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New Uniform Trust Code to Be Submitted to Legislature

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In 1990 the New York State Senate and Assembly, by joint resolution, created the Advisory Committee to the Legislature on EPTL and SCPA, for which I was selected as chair.

It consisted of 12 members, three each selected by the Senate Majority Leader, the Speaker, the State Surrogate's Association and the State Bar Trusts and Estates Section. It was our charge to review the Estates, Powers & Trusts Law and Surrogate's Court Procedure Act for the purposes of bringing them up to date, as it was more than 25 years since the Bennett Commission submitted its reports that brought the two statutes into being. In keeping with the responsibilities that the Bennett Commission undertook, we were to revise, modernize and simplify the acts.

The Advisory Committee has submitted five reports. The First Report concerned descent and distribution and the right of election. The Second Report was a full review of SCPA and assorted provisions of the EPTL. The Third Report recommended revisions that brought about the Prudent Investor Act. The Fourth Report recommended changes in the law of inter vivos trusts, and the Fifth Report recommended the revised Principal and Income Act. Substantially all of the recommendations of the Advisory Committee have been enacted into law, except for various provisions dealing with inter vivos trusts, now set forth in the Sixth Report.

Due to expanded use of inter vivos trusts in estate planning, and the drafting of a national uniform trust code, the members of the Advisory Committee were requested by many organizations to review the proposed Uniform Trust Code. Members of the Advisory Committee worked with representatives from various other organizations, such as state and local bar associations and banking groups, to do an in-depth study of New York's trust law and determine whether it would be advisable to request the Legislature to enact some form of a New York Uniform Trust Code.

While there is some New York statutory law relating to trusts, almost all of New York law on trusts is found in case law and commented upon in treatises. The undertaking of our trust review, if nothing else, compiled New York's scattered trust law from a variety of sources and placed it in a single report for review and access for the Legislature, the Judiciary and the Bar. Assignments were made to committee members of articles of the Uniform Trust Code for the purpose of reviewing the proposed code, making a comparison of the code with existing New York law, both statutory and case law, and determining whether it would be useful to adopt a New York edition of the Uniform Trust Code.

After extensive review, the Advisory Committee found much of the Uniform Trust Code was already set forth in New York's law, but there were additional provisions that might improve New York law. We also rejected some provisions that we could not recommend for adoption for the reasons set forth in our commentary. Based on our research, it is the recommendation of the Advisory Committee

that the Legislature consider enactment of a New York Uniform Trust Code. Our Sixth Report has been drafted and is in the process of being submitted to the Legislature for review.

The Advisory Committee completed a first draft, which has been circulated among various interested organizations. There will be a final meeting of the Advisory Committee in conjunction with the State Bar's annual meeting at the end of January to put the final touches to that draft, and as such it will then constitute the Sixth Report and be submitted to the Legislature.

In addition to requesting the enactment of a New York Uniform Trust Code, we will ask that the Advisory Committee be formally discontinued after more than 20 years in existence. We are recommending that, among other things, the New York State Bar Association's Trusts and Estates Section be assigned the task of assuming the responsibility for working on any further legislation dealing with the Sixth Report as directed by the Legislature. We are also recommending that bills submitted to the Judiciary Committees of the Legislature concerning trusts and estates be submitted to the section for comment prior to the committees taking action on such legislation, which function previously was done by the Advisory Committee.

Proposed Article 7A

We recommend that if New York adopts a version of the Uniform Trust Code, it be incorporated within Article 7 of the EPTL as Article 7A, similar to what was done when New York adopted its version of the Unified Prudent Investor Act and the Principal and Income Act under Article 11 of the EPTL.

The Sixth Report will consist of an introduction, an overview of the Advisory Committee's recommendations, background regarding the Advisory Committee and its future, the committee's report and recommendations, and a proposed New York Uniform Trust Code, which would constitute Article 7A of the EPTL.

The Advisory Committee's reports One through Five can be found in Volume 13 of Warrens Heaton on Surrogate Court Practice, 7th Edition. The Sixth Report will be added thereto after submission to the Legislature.

