

## Trusts and Estates Law

## Expert Analysis

# Proposed New York Trust Code

In 1990, the New York State Senate and Assembly by joint resolution created the Advisory Committee to the Legislature on the Estates, Powers and Trusts Law (EPTL) and the Surrogate's Court Procedure Act (SCPA) for the purposes of bringing up to date the Bennett Commission's work that created the EPTL and SCPA.

### Committee Reports

The committee submitted six reports. The first report dealt with Articles 4 and 5 of EPTL (the Decent and Distribution Statute and Right of Election); the second revised the SCPA; the third proposed the Prudent Investor Rule; the fourth dealt with revocable and irrevocable trusts; and the fifth dealt with the Uniform Principal and Income Act. Substantial legislation was enacted implementing much of the recommendations set forth in reports one to five. As to the sixth report, after 22 years, the committee wound down its work and submitted its final report where it set forth existing New York statutory and case law dealing with testamentary and non-testamentary trusts. It reviewed and compared that with the

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By  
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Uniform Trust Code that was enacted by many states.

The committee noted that there was no comprehensive statutory treatment of trusts within the EPTL and recommended that the legislature consider enacting some type of a trust code for New York so that practitioners could find within one statute substantive practice, and some needed additional procedural provisions not covered under the SCPA law dealing with trusts. It advised the legislature that it deliver its final report to many organizations such as the New York State Bar, the City Bar, New York Bankers Association, and other like organizations for the purposes of their reviewing the report and submitting comments to the legislature.

### Advisory Group

In 2012, the Trusts and Estates Law Section of the New York State Bar and two City Bar Committees—the Trusts and Estates and Surrogate's Court Committee and the Estate and Gift Tax Committee—formed the

New York Uniform Trust Code Legislative Advisory Group (NYUTC-LAG) to review the sixth report. Prof. Ira Bloom of Albany Law School and Prof. William LaPiana of New York Law School served as reporters. During a review period of over four years, the NYUTC-LAG determined that New York already had many of the provisions of the Uniform Trust Code either enacted by statute or followed by case law. However, review of all data available disclosed many areas of difference and room for improvements. An act was therefore proposed that would set forth substantive law for trusts in

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order for New York to have a centralized statutory code dealing with testamentary and inter vivos trusts. To the extent that SCPA does not set forth a practice and procedure dealing with trusts, the proposed code would also

fill that gap similar to what was done under Article 5 of the EPTL concerning the right of election and wrongful death proceedings.

Ultimately, the NYUTC-LAG determined that New York should have its own Trust Code rather than enact a modified revision of the Uniform Trust Code. (This route is similar to the Bennett Commission's decision not to have New York adopt the Uniform Probate

executive committee of the New York State Bar Association and its House of Delegates will be asked to approve the recommended legislation. A copy of the final report can be accessed at the NYSBA website.

I hope that the proposed New York Trust Code recommendations will be submitted to the legislature shortly and we would then have a concise and easy-to-understand New York Trust Code. In conjunction with the New York Trust Code, Profs. Bloom and LaPiana and others are currently working on directed trust legislation, which will allow non-trustees as advisors, committees or protectors to direct trustees regarding such matters as investments and distributions.

#### **Proposed Article 7-A**

Proposed Article 7-A deals with debtor or protector trusts by continuing 7-3.1. The legislation will contain an exception for Crummey Powers. General creditor rights have always been found in the CPLR and continue unchanged. Article 7-A references the CPLR.

#### **Update on Article 17(A)**

Previously I wrote articles regarding Article 17(A), which statute originally was requested by parents of Downs Syndrome children and organizations like AHRC. They noted the progress that Surrogate John Bennett made in modernizing both the substantive and procedural laws dealing with surrogate's practice. They sought his and others aid to deal with a problem they had concerning guardianship of Downs syndrome children. In the late 1960s they could either be the natural guardians of their children or seek guardianship under Article 17 during their child's minority. However, once those children reached majority, while the

children then were physically mature, in most instances, they found the children to still maintain infant mentality and dreaded having to seek the appointment of committees for their children. Those proceedings were drastic, costly, resulting in the child being branded a lunatic and would lose their civil rights. They found their relief in new legislation that was enacted under a new Article 17(A) of the SCPA.

Since the enactment of Article 17(A), much has been learned about Downs Syndrome children and of those suffering other disabilities. More opportunities became open for such children giving them new means to participate in society on an active basis.

The act was later broadened to include different individuals with different disabilities (SCPA Article 1750(a)). As a result and with other developments, Article 17(A) was found in certain instances not to be the route to be taken by certain individuals suffering learning disabilities. While the act still could be a proper answer for the needs of some, it is believed the act could be modernized to answer the concerns of those who raise constitutional questions regarding it and to provide in certain instances limitations on such guardianships. Where the statute would not be appropriate, guidance should be given regarding alternative means of protecting the interests of those not covered by the statute but suffer various other kinds of learning disabilities. Several suggestions have been submitted to the legislature and members thereof have introduced several proposals.

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Code but instead enact New York's own law regarding probate.) Bloom and LaPiana prepared a final report, which embodied the decisions made by the NYUTC-LAG, including references to other provisions of the EPTL and SCPA to alert the practitioner to the other substantive and procedural statutory provisions dealing with trusts found in the EPTL and SCPA. These include the Prudent Investor Act under EPTL Article 11, New York's Uniform Principal and Income Act under EPTL Article 11-A and SCPA Article 23 which deals with commissions.

In March 2017, the executive committee of the Trust and Estates Section of the New York State Bar Association unanimously approved the final report submitted by the two professors and recommended that New York adopt its own New York Trust Code to be enacted within the EPTL under new Article 7-A. Also in March 2017, the president of the City Bar Association approved the final report as affirmative legislation. In November 2017, the