

Is the Third Time the Charm? NYS Assembly Considers Amendment Increasing Individual Charitable Trustee Commission in 2021 Legislative Session

Over three legislative sessions, various New York state legislators have introduced legislation seeking to increase the commission of individual trustees of wholly charitable trusts. Assembly Bill A7800 (the Proposed Legislation) was introduced in the 2021-2022 Legislative Session and currently sits in the Assembly for review. On May 21, 2021 it was referred to the Judiciary Committee for review. If enacted, the Proposed Legislation would increase the commission of an individual charitable trustee, and allow such commission to be derived from both the income and principal of a wholly charitable trust. Thus, this amendment would compensate individual



By
**Raymond
Radigan**



And
**Kassandra
Polanco**

trustees of wholly charitable trusts in the same manner as individual trustees of non-charitable trusts, subject to a percentage reduction as set forth below.

As the law stands currently, the Surrogate's Court Procedure Act (the SCPA) provides default provisions when a trust, wholly charitable or non-charitable, fails to specify how to calculate a trustee's commission. Pursuant to SCPA §2308(5)(a), which applies to trusts of persons dying on or before Aug. 31, 1956, individual trustees of wholly charitable trusts are entitled to commission equal to 6% of the trust's annual income. Likewise, SCPA §2309(5)(a), which applies to trusts of persons dying after Aug. 31, 1956,

sets an annual commission of 6% of income for individual trustees of wholly charitable trusts. In contrast, trustees of non-charitable trusts are entitled to compensation on a sliding scale based on the amount of trust principal, irrespective of the trust's annual income. For example, if a non-charitable trust has \$1,000,000 of assets, the trustee's commission would be \$6,500, regardless of the annual income. Sponsor's Mem., 2017-18 Senate Bill S676B. However, if the same \$1,000,000 of assets was held in a wholly charitable trust, and generated \$1,000 of annual income, the trustee would only be entitled to \$600 as their annual commission. *Id.*

The Proposed Legislation would amend the statute to calculate annual commissions of individual trustees of wholly charitable trusts based on the principal value of the trust, rather than income collected. 2021-22 Assembly Bill A7800. Adoption of the Proposed Legislation

RAYMOND RADIGAN is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act. KASSANDRA POLANCO is an associate at the firm. The authors thank CHUANGCHUANG CHEN, a student at St. John's University School of Law, for contributing to this article.

would mean that individual trustees of charitable and non-charitable trusts would be compensated in the same manner, subject to a 20% reduction for charitable trusts with a principal value up to \$20,000,000, and a 50% reduction for charitable trusts with a principal value exceeding \$20,000,000. The annual commission would likewise be payable 1/3 from income, and 2/3 from principal of the charitable trust. *Id.*

The Proposed Legislation is the third in a series of amendments the Legislature has attempted to pass to increase individual charitable trustee commission. While it has passed in the Senate this session, it has not yet passed the Assembly. If the Legislature returns to session before the end of this calendar year, the Assembly may have time to consider the Proposed Legislation. However, if it is not considered this session, it will have to be reintroduced next session and gain approval from the Senate once more. In an earlier version of the Proposed Legislation, introduced in the 2017-18 legislative session as Senate Bill S676B, Sen. Andrew J. Lanza of Staten Island advocated for the Bill and asserted that the proposed changes are meant to curtail the “unwarranted discrepancy” established between the commissions of trustees of charitable versus

non-charitable trusts. Sponsor’s Mem., 2017-18 Senate Bill S676B.

Whether an individual is a trustee of a charitable or non-charitable trust, both are required to commit time and energy into making decisions that best fit the purpose of the trust. As Senator Lanza highlights in the memorandum to Assembly Bill S676B, not only are individual trustees of charitable trusts held accountable to the charity itself, but they must also answer to the Internal Revenue Service and the

In this Trusts and Estates law column, Raymond Radigan and Cassandra Polanco discuss proposed legislation that would increase the commission of an individual charitable trustee, and allow such commission to be derived from both the income and principal of a wholly charitable trust.

