Report of the Surrogate's Court Advisory Committee

to the Chief Administrative Judge of the Courts of the State of New York

January 2008

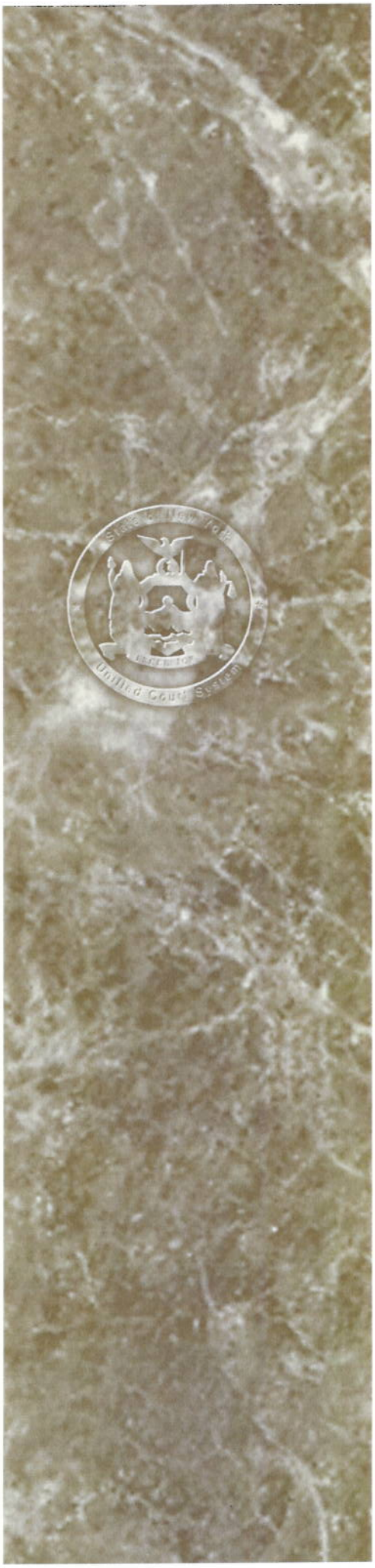

TABLE OF CONTENTS

I. Introduction

The Surrogate's Court Advisory Committee is one of the Committees established, pursuant to section 212(1)(q) of the Judiciary Law, by the Chief Administrator of the Courts to assist him in the execution of the functions of his office. The Committee annually recommends to the Chief Administrator proposals related to the Estates, Powers and Trusts Law, the Surrogate's Court Procedure Act and legal issues involving the practice and procedure of the Surrogate's Courts. These recommendations are based on the Committee's own studies, examination of decisional law and suggestions received from the bench and bar. In addition to recommending its own annual legislative program, the Committee reviews and comments on other pending legislative measures concerning estates, trusts and other matters (e.g., adoptions, guardianships) that are within the subject matter jurisdiction of the Surrogate's Courts.

During the 2007 legislative session, the Committee had two of its proposed bills enacted:

- Chapter 71: Amends section 1726 of the Surrogate's Court Procedure Act to authorize the court, in a proceeding for the appointment of a standby guardian, to dispense, in its discretion, with a hearing for such appointment and to appoint, in its discretion, a guardian ad litem to recommend whether the appointment of a standby guardian is in the best interests of the infant. Effective: June 4, 2007.

- Chapter 488: Amends section 2307-a of the Surrogate's Court Procedure Act to require an attorney who prepares a will to obtain a written acknowledgment of disclosure from the testator where the will designates as executor an employee of such attorney or an affiliated attorney. Effective: August 31, 2007; applies to all wills executed on or after August 31, 2007.

The Committee as presently constituted has 23 members. Its focus has been in the areas of legislation, adoption, guardianship, court rules, forms and technology, with the following four subcommittees of the Committee addressing each of these subjects:

Subcommittee on Legislation
Subcommittee on Adoptions
Subcommittee on Guardianship
Chair, Hon. Robert L. Nahman
Subcommittee on Rules, Forms and Technology

In this report, the Committee sets forth its legislative proposals and the other projects that are being undertaken.

