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Does New York Need a **Trust Code?**

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NEW YORK HAS A VERY well developed common law in the trust area. However, its lack of accessibility to practitioners and trustees has led to recent discussions concerning whether New York should adopt a uniform trust code.

For several years, various organizations at the request of the New York State Legislative Advisory Committee have been considering whether to recommend the adoption of a uniform trust code for New York.

These authors have spent time reviewing and comparing Article 8 of the Uniform Trust Code (2000) (UTC) concerning duties and powers of trustees to the current New York common law in this area. While the uniform code is certainly a good start for any discussion, we believe New York should consider a more tailored code based upon the current New York common law.

When considering the duties and powers of trustees, there are two areas where New York common law diverges from the UTC: trustee delegation of duties and directed trusts, wherein the settlor directs delegation of duties to a non-fiduciary. In these areas in particular, New York might prefer a more

tailored code based upon its current common law, which we would recommend.

The Uniform Trust Code

The UTC is a national codification of the law of trusts.

In recent years, the use of trusts has proliferated in estate planning. As an outgrowth of this increased use, there was a rise in questions involving trusts and a recognition that the trust law in many states was fragmented and sparse. The uniform code was intended to provide states with precise, comprehensive and easily accessible guidance on trust law questions.

Most of the UTC consists of default rules that apply only if the terms of the trust fail to address a particular issue. Currently, 23 states have adopted it.¹

New York has always had its own tailored trusts and estates law. Historically, inter vivos trusts were not utilized in the state to the extent they were in some other jurisdictions because most people found the probate process was satisfactory, despite New York's formal requirements for jurisdiction.

Despite the court's involvement in probate, there was not the usual delay caused by heavy supervision in handling estates in New York. Trusts were mainly utilized in other states in an attempt to avoid probate courts. However, with people living longer and the subsequent attempts to avoid expensive guardianship proceedings, New York attorneys began to utilize inter vivos trusts as part of estate planning.

For a time it seemed New York did not need a uniform trust code because the common law was well developed. However, it has become increasingly clear that much of the state's case law may be unavailable or not easily accessible to the trustee and practitioner.

Often extensive research is required to find and determine the current law on trust issues. The adoption of the uniform code provides New York with an opportunity to codify state law and garner some uniformity.

Article 8 of the UTC in particular concerns the duties and powers of trustees, states their fundamental duties and enumerates the trustee's powers. While these fundamental duties are not new, the law's outlook on them may have changed over the years.

New York law differs significantly from the uniform code's treatment of delegation of duties by a trustee, and there is no current statute concerning directed trusts where the settlor directs the delegation of a trustee's duties. These differences are discussed in detail below and were insisted upon by the New York state legislative leadership when it enacted EPTL 11-2.3.

Delegation of Duties

UTC §807 authorizes delegation in any context, provided the trustee exercises reasonable skill, care and caution in selecting the agent, establishing the scope of the delegation and periodically reviewing and monitoring the agent's actions. The statute states:

“(a) A trustee may delegate duties and

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powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

- (1) selecting an agent;
- (2) establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
- (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

"(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

"(c) A trustee who complies with subsection (a) is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

"(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this state."

The UTC allows delegation of duties within any context and for any purposes. Under this provision, a trustee could conceivably delegate the entire administration of a trust.

This is a significant broadening of the current New York common law, which states that the duty of a fiduciary is personal and cannot be divested.² Indeed, a fiduciary who delegates his or her duties is liable for breach of trust and potentially subject to surcharge.³

Relief is available for any fiduciary who does not wish to participate in or be responsible for the administration of the estate, by petitioning the court for permission to resign his or her office under SCPA §715.

For many years, delegation was specifically prohibited in EPTL 11-2.2(a)(1), unless the governing instrument expressly authorized it. This express prohibition was later altered when the Prudent Investor Act (EPTL 11-2.3) was enacted. However, in this context, delegation was solely authorized for investment purposes and pursuant to very strict and specific

guidelines detailed within the statute.

Moreover, UTC §807 allows a fiduciary to escape liability to beneficiaries for any breaches by the delegating agent as long as he complies with subsection (a), but the agent is only required to reasonably comply with the terms of the delegation and is not under a fiduciary duty of any kind to either the trustee or the trust.

This is contrary to the provisions of EPTL 11-2.3, which not only states that a delegee has a duty to the trustee and the trust to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution, but any attempted exoneration of the delegee from liability for failure to meet such duty is contrary to public policy and void. EPTL 11-2.3(c)(2).

The **proliferating use of trusts** in estate planning led to a rise in questions involving trusts and **recognition that many states' law was fragmented and sparse**; the **uniform code** was intended to provide states with precise, comprehensive and easily accessible guidance.

Under UTC §807 there is a clear hole in liability should a breach occur. Also significantly absent from the statute is any discussion of decreased fees to the trustees, considering their reduced role.

UTC §807 is contrary to the current law of New York concerning delegation. Moreover, even if New York should decide to adopt such a delegation statute, the current language of UTC §807 fails to address key issues that cannot be overlooked.

