child may inherit from his or her father (or the father's side of the family) only if paternity is established in one of the following four ways: i) an order of filiation (clause (A)); ii) an acknowledgment signed by the father and filed with the putative father registry (clause (B)); iii) by clear and convincing evidence and the father has openly and notoriously acknowledged the child as his own (clause (C)); or iv) a blood genetic marker test, which had been administered to the father, together with other evidence (clause (D)). The law has been amended over the years to parallel society's acceptance of the inheritance rights of non-marital children and to reflect recent advancements in science whereby paternity may be established by genetic marker testing.

Since 1993, use of genetic marker tests (DNA) to establish paternity has been discussed in many decisions. The issue initially involved the restriction contained in clause (D) that such a blood test had to be performed during the father's lifetime. In the leading case, *Matter of Janis* (157 Misc 2d 999 [NY Co. 1993], *aff'd* 210 AD2d 620 [1st Dept 1994]), the court analyzed the history of section 4-1.2(a)(2)(D) and held that a blood genetic marker test (DNA) was admissible only if it were performed before death (*see also Matter of Sekanic*, 229 AD2d 76 [3rd Dept 1997]; *Matter of DeLuca*, NYLJ, January 15, 1998, at 37, col 2; *Matter of Johnson*, NYLJ, October 15, 1997, at 37, col 2). After *Janis*, however, two courts extended use of DNA testing to the father's relatives where such persons sought, or contested, a determination of paternity (*Matter of Sandler*, 160 Misc 2d 955 [NY Co. 1994] and *Matter of Nasert*, 192 Misc 2d 682 [Richmond Co. 2002]).

The court in *Janis* observed "that, notwithstanding this interpretation of 'clause D', post-death genetic marker tests might be admissible under clause (C) of EPTL 4-1.2(a)(2), which allows paternity to be 'established by clear and convincing evidence ...'." The prescience of the *Janis* court became apparent in several subsequent decisions where genetic marker testing (of all types of samples from a decedent's body) was authorized under clause (C) (*see Matter of Morningstar, infra; Matter of Poldrugovaz*, NYLJ, 10/27/05, at 31, col 3 [Suffolk Co. 2005]; *Matter of Santos*, 196 Misc 2d 972 [Kings Co. 2003]; *Matter of Bonanno*, 192 Misc 2d 86 [NY Co. 2002] [Petitioner sought to disprove paternity] *Matter of Thayer*, 1 Misc 3d 791 [Madison Co. 2003] [where the father died before the child was born]).

Many of the courts permitting a post-death genetic marker test to be admitted as evidence under clause (C) concluded that the scientific reliability of DNA testing met the standard for clear and convincing proof of paternity. Furthermore, *Santos* suggested that where the results of the DNA test are conclusive (one way or the other) no other evidence should be required.

As noted, EPTL 4-1.2(a)(2)(C) had been construed as having a two-prong test, namely, "clear and convincing evidence of paternity" and "open and notorious acknowledgment by the father." But whether this latter prong had to be established before a court could admit the results of a genetic marker test initially resulted in a split between two appellate departments. The Fourth Department, in *Matter of Morningstar* (17 AD3d 1060 [4th Dept 2005]), held that a party seeking to prove paternity under clause (C) based upon a genetic marker test need not first establish "open and notorious acknowledgment" before seeking to admit such proof into evidence. The Second Department in *Matter of Davis* (27 AD3d 124 [2d Dept 2006]) held that proof of the father's "open and notorious acknowledgment" of the child must be shown before another party could be directed to submit to genetic marker testing.

Recently, the Second Department, in *Matter of Poldrugovaz*, departed from *Davis,* holding that a court may use the results of a posthumous genetic marker test under clause (C) provided there is some evidence that decedent acknowledged the non-marital child as his own.

