

2014 Legislation Update

By Robert M. Harper and Jennifer F. Hillman

Each year, the Trusts and Estates Law Section (the “Section”) advances legislative proposals in order to improve the law governing estates and trusts in New York. Due to the hard work and dedication of so many Section members, the 2013-2014 legislative year proved to be particularly productive for the Section’s legislative initiatives. As discussed below, as of the legislative session’s close, two of our Section’s legislative proposals have passed both houses of the Legislature and await review by Governor Cuomo’s office; two of the Section’s other legislative proposals have passed the Assembly; and four of the Section’s proposals have sponsors in the Legislature.

This article summarizes the legislative proposals for which our Section advocated on Lobby Day. In addition, this article discusses several Office of Court Administration Surrogate’s Court Advisory Committee (“OCA”) proposals that our Section supported. While there remains much work to do to advance our Section’s legislative initiatives, the 2013-2014 legislative year has been a productive one for which we wish to update the Section’s membership.

Trusts and Estates Law Section Proposals

- **Delayed Legacies—A.1185/S.4952**—Under the current version of EPTL 11-1.5, interest is not payable on a legacy unless the beneficiary makes a demand upon the fiduciary for payment before the beneficiary commences a proceeding to compel payment of the legacy; and, if interest is due, it generally accrues at the fixed rate of 6%, commencing seven months from the time that letters (including preliminary letters) are granted.¹ The Section has proposed amendments to EPTL 11-1.5 (and the enactment of EPTL 11-A-2.1) to promote greater fairness and certainty concerning the payment of delayed legacies.² Under the Section’s proposal, interest would be payable from the residuary starting seven months after the issuance of letters (or, if no letters issue, seven months from the date of death), unless the governing instrument provides otherwise, and the interest rate would be set on the first business day of each calendar year at the federal funds rate less 1%, but in no event less than one-half of 1%.³ The Surrogate’s Court would retain authority to disallow interest or to surcharge a fiduciary, thus ensuring the Surrogate’s Court’s discretion to balance the sometimes conflicting interests of specific bequest beneficiaries, residuary beneficiaries, and fiduciaries.⁴ As of the writing of this article, this proposal has passed both houses of the Legislature and awaits review by the Governor’s office.
- **Trustee Commissions and the Power to Adjust**—Our Section has proposed amendments to EPTL 11-2.3(b)(5). The amendments are designed to reconcile trustee commission statutes (*i.e.*, SCPA 2309) with the more fluid, subsequently enacted Prudent Investor Act (the “PIA”) (codified in EPTL 11-2.3) and the Uniform Principal and Income Act (the “UPIA”) (codified in EPTL 11-A-1.2).⁵ The PIA’s power to adjust between principal and income permits a trustee to pursue an investment strategy that bridges the gap between the interests of the trust’s current beneficiary and its remaindermen.⁶ To the extent that a trustee makes adjustments from the income account to the principal account, or vice versa, the assets that are transferred should be re-characterized as income or principal for the purpose of calculating the trustee’s commissions.⁷ Such re-characterization—which is addressed in our Section’s proposed amendment to EPTL 11-2.3(b)(5)—would be consistent with the total return investment regime that is inherent in the PIA and UPIA.⁸ The proposal has not been introduced as a bill in the Legislature.
- **Marriage Equality Act Amendments to the EPTL and SCPA—A.7100/S.7003**—As the Marriage Equality Act legalized same-sex marriage in New York, the Section has proposed amendments to Articles 4 and 6 of the EPTL and Articles 10, 13, and 17 of the SCPA to include gender-neutral language that is consistent with the Marriage Equality Act’s terms.⁹ This proposal has passed the Assembly and recently was sponsored in the Senate, but has not yet been proffered for a vote in the Senate.¹⁰
- **Exoneration Clauses in *Inter Vivos* Trusts**—The Section has proposed amendments to EPTL 11-1.7, which provides that exculpatory clauses in testamentary instruments seeking to absolve executors and testamentary trustees from liability for the failure to exercise reasonable care are void as against public policy.¹¹ As EPTL 11-1.7 does not address exculpatory provisions in *inter vivos* trust instruments, courts have concluded that such clauses are enforceable, except to the extent that such exculpatory clauses seek to excuse trustees of lifetime trusts from liability for bad faith, self-dealing, gross negligence, and reckless indifference.¹² If enacted, the Section’s proposal would amend EPTL 11-1.7 to provide that exculpatory clauses in both testamentary instruments and lifetime trusts are violative of public policy where they seek to absolve fiduciaries from lia-

