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Moving Forward:
Modernizing and Consolidating N.Y. Trust Law

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For better or worse, change does not come frequently or consistently to New York's body of trust law. While some trusts and estates practitioners take solace in this fact, it is the source of frustration for many others who find that it too often fails to serve the modern needs of trust settlors, beneficiaries, and trustees.

Practitioners think that New York trust law, which, traditionally has been among the most developed and respected in the nation, now all too often frustrates, rather than safeguards, a settlor's intent, often forcing the trustee and beneficiaries to deal with problems, or incur expenses, that otherwise could have been avoided. Aggravating the situation is the fact that much of New York's trust law is found in case law, making it more challenging to locate the governing rule, and sometimes creating ambiguity. These problems affect more than just the persons interested in any particular trust. Rather, they have systemic, state-wide repercussions. The reality is many other states have modernized and consolidated their trust laws, and, in so doing, have lured away from New York a tremendous amount of business directly and indirectly related to the trust industry, depriving New York of significant tax revenue and jobs.[1]

Fortunately, New York now finds itself in the midst of a once-in-a-generation opportunity to systematically review, modernize, and consolidate its trust law. On May 22, 2012, the EPTL-SCPA Legislative Advisory Committee, led by former Surrogate C. Raymond Radigan (Radigan committee), submitted to the legislature its Sixth and Final report recommending the adoption of a modified version of the Uniform Trust Code (UTC).[2] That report contained requests that the legislature disband the Radigan committee after 20 years of dutiful service and that the Trusts and Estates Law Section of the New York State Bar Association (NYSBA) take over its independent legislative review function. It also explained that NYSBA and other organizations would undertake a full, independent review of the Radigan committee's UTC proposal.

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Since then, NYSBA, the New York City Bar, and the Advisory Committee of the Office of Court Administration have joined forces to undertake an extensive review of the Radigan committee's UTC proposal in light of current New York law in order to make the appropriate recommendations to the legislature.[3] That process is far from over. At the end of the day, what each of NYSBA, the City Bar, and the OCA recommends to the legislature, and what law is actually enacted, could very well vary from the Radigan committee's proposal.

Nevertheless, as this review process unfolds, practitioners might be left wondering what the future holds for New York trust law. This article attempts to provide at least a glimpse of the direction in which some urge New York needs to move. It does so by focusing on just a few of the provisions of the Radigan committee's proposal, which are presented in no particular order.[4]

Reform to Correct Mistakes

Proposed UTC §415[5] states:

> The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

If enacted, this proposed rule would usher in a significant change from New York's traditional New York law on reformation, as it authorizes a reformation even in the absence of an ambiguous governing instrument. Traditionally, New York courts have been reluctant to exercise their reformation powers and would do so only to effectuate the creator's intent.[6] The underlying theory is that the best evidence of a creator's intent is found in the unambiguous words of the governing instrument.[7] Thus, courts would reform an unambiguous instrument only if the alleged mistake were evident on the face of the instrument.[8] If the instrument is devoid of ambiguity, courts would refuse to allow the reformation.[9] Extrinsic evidence is inadmissible absent ambiguity, even if it establishes that the facially unambiguous governing instrument contains a mistake.[10]

This traditional rule has been abandoned in many states and, even in New York, has been

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chipped away at by some courts and practitioners. The modern rule is based on the notion that the existence of clear and unambiguous language is not a bar to reformation.[11] Indeed, some New York courts have reformed unambiguous instruments because of mistakes established only through extrinsic evidence.[12] Other courts have done so only under limited circumstances, such as reforming in order to create a supplemental needs trust[13] or to address changes in the tax laws.[14] The proponents of the modern rule argue that it better equips courts to enforce the creator's intent, the ascertainment of which should not necessarily be limited to the four corners of the governing instrument. According to them, adherence to the ambiguity requirement in the face of clear and convincing extrinsic evidence of a mistake frustrates such intent. The high burden of clear and convincing evidence provides an adequate safeguard to deviations from the grantor's intent.

This more liberal approach was adopted by the Restatement (Third) of Property[15] and formed the basis of UTC §415, that latter of which, in turn, was adopted by the Radigan committee in its entirety. Proposed UTC §415 explicitly authorizes the reformation of an unambiguous trust if there is clear and convincing extrinsic evidence of a mistake.

Limitations on Trustee Actions

Proposed UTC §1004 states:

(a) A beneficiary may not commence a proceeding against a trustee for breach of trust more than one year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

(b) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

(c) If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within six years after the first to occur of:

(1) the removal, resignation, or death of the trustee;

(2) the termination of the beneficiary's interest in the trust;

(3) the termination of the trust; or

(4) the open repudiation by the trustee.

