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## INCOMPLETE PROTECTION: EXONERATION CLAUSES IN NEW YORK TRUSTS AND POWERS OF ATTORNEY

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Exoneration clauses excuse fiduciaries, most notably executors and trustees, from liability for the failure to exercise reasonable care.<sup>1</sup> Although exoneration clauses in testamentary instruments have been deemed void as against public policy, pursuant to New York Estates, Powers and Trusts Law (“EPTL”) section 11-1.17, there is no analogous statutory prohibition concerning the enforceability of similar provisions in inter vivos trusts and powers of attorney. The absence of such statutory guidance has left courts to reach divergent views concerning the enforceability of exoneration clauses in lifetime trust instruments. In order to create uniformity in terms of the duties that fiduciaries (whether they be executors, trustees of testamentary trusts, trustees of inter vivos trusts, or attorneys-in-fact) owe to the individuals whose interests they protect, the EPTL and the New York General Obligations Law (“GOL”) should be amended to provide that exoneration clauses in inter vivos trust instruments and powers of attorney are void as against public policy.

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<sup>1</sup> Cf. Margaret Valentine Turano, Commentary: N.Y. EST. POWERS & TRUSTS LAW § 11-1.7 (2008) (discussing exoneration clauses).

## I. HISTORY OF EPTL SECTION 11-1.7

Estate and trust fiduciaries owe a duty of undivided, absolute loyalty to the beneficiaries whose interests they protect.<sup>2</sup> This “inflexible” duty of fidelity is akin to the highest standards of honor, not just honesty alone.<sup>3</sup> It obligates fiduciaries to administer the estate or trust for the benefit of the beneficiaries, with undivided loyalty and without regard to self-interest.<sup>4</sup> The legal responsibilities arising from that fiduciary status cannot generally be divested by agreement or other means.<sup>5</sup>

Despite that duty, however, testators and grantors have attempted to insulate fiduciaries from liability for breaching their obligations.<sup>6</sup> These attempts come in the form of exoneration clauses, which purport to exculpate fiduciaries for breaching the duty of undivided loyalty and failing to account.<sup>7</sup> Yet, these provisions are not universally enforceable in New York.

More than a century ago, in *Crabb v. Young*,<sup>8</sup> the New York Court of Appeals first addressed the issue of whether exoneration clauses are enforceable.<sup>9</sup> In *Crabb*, the decedent’s will exempted the trustees of a testamentary trust from liability for “any loss or damage . . . except [that which occurred due to] their own willful default, misconduct or neglect.”<sup>10</sup> When the trust suffered investment losses, the beneficiaries sought to be reimbursed by the trustee.<sup>11</sup> Although both the trial court and intermediate appellate court ruled that the trustee had an obligation to replace the amount lost, the Court of Appeals reversed, relying upon the exoneration clause contained in the

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<sup>2</sup> Boles v. Lanham, 865 N.Y.S.2d 360, 361 (App. Div. 2008); 41 N.Y. Jur. 2d Decedents’ Estates § 1450 (2009); Ian W. MacLean, *Exculpatory Clauses in Inter Vivos Trusts: What Remains of a Trustee’s Duty of Undivided Loyalty?*, 37 NYSBA TRUSTS & ESTATES L. SECTION NEWSL. 5, 5 (Fall 2004).

<sup>3</sup> *In re Wallens*, 877 N.E.2d 960, 962 (N.Y. 2007).

<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> MacLean, *supra* note 2.

<sup>7</sup> Robert Whitman, *Exoneration Clauses in Wills and Trust Instruments*, 4 HOFSTRA PROP. L.J. 123, 124-25 (1992).

<sup>8</sup> 92 N.Y. 56 (1883).

<sup>9</sup> *Id.* at 65, 66.

<sup>10</sup> *See id.* at 66.

