Report of the Surrogate's Court Advisory Committee

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

January 2014

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:

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

II. Legislation

A. New Measures

1. Inheritance by Children Conceived After the Death of a Genetic Parent (EPTL 4-1.3(New); 11-1.5(a), (b), (c) & (d))

This measure would amend the Estates, Powers and Trusts Law ("EPTL") to provide rules governing the status, for purposes of inheritance and participation in certain dispositions in instruments including wills and trusts, of children conceived and born after the death of one or both of the persons from whose sperm or ova they were created (defined under the measure as the child's "genetic parent"). So long as the requirements set forth in this measure are met, such children are distributees of their genetic parents and are included in dispositions to the children of the genetic parents made in instruments created by any person. The measure also makes changes in various provisions of the EPTL necessary to give effect to the rights of such children without creating undue complications in existing law.

Advances in medical technology make it possible for a child to be conceived after the death of one or both of the child's genetic parents (often referred to as posthumously-conceived children). The status of such children for purposes of inheritance and class gifts in wills and trusts is not clear under existing law. With one exception, all of the reported cases in the United States dealing with the inheritance or succession rights of such children have involved the question whether or not the children are the heirs of the parent who died before their conception. If the children can be heirs of their predeceased parents under state law, they are eligible for Social Security survivor benefits based on the earnings record of their deceased genetic parent. (*Astrue v. Capato*, __ U.S. __, 132 S.Ct. 2021, 182 L.Ed.2d 88 (2012)). There is no New York caselaw dealing with the question whether posthumously-conceived children are distributees of their deceased genetic parent, but because EPTL 4-1.1(c) states: "[d]istributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her

lifetime," it is highly unlikely that a New York court could find such children to be distributees of their deceased genetic parents, and the children would not eligible for Social Security survivor benefits.

The only reported case in the United States dealing with the rights of posthumously conceived children under a will or trust is a New York case, *Matter of Martin B.*, 17 Misc.3d 198, 841 N.Y.S.2d 207 (Sur. Ct. New York Co. 2007), where the Surrogate held that two children born to the widow of a son of the creator of the trusts and conceived from the son's stored sperm after the son's death were indeed their father's children and therefore his father's issue, making them beneficiaries of the trusts that were the subject of this construction proceeding. At the end of her opinion, Surrogate Roth wrote: "There is a need for comprehensive legislation to resolve the issues raised by advances in biotechnology." (*Id.* at 204, 841 N.Y.S.2d at 212). This measure answers that call and deals in a comprehensive way with the property rights of posthumously-conceived children by adding to the EPTL a new section 4-1.3 and amending existing section 11-1.5.

1. Statutory requirements for the posthumously conceived child to be a child of the genetic parent

The measure contains four requirements that must be met if what it calls a genetic child is to be child of the "genetic parent" for purposes of inheritance and gifts in wills and trusts. Proposed EPTL 4-1.3(b)(1) would require a writing (requirements for which are set out in paragraph (c)) in which the person storing sperm or ova, the "genetic parent," expressly consents to the use of that sperm or ova, the "genetic material," for posthumous reproduction and authorizes a person to make decisions about the use of that genetic material after the death of the genetic parent. Proposed EPTL 4-1.3(b)(2) would require the person authorized in the writing to give notice within seven months of the genetic parent's death to the personal representative of the genetic parent's estate of the existence of the stored genetic material. If no personal representative has received letters within four months of the genetic parent's death, the notice must be given to a distributee of the genetic parent within seven months of the genetic parent's

death. In addition, under proposed EPTL 4-1.3(b)(3) the authorized person must record the writing in the office of the Surrogate granting letters on the genetic parent's estate or, if letters have not issued, the writing must be recorded in the office of the Surrogate having jurisdiction to do so (the language in proposed EPTL 4-1.3(b)(3) is modeled on EPTL 13-2.3, requiring the recording of a power of attorney related to a decedent's estate). Finally, proposed EPTL 4-1.3(b)(4) requires that the genetic child be *in utero* within twenty-four months or born within thirty-three months of the genetic parent's death.

2. Result of fulfilling the requirements

A. With respect to the estate of and instruments created by the genetic parent.

As noted above, EPTL 4-1.1(c) requires that a distributee of a decedent be conceived during the decedent's lifetime. In addition, EPTL 2-1.3(a)(2) provides that, unless the creator of an instrument "expresses a contrary intention," a disposition to children or to any class that is defined by parent-child relationships (such as issue, descendants, heirs and terms "of like import"), whether that relationship involves the creator or another, includes children "conceived before but born alive after such disposition becomes effective."

If the four requirements of proposed EPTL 4-1.3(b) are satisfied, the same provision states that the genetic child is a child of the genetic parent, a distributee of the genetic parent and is included in any disposition to a class in an instrument created by the genetic parent notwithstanding EPTL 4-1.1(c) and 2-1.3(a)(2). Because the genetic child can be a distributee of the genetic parent, he or she will be entitled to Social Security survivor benefits based on the genetic parent's earning record. The child also will be included in any gift in an instrument created by the genetic parent to the genetic parent's children, issue, descendants, or other classes described by similar terms.