As part of its effort to focus its work on areas which would be of benefit to the legislature, courts, bar and litigants, the Committee welcomes comments and suggestions. Inquiries should be submitted to:

Hon. Renee R. Roth, Chair
Surrogate's Court Advisory Committee
Office of Court Administration
25 Beaver Street, Suite 1170
New York, New York 10004

II. Legislation

A. New Measures

1. Small Estate Administration (SCPA 1123, 1213, 1301, 1304)

The Committee recommends this measure to amend SCPA §1301(1) to increase the definition of a small estate subject to Article 13 summary procedures from $20,000 to $50,000. This figure excludes interests in real property and exempt property as defined in section 5-3.1 of the EPTL.

The formalities of estate administration can be burdensome when applied to modest estates. Small estate administration provides a cost efficient and expedient method for the settlement of estates without court administration. The small estate administration procedures, which require an accounting by the voluntary administrator of the property received and disbursed, coupled with advances in court technology which enable the court to monitor compliance with the procedures, provide adequate safeguards for the administration of modest estates.

In addition, small estate administration facilitates access to the courts by enabling family members to attend to the administration and settlement of modest estates without the need for professional assistance.

SCPA §§ 1115(1) and 1211(1) index the value of an estate as to which the Public Administrator may act without the issuance of letters to the monetary amount defined as a small estate pursuant to SCPA § 1301(1). Accordingly, the authority of public administrators to administer small estates in an efficient and cost effective manner will increase correspondingly by the proposed amendment to Article 13. Nevertheless, a dichotomy exits regarding the settlement of small estates as between the public administrators within and without the City of New York. SCPA § 1123(2)(e), as amended in 1993, permits public administrators within the City of New York to file an informatory account where the gross value of the estate accounted for is "less than" that as defined as a small estate in SCPA §1301(1). However, SCPA §1213(2)(c) limits the filing of informatory accounts by public administrator's outside the City of New York to estates where the gross value of assets accounted for is less than $5,000. This bill amends both SCPA §1123(2)(e) and §1213(2)(c) to permit the settlement of small estates by filing informatory accounts where the gross value of the assets accounted for does not exceed the monetary amount defined as a small estate pursuant

to SCPA §1301(1). This amendment is not meant to abridge any local procedures for administering estates of $500.00 or less.

Finally, this bill retains the current filing fee of $1 for small estates up to $20,000.00. However, where the gross estate exceeds $20,000.00, this bill conforms the court fee for small estate administration to the fee schedule for administration and probate as set forth in SCPA §2402(7).

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to small estates

The people of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 1301 of the surrogate's court procedure act, as amended by chapter 373 of the laws of 1996, is amended to read as follows:

1. A small estate is the estate of a domiciliary or a non-domiciliary who dies leaving personal property having a gross value of [$20,000] $50,000 or less exclusive of property required to be set off under EPTL 5-3.1(a)(1), (2), (3), (4) and (5).

§ 2. Subdivision 4 of section 1304 of the surrogate's court procedure act, as amended by chapter 168 of the laws of 1999, is amended to read as follows:

4. Record. The clerk shall file the affidavit and assign it a number. The clerk shall enter each such proceeding in the records and indexes of the court. The clerk shall charge a fee of $1 for filing the affidavit where the gross value of the estate as stated in the affidavit is equal to or less than $20,000. Where the gross value of the