<sup>11</sup> *See id.* at 65.

will.<sup>12</sup> In doing so, the Court explained that the decedent “had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done.”<sup>13</sup> Since there was no evidence of willful default, misconduct, or negligence on the trustee’s part, the exoneration clause required that the fiduciary be excused from liability for the losses.<sup>14</sup>

Subject to the requirement that fiduciaries act honestly and in good faith, the rule in *Crabb* prevailed in New York for more than five decades, until the Great Depression,<sup>15</sup> when the State Legislature enacted Decedent Estate Law (“DEL”) section 125 in 1936.<sup>16</sup> DEL section 125 proscribed the enforcement of exoneration clauses that purported to excuse estate and testamentary trust fiduciaries from liability for failing to exercise reasonable care.<sup>17</sup> In passing DEL section 125, the Legislature restricted the freedom of testation, which is strongly favored as a matter of public policy.<sup>18</sup>

DEL section 125 was necessitated by the “increasing practice of testamentary draftsmen and corporate fiduciaries in vesting in . . . fiduciaries almost unlimited powers, with a minimum of obligations . . .”<sup>19</sup> As the legislative history reflects, this practice was “a serious potential menace . . . to the rights of . . . all persons interested in estates.”<sup>20</sup> Additionally, “[t]he primary duties of ordinary care, diligence and prudence and of absolute impartiality among . . . beneficiaries [were] of the very essence of a trust, and any impairment of these or similar obligations of a fiduciary [was found to be] contrary to public policy.”<sup>21</sup>

The same policy-based reasons governed thirty years later, when the Legislature enacted DEL section 125’s successor, EPTL section 11-1.7.<sup>22</sup> Under EPTL section 11-1.7, a testator is prohibited

<sup>12</sup> *Id.* at 65-66.

<sup>13</sup> *Crabb*, 92 N.Y. at 65.

<sup>14</sup> *Id.* at 65-66.

<sup>15</sup> See Henry A. Shinn, *Exoneration Clauses in Trust Instruments*, 42 YALE L.J. 359, 359-60 (1933) (discussing the rapid depreciation of trust assets).

<sup>16</sup> See, e.g., *In re Clark’s Will*, 177 N.E.2d 397, 398 (N.Y. 1931); *In re Balfé’s Will*, 280 N.Y.S. 128, 130-31 (App. Div. 1935); Turano, *supra* note 1.

<sup>17</sup> *In re Stralem*, 695 N.Y.S.2d 274, 278 (Sur. Ct., Nassau Cnty. 1999).

<sup>18</sup> Turano, *supra* note 1.

<sup>19</sup> *Stralem*, 695 N.Y.S.2d at 278.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

from exculpating the executor or testamentary trustee nominated in a will from liability for failing to “exercise reasonable care, diligence and prudence.”<sup>23</sup> Will provisions that purport to do so are void as against public policy and have no import.<sup>24</sup> Indeed, as explained in *Estate of Stralem*,<sup>25</sup> “the attempted exoneration of the fiduciary [of an estate or testamentary trust] for any loss, unless occasioned by ‘willful neglect or misconduct’ is a nugatory provision amounting to nothing more than a waste of good white paper.”<sup>26</sup>

Examples of cases in which courts have reached the same conclusion that the court did in *Stralem* abound.<sup>27</sup> In *Estate of Lubin*,<sup>28</sup> the decedent’s will provided that the executor of his estate would be relieved of liability “for any loss or injury to the property . . . except . . . as may result from fraud, misconduct or gross negligence.”<sup>29</sup> Describing that provision as a “toothless tiger,” the court held that it was unenforceable as against public policy.<sup>30</sup>

Another noteworthy case is *Will of Allister*,<sup>31</sup> in which the decedent’s will authorized her testamentary trustee to invest the trust principal “irrespective of whether the same may be authorized by the laws of [this] State . . . as investments for fiduciaries and without the duty to diversify and without any restrictions placed upon fiduciaries by any present or future applicable law.”<sup>32</sup> However, the court found that the exoneration provision contravened EPTL section 11-1.7, reasoning that the provision “would elevate the fiduciary above the law,” if effectuated.<sup>33</sup>

Although EPTL section 11-1.7 unquestionably applies to testamentary instruments, the statute is silent with respect to inter vivos

<sup>23</sup> N.Y. EST. POWERS & TRUSTS LAW § 11-1.7(a)(1).

<sup>24</sup> N.Y. EST. POWERS & TRUSTS LAW § 11-1.7(a)(b).