bility for the failure to exercise reasonable care.¹³ This proposal does not yet have a sponsor in either the Assembly or the Senate.

- **Posthumous Annulment and the Spousal Right of Election**—The Section has lobbied for amendments to EPTL 5-1.2, which enumerates the grounds upon which a surviving spouse may be disqualified from receiving an elective share of a decedent's estate.¹⁴ While recent case law permits courts to disqualify a surviving spouse from taking an elective share based upon "equitable" grounds, the Section's proposal would allow a surviving spouse to be disqualified from receiving an elective share on the basis of a posthumous annulment of the surviving spouse's marriage to the decedent.¹⁵ This proposal has not been introduced in either house of the Legislature.
- **Technical Amendments to SCPA 1724**—A.9055/S.7137—The Section has proposed amendments to SCPA 1724 to correct references contained therein to the Uniform Gifts to Minors Act ("UGMA"), which has been repealed.¹⁶ Under the Section's proposal, the references in SCPA 1724 to UGMA would be replaced by references to the Uniform Transfers to Minors Act, which currently governs custodial accounts.¹⁷ This proposal has passed both houses of the Legislature and awaits review by Governor Cuomo's office, as of the writing of this article.
- **Technical Amendments to Mental Hygiene Law § 81.21**—A.9054—The authority of an Article 81 guardian to transfer an incapacitated person's assets to another is derived from Mental Hygiene Law ("MHL") § 81.21.¹⁸ While MHL § 81.21(c) references MHL § 81.07(d)(1) to specify the persons who are entitled to notice of an application that is brought under MHL § 81.21(a), it appears that the reference in MHL § 81.21(c) to MHL § 81.07(d)(1) is incorrect and, instead, should be to MHL § 81.07(e)(1).¹⁹ The Section has proposed legislation to correct the errant reference in MHL § 81.21(c) to MHL § 81.07(d)(1). This proposal has passed the Assembly, but has not garnered a sponsor in the Senate.

OCA Proposals

- **Technical Amendments to EPTL 10-6.6(s)(10)**—A.9757/S.7244—EPTL 10-6.6, New York's decanting statute, allows a trustee who has authority to invade a trust's principal to exercise such authority by establishing a new trust, thereby permitting the trustee of an irrevocable trust to appoint the trust's assets to another trust.²⁰ While the inclusion of EPTL 10-6.6(s)(10) in a 2013 chapter amendment to the statute clarified

that the grantor of the trust shall not be deemed to be a beneficiary based upon the trustee's power to take certain actions with respect to the trust's principal, the chapter amendment erroneously referred to EPTL 7-1.1.²¹ This proposal, which has passed both houses of the Legislature and currently awaits review by the Governor's office, corrects the cross-reference in EPTL 10-6.6(s)(10) to EPTL 7-1.1 to refer to EPTL 7-1.11.²²