estate as stated in the affidavit exceeds $20,000 the clerk shall charge a fee as shown by the fee schedule in subdivision 7 of section 2402 of this act based upon such gross value; provided however that if the value of the estate as subsequently shown by any proceeding in the surrogate's court involving such estate, or by such papers or documents in connection with such estate as court rules may require to be filed with the court, exceeds the value originally stated and upon which the fee was paid, then an additional fee shall be immediately payable. Such additional fee shall be the difference between the fee based on the value subsequently shown and the fee which was initially paid. In the event that the value of the estate as subsequently shown is less than the value originally stated and upon which the fee was paid, then a refund shall be made which shall be the difference between the fee initially paid and the fee based on the actual value subsequently shown. No order of the court or other proceeding shall be necessary. The clerk shall mail to each distributee who has not renounced his or her right to act and to each beneficiary mentioned in the affidavit other than the affiant, a letter or postcard notice of the proceeding under this article. The giving of such notice is not jurisdictional.

§ 3. Paragraph (e) of subdivision 2 of section 1123 of the surrogate's court procedure act, as relettered by chapter 655 of the laws of 1993, is amended to read as follows:

(e) File in the court an informatory account in a form prescribed by rule where the gross value of the assets of the estate accounted for [is more than $500 and less than that as] does not exceed the monetary amount defined as a small estate in subdivision 1 of section 1301 of this act and shall serve a copy of such informatory accounting by certified mail on all interested parties at least 30 days prior to filing with the court.

§ 4. Paragraph (c) of subdivision 2 of section 1213 of the surrogate's court procedure act, as relettered by chapter 655 of the laws of 1993, is amended to read as follows:

(c) File in the court after the expiration of 7 months from the time he or she commences to act as fiduciary of the estate an informatory account in estates in which the gross value of the assets accounted for [is less than $5,000] does not exceed the monetary amount defined as a small estate pursuant to subdivision 1 of section 1301 of this act and a copy of such account shall be mailed by certified mail, return receipt requested, to each of the persons entitled to receive process upon an accounting proceeding provided the names and addresses of such persons be known to him or her. Unless objection or claim be properly filed in the court within 30 days from mailing such account a final decree settling his or her account may be entered without further notice or proceedings and with the same effect as in an accounting proceeding and he or she shall be entitled to the commissions, costs and allowances allowed him or her by the court in the decree.

§ 5. This act shall take effect immediately and shall apply to the estate of any person dying on or after such effective date.

B. Previously Endorsed Measures

1. Revocatory Effect of Divorce on Testamentary Substitutes (EPTL 5-1.4)

The Committee recommends this measure in relation to the revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage. on a disposition, appointment or other provision in a will made in favor of a former spouse. This measure would ensure that dispositions or appointments to a former spouse that are contained in testamentary substitutes are treated in the same manner as such dispositions in wills.

Under EPTL 5-1.4, a disposition in a will to a former spouse is revoked by a divorce or annulment unless the will expressly provides otherwise. In addition, a divorce revokes a revocable disposition of securities under the recently enacted "Transfer-on-Death Security Registration Act" (*see* EPTL 5-1.4(c)) and, under case law, transforms a tenancy by the entirety into a tenancy in common.

Inconsistently, however, a divorce does not revoke many other revocable dispositions which are essentially like wills (so-called "testamentary substitutes"), such as lifetime revocable trusts (including Totten Trusts), life insurance policies, or joint tenancies (including joint bank accounts).

Inconsistencies also are present in other aspects of present New York law. For example, under EPTL 5-1.4, a divorce revokes a will provision nominating a former spouse as executor or trustee; and under provisions of the Public Health Law, divorce revokes a Health Care Proxy given to a former spouse (NY Public Health Law §2985) or, under recently enacted Public Health Law §4201, a former spouse's power to dispose of a decedent's "remains." On the other hand, a divorce does not revoke a power of attorney given to a former spouse under provisions of the General Obligations Law.