<sup>25</sup> 695 N.Y.S.2d 274 (Sur. Ct., Nassau Cnty. 1999).

<sup>26</sup> *Id.* at 278 (quoting *In re Curley’s Will*, 272 N.Y.S. 489, 501 (Sur. Ct., Kings Cnty. 1934)) modified, 280 N.Y.S. 80 (App. Div. 1935).

<sup>27</sup> See *In re Lang’s Will*, 302 N.Y.S.2d 954, 957 (Sur. Ct., Erie Cnty. 1969); *Matter of Egerer*, No. 1281 P 2002, 2006 WL 6670806, at \*4 (Sur. Ct., Suffolk Cnty. Feb. 2, 2006) (finding portions of the will void).

<sup>28</sup> 539 N.Y.S.2d 695 (Sur. Ct., Bronx Cnty. 1989).

<sup>29</sup> *Id.* at 696.

<sup>30</sup> *Id.*

<sup>31</sup> 545 N.Y.S.2d 483 (Sur. Ct., Nassau Cnty. 1989).

<sup>32</sup> *Id.* at 486.

<sup>33</sup> *Id.*

trust instruments.<sup>34</sup> That silence has left New York courts to reach their own, sometimes divergent, views on the issue, and necessitates amendments to EPTL section 11-1.7 to provide that the statute applies to exoneration clauses in *inter vivos* trust instruments.

## II. EXONERATION CLAUSES IN *INTER VIVOS* TRUST INSTRUMENTS

As EPTL section 11-1.7 does not address *inter vivos* trusts, the issue of the enforceability of exoneration clauses in such instruments has been left to the discretion of the New York courts.<sup>35</sup> In exercising their discretion, however, the courts have reached conflicting conclusions as to the applicability of EPTL section 11-1.7 to *inter vivos* trust instruments and the enforceability of the exculpatory provisions contained in them.<sup>36</sup>

Absent statutory guidance declaring exoneration clauses in *inter vivos* trust instruments void as against public policy, most New York courts have, historically speaking, enforced them, applying “[a] more liberal rule” to such provisions than to exculpatory clauses in testamentary instruments.<sup>37</sup> “The rationale for this difference . . . 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.”<sup>38</sup>

Notwithstanding a grantor’s freedom to contract as he or she wishes, several courts have found that EPTL section 11-1.7 governs in cases involving *inter vivos* trusts.<sup>39</sup> Indeed, even the courts that

<sup>34</sup> See *In re Shore*, 854 N.Y.S.2d 293, 295-96 (Sur. Ct., N.Y. Cnty. 2008); *In re Francis*, 853 N.Y.S.2d 245, 250 (Sur. Ct., Westchester Cnty. 2008).

<sup>35</sup> See Turano, *supra* note 1.

<sup>36</sup> Compare *In re Mednick*, 587 N.Y.S.2d 127, 128-29 (Sur. Ct., N.Y. Cnty. 1992) (concluding that “the limitations on the powers and immunities of testamentary trustees under EPTL 11-1.7 do not apply to *inter vivos* trustees”), with *Shore*, 854 N.Y.S.2d at 296 (stating that the “public policy against exonerating testamentary fiduciaries from any and all accountability is equally applicable with respect to *inter vivos* trusts where . . . there is no one in a position to protect the beneficiaries’ interests during the existence of the trust”).

<sup>37</sup> *In re Mankin*, No. 330328, 2010 WL 2801614, at \*3-4 (Sur. Ct., Nassau Cnty. May 26, 2010), *aff’d*, 930 N.Y.S.2d 79 (App. Div. 2011).