- **Inheritance Rights of Posthumously Conceived Children**—A.7461-A/S.4779-B—OCA proposed—and our Section supported—legislation to address the inheritance rights of posthumously conceived children, which would amend EPTL 4-1.3 and add EPTL 11-1.5. Subject to certain notice, writing, and timing conditions, the proposal provides for posthumously conceived children to be treated as the distributees of their genetic parents and as beneficiaries of certain class gifts.²³ The proposal has passed the Assembly and Senate, and awaits review by Governor Cuomo's office, as of this article's writing.
- **Renunciation of Property Interests**—A.9355-A/S.7144—EPTL 2-1.11(d)(5) permits a fiduciary of a decedent's estate to renounce property in which the decedent had a beneficial interest, but did not receive before death, provided that the fiduciary receives authorization to do so from the court having jurisdiction over the decedent's estate.²⁴ OCA has proposed—and the Section has supported—amendments to EPTL 2-1.11(d)(5), which would eliminate the requirement that a fiduciary obtain court approval before renouncing on behalf of the decedent's estate.²⁵ This proposal has passed both houses of the Legislature and is subject to review by the Governor's office, as of the writing of this article.
- **Finder's Agreements and Unclaimed Funds**—A.9759/S.7077-A—Mindful that the New York State Comptroller's Office of Unclaimed Funds has adopted a new policy concerning abandoned property location service agreements, OCA has proposed—and the Section has supported—amendments to EPTL 13-2.3.²⁶ If enacted, the amendments will clarify the law concerning the filing of abandoned property location service agreements with the Surrogate's Court under SCPA 1310, and put an end to the practice of permitting a finder's agreement signed by a potential claimant to unclaimed funds to be filed with the Surrogate's Court, where there is no estate pending or fiduciary who has been appointed.²⁷ The proposal has passed the Assembly and Senate, and awaits review by the Governor's office, as of the time of this article's writing.

As the Co-Chairs of the Section's Legislation and Governmental Relations Committee, we wish to thank the members of our Section who worked to advance the Section's legislative initiatives during the 2013-2014 legislative session. We also wish to thank the OCA's Surrogate's Court Advisory Committee and the Surrogate's Association of the State of New York for their gracious support of several of our Section's legislative priorities. Through the hard work and dedication of our Section's members, among others, the New York State Bar Association has contributed to the development of New York's trusts and estates law. We look forward to working with the Section's exemplary membership on future legislative developments.

Endnotes

1. NYSBA Memorandum Urging Approval of Delayed Legacies Bill (Apr. 4, 2013) (which is based upon the legislative memorandum prepared by Natalia Murphy).
2. *See id.*
3. *See id.*
4. *See id.*
5. Jill C. Beier and Joseph T. La Ferlita, NYSBA Mem. in Support of Amendment to Section 11-2.3(b)(5) of New York's Estates, Powers and Trusts Law (2013).
6. *See id.*
7. *See id.*
8. *See id.*
9. Darcy M. Katris, NYSBA Mem. in Support of a Bill to Make Amendments to Articles 4 and 6 of the Estates, Powers and Trusts Law and Articles 10, 13, and 17 of the Surrogate's Court Procedure Act in Response to the Marriage Equality Act (2012).
10. *See id.*
11. *Matter of Knox*, 98 AD3d 300, 313, 947 N.Y.S.2d 292 (4th Dep't 2012).
12. *Matter of Tydings*, 32 Misc 3d 1204(A), at 6, 932 NYS2d 763 (Sur. Ct., Bronx Co. 2011).
13. Ilene S. Cooper and Robert M. Harper, NYSBA Mem. in Support of Proposal to Amend EPTL 11-1.7 (2012).
14. Jennifer F. Hillman et al., NYSBA Mem. in Support of Proposal to Amend EPTL 5-1.2 (2012).
15. *See id.*
16. Jennifer F. Hillman et al., NYSBA Mem. in Support of Amendments to SCPA 1724 (2013).
17. *See id.*
18. Robert M. Harper et al., NYSBA Mem. in Support of Amendments to Mental Hygiene Law § 81.21 (2013).
19. *See id.*
20. N.Y.S. Assembly Mem. in Support of A.9757 (2013).
21. *See id.*
22. *See id.*
23. Robert M. Harper and Jill C. Beier, NYSBA Mem. in Support of OCA Proposal to Amend EPTL concerning the Inheritance Rights of Posthumously Conceived Children (2013).
24. N.Y.S. Assembly Mem. in Support of A.9355 (2014).
25. *See id.*
26. N.Y.S. Assembly Mem. in Support of A.9759 (2014).
27. *See id.*

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NEW YORK STATE BAR ASSOCIATION

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