The provision of EPTL 5-3.2(b) limiting the meaning of "after-born child" to a child born during the testator's lifetime or in gestation at the testator's death is unchanged by proposed

EPTL 4-1.3. If the genetic parent's will makes a disposition to the genetic parent's children or issue, the genetic child is included in the disposition but, if the will makes no such disposition, the genetic child is not entitled to the benefits of EPTL 5-3.2 and administration of the genetic parent's testate estate will not be delayed waiting for the possible birth of a genetic child. In every reported case involving genetic children, the children have been born to the widow of the genetic parent. In such cases, if the genetic parent died testate, it is highly likely that the primary if not sole beneficiary of the will is the surviving spouse who also will be the other parent of the genetic child and it is not necessary to protect the child by guaranteeing the child an intestate portion of the genetic parent's probate estate.

B. With respect to the estates of and instruments created by persons other than the genetic parent:

i. In intestacy.

Proposed ETPL 4-1.3(b) provides that, if the requirements of the paragraph are met, the genetic child is a child of the genetic parent. This provision means that the genetic child will inherit through the genetic parent so long as the genetic child is conceived during the lifetime of the intestate decedent, is born alive and survives 120 hours (EPTL 2-1.6).

ii. In instruments.

Proposed EPTL 4-1.3(f) parallels EPTL 2-1.3(c), which deals with rights of nonmarital children under the instruments of persons other than the parents of the children. It provides that if the genetic child is entitled to inherit from the genetic parent under proposed EPTL 4-1.3, the genetic child is a child of the genetic parent for purposes of gifts in instruments to children, issue, descendants and similar classes in instruments, whether of the creator or of other persons. Because this is a new provision, it is applicable only to wills of persons dying on or after September 1, 2013 and to lifetime instruments executed before that date but which on that date can be revoked or amended by the creator and to all lifetime instruments executed on or after

that date.

C. Examples

The following examples illustrate the workings of proposed EPTL 4-1.3(b) and (f). They all start with the paradigmatic situation — husband deposits sperm for use by wife should he not survive a life threatening illness or, where he survives treatment, should he thereupon become totally infertile. All the examples assume that the requirements of proposed EPTL 4-1.3(b) have been fulfilled, wife gives birth to a child conceived with husband's sperm within the required time period, and that child is therefore the child of husband.

Example 1: Husband dies intestate. Child is a distributee of husband who is the child's father because proposed EPTL 4-1.3(b) overrides EPTL 4-1.1(c).

Example 2: Husband dies testate. The will is duly admitted to probate and makes a disposition to "my issue" or "my children." Child is a beneficiary of the disposition because proposed EPTL 4-1.3(b) also overrides EPTL 2-1.3(a)(2).

Example 3: Shortly after husband's death, husband's mother (mother) dies intestate survived by her spouse and issue. Child is a distributee of husband's mother *only* if child is living at mother's death (or is *en ventre sa mere* and is then born alive and survives for 120 hours) because under EPTL 4-1.1(c) all of mother's distributees must at least be conceived before her death.

Example 4: Shortly after husband's death, mother dies testate and her will, duly admitted to probate, includes a general disposition of $10,000 "to each of my grandchildren living at my death." Child participates in the gift *only* if child is living at mother's death (or is *en ventre sa mere* and is then born alive and survives for 120 hours).

Example 5: At mother's death, the testamentary QTIP trust created by husband's father (father) terminates and the trust terms direct the trustee to distribute the trust property to father's "issue, then living, free of trust." Child is a remainder beneficiary of the trust *only* if child is living at mother's death (or is *en ventre sa mere* and is then born alive and survives for 120 hours) because under EPTL 2-1.3 a member of the class of "issue" must be alive when the disposition becomes effective or at least have been conceived before and born alive after the disposition becomes effective.

Example 6: Husband is the creator a revocable trust which on his death divides into two trusts: Trust 1, to pay income to wife for life and, at her death, to terminate with the trust property to be distributed free of trust to husband's issue by representation; and Trust 2, to pay income to husband's issue until the youngest is 30 years of age at which time the trust terminates and the trust property is to be distributed to husband's issue by representation. Child is a contingent remainder beneficiary of Trust 1, and a present beneficiary and contingent remainder beneficiary of Trust 2. Child is a child of husband under proposed EPTL 4-1.3(b), which overrides the provisions of EPTL 2-1.3(a)(2) which would otherwise prevent child from being a beneficiary because child was conceived after the dispositions became effective at husband's death and thus would not be a child of husband under that provision.

Example 7: In any of the above examples, if the genetic child had been *in utero* or born outside of the time limit in proposed EPTL 4-1.3, the genetic child would not be a distributee of the genetic parent nor would he or she be included in any of the classes involved in the examples, even if conceived or born before the class closed.[1]

3. The required writing

Proposed EPTL 4-1.3(c) sets forth the requirements for the writing specified in proposed

[1]Under proposed ETPL 4-1.3, neither of the posthumously conceived children whose status as beneficiaries of trusts created by their genetic father's father was confirmed in *Matter of Martin B*, 17 Misc.3d 198, 841 N.Y.S.2d 207 (Sur. Ct. New York Co. 2007) would be children of their genetic father or issue of his father because they were conceived and born well outside of the applicable time limits.

