REPORT ON LEGISLATION BY THE TRUSTS, ESTATES
AND SURROGATE’S COURTS COMMITTEE

A.7522
S.5512

M. of A. Buchwald
Sen. Hoylman

AN ACT to amend the surrogate's court procedure act, in relation to the commissions of donees of a power in trust, including donees of a power during minority (Office of Court Administration (Internal # 34 - 2019))

THIS BILL IS APPROVED

On behalf of the Trusts, Estates and Surrogate’s Courts Committee of the New York City Bar Association we submit this report as a comment in support of the proposed legislation to amend the Surrogate's Court Procedure Act (SCPA) §§ 2306, 2307, 2308, 2309, 2312 and 2313.

SUMMARY OF PROPOSAL

The legislation proposes to amend SCPA §§ 2306, 2307, 2308, 2309, 2312 and 2313 to formalize rules governing the commissions of donees of powers in trust, including donees of powers during minority and incapacity, in order to conform the calculation of such commissions to the existing rules governing the commissions of trustees.

DISCUSSION

“Powers in trust” under New York law refers to powers granted under a will, excluding powers of appointment, to manage property vested in an infant or an incapacitated person. See EPTL §10-3.1(b). Such powers seek, in part, to avoid the necessity for the appointment of a guardian to manage the subject property during the period of minority or incapacity. The powers, rights, responsibilities and liabilities of a donee of a power in trust are often similar to those granted to a trustee under a will. See Matter of Hitchcock, 9 Misc. 2d 393, In Re Martin’s Will, 32 Misc. 2d 555.

While compensation of donees of powers in trust is not clearly referenced in the SCPA, case law has often resulted in the commissions of such powerholders being calculated under SCPA §2307, which governs commissions paid to fiduciaries other than trustees. One court’s opinion (referenced by the bill’s sponsors memo), however, noted it would be more appropriate for such commissions to be calculated under SCPA §2308 and §2309, which govern
commissions for trustees, given the similarities between the two roles. See Matter of Chase Manhattan Bank (Golding), 129 Misc. 2d 952.

Generally speaking, the role of a donee of a power in trust implies an ongoing fiduciary relationship during the time period in which the power exists. Though the property subject to the power is not vested in the donee, as would be the case with a trust, the same responsibilities and risks would apply to the donee as would apply to a trustee. Thus, despite technical differences that exist between the two roles, each is acting in a fiduciary capacity and should be compensated accordingly.

RECOMMENDATION

Based on the foregoing, it is recommended that the proposed changes to SCPA §§ 2306, 2307, 2308, 2309, 2312 and 2313 be adopted.

Committee on Trusts, Estates & Surrogate’s Courts
Andrew S. Auchincloss, Chair

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