Poldrugovaz summarized the development of the law concerning the rights of non-marital children as intended to "enhance the ability of non-marital children to assert their rights of inheritance" [50 AD3d at 123-124]. Where evidence of paternity by a genetic marker test is clear and convincing, the court questioned the necessity of establishing open and notorious acknowledgment by the father. The court then resolved the question as to the degree of proof needed to obtain authorization for genetic marker testing by requiring some proof of open and notorious acknowledgment by the father.

We are now left with the possibility that *Poldrugovaz* may not be followed in other departments. Accordingly, this measure would facilitate the use of genetic marker testing as a means of proving paternity and eliminate any further inconsistency in the application of the two standards under clause (C). It is noted that, although in most cases the results of a genetic marker test will be dispositive of the non-marital child's status, it is conceivable that a court may determine for policy or equitable reasons that a father's open and notorious acknowledgment prevails.

Accordingly, this measure merges clauses (C) and (D) of section 4-1.2(a)(2) into a single clause (C) with respect to use of a genetic marker test and recognizes two methods by which a person may establish paternity: the results of a genetic marker test, or by open and notorious acknowledgment of the father during his lifetime. Thus, proof may be in the form of a genetic marker test administered to the father (or close relative at any time), or a party may demonstrate that the father openly and notoriously acknowledged the child as his own. The burden of proof for either method is by clear and convincing evidence.

Clause (D) no longer serves a purpose and should be repealed. Additionally, this measure would amend subdivision (b) to delete the word "legitimate" and substitute "marital child," and to provide that a paternal relative may seek to share in an estate where proof of status meets one of the three requirements provided under 4-1.2(a)(2).

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to establishing inheritance by a non-marital child

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

Section 1. Clause (C) of subparagraph (2) of paragraph (a) of section 4-1.2 of the estates, powers and trusts law is amended to read as follows:

(C) paternity has been established by clear and convincing evidence [and], which may include, but is not limited to: (i) evidence derived from a genetic marker test, or (ii) evidence that the father [of the child has] openly and notoriously acknowledged the child as his own[; or].

§2. Clause (D) of subparagraph (2) of paragraph (a) of section 4-1.2 of the estates, powers and trusts law is REPEALED.

§3. Paragraph (b) of section 4-1.2 of the estates, powers and trusts law is amended to read as follows:

(b) If a non-marital child dies, his or her surviving spouse, issue, mother, maternal kindred, father and paternal kindred inherit and are entitled to letters of administration as if the decedent [were legitimate] was a marital child, provided that the father and paternal kindred may inherit or obtain such letters only if the paternity of the non-marital child has been established pursuant to any of the provisions of [clause (A) of] subparagraph (2) of paragraph (a) [or the

father has signed an instrument acknowledging paternity and filed the same in accordance with the provisions of clause (B) of subparagraph (2) of paragraph (a) or paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own].

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

2. Payment of Attorneys Fees in Wrongful Death Actions (EPTL 5-4.6(a)(2))

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

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

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

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

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

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

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

the trial court stating that jurisdiction has been obtained over all necessary parties in the surrogate's court proceeding.

Proposal:

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

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

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

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

§2. This act shall take effect immediately.

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

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

EPTL 3-3.7, the "pour-over" statute, permits a testator to dispose of or appoint by will all or part of his or her estate ("pour-over assets") to the trustee of an inter vivos trust that is amendable or revocable or both ("receptacle trust"). However, paragraph (e) provides that the revocation or termination of the receptacle trust before the testator's death will cause the disposition or appointment "to fail, unless the testator has made an alternative disposition." The proposed measure would amend paragraph (e) of EPTL 3-3.7 to allow the testator, by an express direction, to create a testamentary trust to hold or dispose of the pour-over assets by simply incorporating by reference the terms of the revoked or terminated trust.