<sup>38</sup> *Id.*

<sup>39</sup> *In re Goldblatt*, 618 N.Y.S.2d 959, 963 (Sur. Ct., Nassau Cnty. 1994) (observing that in the context of an SCPA Article 17-A guardianship proceeding, an exoneration clause contained in a proposed supplemental needs trust violated public policy); *Shore*, 854 N.Y.S.2d at 296 (finding that “the public policy in EPTL 11-1.7 against exonerating a fiduciary from

have applied a more liberal standard to exoneration clauses in inter vivos trust instruments have held that there are “limitations to the enforceability of such clauses.”<sup>40</sup>

It is beyond dispute that the “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>41</sup> Nor will the courts enforce exculpatory provisions that seek to render a trustee completely unaccountable;<sup>42</sup> to excuse the fiduciary of an inter vivos trust from the duty to account;<sup>43</sup> or to absolve an attorney-fiduciary who drafted the trust instrument of liability for all conduct other than acts committed in bad faith.<sup>44</sup> Even under the more liberal standard discussed above, the beneficiaries of an inter vivos trust are entitled to some level of protection, as loyalty, accountability and reasonableness are hallmarks of a trustee’s fiduciary relationship.<sup>45</sup>

Additionally, case law suggests that an exoneration clause contained in an inter vivos trust instrument is not enforceable when the fiduciary is involved, either directly or indirectly, in drafting or creating it.<sup>46</sup> The court recognized as much in *In re Shore*,<sup>47</sup> where it

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liability for the failure to exercise reasonable care, diligence and prudence applies equally to inter vivos trust where by its terms there is no one in a position to protect the beneficiaries from the actions of the trustee”).

<sup>40</sup> *In re Tydings*, No. 2008-2623, 2011 WL 2556955, at \*6 (Sur. Ct., Bronx Cnty. June 28, 2011); *see also O’Hayer v. de St. Aubin*, 293 N.Y.S.2d 147, 152-53 (App. Div. 1968) (addressing the application of an exoneration clause in an inter vivos trust instrument to acknowledge its effect in limiting, but not precluding, liability imposed upon a trustee); *In re Cowles*, 255 N.Y.S.2d 160, 173-74 (App. Div. 1965), *aff’d*, 215 N.E.2d 509 (N.Y. 1966) (construing the express terms of the exculpatory clause as “relieving the trustee from any responsibility for the loss resulting”).

<sup>41</sup> *Tydings*, 2011 WL 2556955, at \*6; *see also Boles*, 865 N.Y.S.2d at 361 (opining that a “trustee is liable if he or she commits a breach of trust in bad faith, intentionally, or with reckless indifference to the interests of the beneficiaries”).

<sup>42</sup> *In re Rivas*, No. 2000 LT 00007/B, slip op. at \*4 (Sur. Ct., Monroe Cnty. Jan. 5, 2011).

<sup>43</sup> *See, e.g., Shore*, 854 N.Y.S.2d at 295 (“[A]ccountability is an essential element of all fiduciary relationships which cannot be waived.”); *Stansbury v. Stansbury*, 2007 N.Y. Misc. LEXIS 4505, at \*7 (Sur. Ct., Kings Cnty. May 21, 2007) (noting that an exoneration from such an accounting would stand in opposition to public policy).

<sup>44</sup> *Tydings*, 2011 WL 2556955, at \*6.

<sup>45</sup> *See Shore*, 854 N.Y.S.2d at 296.

<sup>46</sup> *Cf. Tydings*, 2011 WL 2556955, at \*6, stating:

Nonetheless, it is clear that where, as here, a trustee was neither directly nor indirectly involved in drafting or creating the trust, and may be presumed to have relied upon the explicit provisions of an exoneration clause contained in a lifetime trust instrument before agreeing to serve as

found that an exculpatory clause contained in an *inter vivos* trust drafted by the trustee was void and unenforceable.<sup>48</sup>

In the absence of statutory guidance, the issue of the enforceability of exoneration clauses in *inter vivos* trust instruments in New York has been left to the discretion of the courts and resulted in what appear to be decisional inconsistencies. The inconsistencies, when taken in conjunction with the public policies discussed below, warrant legislative action, declaring broad exculpatory clauses in *inter vivos* trust instruments exonerating fiduciaries from the duties of reasonable care, diligence, and prudence void as against public policy.

### III. ADDITIONAL POLICY-BASED REASONS TO AMEND EPTL SECTION 11-1.7

While the freedom of contract, much like the freedom of testation, generally is favored,<sup>49</sup> it is not so sacred as to render enforceable a contract provision that contravenes public policy.<sup>50</sup> It has been restricted on public policy grounds in several contexts, including disputes concerning attorneys' fees;<sup>51</sup> collective bargaining conflicts involving public employees;<sup>52</sup> and cases concerning contractual provisions exonerating caterers from liability for damages resulting from the caterer's negligence.<sup>53</sup> Moreover, as the law is anything but stat-

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fiduciary, generally the trustee will not be held liable for acts specified in the exoneration clause.