Directed Trusts

Another area where the UTC differs from the current New York law is with directed trusts. At this time, there is no New York statute authorizing "directed trusts," wherein

a settlor directs that the trustee shall act in a certain manner.

For example, the settlor can direct that the trustee maintain a concentrated stock position, even though it may be prudent to diversify a portfolio. Under a directed trust, a settlor could also fund a trust with an interest in a closely held business, and then direct that he himself or another specifically named person continues managing the business. The settlor could also direct a very specific succession plan.

Even though there is no current statutory authority in New York for a directed trust, there is case law support. *In re Rubin*, 143 Misc.2d 303 (Sur.Ct Nassau Co. 1989) (Radigan, S.), discussed a construction proceeding where the executors disputed the validity of a will clause granting specific advisors the power to direct the executors.

In reviewing the clause's validity, the court noted that "the earliest common law cases and texts recognize the right of a testator to limit, qualify, or condition the authority granted his fiduciary" which includes "limitations as to time (when the appointment shall begin or end), or place (different executors may be appointed in different geographic areas), or subject matter (one executor may be given exclusive authority over a particular asset or group of assets)." *Id.* at 304-305.

The court also looked to Justice Benjamin Cardozo's statement in *Oliver v. Wells*, 254 N.Y. 451, 459 (1930) that "legacies and devises were acts of bounty merely. The testator was free to withhold them altogether, or subject them to conditions, whether sensible or futile. The gift is to be taken as it is made or not at all."

Following this rationale, the court determined that the clause was valid, and the fiduciary was required to follow out the directions of the advisor named within the will.

"A grantor or testator may give his gift subject to any terms or conditions he chooses, unless the terms are contrary to public policy or some such restriction applies. Therefore, certain powers can be withheld from the...

trustee and delegated to others.” *In re Rubin*, at 305 -306.

However, while there is authority for a directed trust, the cases fail to address the issue of trustee liability for losses resulting from improper investments or whether the trustee will incur a reduced trustee fee based upon a limit to his or her role.

Notably, EPTL 11-2.3(c) is not applicable here because that statute allows trustee investment responsibility to be delegated to another by the trustee and at his or her discretion. EPTL 11-2.3(c) does not apply where the settlor, not the trustee, appoints a directing advisor to handle trust investments, thereby outright relieving the trustee of the responsibility for investment decisions. There are also issues concerning the delegee’s submission to the jurisdiction of New York courts.⁴

A Good Model for a Statute

Uniform Trust Code §808 and the Restatement of Trusts (Second) §185, upon which UTC §808 is based, both provide models for a directed trust statute.

“Section 808 Powers to Direct:

“(a) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

“(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee shall act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

“(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

“(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The

holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.”

While UTC §808 is a good starting point for a New York directed trust statute, there are still issues with the language therein.

For example, UTC 808(b) affords protection to the directed trustee in terms of potential liability, stating the trustee shall act “in accordance with” the directions unless the attempted exercise is “manifestly contrary” to the terms of the trust or the trustee “knows the attempted exercise would constitute a serious breach of fiduciary duty.”

It is still the trustee’s obligation to investigate the directing advisor’s investment strategy to determine if a breach of fiduciary duty exists.

The Uniform Trust Code allows **delegation of duties within any context and for any purposes**, under which a trustee could conceivably delegate the entire administration of a trust. This is a **significant broadening** of the current New York common law.

Currently, the New York State Bar Association is lobbying the Legislature to enact a directed trust statute that provides for a clear division of trust responsibilities and liabilities.⁵ The proposed statute states that a trustee shall have no duty to review the actions of the directed agent and that the trustee must comply with the directed agent’s directions, removing any oversight issues.

Consequently, the directed agent is deemed a fiduciary, and liable for any loss that results from any breach of his or her duties, and submits to the jurisdiction of the courts of New York state.

In sum, while the Uniform Trust Code is a good starting point, New York needs to draft its own tailored uniform trust code that addresses and conforms to New York’s long-standing tenets of trust law.

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1. According to information obtained from “The National Conference of Commissions on Uniform State Laws” website, last visited on Jan. 6, 2011, Alabama, Arizona, Arkansas, the District of Columbia, Florida, Kansas, Maine, Missouri, Michigan, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia and Wyoming have adopted the Uniform Trust code, and it was introduced in New Jersey in 2010. See http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp.

2. *In re Jones*, Jan. 31, 2003, NYLJ, 22, (col. 3).

3. *Id.*

4. See e.g., *In re Blumenkrantz*, 14 Misc.3d 462 (Sur. Ct. Nassau Co. 2006), where a delegee was not subject to an accounting proceeding because of an arbitration clause within the agreement between the trustee and delegee wherein the trustee delegated its investment function to a delegee.

5. For a more detailed description of the proposed statute and the current New York law on directed trusts, see Natalia Murphy, “Staying Competitive With a Directed Trust Statute: The Proposed Bill for New York,” New York State Bar Association Trusts and Estates Law Section Newsletter, Fall 2010, pg. 27-30.