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

Pour-over wills customarily provide for the disposition of the testator's entire probate estate or residuary estate to the trustee of an inter vivos trust created by himself or herself or by another person. *See e.g. Matter of Sackler*, 145 Misc. 2d 950 [Nassau Co. 1989]; *Matter of Pozarny*, 177 Misc. 2d 752 [Kings Co. 2002]. For this reason, if intestacy is to be avoided, it is imperative that the testator provide for an alternative disposition in the event that the pour-over is found invalid.

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

To cover such eventualities, attorneys often provide for an alternative testamentary trust with dispositions similar to those of the revoked inter vivos trust. However, without the benefit of the proposed amendment, it is necessary to recite in the will all of the dispositive and other essential terms of the revoked trust, in order to foreclose an argument by intestate takers or contingent beneficiaries that the provisions of the revoked trust cannot be "incorporated by

reference." The rule prohibiting incorporations by reference was stated succinctly in *Booth v. The Baptist Church of Christ* (126 NY 215, 247-248 [1891]): "It is unquestionably the law of this state that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument."

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

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

However, whether the terms of a trust that has been terminated or revoked before the death of the testator can be incorporated by reference to create a testamentary trust may raise issues of first impression. For this reason, without the enactment of the proposed amendment of paragraph (e), the better practice would require repetition of all of the terms of the terminated or revoked trust in the text of the will. The proposed amendment to paragraph (e) would enable the testator to create a testamentary trust as an alternate disposition without undue repetition and prolixity.

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

Proposal:

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

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[1] Moreover, EPTL 3-3.7(d) validated dispositions or appointments to the trustee of an inter vivos trust made by testators who died prior to the effective date of this section by simply providing that such disposition or appointment "shall be construed to create a testamentary trust under and in accordance with the terms of the trust instrument which the testator originally intended should embrace the property disposed of or appointed, as such terms appear in such trust instrument at the date of the testator's death." In other words, in the case of testators who died prior to the effective date of the statute, EPTL 3-3.7(d) created a testamentary trust by incorporating the terms of the intended receptacle trust.

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

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

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

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

4. Renunciation of Specific Compensation in Favor of Statutory Commissions (SCPA 2307(5)(b); 2308(11); 2309(10))

The Committee recommends this measure to prevent a fiduciary from avoiding a will's directive that he or she receive specific compensation in lieu of statutory commissions. The measure would require that where a will provides for specific compensation, the fiduciary who elects to serve is not entitled to any other allowances for his or her services as fiduciary.

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

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

On the other hand, with respect to individual trustees (both testamentary trustees and trustees of lifetime trusts) sections 2308 and 2309 both provide that "Where the will provides a specific compensation to a trustee he is not entitled to any other allowances for his services." Similarly, with respect to corporate trustees, section 2312 provides that "If the will or lifetime trust instrument makes provisions for specific rates or amounts of commissions (other than a general reference to commissions allowed by law or words of like import) for a corporate trustee, or, if a corporate trustee has agreed to accept specific rates or amounts of commissions, a corporate trustee shall be entitled to be compensated in accordance with such provisions or agreement, as the case may be."

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

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

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

"... [U]nlike SCPA §2307, SCPA §2309 does not provide for the renunciation of a specific bequest in favor of the statutory commission where trustees are concerned.

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

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

"The language employed in 1948 was repeated in 1956 in both SCA §285-a (11), pertinent to trustees' commissions under wills of persons dying, or under lifetime trusts created, on or before August 31, 1956, and in §SCA 285-b (10), added by L. 1956, c. 931, and pertinent to trustees' commissions under wills of persons dying, etc., after August 31, 1956. Finally, the same language was repeated in 1966 when the comparable sections of the current statute, SCPA §§2308 and 2309, were enacted (L. 1966, c. 953, effective September 1, 1967). Thus, in its present form, a trustee nominated after August 31, 1956, as here, must accept the specific compensation provided by the will or renounce his appointment entirely (SCPA §2309 (10))."