Charities Bureau of the New York Attorney General’s Office. Sponsor’s Mem., 2017-18 Senate Bill S676B. In that same memorandum to Assembly Bill S676B, Senator Lanza posits that increasing the commission paid out to individual charitable trustees, who currently rely solely on income-based commission, would decrease a potential conflict of interest.

Sponsor’s Mem., 2017-18 Senate Bill S676B. In theory, by authorizing payment of commission out of income only, a trustee may prioritize annual increases in trust income, whether it is in the best interest of the charitable trust or not. Arguably, the trustee’s duty to administer the trust truthfully and faithfully could be influenced by their personal interest in being compensated for their service. The Proposed Legislation furthers the legislative intent of decreasing a potential conflict of interest not only by increasing the commission of an individual charitable trustee, but also by using a portion of both the principal and income as a source for annual commissions.

The Legislature’s concern about a trustee’s potential conflict of interest is well-placed. Often, the most newsworthy stories surrounding charitable trusts are those where a trustee, or other fiduciary, takes advantage of the power they receive under an instrument. Though not a New York case, the *He Depu* case serves as an unfortunate example of what can go wrong when a charitable trustee abuses their power, or does not act in the best interest of the trust and its beneficiaries. The case has an involved history, but at its core concerned the Laogai Research Foundation (LRF) and the Yahoo! Human Rights

Fund (YHRF). In *He Depu*, the plaintiffs are a group of beneficiaries of the LRF who claim that various trustees and other fiduciaries improperly depleted the charitable trust's funds. *He Depu v. Oath Holdings*, No. CV 17-635 (RDM), 2021 WL 1110845 (D.D.C. March 22, 2021). Yahoo! funded the LRF as part of a settlement agreement in 2007. Chinese political dissenters sued Yahoo! after the company disclosed their personal information to the Chinese government, directly resulting in their imprisonment. Hongda "Harry" Wu, who had also been imprisoned as a result of his public political dissent toward the Chinese government, represented the plaintiffs' interest in the settlement. Pursuant to the terms of the settlement, Yahoo! would fund the LRF with \$3,200,000 to be held in trust for each plaintiff, and additionally provide \$17,300,000 to establish the YHRF. *Id.* The monies provided were to be used, *inter alia*, to provide humanitarian and legal assistance to Chinese political dissenters who have been imprisoned for expressing their views through Yahoo! or another medium. *Id.* Ultimately, Yahoo! deferred to Wu when it came to funding the YHRF through the LRF. Wu yielded immense power over the YRFH and was also the executive director of the LRF. In 2015, it was discovered that

the LRF had spent \$14,000,000 of the YHRF, with only approximately 8% of those funds going to political dissenters for whom the LRF was established to support. Wu positioned himself to be in a decision-making position every step of the way when it came to the funding of and disbursements coming from the LRF, signaling a clear conflict of interest. Wu used the funds to pay his salary, purchase real estate, pay for his various legal expenses and to "fund" another non-profit. *Id.* During this time, the trustees of the LRF, Yahoo! employees, were either complacent or in the dark about the manner by which funds were disbursed. This case illustrates how a failure in oversight by trustees of a charitable trust can lead to disaster, with the beneficiaries suffering the brunt of the trustees' misdoings. This case has a litany of factors at play outside of the charitable trust arena, but it does highlight the importance of careful and considerate drafting when it comes to ensuring a charitable trust's purpose is fulfilled and protected.

While it is unclear whether the Proposed Legislation will be approved and adopted, practitioners should keep it in their peripheral vision. Practitioners should advise their clients that as the law stands, the SCPA does not allow any flexibility when it comes to statutory

commission for individual trustees of charitable trusts. This potential change may leave current individual charitable trustees hanging in abeyance, but the Proposed Legislation does not change the fact that clients may choose the manner in which individual charitable trustees are compensated by drafting explicit provisions into the trust. Once fully informed, clients can decide to either allow the statutory scheme to determine commission, or draft specific provision that provide additional or less compensation to their trustees. Lastly, practitioners should highlight the importance of considering potential conflicts of interest to their clients, especially within the governing body of the trust, to ensure that the trust's purpose is fulfilled.