Current New York law prescribes a six-year statute of limitations applicable to enforcement of a trustee's obligations.[16] Under New York case law, the statute of limitations period does not begin to run until there is an open repudiation of the trustee's obligations to administer the trust estate that is clearly made known to the beneficiaries.[17]

It is not always obvious what acts trigger the running of the statute, which issue frequently is the subject of litigation. For example, several years ago, the Court of Appeals was called upon to decide when the statute of limitations governing a proceeding to compel the trustee to account commenced where a trustee had resigned and was replaced by a successor. There, the court upheld the reversal of the Surrogate and held that limitations period runs from the date the trusteeship is turned over to a successor.[18]

Section 417 of the UTC does more than **liberalize trust division rules**; it also authorizes trustees to **combine trusts with different provisions**.

Some also question New York's rule from a policy perspective. For example, many trustees are surprised to learn that full disclosure to a beneficiary of an act or transaction performed in good faith during the course of the trustee's stewardship does not commence the running of the statute of limitations for a claim of breach of duty regarding such transaction, as it does not constitute an open repudiation of the trustee's obligations.[19] Thus, many practitioners think that the rule can discourage voluntary disclosure.

The Radigan committee's proposal attempts to address these problems. First, it sets forth a detailed list of events that trigger the running of the limitations period. Second, it promotes voluntary disclosure by trustees by reducing the limitations period from six years to one year if certain requirements are met. In order to benefit from the reduced limitations period, the trustee must (1) disclose enough information so that a beneficiary either has knowledge of a potential claim for breach of duty or a reasonable basis to inquire into whether such a breach occurred, and (2) advise the beneficiary of the time period during which a proceeding must be commenced.[20] The thought is that even beneficiaries will benefit from this rule, as it will increase their knowledge of how a given trust is being administered and allow them to act before evidence gets stale and parties can no longer be found.

Trust Combination, Division

UTC §417 states:

(a) After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts, if the result does not impair rights of any beneficiary or adversely affect achievement of the purposes of the trust.

(b) Unless the terms of the trust provide otherwise, the commissions allowed to a trustee as determined under article twenty-three of the surrogate's court procedure act, as amended from time to time, shall not be increased by reason of the establishment of separate trusts pursuant to this section unless the court otherwise permits an increase, provided, however, that such trustee shall be entitled to charge the trust for any additional reasonable and necessary expenses incurred in the administration of such separate trusts.

In connection with this proposed statute, the Radigan committee's proposal recommended the repeal of EPTL 7-1.13, the latter of which codifies New York's current law on trust.

EPTL 7-1.13 contains an elaborate set of rules that determine a trustee's ability to divide a trust that vary according to different circumstances. The sum and substance of those rules are that (1) a trustee may divide a trust without court approval and the consent of those interested in the trust if the division is made for certain specified tax purposes (e.g., dividing a trust into two resulting trusts, one of which is exempt from GST tax, and the other of which is fully subject to GST tax),[21] (2) a trustee may divide a trust without court approval "for any reason not directly contrary to the primary purpose of the trust,"[22] and (3) the court, upon application by the trustee or any person interested in the trust, may order the division of the trust for any reason not contrary to the primary purpose of the trust.[23] The current statute also contains detailed provisions regarding administrative aspects of trust division.[24] Notable among such administrative rules is the requirement that each trust resulting from a division contain the same terms as the original, undivided trust.[25]

Some practitioners consider EPTL 7-1.13 to be too rigid because it allows trustees to divide trusts without court approval and beneficiary consent only in very limited, tax-related circumstances, and because it generally requires the resulting divided trusts to contain the same terms. Section 417 of the UTC would liberalize the current rule by allowing a trustee to divide a trust for any

reason, including a non-tax reason, provided that the division does not adversely affect any of the beneficiaries or the achievement of the trust's primary purposes.[26] Also, the Radigan committee's commentary on §417 explicitly states that the dispositive terms of the divided trusts do not have to be identical. Thus, the divided trusts can be tailored to address the particular needs of different beneficiaries.

Section 417 of the UTC does more than liberalize trust division rules; it also authorizes trustees to combine trusts with different provisions. The Radigan committee's commentary states that, often, "the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details…. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414."[27]

Uneconomic Trusts

UTC §414 states

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value less than $100,000 may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(c) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

(d) This section does not apply to an easement for conservation or preservation.

New York currently has a statute, EPTL 7-1.19, that deals with terminating uneconomical trusts. It permits the Surrogate's Court, upon a trustee's or beneficiary's application, to terminate a lifetime or testamentary trust (other than a wholly charitable trust and a supplemental needs trust) when the expense of administering it is uneconomical. The court's authority is predicated on findings that continuation of the trust is economically impracticable, that the trust's terms do not prohibit its early termination, and that such termination would not defeat the trust's specified purpose and would be in the beneficiaries' best interests. If it so finds, the court may direct distribution of the trust assets to and among those beneficiaries who at the time are entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust and those beneficiaries who would be entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust if it were to terminate immediately before such order or decree. The distribution of the trust assets are to be made in such manner, proportions, and shares as in the judgment of the court will effectuate the intention of the creator. The court is without power to terminate if doing so would reduce or eliminate a charitable deduction otherwise available to any person under the income tax, gift tax, estate tax or generation-skipping transfer tax regimes.

Indeed, some New York courts have **reformed unambiguous instruments** because of mistakes established only through extrinsic evidence.