4-1.3(b)(1). The writing must be signed by the genetic parent in the presence of two witnesses at least eighteen years of age, neither of whom is a person authorized to make decisions about the use of the genetic parent's genetic material. The instrument must be signed and witnessed not more than seven years before the genetic parent's death. The instrument can be revoked only by a written instrument signed by the genetic parent and executed in the same manner as the instrument it revokes. It may not be altered or revoked by the will of the genetic parent. It may authorize an alternate to make decisions if the first person designated dies before the genetic parent or is unable to exercise the authority granted under the instrument.

Proposed EPTL 4-1.3(c)(5) sets forth a model instrument.

4. Other provisions

Proposed EPTL 4-1.3(d) revokes the authority given under the written instrument to the genetic parent's spouse should the marriage end in divorce, annulment, or a judgment or order of legal separation is entered against the spouse. (This is the same standard applicable to revocation of dispositions to and beneficiary designations of an ex-spouse under EPTL 5-1.4(f)(2).)

In order to prevent undue difficulties in opening administration of the genetic parent's estate, proposed EPTL 4-1.3(e) modifies SCPA 1003 and 1403 by requiring that process shall not issue to a genetic child unless the child is in being at the time process issues. In other words, the possibility of the existence of a genetic child of a decedent will not delay the issuing of letters to the decedent's personal representative.

Proposed EPTL 4-1.3(g) provides that a genetic child entitled to inherit from a genetic parent under proposed EPTL 4-1.3(b) is included in the terms "issue," "surviving issue" and "issue surviving" as used in EPTL 3-3.3, the anti-lapse statute. A genetic child would therefore take a share of a lapsed gift on the same basis as the birth, adopted, or nonmarital issue of the person to whom a testamentary disposition is made but who dies before the testator and to which

EPTL 3-3.3 applies.

Proposed EPTL 4-1.3(h) removes the possibility of the birth of a genetic child from determinations of validity of a disposition under the rule against perpetuities (EPTL 9-1.1). The exclusion of genetic children from such determinations mirrors the exclusion of the possibility of adoption in EPTL 9-1.3(e)(3).

Genetic material cannot be the subject of a disposition in any instrument. In *Kass v. Kass*, 91 N.Y.2d 554, 696 N.E.2d 174, 673 N.Y.S.2d 350 (1998), a unanimous Court of Appeals held that the disposition of pre-embryos created by a husband and wife on the couple's divorce was governed by the contracts between the fertility clinic and the couple. The court put great weight on the freely made choices of the parties and clearly did not equate the pre-embryos with "property" subject to disposition on divorce. In the case of preserved genetic material, proposed EPTL 4-1.3 provides a comprehensive scheme under which the depositor of the material can express his or her desires with regard to the use of such material for posthumous reproduction. In light of *Kass*, it is reasonable that proposed EPTL 4-1.3 and the agreement freely made between the depositor and the depository govern the use of the genetic material, to the exclusion of other agreements including the depositor's will.

Because distribution of the genetic parent's estate may be delayed by the possibility of the birth of a genetic child, this measure amends EPTL 11-1.5 to deal with that possibility. Paragraph (a) states that the personal representative need not pay a testamentary disposition or distributive share before completion of the publication of notice to creditors or if no notice is published, before the expiration of seven months from the time letters were granted. The measure amends the statute to add to these two events the birth of a genetic child of the decedent who is entitled to inherit under proposed EPTL 4-1.3, so long as notice of the availability of the decedent's genetic material has been given under the statute. Paragraph (b) is amended to allow the personal representative to require a bond whenever the will directs a disposition to be paid before the birth of a child entitled to inherit under proposed EPTL 4-1.3 and paragraph (c) is amended to allow the personal representative to refuse a demand to pay before the birth of a

child entitled to inherit under proposed EPTL 4-1.3. Finally, paragraph (d) directs that interest be paid at the statutory 6% rate commencing at the later of the expiration of seven months from the grant of letters or the birth of a child entitled to inherit under proposed EPTL 4-1.3. Because the rule of paragraph (a), which as amended allows the personal representative to delay distribution until the birth of the posthumously conceived child of the decedent is subject to "court decree or order," the rule can be modified by the court under appropriate circumstances.

This measure would take effect immediately and apply to the estates of decedents dying on or after that date, provided, however, that the provisions of paragraph (f) of proposed EPTL 4-1.3, as added by section 1 of the measure, would apply to the wills of persons dying on or after September 1, 2013, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to rights of a child conceived after the death of a genetic parent of such child

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 4-1.3 to read as follows:

4-1.3 Inheritance by children conceived after the death of a genetic parent

(a) When used in this article, unless the context or subject matter manifestly requires a different interpretation:

(1) "Genetic parent" shall mean a man who provides sperm or a woman who provides ova used to conceive a child after the death of the man or woman.

(2) "Genetic material" shall mean sperm or ova provided by a genetic parent.

(3) "Genetic child" shall mean a child of the sperm or ova provided by a genetic parent, but only if and when such child is born.