This measure would rectify the inconsistencies noted above and would harmonize New York law in this area. Under its provisions, a divorce or annulment would revoke any revocable disposition or appointment of property to a former spouse, including a disposition or appointment by will, by beneficiary designation, or by revocable trust (including a bank account in trust form). It also would revoke any revocable provision conferring a power of appointment on the former spouse and any revocable nomination of the former spouse to serve in a fiduciary or representative capacity, such as nomination of the former spouse as a personal representative,

executor, trustee, guardian, agent, or attorney-in-fact. Finally, a divorce would sever joint tenancies between former spouses (including joint bank accounts) and transform them into tenancies in common. The measure does not change the New York case law concerning the effect of divorce on tenancies by the entirety. (*See Kahn v Kahn*, 43 NY2d 203 (1977); *Anello v Anello*, 22 AD2d 694 (1964)).

The measure would continue the rules of present EPTL 5-1.4 which provide that the provisions of the governing instrument are given effect as if the former spouse predeceased the divorced individual, and that a revoked disposition, appointment, provision or nomination is revived by the divorced individual's remarriage to the former spouse.

An important feature of this measure is that it would protect a payor, such as a bank in connection with a joint account, or a life insurance company in connection with a life insurance policy, where the payor has made a payment to a beneficiary designated in the governing instrument after the divorce has taken place, unless and until the payor has received written notice of the divorce. Indeed, even after such written notice is received, the payor can still receive protection and a complete discharge of liability by making the payment to the court.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment or other provision in will to former spouse

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 5-1.4 of the estates, powers and trusts law is REPEALED and a new section 5-1.4 is added to read as follows:

§5-1.4. Revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment, provision, or nomination regarding

a former spouse. (a) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as hereinafter defined) or annulment of a marriage revokes any revocable (i) disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse, including (but not limited to) a disposition or appointment by will, by beneficiary designation in a life insurance policy or (to the extent permitted by law) in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form, (ii) provision conferring a power of appointment or power of disposition on the former spouse, and (iii) nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian, agent, or attorney-in-fact.

(b)(1) Provisions of a governing instrument are given effect as if the former spouse had predeceased the divorced individual as of the time of the revocation.

(2) A disposition, appointment, provision, or nomination revoked solely by this section shall be revived by the divorced individual's remarriage to the former spouse.

(c) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as hereinafter defined) or annulment of a marriage severs the interests of the divorced individual and the former spouse in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming their interests into interests as tenants in common.

(d)(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary (including a former spouse) designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage.

(2) Written notice of a divorce, annulment, or remarriage under subsection (d)(1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action and may be filed with the secretary of state if real property or a cooperative apartment is affected. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction over the divorce, the real property or cooperative apartment, securities, bank accounts or other assets affected by the divorce or annulment under this section. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other

third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(e) A person who purchases property from a former spouse or any other person for value and without notice, or who receives from a former spouse or any other person, a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property or benefit, nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse or other person who, not for value, received a payment, item of property or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property or benefit, with interest thereon, to the person who is entitled to it under this section.

(f) For purposes of this section, the following terms shall have the following meaning and effect:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment" means a final decree or judgment of divorce or annulment, or a final decree, judgment or order declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, or a "judicial separation," which means a final decree or judgment of

separation, recognized as valid under the law of this state, which was rendered against the spouse.

(3) "Divorced individual" includes an individual whose marriage has been annulled or subjected to a judicial separation.

(4) "Former spouse" means a person whose marriage to the divorced individual has been the subject of a divorce, annulment, or judicial separation.

(5) "Governing instrument" includes, but is not limited to, a will, testamentary instrument, trust agreement (including, but not limited to a totten trust account under section 7-5.1 (d)), insurance policy, thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, agreement with a bank, brokerage firm or investment company, registration of securities in beneficiary form pursuant to part 4 of article 13 of this chapter, a court order, or a contract relating to the division of property made between the divorced individuals before or after the marriage, divorce, or annulment.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was empowered, by law or under the governing instrument, either alone or in conjunction with any other person who does not have a substantial adverse interest, to cancel the designation in favor of the former spouse, whether or not the divorced individual was then empowered to designate himself or herself in place of the

former spouse and whether or not the divorced individual then had the capacity to exercise the power.