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

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

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

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

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

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

This measure also recognizes that since a fiduciary may renounce (in whole or in part) the "specific compensation" provided for in a will or trust, the fiduciary may effectively (although not formally) take the *lesser* of the specific compensation or the statutory commissions where the statutory commissions are less than the specific compensation.

Proposal:

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

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

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

(b) $100,000 or more but less than $300,000 each fiduciary is entitled to the full compensation for receiving and paying out principal and income allowed herein to a sole fiduciary unless there are more than 2 fiduciaries in which case the full compensation for receiving and paying out principal and income allowed herein to 2 fiduciaries must be apportioned among them according to the services rendered by them respectively, unless the fiduciaries shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. Where the will provides a specific compensation to a fiduciary other than a trustee, he or she is not entitled to any other allowance for his or her services [unless by an instrument filed with the court within 4 months from the date of his letters he renounces the specific compensation]. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters of administration are issued to a person who has previously been appointed a temporary administrator, he or she is entitled to a total compensation equal to the compensation allowed for the full administration of the estate by a fiduciary acting in a single capacity only. Such total compensation shall be payable in such proportions and upon such

accounting as shall be fixed by the court settling the account of the person holding successive or different letters but no paying out commissions shall be allowed except upon such sums as shall actually have been paid out at the time of the respective decrees for debts, expenses of administration or to beneficiaries.

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

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

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

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

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

5. 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.

6. Harmonizing Inconsistent Distributions (EPTL 3-3.3)

The Committee recommends this measure to eliminate the conflict between EPTL 3-3.3 and EPTL 2-1.2 with respect to testamentary class gifts to the testator's issue, brothers, or sisters, and to harmonize the treatment of such gifts with that which would occur in intestacy under EPTL 4-1.1. This measure would eliminate the provision of EPTL 3-3.3 which treats testamentary class gifts to the testator's issue, brothers, or sisters as though such gifts were made to specifically named individuals. Instead, such gifts would be subject to the principle of "by representation" found in EPTL 1-2.16, with the result that each surviving member of the class would receive an equal share with other surviving members of the same generation, *i.e.*, the same result which occurs in intestacy under EPTL 4-1.1.

Under provisions of EPTL 3-3.3 and 2-1.2, a conflict can arise when a will disposes of property to the testator's "issue" or to the testator's "brothers," or "sisters," or "brothers and sisters."

Suppose, for example, a testator's will disposed of his or her estate to his or her "issue," and the testator was survived by one child, A, by a grandchild, GC1 (the child of the testator's predeceased child, B), and by grandchildren, GC2, GC3, and GC4 (the children of the testator's predeceased child, C). In such a case, under EPTL 3-3.3, A would take 1/3, GC1 would take 1/3, and GC2, GC3, and GC4 would each take 1/9. However, under EPTL 2-1.2, A would take 1/3, and all the grandchildren would share equally, *i.e.*, GC1, GC2, GC3 and GC4 would each take 1/6. This result under EPTL 2-1.2 is also the result that would occur under EPTL 4-1.1, if such testator had died intestate.

Similar disparities between the result under EPTL 3-3.3, and that under EPTL 2-1.2 and 4-1.1, can arise where a decedent is survived only by grandchildren. If, in the above hypothetical, the testator were survived only by GC1, GC2, GC3, and GC4, the result under EPTL 3-3.3 would be 1/2 to GC1 (as the only child of predeceased B), and 1/6 to each of GC2, GC3, and GC4, whereas under EPTL 2-1.2 (or under 4-1.1, if the testator had died intestate) GC1, GC2, GC3, and GC4 would each take 1/4.

The same disparities can occur when the testamentary disposition is to the class of brothers or sisters, rather than to issue.

These disparities are not justified by any deliberate legislative policy. To the contrary, since all three statutory provisions (EPTL 2-1.2, 3-3.3, 4-1.1) are "default" statutes, *i.e.*, capable of being overridden by the testator's will, the results should be uniform since, as stated by Surrogate Holzman in *Estate of Lambiase*, NYLJ July 28, 1993, p. 23 (Bronx County), in enacting such statutes "the Legislature steps in and provides for a disposition based upon the presumption that this is the distribution most decedents would want under the circumstances."

