Report of the Surrogate's Court Advisory Committee

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

January 2006

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I. Introduction

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

The Committee as presently constituted has 24 members. Its focus has been in the areas of legislation, adoption, guardianship, court rules, forms and technology, with the following four subcommittees of the Committee addressing each of these subjects:

Subcommittee on Legislation
Chair, Genevieve L. Fraiman, Esq.
Subcommittee on Adoptions
Subcommittee on Guardianship
Chair, Hon. Robert L. Nahman
Subcommittee on Rules, Forms and Technology

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. Settlement of Final Guardianship Reports (MHL 81.44)

The Committee recommends this measure to create a procedure for settling final guardianship reports upon the death of an incapacitated person. This measure would create a uniform procedure for transferring guardianship assets to an estate administrator.

Article 81 of the Mental Hygiene Law provides a comprehensive framework for addressing the complex and diverse needs of persons with incapacities. Throughout its 43 sections, the Article sets forth procedural and substantive guidelines regarding the appointment, powers and duties of court-appointed guardians.

While the Article addresses adequately the lifetime needs of the incapacitated person, it does not provide an effective and efficient roadmap to facilitate the transition from guardianship administration to estate administration upon the death of the incapacitated person. The absence of a statutory time-line for settling the guardian's final report and for effecting the transfer of guardianship assets to the estate administrator has had wide-ranging implications.

At the judicial level, it has required courts to implement local rules and procedures regarding the retention, application and distribution of guardianship assets. Often, these rules conflict from jurisdiction to jurisdiction, causing confusion and consternation among guardians, estate administrators and family members. Estate administrators also have obligations to taxing authorities, creditors and the judges who appointed them that are impeded by their inability to obtain timely distribution of guardianship assets. Post-mortem tax planning opportunities can be jeopardized or lost because the estate fiduciary and estate beneficiaries lack adequate information to make informed decisions. There are also instances where guardians have failed to disclose the death of their ward, thus preventing the court, the public administrator or the nominated estate representative from carrying out their statutory duties. Most importantly, the failure to effect a timely and orderly settlement of the guardianship administration places the guardianship assets at risk by leaving them in the hands of a

fiduciary with no apparent authority to administer such assets and only limited statutory authority to apply guardianship funds to the obligations of the deceased ward.

The proposed amendment addresses each of these concerns by providing a statutory procedure for effecting distribution of guardianship assets and settlement of the guardian's final report on terms that respect the needs of both the guardian and the estate representative. This amendment has four parts. The first part is a notice provision that requires the guardian to provide the court and other necessary persons with written confirmation of the death of the incapacitated person. The second part describes the process for delivery of guardianship property to the estate representative or county officer and retention by the guardian of sufficient assets to secure claims for administration expenses. The third part addresses the need for timely settlement of the guardian's final report. Finally, the fourth part provides an enforcement mechanism should the guardian fail to either deliver guardianship assets or settle his or her final report in the time or manner prescribed by the amendment.

This amendment supplements Article 81 by establishing a procedure to finalize property management guardianships upon the death of the incapacitated person. It does not supplant existing law regarding the appointment of guardians or the duties and responsibilities of guardians to the court or to their wards.

Proposal:

AN ACT to amend the mental hygiene law, in relation to the settlement of final guardianship reports

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

Section 1. The mental hygiene law is amended by adding a new section 81.44 to read as follows:

§ 81.44 Proceedings upon the death of an incapacitated person. (a) Definitions. When used in this section:

(1) "Statement of death" means a statement, in writing and acknowledged, containing the caption and index number of the guardianship proceeding, and the name and address of the last residence of the deceased incapacitated person, the date and place of death, and the names and last known addresses of all persons entitled to notice of further guardianship proceedings pursuant to paragraph three of subdivision (c) of section 81.16 of this article including the nominated and/or appointed personal representative, if any, of the deceased incapacitated person's estate.

(2) "Personal representative" means a fiduciary as defined by subdivision twenty-one of section one hundred three of the surrogate's court procedure act to whom letters have issued and who is authorized to marshal the assets of the decedent's estate.

(3) "Public administrator" means a public administrator within or without the city of New York , as established by article eleven or twelve of the surrogate's court procedure act.

(4) "Chief fiscal officer" means a chief fiscal officer of a county eligible to be appointed an administrator pursuant to section twelve hundred nineteen of the surrogate's court procedure act.

(5) "Statement of assets and notice of claim" means a written statement under oath containing the caption and index number of the guardianship proceeding, the name and address of the incapacitated person at the time of death, a description of the nature and approximate value of guardianship property at the time of the incapacitated

person's death, and if claim is to be made for administrative costs, an itemization and approximate value of such costs.