(b) For purposes of this article, a genetic child is the child of his or her genetic parent or parents and, notwithstanding paragraph (c) of section 4-1.1 of this part, is a distributee of his or her genetic parent or parents and, notwithstanding subparagraph (2) of paragraph (a) of section 2-1.3 of this chapter, is included in any disposition of property to persons described in any instrument of which a genetic parent of the genetic child was the creator as the issue, children, descendants, heirs, heirs at law, next of kin, distributes (or by any term of like import) of the creator if it is established that:

(1) the genetic parent in a written instrument executed pursuant to the provisions of this section not more than seven years before the death of the genetic parent:

A. expressly consented to the use of his or her genetic material to posthumously conceive his or her genetic child, and

B. authorized a person to make decisions about the use of the genetic parent's genetic material after the death of the genetic parent;

(2) the person authorized in the written instrument to make decisions about the use of the genetic parent's genetic material gave written notice, by certified mail, return receipt requested, or by personal delivery, that the genetic parent's genetic material was available for the purpose of conceiving a genetic child of the genetic parent, and such written notice was given;

A. within seven months from the date of the issuance of letters testamentary or of administration on the estate of the genetic parent, as the case may be, to the person to whom such letters have issued, or, if no letters have been issued within four months of the death of the genetic parent, and

B. within seven months of the death of the genetic parent to a distributee of the genetic parent;

(3) the person authorized in the written instrument to make decisions about the use of the genetic parent's genetic material recorded the written instrument within seven months of the genetic parent's death in the office of the surrogate granting letters on the genetic parent's estate, or, if no such letters have been granted, in the office of the surrogate having jurisdiction to grant them; and

(4) the genetic child was in utero no later than twenty-four months after the genetic parent's death or born no later than thirty-three months after the genetic parent's death.

(c) The written instrument referred to in subparagraph (1) of paragraph (b) of this section:

(1) must be signed by the genetic parent in the presence of two witnesses who also sign the instrument both of whom are at least eighteen years of age and neither of whom is a person authorized under the instrument to make decisions about the use of the genetic parent's genetic material;

(2) may be revoked only by a written instrument signed by the genetic parent and executed in the same manner as the instrument it revokes;

(3) may not be altered or revoked by a provision in the will of the genetic parent;

(4) may authorize an alternate to make decisions about the use of the genetic parent's genetic material if the first person so designated dies before the genetic parent or is unable to exercise the authority granted; and

(5) may be substantially in the following form and must be signed and dated by the genetic parent and properly witnessed:

I, _____,

(Your name and address)

consent to the use of my [sperm *or* ova] (referred to below as my "genetic material") to conceive a child or children of mine after my death, and I authorize

_____

(Name and address of person)

to decide whether and how my genetic material is to be used to conceive a child or children of mine after my death.

In the event that the person authorized above dies before me or is unable to exercise the authority granted I designate

_____

(Name and address of person)

to decide whether and how my genetic material is to be used to conceive a child or children of mine after my death.

I understand that, unless I revoke this consent and authorization in a written document signed by me in the presence of two witnesses who also sign the document, this consent and authorization will remain in effect for seven years from this day and that I cannot revoke or modify this consent and designation by any provision in my will.

Signed this _____ day of _____, ____

_____

(Your signature)

Statement of witnesses:

I declare that the person who signed this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed this document in my presence. I am not the person authorized in this document to control the use of the genetic material of the person who signed this document.

Witness:

Address:

Date:

Witness:

Address:

Date:

(d) Any authority granted in a written instrument authorized by this section to a person who is the spouse of the genetic parent at the time of execution of the written instrument is revoked by a final decree or judgment of divorce or annulment, or a final decree, judgment or order declaring the nullity of the marriage between the genetic parent and the spouse or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, or a final decree or judgment of separation, recognized as valid under the law of this state, which was rendered against the spouse.

(e) Process shall not issue to a genetic child who is a distributee of a genetic parent under sections one thousand three and one thousand four hundred three of the surrogate's court procedure act unless the child is in being at the time process issues.

(f) Except as provided in paragraph (b) of this section with regard to any disposition of property in any instrument of which the genetic parent of a genetic child is the creator, for purposes of section 2-1.3 of this chapter a genetic child who is entitled to inherit from a genetic parent under this section is a child of the genetic parent for purposes of a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another. This paragraph shall apply to the wills of persons dying on or after September first, two thousand thirteen, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

(g) For purposes of section 3-3.3 of this chapter the terms "issue", "surviving issue" and "issue surviving" include a genetic child if he or she is entitled to inherit from his or her genetic parent under this section.

(h) Where the validity of a disposition under the rule against perpetuities depends on the ability of a person to have a child at some future time, the possibility that such person may have a genetic child shall be disregarded. This provision shall not apply for any purpose other than that of determining the validity of a disposition under the rule against perpetuities where such validity depends on the ability of a person to have a child at some future time. A determination of validity or invalidity of a disposition under the rule against perpetuities by the application of this provision shall not be affected by the later birth of a genetic child disregarded under this provision.

(i) The use of a genetic material after the death of the person providing such material is subject exclusively to the provisions of this section and to any valid and binding contractual agreement between such person and the facility providing storage of the genetic material and may not be the subject of a disposition in an instrument created by the person providing such material or by any other person.