This measure would amend EPTL 3-3.3 so that the results of its application are the same as they would be under 2-1.2 (or 4-1.1 in case of intestacy). The effect of the measure is to

harmonize the results through the use of the EPTL 1-2.16 principle of "by representation," a principle which currently is present in all three statutory provisions and which reflects the legislative determination that most decedents prefer that relatives of the same generation share equally.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to class distributions to issue or brothers or sisters of testator

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

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

(a) Unless the will whenever executed provides otherwise:

(1) Instruments executed prior to September first, nineteen hundred ninety-two. Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, per stirpes. The provisions of this paragraph shall apply to a disposition made to issue, brothers or sisters as a class, and such issue, brothers or sisters shall take per stirpes.

(2) Instruments executed on or after September first, nineteen hundred ninety-two. Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, by representation. The provisions of this paragraph shall apply to a disposition made to issue, brothers or sisters as a class, and such issue, brothers or sisters shall take by representation.

[(3) The provisions of subparagraphs (1) and (2) apply to a disposition made to issue, brothers or sisters as a class as if the disposition were made to the beneficiaries by their individual names, except that no benefit shall be conferred hereunder upon the surviving issue of an ancestor who died before the execution of the will in which the disposition to the class was made.]

§2. This act shall take effect immediately.

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

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

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

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

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

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

Proposal:

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

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

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

§4-1.7. Disqualification of tenant by the entirety in certain instances. Notwithstanding any other provision of law to the contrary, a tenant by the entirety in real property, or in a cooperative apartment as defined in paragraph (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.

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

The Committee recommends that section 5-1.2(a) of the Estates, Powers and Trusts Law be amended to disqualify as surviving spouses persons who for a prolonged period prior to a decedent's death were married to the decedent in name only.

This measure would amend section 5-1.2(a) of the Estates, Powers and Trusts Law by adding a subparagraph 7 to provide for the disqualification of a person as the decedent's surviving spouse if the decedent and the survivor had lived separate and apart for a period of at least one year prior to the decedent's death and the total time that they lived separate and apart exceeded the total time that they cohabited as spouses. Disqualification under such circumstances will not occur, however, if the survivor can show any one of the following: the reason that the couple lived separate and apart was due to an illness or injury which required that one or both spouses be cared for in a facility; that the survivor departed from the marital abode because the decedent had abused the survivor or another member of the marital household; or that, as a result of voluntary, contractual or court-ordered support, an economic relationship continued between the spouses notwithstanding their separation. The survivor will be allowed to testify about communications or transactions with the decedent even though such testimony would otherwise be barred by CPLR 4519 because the survivor might be the only person who can establish that the separation was caused by abuse or that the decedent voluntarily provided support.

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

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

The public policy supporting the amendment is that, if the surviving spouse was willing to live for a prolonged period of time prior to the decedent's death without having had anything whatsoever to do with the decedent, the survivor should also be willing to do without any rights to the decedent's property after the decedent's death. The disqualification only applies to spouses who voluntarily had nothing to do with the decedent for a prolonged period of time. There is no

disqualification if the separation was caused by abuse, or the need of at least one of the spouses to be cared for in a facility due to injury or illness. There is also no disqualification where, after the separation, there was voluntary, contractual or court-ordered support. This measure will result in reduced litigation because in numerous cases where there is presently a question of whether an abandonment can be established under EPTL 5-1.2(a)(5), it will now be clear that the spouse is disqualified under the new subparagraph 7 of section 5-1.2(a).