(b) Service. Unless otherwise directed by the court, all papers required to be served by this section shall be served by certified mail return receipt requested.

(c) Filing statement of death; service; proof of service. Within twenty days of the death of an incapacitated person, the guardian shall:

1. serve a copy of the statement of death upon the court examiner and either the duly appointed personal representative of the decedent's estate, or, if no personal representative has been appointed, then upon the personal representative named in the decedent' s will if known and upon the public administrator or the chief fiscal officer of the county in which the guardian was appointed, and

2. file the original statement of death, together with proof of service upon the personal representative and/or public administrator or chief fiscal officer, as the case may be, with the court that issued letters of guardianship.

(d) Delivery of guardianship property. Within sixty days of the death of the incapacitated person, the guardian shall serve upon the personal representative of the decedent's estate, or where there is no personal representative, upon the public administrator or chief fiscal officer, a statement of assets and notice of claim and, except for property retained to secure administrative costs of the guardianship pursuant to subdivision (e), shall deliver all guardianship property to:

1. the duly-appointed personal representative of the deceased incapacitated person's estate, or

2. the public administrator or chief fiscal officer given notice of the filing of the statement of death, where there is no personal representative.

(e) Property retained by guardian to secure claim for administrative costs. The guardian may retain, pending the settlement of his or her final report, guardianship property equal in value to the claim for administrative costs, unless otherwise ordered by the court upon motion by the guardian on notice to the person or entity to whom guardianship property is deliverable and the court examiner.

(f) Judicial settlement of guardian's final report. Within ninety days of the incapacitated person's death, the guardian shall file his or her final report with the clerk of the court of the county in which annual reports are filed, and thereupon proceed to judicially settle the final report upon such notice as required by subdivision (c) of section 81.33 of this article, including notice to the person or entity to whom the guardianship property was delivered. There shall be no extension of the time to file a final report except by order of the court.

(g) Compulsory accounting and related relief. Upon failure of the guardian to comply with subdivision (d) or (f), any interested person may file a petition to compel the guardian to account, to suspend and/or remove the guardian, and to take and state the guardian's account.

§ 2. This act shall take effect immediately.

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

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

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

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

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

To cover such eventualities, attorneys often provide for an alternative testamentary trust with dispositions similar to those of the revoked inter vivos trust. However, without the benefit of the proposed amendment, it is necessary to recite in the will all of the dispositive and other essential terms of the revoked trust, in order to foreclose an argument by intestate takers or contingent beneficiaries that the provisions of the revoked trust cannot be "incorporated by reference." The rule prohibiting incorporations by reference was stated succinctly in *Booth* v *The Baptist Church of Christ*, 126 N.Y. 215, 247-248, 28 N.E. 238 (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 N.Y. 327, 331, 179 N.E. 755 (1932), decided long before the enactment of EPTL 3-3.7, the testator gave one-fifth of his residuary estate to the corporate trustee of an inter vivos trust to be disposed of under the trust's agreement "which agreement is hereby made part of this my will." The Appellate Division had determined that the rule forbidding the incorporation of unattested documents had been violated and that, to that extent, the testator had died intestate. Finding that the legacy to the trustee was simply an enlargement of the subject matter of an existing trust, Judge Cardozo rejected the reasoning of the court below that this could not be done unless the terms of the deed of trust were repeated in the will.

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

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[1] Moreover, EPTL 3-3.7, paragraph (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

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

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

Proposal:

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

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

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

(e) A revocation or termination of the inter vivos trust before the death of the testator shall cause the disposition or appointment to fail, unless the testator has made an alternative disposition; provided, however, that the testator may, by express

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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.

direction, provide that the disposition or appointment of all or part of his or her estate to such revoked or terminated trust shall be deemed to create a testamentary trust under and in accordance with the terms of such inter vivos trust at the time of the execution of the will or, if the testator so directs, including amendments made thereto prior to such revocation or termination, and such testamentary trust and the dispositions of income and principal thereunder shall be valid even though the terms of such inter vivos trust are not recited in the will.

§ 2. This act shall take effect immediately; provided, however, that the amendments to section 3-3.7 of the estates, powers and trusts law as added by section 1 of this act shall apply only to the estates of decedents who shall have died on or after such effective date.

2. Clarification of "After-born Child" (EPTL 5-3.2)

The Committee recommends this measure to add a new paragraph (b) to EPTL section 5-3.2 to make clear that only children born after the execution of a last will and during the life of the testator, or a child in gestation at the time of the testator's death who is born after the testator's death, will cause the revocation of a last will to the extent provided in paragraph (a) of the section.