§2. Paragraphs (a), (b), (c) and (d) of section 11-1.5 of the estates powers and trusts law, paragraph (a) and subparagraph (1) of paragraph (b) as amended, and such section as renumbered by chapter 686 of the laws of 1967, and paragraph (d) as amended by chapter 634 of the laws of 1985, are amended to read as follows:

(a) Subject to his or her duty to retain sufficient assets to pay administration and reasonable funeral expenses, debts of the decedent and all taxes for which the estate is liable, a personal representative may, but, except as directed by will or court decree or order, shall not be required to, pay any testamentary disposition or distributive share before the completion of the publication of notice to creditors or, if no such notice is published, before the expiration of seven months from the time letters testamentary or of administration are granted, or, if notice of the availability of genetic material of the decedent has been given under section 4-1.3, before the birth of a genetic child who is entitled to inherit from the decedent under section 4-1.3.

(b) Whenever a disposition is directed by will to be paid in advance of such publication of notice or the expiration of such seven month period or the birth of a genetic child entitled to

inherit from the decedent under section 4-1.3, the personal representative may require a bond, conditioned as follows:

(1) That if debts of the decedent appear, and the assets of the estate are insufficient to pay them or to pay other testamentary dispositions entitled, under section 13-1.3, to payment equally with or prior to that of the disposition paid in advance, the beneficiary to whom advance payment was made will refund it, or the value thereof, together with interest thereon and any costs incurred by reason of such payment, or such ratable portion thereof, as is necessary to pay such debts or to satisfy the rights, if any, of other beneficiaries under the will.

(2) That if the will, under which the disposition was paid, is denied probate, on appeal or otherwise, such beneficiary will refund the entire advance payment, together with interest and costs as described in subparagraph (1), to the personal representative entitled thereto.

(c) If, after the publication of notice to creditors or the expiration of seven months from the time letters are granted or the birth of a genetic child entitled to inherit from the decedent under section 4-1.3, as the case may be, the personal representative refuses upon demand to pay a disposition or distributive share, the person entitled thereto may maintain an appropriate action or proceeding against such representative. But, for the purpose of computing the time limited for its commencement, the cause of action does not accrue until the personal representative's account is judicially settled.

(d) In any action or proceeding to compel payment of a disposition or distributive share, the interest thereon, if any, shall, in the case of a disposition, be at the rate fixed in the will or, if none is so fixed, in any case at the rate of six percent per annum commencing the later of, seven months from the time letters, including preliminary or temporary letters, are granted or the birth of a genetic child of the decedent entitled to inherit under section 4-1.3.

§3. This act shall take effect immediately and shall apply to estates of decedents dying on or after such date, provided, however, that the provisions of paragraph (f) of section 4-1.3 of the estates, powers and trusts law, as added by section one of this act, shall apply to the wills of persons dying on or after September 1, 2013, to lifetime instruments theretofore executed which on said date are subject to the grantor’s power to revoke or amend, and to all lifetime instruments executed on or after such date.

2. Renunciation of Property Interests (EPTL 2-1.11(d)(5))

EPTL 2-1.11(d)(5) authorizes the personal representative of a decedent to renounce property to which the decedent became entitled but did not receive before death, so long as the personal representative is authorized to do so by the court having jurisdiction of the decedent's estate. The most common situation in which a disclaimer by a personal representative is useful involves spouses who have wills giving all to the surviving spouse and, if the spouse does not survive, to the couple's descendants. The result is no matter which spouse dies first the same beneficiaries take the couples' property. If the spouses both die within a short period of time the first estate must transfer all of the property to the second estate so that the second estate can make distribution of the property to the beneficiaries. Property in the estate of the first to die, therefore, is subject to the expenses of administration twice even though the beneficiaries of both estates are ultimately the same (the problem is the same if the spouses die intestate with respect to the surviving spouse's share in intestacy). If the second spouse dies within nine months of the date of the death of the first spouse, a renunciation by the personal representative of the second to die's estate will keep the renounced property in the estate of the first spouse to die allowing it to pass directly to the beneficiaries without first having to pass through the estate of the second spouse to die.

Because such a renunciation does not alter the identity of the beneficiaries of either estate, requiring court authorization results in unnecessary expense and delay, and delay can be fatal because of the nine-month deadline for making a renunciation. The renunciation will appear in the personal representative's accounting to the beneficiaries of the estate of the second spouse to die and, under EPTL 2-1.11(c)(2), notice must be given to the personal representative of the estate of the first spouse to die (who will often be the same as the personal representative of the estate of the second spouse to die) and to the beneficiaries of the estate of the first spouse to die whose interest in that estate will be

increased.

Finally the amendment only removes the requirement of court approval. A personal representative who desires to may still seek court approval for a renunciation.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to renunciation of property interests

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

Section 1. Subparagraph (5) of paragraph (d) of section 2-1.11 of the estates, powers and trusts law is amended to read as follows:

(5) The personal representative of a decedent, [when so authorized by] provided, however, that the personal representative may seek authorization from the court having jurisdiction of the estate of the decedent.

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

3. Limitation on Filing of a Finder's Agreement
(SCPA 13-2.3(e)(new))

The Committee recommends this measure to clarify the law with regard to the filing of an agreement with the Surrogate's Court by an abandoned property services locator under SCPA 1310 and a rule requirement adopted by the Office of Unclaimed Funds of the New York Office of the State Comptroller. The measure would eliminate the current practice whereby any "finder's agreement" that has been executed by a potential claimant to such unclaimed funds be filed with the Surrogate's Court when no estate has been opened and no fiduciary has been appointed for the estate.

