

## Exoneration Clauses

By Robert M. Harper

As trusts and estates practitioners, we bear witness to the fact that fiduciary relationships regularly involve a level of tension. On the one hand, executors and trustees wish to minimize any exposure to liability that they may face due to their conduct as fiduciaries; on the other hand, beneficiaries rightfully expect that they will be compensated when an executor or trustee breaches his or her fiduciary duties. Given that tension, testators and grantors oftentimes seek to limit the potential liability of their respective fiduciaries by including exoneration clauses, which purport to absolve executors and trustees from liability for the failure to exercise a certain standard of care, in the instruments that govern. This article discusses the extent to which exoneration clauses contained in testamentary and inter vivos trust instruments are enforceable.

### EPTL § 11-1.7

Under Estates, Powers and Trusts Law ("EPTL") § 11-1.7, "a testator is prohibited from exculpating the executor or testamentary trustee nominated in a will from liability for failing to 'exercise reasonable care, diligence and prudence.'"<sup>1</sup> Testamentary provisions that endeavor to do so are void as against public policy. Indeed, they have been described by former Nassau County Surrogate C. Raymond Radigan as "nugatory provision[s] amounting to nothing more than a waste of good white paper."<sup>2</sup>

For an illustration of this, practitioners need not look any farther than Bronx County Surrogate Lee L. Holzman's decision in *Matter of Lubin*.<sup>3</sup> In *Lubin*, the decedent's will contained a broad exoneration clause, providing that the executor would be absolved of liability "for

any loss or injury to the property . . . except . . . as may result from fraud, misconduct or gross negligence." Surrogate Holzman found that the provision was unenforceable, describing it as a "toothless tiger."

While EPTL § 11-1.7 resolves the extent to which exoneration provisions contained in testamentary instruments are void as against public policy, it does not address whether similar provisions in inter vivos trust instruments are enforceable. As discussed more fully below, given that statutory silence, courts have reached sometimes conflicting conclusions as to the enforceability of exoneration clauses contained in inter vivos trust instruments.

### Inter Vivos trusts

In the absence of statutory guidance concerning the validity of exoneration clauses in inter vivos trust instruments, most courts have, historically speaking, applied a "more liberal rule" to exculpatory provisions in inter vivos trusts than to similar clauses in testamentary instruments. Consequently, most courts have enforced exoneration provisions absolving fiduciaries from liability for the failure to exercise reasonable care in connection with inter vivos trusts.<sup>4</sup> The underlying rationale is "said to be the nature of an *inter vivos* transaction and the contracting freedom of the [grantor] and trustee to define the scope of the latter's powers and liabilities."

What is more, while there are several cases in which courts have found that EPTL § 11-1.7 applies to inter vivos trusts,<sup>5</sup> those cases stand in stark contrast to the Appellate Division's recent decision in *Matter of Knox*.<sup>6</sup> In *Knox*, the Fourth Department acknowledged that certain Surrogates have "begun to apply EPTL [§] 11-1.7 to inter vivos trusts," but declined "to extend the statute

beyond its clear and unambiguous terms" addressing only exoneration provisions in testamentary instruments.

Nonetheless, whether applying EPTL § 11-1.7 to inter vivos trusts or declining to do so, all courts appear to agree that there are "limitations to the enforceability of [exoneration] clauses."<sup>7</sup> At the very least, it is undisputed that a "trustee of a lifetime trust who is guilty of wrongful negligence, impermissible self-dealing, bad faith or reckless indifference to the interests of beneficiaries will not be shielded from liability by an exoneration clause."<sup>8</sup> Exoneration clauses that purport to absolve the trustee of an inter vivos trust of the duty to account or an attorney-fiduciary who drafted the inter vivos trust from liability for all conduct other than bad faith are similarly unenforceable.<sup>9</sup>

Given the foregoing, it logically follows that most courts will enforce exoneration clauses contained in inter vivos trusts, to the extent that the clauses seek to exculpate trustees from liability for the failure to exercise reasonable care. Inasmuch as the exoneration clauses contained in inter vivos trusts purport to absolve the fiduciary from the duty to account or from liability for gross negligence, reckless indifference, bad faith or self-dealing, those provisions are void and unenforceable as against public policy.

In counseling clients, whether they be testators, grantors, or fiduciaries, practitioners should be mindful of the extent to which the exoneration clauses that their clients may wish to include in testamentary and inter vivos trust instruments are enforceable. The failure to adequately consider the enforceability of such exculpatory provisions may cause testators, grantors, and fiduciaries to rely



Robert M. Harper

upon them, without justification and to their detriment.

*Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in estate and trust litigation. Mr. Harper serves as Co-Chair of the Bar Association's Member Benefits Committee and a Vice-Chair of the Governmental Relations and Legislation Committee of the New York State Bar Association's Trusts and Estates Law Section.*

1 Ilene S. Cooper & Robert M. Harper, "Incomplete Protection: Exoneration Clauses in New York Trusts and Powers of Attorney," 28 *Touro L. Rev.* 379 (2012).

2 *Matter of Stralem*, 181 Misc.2d 715 (Sur. Ct., Nassau County 1999).

3 *Matter of Lubin*, 143 Misc.2d 121 (Sur. Ct., Bronx County 1989).

4 *Matter of Mankin*, No. 330328, 2010 WL 2801614 (Sur. Ct., Nassau County 2010), *aff'd*, 88 A.D.3d 717 (2d Dep't 2011).

5 *Matter of Goldblatt*, 162 Misc.2d 888 (Sur. Ct., Nassau County 1994); *Matter of Shore*, 19 Misc.3d 663 (Sur. Ct., Westchester County 2008).

6 *Matter of Knox*, 947 N.Y.S.2d 292 (4th Dep't 2012).

7 *Matter of Tydings*, No. 2008-2623, 2011 WL 2556955 (Sur. Ct., Bronx County 2011).

8 *See id.*

9 *See Shore, supra; Tydings, supra.*