*Id.*

<sup>47</sup> 854 N.Y.S.2d 293 (Sur. Ct., N.Y. Cnty. 2008).

<sup>48</sup> *Id.* at 296.

<sup>49</sup> *Bajan Grp., Inc. v. Consumers Interstate Corp.*, No. 1099-07, slip op. at \*8 (Sup. Ct., Albany Cnty. 2010) ("After all, even in commercial contracts between sophisticated business entities, a covenant against competition is subject to a rule of reason that requires courts to balance the competing public policies in favor of robust competition and freedom of contract.").

<sup>50</sup> *Lustig v. Congregation B'Nai Israel of Midwood*, 319 N.Y.S.2d 994, 1000 (Sup. Ct., Kings Cnty. 1971); *see also Brown v. Sup. Ct.*, 68 N.E. 145, 146 (N.Y. 1903) (opining that despite "the general rule that the law permits great freedom of action in making contracts, there are some restrictions placed upon that right by legislation by public policy and by the nature of things").

<sup>51</sup> *Samuel v. Druckman & Sinel, LLP*, 855 N.Y.S.2d 90, 92 (App. Div. 2008).

<sup>52</sup> *Niagara Wheatfield Admins. Ass'n v. Niagara Wheatfield Cen. Sch. Dist.*, 375 N.E.2d 37, 39 (N.Y. 1978).

<sup>53</sup> *Lustig*, 319 N.Y.S.2d at 996.

ic, the courts have recognized that contract provisions which were “valid in one era may be wholly opposed to the public policy of another.”<sup>54</sup>

In the trusts and estates context, the freedom of testation—which, much like the freedom of contract, is strongly favored—has already been restricted, yielding to public policy concerns that executors and trustees under testamentary instruments not be absolved of the duty of reasonable care.<sup>55</sup> There exists no public policy-based justification for differentiating between the standards of care owed by fiduciaries acting under testamentary and *inter vivos* trust instruments. On the contrary, public policy requires that fiduciaries acting pursuant to testamentary and *inter vivos* trust instruments alike adhere to the standards of reasonable care, diligence, and prudence,<sup>56</sup> as they are, unquestionably, bound by the same duty of undivided loyalty.<sup>57</sup>

This is especially true in the case of a revocable trust. As a revocable trust is a substitute for a will,<sup>58</sup> a fiduciary acting under a revocable trust should be bound to the same duty of reasonable care,

<sup>54</sup> See *id.* at 996.

<sup>55</sup> N.Y. EST. POWERS & TRUSTS LAW § 11-1.7.

<sup>56</sup> Hon. C. Raymond Radigan, “*New Uniform Trust Code to be Submitted to Legislature*”, N.Y.L.J., available at [http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202537636765&New\\_Uniform\\_Trust\\_Code\\_to\\_Be\\_Submitted\\_to\\_Legislature](http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202537636765&New_Uniform_Trust_Code_to_Be_Submitted_to_Legislature) (last visited Jan. 12, 2012) (proposing legislation which would unify testamentary and *inter vivos* trusts under the same standards).

<sup>57</sup> *Boles*, 865 N.Y.S.2d at 361; see also *In re Quatela*, No. 355511, 2010 WL 4466757 (Sur. Ct., Nassau Cnty. Sept. 30, 2010) (citations omitted) (pincite unavailable) (“A trustee is duty-bound to act in good faith in the administration of a trust, with honesty and undivided loyalty to the beneficiaries and avoid any circumstances whereby the trustee’s personal interest will come in conflict with the interest of the beneficiaries. The purpose of this rule is to ensure that the trustee’s acts are above suspicion and that the trust receives the trustee’s uninfluenced judgment.”).