Currently, a claimant who is not a fiduciary may enter into an agreement with an abandoned property services locator or other similar agent to pay the agent up to 15 % of the unclaimed funds recovered. A claimant who has not been appointed as a fiduciary is not authorized to represent the estate. The agreement is simply a contract between two individuals, neither of whom has the authority to represent the estate. Operationally, the Office of Unclaimed Funds requires the party making the claim to provide a court certified copy of the property location agreement filed with the Surrogate's Court when a decedent's estate representative or qualifying heir pursuant to section 1310 of the Surrogate's Court Procedure Act is making claim to abandoned funds. However, the Committee believes that the statute does not require that such agreements be filed with the court when the agreement is signed by a person claiming the property as a qualified affiant pursuant to section 1310 of the Surrogate's Court Proceedings Act. In practice such agreements are filed in bulk by the property locator's agent, in a county of its choice, without a companion estate proceeding. The absence of an estate proceeding renders such filings meaningless from an oversight perspective and is unnecessary pursuant to statute. In the opinion of the Committee, with limited exceptions, property locator agreements concerning assets of a decedent should be executed only by fiduciaries and thereafter filed in the Surrogate's Court which issued such letters, so that all interests

of the rightful heirs of a decedent and creditors of an estate are protected.

Administratively, the Office of the State Comptroller's (OSC's)Department of Audit and Control by its Office of Unclaimed Funds has determined it will no longer accept an abandoned property location services agreement where letters have not been issued to an estate representative, unless it is executed by the spouse or children of a decedent and the amount at issue is less than $1,000.00. Further, where, excepting those cases where a locator's agreement is signed by the spouse or children of a decedent, all other claimants would be required to obtain letters pursuant to Article 13 of the SCPA for claims in excess of $1,000. The process can be completed on line, costs $1.00 for a certificate, and more adequately ensures that all distributees, beneficiaries and creditors are protected. The OSC has proposed and expects to adopt regulatory changes to this effect.

This measure would enact the necessary statutory amendments to ensure that these agreements are not accepted for filing by the Surrogate's Court unless a fiduciary has been appointed or is pending before the court.

Proposal:

AN ACT to amend the estates, powers and trusts law in relation to powers of attorney in relation to decedents' estates required to be in writing and recorded

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

Section 1. Section 13-2.3 of the estates, powers and trusts law is amended by adding a new paragraph (e) to to read as follows:

(e) Notwithstanding the provisions of any other statute or rule, no instrument containing a delegation of powers, assignment of interest, fee arrangement, or any instrument of like import created for the purpose of participating on behalf of an individual in any application seeking the recovery of property pursuant to section 1410 of the abandoned property law or section 1310 of the surrogate's court procedure act, nor any power of attorney, shall be accepted for filing or recording by the surrogate's court of a particular county unless a fiduciary, as that term in defined by paragraph 21 of section 103 of the surrogate's court procedure act, has been appointed, or a proceeding for the appointment of a fiduciary is pending in such court. The provisions of paragraph (b) of this section shall apply to all instruments eligible for filing and recording hereunder.

§ 2. This act shall take effect immediately.

4. 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 was 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 regard 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.

B. Previously Endorsed Measures

1. 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.[2]

[2]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. 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.

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.

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

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

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

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

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

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

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

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

> "... [U]nlike SCPA §2307, SCPA §2309 does not provide for the renunciation of a specific bequest in favor of the statutory commission where trustees are concerned.
>
> "This was not always the case. Prior to 1948, testamentary trustees could renounce specific compensation in a will and take instead the statutory commission, just as executors, administrators and guardians could (*see, e.g.,* SCA §285, Commissions of executor, administrator, guardian or testamentary trustee [L. 1923, c. 649]; *see also, Matter of Larney*, 148 Misc 871, 872; *Matter of Bolton*, 143 Misc 769, 771). Even when the SCA was

amended in 1943 and §285-a was added [L. 1943, c. 694], thus separating the provisions for the commissions of the other fiduciaries (executors, administrators and guardians [§285]) from those of the testamentary trustee, subsection (7) of §285-a still permitted a trustee to timely renounce (within four months) a specific bequest in favor of the statutory commission.

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

"The language employed in 1948 was repeated in 1956 in both SCA §285-a (11), pertinent to trustees' commissions under wills of persons dying, or under lifetime trusts created, on or before August 31, 1956, and in §SCA 285-b (10), added by L. 1956, c. 931, and pertinent to trustees'

> commissions under wills of persons dying, etc., after August 31, 1956. Finally, the same language was repeated in 1966 when the comparable sections of the current statute, SCPA §§2308 and 2309, were enacted (L. 1966, c. 953, effective September 1, 1967). Thus, in its present form, a trustee nominated after August 31, 1956, as here, must accept the specific compensation provided by the will or renounce his appointment entirely (SCPA §2309 (10))."

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

In amending the predecessors of sections 2308 and 2309 in 1948, the Legislature was adopting the view that most testators who provided "specific compensation" to a trustee would not want such trustee to get any more compensation for serving as trustee. Thus, as with other default statutes (*see e.g.* EPTL 3-3.3 or 5-1.4), a will that provides "specific compensation" to a *trustee* was being legislatively construed — in this case 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 procedures act, as added by chapter 953 of the laws of 1966, is amended to read as follows:

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

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

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

The Committee recommends this measure to reduce unduly burdensome notice requirements in proceedings to determine the validity and enforceability of claims. By limiting the necessary parties to the claimant and the fiduciary, unless the court directs otherwise, the expense of serving process on all beneficiaries can be eliminated, to the benefit of the estate.