This provision is consistent with the recommendation of the New York State Task Force on Life and the Law (1998) at p. 446: "An individual who dies before implantation of an embryo ... using the individual's egg or sperm, should not be considered a parent of the resulting child."

Recent developments in reproductive technology now makes it possible for children to be conceived and born many years after the death of the biological father and/or mother. Ronald Chester, *Posthumously Conceived Heirs Under a Revised Uniform Probate Code*, Real Property, Probate and Trust Journal, Vol. 38, No 4 (Winter 2004), 728 at 728-730; Kayla VanCannon, *Fathering a Child from the Grave: What are the Inheritance Rights of Children Born Through New Technology After the Death of a Parent*, 53 Drake L. Rev. 331 (Winter 2004) at pp. 338-331; Kristine S. Knaplund, *Postmortem Conception and a Father's Last Will*, 46 Ariz. L. Rev. 91 (Spring 2004) at pp. 92-99.

The measure would avoid the possibility that a child born many years after the death of the testator, without the testator's desire and knowledge, will claim a share of the estate pursuant to EPTL 5-3.2. The sperm, ova or preembryos may have been donated to a fertility clinic, without any intent on the part of the donor that a resulting child would share in his or her estate. The testator's children born during the testator's lifetime would be unfairly deprived of their expected inheritance by a child with whom the testator had no relationship, a possibility that in all likelihood would have not been foreseen or desired by the testator.

Moreover, a testator who anticipates the possibility of having a posthumous child could readily create a trust for such child under his or her last will.

Finally, the administration of the estate would be unduly complicated and prolonged by the uncertainty of possibly posthumous children born years after the testator's death.

This measure, which would have no fiscal impact upon the State, would take effect with respect to the estates of decedents who die on or after the date on which it shall have become a law.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the revocatory effect of a child born after execution of a will

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

Section 1. The opening paragraph of paragraph (a) of section 5-3.2 of the estates, powers and trusts law, as added by chapter 952 of the laws of 1966, is amended to read as follows:

Whenever a testator [, during his lifetime or after his death] has a child born after the execution of a last will and dies leaving the after-born child unprovided for by any settlement, and neither provided for nor in any way mentioned in the will, every such after-born child shall succeed to a portion of the testator's estate as herein provided:

§ 2. Paragraph (b) of section 5-3.2 of the estates, powers and trusts law, as added by chapter 952 of the laws of 1966, is amended to read as follows:

(b) The term "after-born child" shall mean a child of the testator born during the testator's lifetime or in gestation at the time of the testator's death and born thereafter.

(c) The after-born child may recover the share of the testator's estate to which [he] such child is entitled, either from the other children under subparagraph (a)(1)(B) or the testamentary beneficiaries under subparagraph (a)(2), ratably, out of the portions of such estate passing to such persons under the will. In abating the interests of such beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.

§ 3. This act shall take immediately; provided, however, that the amendments to section 5-3.2 of the estates, powers and trusts law as added by sections 1 and 2 of this act shall apply only to the estates of decedents who shall have died on or after such effective date.

3. Renunciation of Specific Compensation in Favor of Statutory Commissions (SCPA 2307(5)(b))

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, *aff'd sub nom Butler v Mander*, 159 AD2d 379). Trustees, on the other hand, are prohibited from exercising such right (*see Estate of Hillman*, 2/28/96 NYLJ 29).

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

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

> "... [U]nlike SCPA §2307, SCPA §2309 does not provide for the renunciation of a specific bequest in favor of the statutory commission where trustees are concerned.
>
> This was not always the case. Prior to 1948, testamentary trustees could renounce specific compensation in a will and take instead the statutory commission, just as executors, administrators and guardians could (*see, e.g.*, SCA §285, Commissions of executor, administrator, guardian or testamentary trustee [L. 1923, c. 649]; *see also, Matter of Larney*, 148 Misc 871, 872; *Matter of Bolton*, 143 Misc 769, 771). Even when the SCA was amended in 1943 and §285-a was added (L. 1943, c. 694], thus separating the provisions for the commissions of the other fiduciaries (executors, administrators and guardians [§285] from those of the testamentary trustee, subsection (7) of §285-a still permitted a trustee to timely renounce (within four months) a specific bequest in favor of the statutory commission.
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> In 1948, however, the original SCA §285-a was repealed and a new §285-a was added [L. 1948, c. 582]. For the first time, subsection (11) of the statute treated trustees differently from other fiduciaries in that it prohibited them from renouncing specific compensation in favor of the statutory commission. It stated in full that '[w]here the will provides a specific compensation to a trustee, he is not entitled to any other allowances for his services.' In its Report No. 280 included in the bill jacket for L. 1948, c. 582, the Committee on the Surrogate's Court of the New York County Lawyers Association commented that although subdivision (11) of the proposed law was among those "requiring further serious consideration by the legislature," it was approving the new law