<sup>58</sup> *In re Tisdale*, 655 N.Y.S.2d 809, 811 (Sur. Ct., N.Y. Cnty. 1997); see also *In re Goetz*, 793 N.Y.S.2d 318, 322 (Sur. Ct., Westchester Cnty. 2005) (citations omitted) (“Further, revocable *inter vivos* trusts are commonly employed as estate planning tools and are coordinated with the grantor’s will, functioning in much the same manner as a will. Because the Goetz revocable trust was created as a part of the decedent’s overall estate planning at the same time as his will, the trust can be deemed to ‘function[s] as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor’s property.’ ” (alteration in original) (emphasis added)); *In re Davidson*, 677 N.Y.S.2d 729, 730 (Sur. Ct., N.Y. Cnty. 1998) (noting that “revocable trusts—used increasingly as devices to avert will contests—function essentially as testamentary instruments (*i.e.*, they are ambulatory during the settlor’s lifetime, speak at death to determine the disposition of the settlor’s property, may be amended or revoked without court intervention and are unilateral in nature) and therefore must be treated as the equivalents of wills in the eyes of the law”).

diligence and prudence that is imposed upon an executor or testamentary trustee.

Based upon the foregoing, EPTL section 11-1.7 should be amended to reflect that inter vivos trustees are subject to its provisions. Doing so will further the public interest of ensuring that fiduciaries acting under lifetime trusts exercise reasonable care, diligence, and prudence in connection with their fiduciary duties.

#### IV. EXONERATION CLAUSES IN POWERS OF ATTORNEY

By executing a power of attorney, a principal can appoint an attorney-in-fact to act on his or her behalf as to the powers granted in the governing instrument,<sup>59</sup> including the authority to engage in real-estate transactions, banking transactions, and estate-related transactions, among others.<sup>60</sup> “A durable power of attorney authorizes the [attorney-in-fact] to exercise powers despite the incompetence or disability of the principal and is effective until the principal’s death unless the instrument expressly provides that the power is terminated by the incapacity of the principal . . . .”<sup>61</sup>

As the relationship of an attorney-in-fact to the principal is that of an agent and principal, the relationship carries with it the duty to act prudently.<sup>62</sup> The relationship also imposes upon an attorney-in-fact the duty to act on the principal’s behalf, with undivided loyalty, independent of the attorney-in-fact’s self-interest.<sup>63</sup> Indeed, an attorney-in-fact must “act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing.”<sup>64</sup> Additionally, to the extent that a power of attorney authorizes an attorney-in-fact to make a gift on a principal’s behalf, the attorney-in-fact must only exercise that

<sup>59</sup> *In re Hoerter*, No. 333127, slip op. at \*6 (Sur. Ct., Nassau Cnty. 2007).

<sup>60</sup> Hon. C. Raymond Radigan, LexisNexis Practice Insights: “Formal Requirements for General Powers of Attorney” (last viewed on Mar. 18, 2012) (on file with the authors).

<sup>61</sup> *See id.*

<sup>62</sup> N.Y. GEN. OBLIG. LAW § 5-1505(1) (“In dealing with property of the principal, an agent shall observe the standard of care that would be observed by a prudent person dealing with property of another.”).

<sup>63</sup> *In re Ferrara*, 852 N.E.2d 138, 144 (N.Y. 2006) (quotations omitted); *see also Weber v. Burman*, No. 20875/06, slip op. at \*6 (Sur. Ct., Nassau Cnty. 2008) (citation omitted) (reiterating that an attorney-in-fact must “act in the utmost good faith and undivided loyalty toward [the principal] and must act in accordance with the highest principles of morality, fidelity, loyalty and fair dealing”).

<sup>64</sup> *Ferrara*, 852 N.E.2d at 144.

discretion when the gift is in the principal's best interests.<sup>65</sup>

Consistent with those fiduciary obligations, in *In re Estate of Francis*,<sup>66</sup> the only reported New York case addressing whether an exoneration clause in a power of attorney is enforceable, the court found that a broad exculpatory provision in a power of attorney violated public policy.<sup>67</sup> There, the decedent's attorney-in-fact "admitted that he transferred to himself or his mother virtually all of [the] decedent's liquid assets and secured a life tenancy in the [decedent's] real property."<sup>68</sup> The attorney-in-fact also "used [the] decedent's assets to pay off his personal credit card debts, to purchase a computer, clothes, CDs, DVDs, whiskey and fund his Pay Pal accounts."<sup>69</sup>