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

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

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

Finally, this proposal eliminates the grace period of 8 days from the return day to serve and file an answer. The practice has few corollaries in the Surrogate's Court Procedure Act and is contrary to the general practice of filing responsive pleadings on the return day of process or on such subsequent day as directed by the court.

Proposal:

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

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

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

2. If the petition be entertained process shall issue only to the claimant or possible claimant or fiduciary, as the case may be, [and, whenever the claim sought is in excess of ten thousand dollars or constitutes twenty-five percent or more of the estimated gross probate estate, whichever is the lesser, to any person whose rights or interests will be affected by allowance of the claim and the person cited may within 8 days from the return day, serve and file an answer] unless the court directs otherwise. The answer[, if] shall be filed on or before the return day of process or on such subsequent day as directed by the court. If filed by the claimant, the answer shall be accompanied by a copy of any notice of claim, supporting affidavit or other evidence of the claim, if any, filed with the fiduciary. If the fiduciary deems it necessary he or she may, within 5 days from the service upon him or her of a copy of the answer, serve and file a reply thereto. The claimant may also file a reply to an answer served by the fiduciary.

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

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

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

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

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

This holding was held to be a “legal fiction" and was rejected by the court in *Citibank v. Goldberg* (178 Misc.2d 287 [Sup. Ct. Nassau Co. 1998]). That court held that

the intentional slaying of a spouse by the other acts as a voluntary repudiation of the essence of an ownership by the entireness, thereby alienating the surviving spouse from any interest in the property. The court further held that section 79-b of the Civil Rights Law never addressed shared interests in property, or the creation of new and different interests from those that existed at the time of the crime (*accord Matter of the Estate of Mary Mathew,* NYLJ, April 26, 1999, p. 32 [Rockland Co.], *rev'd* 270 AD2d 416 [2nd Dept 2000]).

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

Proposal:

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

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

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

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

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

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

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

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

under section 5-1.2, these “laughing” spouses would also be disqualified under sections 5-1.3, 5-3.1 and 5-4.4.

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

The public policy supporting the amendment is that, if the surviving spouse was willing to live for a prolonged period of time prior to the decedent's death without having had anything whatsoever to do with the decedent, the survivor should also be willing to do without any rights to the decedent's property after the decedent's death. The disqualification only applies to spouses who voluntarily had nothing to do with the decedent for a prolonged period of time. There is no disqualification if the separation was caused by abuse, or the need of at least one of the spouses to be cared for in a facility due to injury or illness. There is also no disqualification where, after the separation, there was voluntary, contractual or court-ordered support. This measure will result in reduced litigation because in numerous cases where there is presently a question of whether an abandonment can be established under EPTL 5-1.2(a)(5), it will now be clear that the spouse is disqualified under the new subparagraph 7 of section 5-1.2(a).

Proposal:

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

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

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

(7) The survivor and the decedent have continuously lived separate and apart for a period of at least one year prior to the date of the decedent's death and that the total time that they have lived separate and apart exceeds the total time that they cohabited as a married couple, unless the survivor can establish any one of the following: the reason that the parties lived separate and apart was due to illness or injury which required one or both of the spouses to need the care of a facility; or, the survivor was actually receiving support from, or paying support to, the decedent or was entitled to receive support from the decedent pursuant to court order or agreement; or, that the abuse of the decedent towards the survivor or another member of the household was the reason that the survivor stopped cohabiting with the decedent. For the purpose of this subparagraph, the court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

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

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

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

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

Recent advances in medical technology, however, have expanded the methods and opportunities for married infertile couples to have children by new techniques of assisted reproduction, including in vitro fertilization (IVF) and gamete intrafallopian transfer (GIFT) that may involve donated gametes (sperm, eggs) or embryos (fertilized eggs). Use of donated semen and eggs could raise issues of the rights, duties and responsibilities of the donor (biological parent) under our present laws.[3] Moreover, cryopreservation allows frozen gametes or frozen embryos to be implanted in a married woman for this

[3] 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."

purpose even after the death of the donors.[4] 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,[5] 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

---

[4] 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.

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

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.

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

This measure would amend section 117 of the Domestic Relations Law and section 2-1.3(a)(1) of the Estates, Powers and Trusts Law to ensure that, where an adoptive child continues to reside with the natural parent, as 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. Recommendations for Amendment to Certain Regulations

1. Secure Filing of Certain Documents in Surrogate's Court (22 NYCRR § 207.64(new))

The Committee has examined the issue of public access to the Surrogate Court records containing personal and financial information. It is uncontroverted that the records of the Surrogate's Court are public and access should be afforded to all persons interested. However, it is also clear that, given the vast amount of personal identifying information contained in these files, the risk for misuse of the court's records for illegal purposes is significant.