As to the Sixth Report, the Advisory Committee, as mentioned above, found that much of the Uniform Trust Code restates substantially New York's law dealing with trusts. To the extent that provisions of the code were found by the Advisory Committee to enhance New York Trust Law, it recommended adoption and rejected any provisions that it felt did not do so. Much of our trust laws will remain as already statutorily provided within EPTL. We recommended legislation that will codify existing case law and carry over existing statutory provisions.

The new proposed EPTL Article 7A is not designed to supplant all existing trust and estate related statutes. The default approach would be that existing statutes in the EPTL and SCPA would remain effective unless modified by the new Article. Therefore, practitioners must still consult the various provisions of the EPTL and SCPA in addition to those contained in the New York Uniform Trust Code Article. The committee strived to include in the Report cross-references to those existing sections that will remain in effect, to provide for a smooth search.

Sections

The purpose of adopting a New York Uniform Trust Code would be to modernize the law, clarify existing law and provide greater accessibility for out-of-state lawyers, as well as New York practitioners. To the extent that uniformity of emerging trends across the country could be incorporated within the New York law, the Advisory Committee recommended such modification. The Uniform Trust Code has 11 Articles. The Advisory Committee's recommendation covers each Article within a section of the proposed new Article 7A of the EPTL.

Section One addresses the general nature and background principles on which the code is based. It clearly indicates that the code is a default statute, in that a testator or settlor may generally provide otherwise in their instruments.

A settlor is generally free to determine in the instrument what state law is to control and establish the principal place of administration, as well as transfer of situs of the trust. It also covers non-judicial settlement of trusts and for resignation and appointment of trustees without judicial intervention.

Section Two covers jurisdiction and venue, leaving most of New York law intact.

Section Three deals with virtual representation. The Uniform Trust Code provisions are not recommended, but instead SCPA 315 would apply.

Section Four deals with the creation of a trust and is basically a codification of New York law, including case law. It addresses trust validity, modification, reformation, termination, cy pres, decanting and combining trusts, among others.

Section Five deals with rights of creditors in the case of spendthrift or discretionary trusts. Much of New York law is retained and various provisions of the Uniform Trust Code were not adopted.

Section Six provides for the treatment of irrevocable trusts and in large part adopts the Uniform Trust Code's provisions. This section establishes the capacity standard for the creation of irrevocable trusts, which would be the same as testamentary capacity.

The proposal would change the rule that lifetime trusts are irrevocable unless otherwise provided. Under the proposed revision, a trust is subject to revocation or amendment by the settlor in the absence of a contrary direction. A settlor who wishes to create an irrevocable trust typically does so in order to accomplish a tax objective, making it likely that skilled counsel will be involved in the process and will appreciate the need to explicitly provide a statement of the settlor's intent on this issue. In addition, methods for revocation are covered.

The section provides that a claim concerning the validity of irrevocable trusts would be subject to a three-year statute of limitation starting to run at the time of the settlor's death, but that period may be shortened if after the settlor's death the trustee provides the required notice to the person seeking to invalidate the trust. When such notice is given, the claim is barred upon the expiration of 120 days.

Section Seven addresses the office of trustee and tidies up provisions dealing with posting of bonds, appointment of successors, resignation, removal and compensation.

Section Eight covers duties and powers of trustees, including overall relationship with the trust beneficiaries, claims, delegation, distributions and general powers.

The proposal imposes the duty on a trustee to maintain adequate records and keep trust property separate. It covers divulging information concerning a trust to interested parties and supplying copies of trust instruments.

Section Nine sets forth the Prudent Investor Act, which has already been enacted under EPTL 11-2.3 and therefore is not repeated.

Section Ten covers trustees' liability and computation of damages, as well as settling trust and estate disputes and the obtaining of trust information.

Regarding the issue of exoneration of a trustee from liability, EPTL 11-1.7 is incorporated in Section Ten, rather than the provisions set forth under the Uniform Trust Code. This section also introduces a new concept under which a person, other than the beneficiary, who seeks a copy of the trust may be given instead a certification of trust, which would be a document containing certain information about the trust, but not all of its terms.

Section Eleven provides the general rules concerning severability and effective date of the new code, which generally will have retroactive effect covering existing trusts.

Conclusion

If the Legislature adopts the recommendations of the Advisory Committee, it will join many other states in providing clarity and uniformity of trusts for our transient society, as well as bring together under a code New York statutory and case law dealing with trusts.

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