anyway because it "over[came] so many of the objections of the existing law" (at p. 8). The Committee on State Legislation for the New York State Bar Association merely pointed out the "material difference" between subdivision 7 of the old SCA §285-a and subdivision (11) of the proposed law, *i.e.*, the extinction of the right of renunciation of specific compensation, without offering further comment (at p. 48).

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

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

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

It is therefore proposed that section 2307 be amended to conform it with sections 2308, 2309 and 2312. (The proposal also incorporates a technical amendment to

sections 2308 and 2309 to clarify that those statutes apply where the provision for "specific compensation" is contained in a lifetime trust instrument.)

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

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

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

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

Proposal:

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

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

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

(b) $100,000 or more but less than $300,000 each fiduciary is entitled to the full compensation for receiving and paying out principal and income allowed herein to a

sole fiduciary unless there are more than 2 fiduciaries in which case the full compensation for receiving and paying out principal and income allowed herein to 2 fiduciaries must be apportioned among them according to the services rendered by them respectively, unless the fiduciaries shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. Where the will provides a specific compensation to a fiduciary other than a trustee, he or she is not entitled to any other allowance for his or her services [unless by an instrument filed with the court within 4 months from the date of his letters he renounces the specific compensation]. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters of administration are issued to a person who has previously been appointed a temporary administrator, he or she is entitled to a total compensation equal to the compensation allowed for the full administration of the estate by a fiduciary acting in a single capacity only. Such total compensation shall be payable in such proportions and upon such accounting as shall be fixed by the court settling the account of the person holding successive or different letters but no paying out commissions shall be allowed except upon such sums as shall actually have been paid out at the time of the respective decrees for debts, expenses of administration or to beneficiaries.

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

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

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

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

§ 4. This act shall take immediately; provided, however, that the amendments to subdivision 5 of section 2307 of the surrogate's court procedure act as added by 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 creditors 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 future proceedings to determine the validity and enforceability of claims.

5. Harmonizing Inconsistent Distributions (EPTL 3-3.3)

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

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

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

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

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

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

This measure would amend EPTL 3-3.3 so that the results of its application are the same as they would be under 2-1.2 (or 4-1.1 in case of intestacy). The effect of the measure is to harmonize the results through the use of the EPTL 1-2.16 principle of "by representation," a principle which currently is present in all three statutory provisions and which reflects the legislative determination that most decedents prefer that relatives of the same generation share equally.

Proposal:

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

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

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

(a) Unless the will whenever executed provides otherwise:

(1) Instruments executed prior to September first, nineteen hundred ninety-two. Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving

issue, per stirpes. The provisions of this paragraph shall apply to a disposition made to issue, brothers or sisters as a class, and such issue, brothers or sisters shall take per stirpes.

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

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

§2. This act shall take effect immediately.

6. 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). 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. Civil Rights Law §79-b.

In the case of *Matter of Hawkin's Estate,* 213 NYS2d 188 (Sur. Ct. Queens County 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 the cases *Matter of Pinnock,* 83 Misc.2d 233 (Sur. Ct. Bronx County 1975), *Matter of Busacca,* 102 Misc.2d 567 (Sur. Ct. Nassau County 1980) and *Matter of Nicpon's Estate,* 102 Misc.2d 619 (Sur. Ct. Erie County 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 County 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, col. 5 (Sur. Ct. Rockland County), *reversed* 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.

7. 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 subdivision 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; or 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 (*Schine v. Schine*, 31 N.Y.2d 113; *Solomon v. Solomon*, 290 N.Y. 337; *Matter of Maiden*, 284 N.Y. 429). 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 subparagraph 5, it will now be clear that the spouse is disqualified under subparagraph 7.