Some practitioners consider EPTL 7-1.19 fundamentally flawed because it requires a court proceeding. Their reasoning is that trusts with relatively little assets, which presumably are the trusts that need to rely on the statute, are the very trusts that could least afford the expense of a court proceeding.

Proposed UTC §414 addresses this concern by eliminating the requirement for a court proceeding. It does so by instituting a bright line test: if the value of the trust's assets is less than $100,000, the trustee may terminate the trust if he concludes that the costs of administration are uneconomical. The trustee is authorized to distribute the assets of the terminated trust in a manner consistent with the purposes of the trust. In order to safeguard the beneficiaries' interests, the trustee must notify the trust's beneficiaries prior to terminating the trust.

To the extent that some form of this statute is adopted, it will be interesting to see whether the $100,000 threshold is utilized. The "actual" UTC uses a $50,000 threshold, which the Radigan committee concluded was too low for New York. Regardless of the amount that ultimately be decided upon, the point is that the expense of delays often incident to a court proceeding may be avoided.

Conclusion

New York's body of trust law traditionally has been among the most developed and well-respected in the nation. However, many argue that some portions of it now need to be modernized, clarified, and consolidated. The Radigan committee's proposal that New York adopt a modified version of the UTC has provided the spark that New York needed to consider these issues in a comprehensive, systematic manner.

1. See, e.g., Appleseed, A Matter of Trusts: Preserving Jobs and Taxes in New York's Personal Trust Business, a Report to the Lower Manhattan Development Corporation, February 2005.
2. It should be noted that most of the Radigan committee's proposal merely codifies and consolidates current New York trust law. While there are some key changes from current New York law, the proposal does not constitute a wholesale abandonment current New York law.
3. For the sake of full disclosure, the author of this article is an active member of the NYSBA committee currently reviewing the Radigan committee's proposal.
4. Clearly, this selection is in no way exhaustive. For example, a noteworthy provision of the Radigan committee's proposal that would constitute a change from current New York law, the so-called "Quiet Trust" provision, is not discussed here, but was discussed in a previously-published article. See Jonathan J. Rikoon and Louise Ding, "Quiet Trusts and Great Expectations," NYLJ, Sept. 17, 2012. Another significant provision not discussed here is the directed trustee section (Powers to Direct, UTC §808), which adopts a bill drafted by NYSBA currently pending in the legislature, subject to certain recommendations of the Radigan committee.
5. All UTC references are to the Radigan committee's proposed version of the UTC, the numbering of which sometimes differs from the original UTC.
6. *In re Estate of Hyman*, 14 Misc.3d 1232A, 836 N.Y.S.2d 493 (Sur. Ct. Nassau County 2007).
7. *In re Estate of Stahle*, NYLJ, Jan. 23, 2001, at 32.
8. *In re Patrick*, NYLJ, July 9, 2001, at 28, col. 3 (Sur. Ct. Onondaga County 2001).
9. *In re Estate of Stahle*, NYLJ, Jan. 23, 2001, at 32.
10. See Decision by Surrogate John Czygier (case name not given), NYLJ, Dec. 26, 2007, at 39, col. 4 (Sur. Ct. Suffolk County).
11. *In re Estate of Longhine*, 15 Misc. 3d 1106A, 836 N.Y.S.2d 500 (Sur. Ct. Wyoming County 2007); see also Restatement (Third) of Property (Wills & Don. Trans.) §12.1 (2003); Ordover & Gibbs, "Correcting Mistakes in Wills and Trusts," NYLJ, Aug. 6, 1998, at 3, col. 1.
12. Id.
13. See *In re Estate of Hyman*, 14 Misc.3d 1232(A) (Sur. Ct. Nassau County 2007).
14. See *In re Matter of Choate*, 141 Misc.2d 489, 533 N.Y.S.2d 272 (Sur. Ct. New York County 1988) (allowing reformation for tax reasons).
15. Restatement (Third) of Property (Wills & Don. Trans.) §12.1 (2003).
16. CPLR 213(1), which applies a six-year limitations period to "an action for which no limitation is specifically prescribed by law."
17. *In re Barabash*, 31 N.Y.2d 76 (1972); see *In re Meyer*, 303 A.D.2d 682 (2d Dept. 2003).
18. *Matter of Tydings*, 11 N.Y.3d 195 (2008).
19. *Matter of Baird*, 58 A.D.3d 958 (3d Dept. 2009). However, if the beneficiary with full knowledge of the transaction ratifies same, he may be estopped from later objecting to it. A beneficiary's mere silence does not constitute consent (*Matter of Bloomingdale*, 48 A.D.3d 559 (2d Dept. 2008)).
20. See UTC §1004(a).
21. EPTL 7-1-13(a)(1).
22. EPTL 7-1-13(a)(2).
23. EPTL 7-1.13(a)(3).
24. See EPTL 7-1.13(b)-(k).
25. EPTL 7-1.13(c), which provides certain exceptions to this rule.
26. UTC §417(a).
27. Commentary of the Radigan committee on UTC §417. UTC §414 is discussed infra.