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

Proposal:

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

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

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

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

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

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

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

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

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

Recent advances in medical technology, however, have expanded the methods and opportunities for married infertile couples to have children by new techniques of assisted reproduction, including in vitro fertilization (IVF) and gamete intrafallopian transfer (GIFT) that may involve donated gametes (sperm, eggs) or embryos (fertilized eggs). Use of donated semen and eggs could raise issues of the rights, duties and responsibilities of the donor (biological parent) under our present laws.[2] Moreover, cryopreservation allows frozen gametes or frozen embryos to be implanted in a married woman for this purpose even after the death of the donors.[3] Accordingly, it is imperative that DRL 73 include children born by any method of assisted reproduction now in use or developed in the future, so that these children will be deemed the legitimate, natural children of the wife and her consenting husband, regardless of whether their own or donated gametes or embryos are used.

After an intensive, comprehensive examination of assisted reproduction, the New York State Task Force on Life and the Law, appointed by executive order in 1985, issued its report, Assisted Reproductive Technologies, Analysis and Recommendations for Public Policy in April 1998,[4] recommending, inter alia, at p. xxvi that:

> "New York's Domestic Relations Law should be amended to provide that when a married woman undergoes any assisted

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

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

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

> reproductive procedure using donor semen, the woman's husband is the legal father of any child who results, provided the procedure was performed by a licensed physician with the husband's consent.
>
> * * *
>
> "New York law should provide that a woman who gives birth to a child is the child's legal mother, even if the child was not conceived with the woman's egg."

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

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

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

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

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

Proposal:

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

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

Section 1. Section 73 of the domestic relations law is amended to read as follows:

§73. Legitimacy of children born by [artificial insemination] assisted reproduction. 1. Any child born to a married woman by means of artificial insemination, in vitro fertilization or any other technique of assisted reproduction, whether with the genetic material of the woman and her husband or with genetic material donated by others, performed in accordance with the laws of the jurisdiction where such assisted reproduction occurs by persons duly authorized to practice medicine or by any other person or persons under the supervision of a person duly authorized to practice medicine, and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes. Such child and his or her issue shall be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for all purposes, including without limitation the right to receive real and personal property by intestacy and class designations in wills or other instruments, and such child and his or her issue shall have no rights to receive real and personal property from and through the donor or donors of genetic material and their respective kindred by any means, including without limitation intestacy and class designations in wills or other instruments.

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

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

4. The [aforesaid] written consent required by subdivision one shall be executed and acknowledged before or at any time after the birth of the child by both the husband and the wife and the physician who performs the technique (or if the physician has died or is unavailable, any person who assisted the physician) or the person who performed the technique under the supervision of the physician, who shall certify in writing that he or she had rendered the service at the time, date and place set forth in the certification.

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

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

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

Proposal:

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

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

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

4. Notwithstanding subdivisions one and two of this section, if a parent having custody of a child consents that the child be adopted by an unrelated adult who resides with such parent, after the making of an order of adoption the consenting parent shall retain all parental duties and responsibilities and all rights with respect to such child, and neither such consent nor the order of adoption shall affect:

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

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

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

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

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

III. Future Matters

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

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

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

2. EPTL 11-1.7 Exoneration Clauses

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

3. Uniform Rule 207.13 Guardian Ad Litem Expenses

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

4. SCPA 209(8) Failure to Prosecute

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

5. Uniform Rule 207.29 Attorney's Authority to Settle

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

6. SCPA 2308, 2309 and 2312 Charitable Trust Commissions

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

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

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

8. SCPA 2313 Multiple Commissions

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

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

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

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

1. Enforcement of in terrorem clauses based on pre-objection conduct.

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

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

4. Creation of a statutory living will.

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

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

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

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

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

10. Fiduciaries who become cognitively impaired.
11. Protection of beneficiaries of bank-run mutual funds, via periodic accountings and other possible procedures.

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

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

14. Gift-giving powers of attorney.

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

16. The elimination of obsolete Uniform Rules.

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

18. Statutory rates of compensation for attorneys.

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

Respectfully submitted,

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