Recognizing the potential for misuse of this information, many Surrogate's Courts have initiated various procedures in an attempt to balance the public's right of access with the court's obligation to safeguard the personal identifying information it must collect. The Committee has concluded therefore that there is a need for a statewide rule in order to remedy the current practice of informal, piecemeal application of different procedures, especially in light of the concern that the informal procedures currently utilized also may lack express guidelines.

Therefore, the Committee recommends enactment of the following proposed rule. The rule would be in accordance with existing statutory parameters on public access to information and allow access on a limited scope to a specified list of documents. These documents are death certificates, tax returns, documents containing social security numbers, firearms inventories and the inventory of assets, as well as guardianship proceedings instituted pursuant to SCPA Articles 17 and 17A.

With respect to these documents the proposed rule would allow access without the need for court permission to persons interested in the estate of the decedent, as defined by SCPA §103(39), or their counsel; the Public Administrator or counsel thereto; counsel for any Federal, State or local governmental agency; or court personnel. Importantly, a person not listed in paragraph 39 of section 103 may seek written permission from the Court to view the documents and the rule states expressly that such permission shall not be unreasonably withheld.

Proposal:

207.64 Public Access to Certain Filings

The following documents may be viewed only by persons interested in the estate of the decedent, as defined by SCPA §103(39), or their counsel; the Public Administrator or counsel thereto; counsel for any Federal, State or local governmental agency; or court personnel; except upon written permission of the Surrogate or Chief Clerk of the court which shall not be unreasonably withheld:

(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.

2. The Filing and e-Filing of Death Certificates
(22 NYCRR 207.4-a(e)(6) & (7);
22 NYCRR 207.4-aa(d))

This proposal recommends a revision of the rule regarding the filing of the hard copy death certificate in e-filed proceedings in Surrogate's Court. In particular, the revision would add the language *"The paper original certified death certificate shall be filed with the will unless the court in its discretion accepts an e-filed death certificate with no hard copy."*

The Committee agrees that the decision whether to allow the electronic filing of a death certificate is appropriately a matter for the Surrogate's discretion, but this discretion should be utilized *only* in the unusual case. It is further the opinion of the Committee that in *every* case there should be a hard copy version filed that is the official document. Thus, the Committee disapproves any practice allowing a blanket dispensing of the hard copy death certificate whether in a paper case or an e-filed case.

Proposal:

(6) If an e-filer submits a petition for probate for which the court does not already have in its possession the original purported last will and testament and any codicils thereto being offered for probate, the e-filer shall file directly with the court the paper original purported last will and testament and any codicils thereto and a hard copy of the death certificate, attorney certified if required by the court, within two business days of the date of e-filing. Except as otherwise directed by the court, process shall not issue nor shall a fiduciary be appointed before the original purported last will and testament, any codicils thereto and the appropriate death certificate are filed with the court. The paper original certified death certificate shall be filed with the will unless the court in its discretion accepts an e-filed death certificate with no hard copy.

(7) If an e-filer submits a petition for administration the e-filer shall file a hard copy of the death certificate, attorney certified if required by the court, directly with the court within two business days of the date of e-filing. Except as otherwise directed by the court, process will not issue nor shall a fiduciary be appointed before the appropriate death certificate is filed with the court. The paper original certified death certificate shall be filed with the will unless the court in its discretion accepts an e-filed death certificate with no hard copy.

§ 207.4-aa(d)

(d) Clerk of Court Not to Accept Hard Copies of Documents for Filing Where Electronic Filing Is Required. The clerk of the court shall refuse to accept for filing hard copies of documents sought to be filed in proceedings where such documents are required to be filed electronically. The paper original certified death certificate shall be accepted for filing with the will unless the court in its discretion accepts an e-filed death certificate with no hard copy.

IV. Future Matters

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

1. EPTL 7-1.2(e)(1)(2) Special Needs Trusts

This measure would amend EPTL 7-1.2 in regard to the duties of the trustee of a special needs trust with respect to the duties to an incapacitated person

2. EPTL 11-1.7 Exoneration Clauses

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

3. Uniform Rule 207.13 Guardian Ad Litem Expenses

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

4. SCPA 209(8) Failure to Prosecute

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

5. Uniform Rule 207.29 — Attorney's Authority to Settle

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

6. SCPA 2308, 2309 and 2312 — Charitable Trust Commissions

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

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

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

8. SCPA 2313 — Multiple Commissions

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

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

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

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

1. Competing charitable interests.

2. The 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.

Respectfully submitted,

Hon. Renee R. Roth, Chair

Rozlyn Anderson, Esq.
Colleen Carew, Esq.
Ann-Margaret Carrozza, Esq.
Hon. John Czygier
T. Randolph Harris, Esq.
Gregory Hesterberg, Esq.
Hon. Lee Holzman
Hon. Barbara Howe
Andrea Hyde, Esq.
Prof. Kenneth Joyce
Hon. Peter J. Kelly
Prof. William LaPiana
Hon. Margarita Lopez-Torres
Richard Miller, Esq.
Marilyn Ordover, Esq.
John Reddy, Esq.
Jonathan J. Rikoon, Esq.
Lydia Romer, Esq.
Joshua Rubenstein, Esq.
Joseph Samulski, Esq.
Charles Scott, Esq.
Ronald J. Weiss, Esq.
Hon. Peter N. Wells
Laura Werner, Esq.

Holly Nelson Lütz, Esq., Counsel