When the decedent died and the fiduciary of his estate commenced a turnover proceeding against the attorney-in-fact, the attorney-in-fact endeavored to shield himself from liability for his misconduct.<sup>70</sup> The attorney-in-fact did so based upon an exoneration clause that the decedent included in the power of attorney, which purported to excuse the attorney-in-fact from liability for any and all actions taken under the power of attorney.<sup>71</sup> However, the court rejected the attorney-in-fact's efforts, noting that "a clause which seeks to exonerate an attorney-in-fact from any and all liability runs afoul of the spirit of New York's public policy . . . ."<sup>72</sup> As a result, the court set aside the transfers made by the attorney-in-fact and directed him to account.<sup>73</sup>

Considering the fiduciary duties of an attorney-in-fact to act reasonably, with undivided loyalty, and independent of any self-

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<sup>65</sup> *Id.* at 139 ("[P]ower of attorney that contains additional language augmenting the gift-giving authority must make gifts pursuant to those enhanced powers in the principal's best interest"). "[A]bsent a specific provision in the power of attorney document authorizing gifts, an attorney-in-fact, in exercising his or her fiduciary responsibilities to the principal, may not make a gift to himself [or herself] or a third party of the money or property which is the subject of the agency relationship." *In re Curtis*, 923 N.Y.S.2d 734, 737 (App. Div. 2011) (alteration in original). "Such a gift carries with it a presumption of impropriety and self-dealing, a presumption which can be overcome only with the clearest showing of intent on the part of the principal to make the gift." *Id.*

<sup>66</sup> 853 N.Y.S.2d 245 (Sur. Ct., Westchester Cnty. 2008).

<sup>67</sup> *Id.* at 250-51.

<sup>68</sup> *Id.* at 249.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 247-48.

<sup>71</sup> *Francis*, 853 N.Y.S.2d at 247-48.

<sup>72</sup> *Id.* at 250

<sup>73</sup> *Id.* at 251.

interest, it logically follows that an exoneration clauses purporting to excuse an attorney-in-fact for failing to honor those duties violates public policy. For the reasons discussed more fully below, the GOL should be amended to so provide.

#### **V. REASONS TO AMEND THE GOL**

While the freedom of a principal to appoint an individual of his or her choice to exercise certain powers on the principal's behalf is entitled to great respect, it is not absolute. Public policy dictates that an attorney-in-fact act reasonably in connection with the principal, and an exoneration clause exculpating an attorney-in-fact from the failure to honor the duty of reasonable care should, therefore, be deemed unenforceable.

The potential for the financial exploitation of a principal at the hands of an attorney-in-fact has proven itself to be too great to excuse an attorney-in-fact from the duty of reasonable care.<sup>74</sup> This is especially true, when taken in conjunction with the fact that, in cases concerning durable powers of attorney, the powers survive even the principal's incapacity or disability, potentially leaving the principal unprotected against an attorney-in-fact's exploitation until the principal's death.

Consequently, in order to ensure that an attorney-in-fact acts reasonably with respect to his or her principal, the GOL should be amended to provide that an exoneration clause in a power of attorney that seeks to absolve an attorney-in-fact from liability for failing to exercise reasonable care is void and unenforceable as a matter of public policy.

#### **VI. CONCLUSION**

Since executors, testamentary trustees, *inter vivos* trustees, and attorneys-in-fact are held to the same standard of absolute, undivided loyalty to the beneficiaries whom they serve, public policy necessitates that they be treated similarly, especially in the context of exoneration clauses. The New York EPTL and GOL should be amended to effectuate that purpose by filling the statutory silence

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<sup>74</sup> See N.Y. St. Law Revision Comm., "Report on Proposed Revisions to the General Obligations Law in Relation to Powers of Attorney" (2003).

with respect to inter vivos trust instruments and powers of attorney, regardless of a grantor or principal's expressed intentions. Doing so will ensure that New York's public policy concerns regarding reasonable fiduciary conduct are served and that the courts address these issues uniformly.