§2. This act shall take effect immediately and apply to a divorce, annulment or judicial separation that becomes final on or after such effective date.

2. Payment of Attorney's Fees in Wrongful Death Actions (EPTL 5-4.6(a)(2))

The Committee recommends this measure to amend EPTL 5-4.6 in relation to payment of attorney's fees in the Supreme Court in wrongful death actions. This measure would help ensure that distributees expeditiously receive settlement proceeds.

EPTL Article 5, Part 4 provides for the rights of a decedent's family members when a wrongful act, neglect or default causes the decedent's death. Insofar as the right to recover damages for wrongful death is statutory, the Part sets forth the procedural and substantive guidelines for such an action. It specifically provides that either the court in which the wrongful death action is brought or the Surrogate's Court which issued letters to the estate fiduciary may determine how any damages recovered, either after trial or by settlement, are to be distributed; and the reasonable expenses, including attorney's fees, incurred in bringing the action.

Prior to October 2005, after approving an application by the estate representative to compromise a wrongful death action, the court in which the action was brought typically deferred to Surrogate's Court in determining how the settlement should be distributed. In those circumstances, Surrogate's Court also fixed the reasonable expenses, including attorney's fees, of the action or settlement. Payment of settlement proceeds awaited approval of the compromise by the Surrogate's Court.

Effective 11/1/05, EPTL 5-4.6 was amended to provide for settling defendant(s) to more expeditiously pay settlement proceeds into an interest-bearing escrow account, and to require an estate fiduciary to immediately pay certain court-approved expenses. *See* L. 2005, c. 719. Court-approved attorneys fees and disbursements incurred in prosecuting the wrongful death action may be paid only upon an attorney's submission to the trial court proof that a petition for allocation and distribution of the settlement proceeds has been filed in Surrogate's Court.

One goal of the legislation was to reduce the hardships incurred by professionals and businesses resulting from the delay in receiving payment for their services to the estate. Requiring the attorney to prove that a petition for allocation and distribution has been filed in Surrogate's Court before he or she could receive payment of attorneys fees and disbursements ensures that the attorney will diligently represent the estate.

The filing of a petition for allocation and distribution in Surrogate's Court, however, does not necessarily ensure that the estate distributees will expeditiously receive settlement proceeds. Counsel's failure to obtain jurisdiction over the

necessary parties in a timely fashion or to prosecute the proceeding diligently often significantly delays payment of those proceeds.

The proposed amendment addresses this concern by providing for an additional precondition to the payment of attorneys fees and disbursements incurred in prosecuting the wrongful death action. The amendment would require the attorney to submit an affirmation to the trial court stating that jurisdiction has been obtained over all necessary parties in the surrogate's court proceeding.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the payment of attorney's fees in a proceeding to compromise an action for wrongful act, neglect or default causing the death of a decedent

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (2) of subdivision (a) of section 5-4.6 of the estates, powers and trusts law is amended to read as follows:

(2) All attorneys fees approved by the court for the prosecution of the action for wrongful act, neglect or default, inclusive of all disbursements, shall be immediately payable from the escrow account upon submission to the trial court of proof of filing of a petition for allocation and distribution in the surrogate's court on behalf of the decedent's estate and an affirmation by the attorney seeking immediate payment of such attorneys fees that jurisdiction has been obtained over all necessary parties in the proceeding for allocation and distribution filed in the surrogate's court .

§2. This act shall take effect immediately.

3. Settlement of Final Guardianship Reports (MHL 81.44)

The Committee recommends this measure to create a procedure for settling final guardianship reports upon the death of an incapacitated person. This measure would create a uniform procedure for transferring guardianship assets to an estate administrator.

Article 81 of the Mental Hygiene Law provides a comprehensive framework for addressing the complex and diverse needs of persons with incapacities. Throughout its 43 sections, the Article sets forth procedural and substantive guidelines regarding the appointment, powers and duties of court-appointed guardians.