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

Proposal:

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

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

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

(7) The survivor and the decedent have continuously lived separate and apart for a period of at least one year prior to the date of the decedent's death and that the total time that they have lived separate and apart exceeds the total time that they cohabited as

a married couple, unless the survivor can establish any one of the following: the reason that the parties lived separate and apart was due to illness or injury which required one or both of the spouses to need the care of a facility; or, the survivor was actually receiving support from, or paying support to, the decedent or was entitled to receive support from the decedent pursuant to court order or agreement; or, that the abuse of the decedent towards the survivor or another member of the household was the reason that the survivor stopped cohabiting with the decedent. For the purpose of this subparagraph, the court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

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

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

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

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

Recent advances in medical technology, however, have expanded the methods and opportunities for married infertile couples to have children by new techniques of assisted reproduction, including in vitro fertilization (IVF) and gamete intrafallopian transfer (GIFT) that may involve donated gametes (sperm, eggs) or embryos (fertilized eggs). Use of donated semen and eggs could raise issues of the rights, duties and responsibilities of the donor (biological parent) under our present laws.[2] Moreover, cryopreservation allows frozen gametes or frozen embryos to be implanted in a married woman for this purpose even after the death of the donors.[3] Accordingly, it is imperative that section 73 of the Domestic Relations Law 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.

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

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

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

> New York's Domestic Relations Law should be amended to provide that when a married woman undergoes any assisted 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 section 73 of the Domestic Relations Law would provide that a married woman and her consenting husband would be deemed the natural parents of the child for all purposes, whether the child resulted from semen, egg or embryo donated by persons then living or who have died. Such child and his or her issue would also be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for purposes of intestacy and class designations in wills or other instruments.

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

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

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

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

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

Proposal:

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

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

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

§73. Legitimacy of children born by [artificial insemination] assisted reproduction. 1. Any child born to a married woman by means of artificial insemination, in vitro fertilization or any other technique of assisted reproduction, whether with the genetic material of the woman and her husband or with genetic material donated by others, performed in accordance with the laws of the jurisdiction where such assisted reproduction occurs by persons duly authorized to practice medicine or by any other person or persons under the supervision of a person duly

authorized to practice medicine, and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes. Such child and his or her issue shall be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for all purposes, including without limitation the right to receive real and personal property by intestacy and class designations in wills or other instruments, and such child and his or her issue shall have no rights to receive real and personal property from and through the donor or donors of genetic material and their respective kindred by any means, including without limitation intestacy and class designations in wills or other instruments.

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

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

bonus or profit-sharing plan, or any other instrument disposing of real or personal property.

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

§2. This act shall take effect immediately and shall apply to any child described in subdivision one of section 73 of the domestic relations law as amended pursuant to this act, whenever he or she is born.

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

This measure would amend section 117 of the Domestic Relations Law and section 2-1.3(a)(1) of the Estates, Powers and Trusts Law, to ensure that, where an adoptive child continues to reside with the natural parent, as in the case in step-parent adoptions and adoptions pursuant to *Matter of Jacob* and *Matter of Dana*, 86 N.Y.2d 651 (1995), such adoptive child is not penalized by losing inheritance rights either from his or her natural parent(s) under EPTL 4-1.1 or from a lifetime or testamentary disposition from his or her natural family as a member of a class under EPTL 2-1.3. This amendment neither endorses nor rejects 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. Paragraph (1) of subdivision (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 natural relationship shall be governed by the provisions of [subdivision] subdivisions two and four of section one hundred seventeen of the domestic relations law.

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

III. Future Matters

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

1. SCPA 2309 — Charitable Trust Commissions

This measure would amend SCPA 2309 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, commissions on charitable trusts would be permitted at the same rate as on non-charitable trusts, or some reasonable percentage thereof, and would be payable 2/3 from principal and 1/3 from income, in conformity with the practice for non-charitable trusts.

2. SCPA 707(f) — Disqualification of Fiduciary Prior to Appointment

This measure would permit objections to be made to the appointment of a fiduciary for the same reasons that a fiduciary may be removed pursuant to SCPA 711 and 719. This measure would thus make explicit the likely implicit authority of the court to disqualify a proposed fiduciary in advance of appointment on the grounds contained in section 711.

3. Agency Bank Accounts

This measure would create a new type of agency bank account, which would be more consumer-friendly than the form power of attorney and permit banking transactions to be accomplished by an agent without creating a right of survivorship. It is intended that such accounts would replace the little-known or used convenience accounts presently available.

4. 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.

6. 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.

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

2. 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.

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

4. Gift-giving powers of attorney.

5. The use of posthumous DNA testing to establish paternity.

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

7. The revocatory effect of divorce on dispositions in wills to relatives of former spouses; the revocatory effect of divorce on dispositions in instruments other than wills to former spouses.

8. The elimination of obsolete Uniform Rules.

9. The voiding of wills of incapacitated persons by Article 81 courts.

10. The tax treatment of capital gains in unitrust distributions.

11. Statutory rates of compensation for attorneys.

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

13. Possible conflicts between SCPA 2309(5) and the prudent investor rule.

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

Respectfully submitted,

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