CONTACT
POLICY DEPARTMENT
MARIA CILENTI
212.382.6655 | mcilenti@nycbar.org
ELIZABETH KOCIENDA
212.382.4788 | ekocienda@nycbar.org

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

A.7519 **M. of A. Stirpe**
S.5513 **Sen. Hoylman**

AN ACT to amend the estates, powers and trusts law, in relation to testamentary disposition to trustee under, or in accordance with, terms of existing inter vivos trust (Office of Court Administration (Internal # 31 - 2019))

THIS BILL IS APPROVED

Section 3-3.7 of the New York Estates, Powers and Trusts Law (the "EPTL") permits a testator to make a testamentary gift to a trust, regardless of whether or not the trust holds any property during the testator's lifetime, provided that the trust instrument was "executed in the manner provided for in [EPTL §] 7-1.17 prior to or contemporaneous with the will." The proposed legislation would make two amendments to EPTL § 3-3.7. One is intended to clarify that the trust need not hold any assets prior to the death of the testator, and the other is intended to allow a trust instrument created by the testator, as grantor, to be signed by a third party trustee AFTER the execution of the testator's will, provided that the testator signed the trust agreement prior to or contemporaneous with the will. The first change is intended to resolve an apparent conflict in the EPTL. The second is intended to address the holding in Matter of D'Elia, 40 Misc.3d 355 (Surrogate's Court, Nassau County 2013). In addition, the proposed legislation would make additional changes to make the statute gender neutral.

RESOLVING AN APPARENT CONFLICT WITH EPTL § 7-1.18

EPTL § 3-3.7 specifically allows a testator to make a gift to a trust, even if that trust has no assets at the time the will is executed. EPTL § 3-3.7(a) provides in pertinent part:

> "a testator or testatrix may by will dispose of * * *all or any part of his or her estate to a trustee of a trust * * * regardless of the existence, size or character of the corpus of such * * * trust."

Accordingly, it is clear that a gift can be made by will to a trust that has no assets at the time the will is signed. But EPTL § 7-1.18 provides in pertinent part:

> "a lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trust."

EPTL § 7-1.18 then goes on to prescribe specific requirements for transferring certain types of assets, and specifically provides that:

> "For purposes of this section * * *transfer is not accomplished by recital of assignment, holding or receipt in the trust instrument."

EPTL § 7-1.18 was intended to provide clarity regarding which assets are disposed of by the terms of a trust agreement a testator created during life, and which items are part of a testator's probate estate to be disposed of by will or the laws of intestacy. It was not intended to prevent what EPTL § 3-3.7 expressly allows—a transfer of assets that unquestionably are part of the probate estate to a trust upon the testator's death.

The sponsors memo of the proposed legislation expresses concern that there is an apparent conflict between EPTL § 3-3.7 and EPTL § 7-1.18.[1] The former allows a testamentary gift to an empty trust, but the latter implies that the trust will be valid only with respect to assets transferred to it during the testator's lifetime. The Committee does not believe there is a conflict. In the case of a gift made to a trust pursuant to EPTL § 3-3.7, the assets passing to the trust will be transferred to the trust in the manner required by EPTL § 7-1.18 after the testator's death. EPTL § 7-1.18 does not say that no assets can be transferred to a trust upon the death of the transferor. That said, the Committee is in favor of removing any doubt that others may have.

The proposed legislation would resolve the apparent conflict between the sections by changing the wording of EPTL § 3-3.7 so that it there is no longer any argument that it contradicts EPTL § 7-1.18. Specifically, the proposed legislation would remove the phrase ***"regardless of the existence, size or character of the corpus of such * * * trust"*** and replace it with ***"regardless of whether any assets have been transferred to the trust prior to the death of the testator"***. With this amendment, EPTL § 3-3.7 will clarify that the transfer to the trust required by EPTL § 7-1.18 can occur after the testator's death. The Committee approves this change.

ADDRESSING MATTER OF D'ELIA

Under EPTL § 3-3.7, a gift in a will to a trust will be valid only if

> "the terms of [the trust] are evidenced by a written instrument executed by the testator or testatrix, the testator or testatrix and some other person, or some other person * * * provided that such trust instrument is executed * * * prior to or contemporaneously with the will, and such trust instrument is identified in such will."

In Matter of D'Elia, a testator/grantor created a trust pursuant to a trust agreement made by the testator, as grantor, and by his son, as trustee. The testator also signed a will leaving his residuary estate to the trust.

[1] *See* Memorandum in Support of Legislation, A.7519/S.5513 (NYS 2019), *available at* https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A7519&term=2019&Summary=Y&Memo=Y.

The testator executed the trust agreement prior to executing his will. However, the testator's son did not sign the trust agreement until seven days later. The court ruled that the testator's gift of his residuary estate to the trust was not valid because the trust agreement was not "executed in the manner provided for in [EPTL §] 7-1.17 prior to or contemporaneous with the will."

The drafters of the proposed legislation acknowledge that the decision in Matter of D'Elia was correct, but feel that it is unduly harsh, especially given that the result was so easily avoidable.[2] For example, the testator could have signed the agreement as both the grantor and the initial trustee contemporaneous with the will. Then, his son could have signed as co-trustee seven days later and the testator could have resigned. However, because the testator's son was listed as the sole trustee, and he did not sign contemporaneous with the will, the trust agreement was not "executed * * * prior to or contemporaneous with the will."

The proposed legislation would amend EPTL § 3-3.7 to provide that if a testator is making a bequest to a trust, the grantor will have to sign the trust instrument "prior to or contemporaneous with the will" but the trustee will only have to sign "prior to the death of the testator." Specifically, the proposed legislation would strike the language requiring a trust instrument to be ***"executed * * * prior to or contemporaneously with the will"*** and replace it with a requirement that the trust instrument be:

> **"executed by the person establishing the trust prior to or contemporaneously with the execution of the will and, unless such person is the sole trustee, by at least one trustee thereof prior to the death of the testator."**

The Committee believes that this change would remove the trap for the unwary that currently exists in EPTL § 3-3.7. Accordingly, the Committee approves this change.

Finally, the Committee approves all of the changes that would make § 3-3.7 gender neutral (e.g., replacing references to "testator or testatrix" with references to just "testator", replacing all references to "his or her" with references to "such testator's", etc.).

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

Reissued May 2019

[2] *Id.*