While the Article addresses adequately the lifetime needs of the incapacitated person, it does not provide an effective and efficient roadmap to facilitate the transition from guardianship administration to estate administration upon the death of the incapacitated person. The absence of a statutory time-line for settling the guardian's final report and for effecting the transfer of guardianship assets to the estate administrator has had wide-ranging implications.

At the judicial level, it has required courts to implement local rules and procedures regarding the retention, application and distribution of guardianship assets. Often, these rules conflict from jurisdiction to jurisdiction, causing confusion and consternation among guardians, estate administrators and family members. Estate administrators also have obligations to taxing authorities, creditors and the judges who appointed them that are impeded by their inability to obtain timely distribution of guardianship assets. Post-mortem tax planning opportunities can be jeopardized or lost because the estate fiduciary and estate beneficiaries lack adequate information to make informed decisions. There are also instances where guardians have failed to disclose the death of their ward, thus preventing the court, the public administrator or the nominated estate representative from carrying out their statutory duties. Most importantly, the failure to effect a timely and orderly settlement of the guardianship administration places the guardianship assets at risk by leaving them in the hands of a fiduciary with no apparent authority to administer such assets and only limited statutory authority to apply guardianship funds to the obligations of the deceased ward.

The proposed amendment addresses each of these concerns by providing a statutory procedure for effecting distribution of guardianship assets and settlement of

the guardian's final report on terms that respect the needs of both the guardian and the estate representative. This amendment has four parts. The first part is a notice provision that requires the guardian to provide the court and other necessary persons with written confirmation of the death of the incapacitated person. The second part describes the process for delivery of guardianship property to the estate representative or county officer and retention by the guardian of sufficient assets to secure claims for administration expenses. The third part addresses the need for timely settlement of the guardian's final report. Finally, the fourth part provides an enforcement mechanism should the guardian fail to either deliver guardianship assets or settle his or her final report in the time or manner prescribed by the amendment.

This amendment supplements Article 81 by establishing a procedure to finalize property management guardianships upon the death of the incapacitated person. It does not supplant existing law regarding the appointment of guardians or the duties and responsibilities of guardians to the court or to their wards.

Proposal:

AN ACT to amend the mental hygiene law, in relation to the settlement of final guardianship reports

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The mental hygiene law is amended by adding a new section 81.44 to read as follows:

§ 81.44 Proceedings upon the death of an incapacitated person. (a) Definitions. When used in this section:

(1) "Statement of death" means a statement, in writing and acknowledged, containing the caption and index number of the guardianship proceeding, and the name and address of the last residence of the deceased incapacitated person, the date and

place of death, and the names and last known addresses of all persons entitled to notice of further guardianship proceedings pursuant to paragraph three of subdivision (c) of section 81.16 of this article including the nominated and/or appointed personal representative, if any, of the deceased incapacitated person's estate.

(2) "Personal representative" means a fiduciary as defined by subdivision twenty-one of section one hundred three of the surrogate's court procedure act to whom letters have issued and who is authorized to marshal the assets of the decedent's estate.

(3) "Public administrator" means a public administrator within or without the city of New York , as established by article eleven or twelve of the surrogate's court procedure act.

(4) "Chief fiscal officer" means a chief fiscal officer of a county eligible to be appointed an administrator pursuant to section twelve hundred nineteen of the surrogate's court procedure act.

(5) "Statement of assets and notice of claim" means a written statement under oath containing the caption and index number of the guardianship proceeding, the name and address of the incapacitated person at the time of death, a description of the nature and approximate value of guardianship property at the time of the incapacitated person's death, and if claim is to be made for administrative costs, an itemization and approximate value of such costs.

(b) Service. Unless otherwise directed by the court, all papers required to be served by this section shall be served by certified mail return receipt requested.

(c) Filing statement of death; service; proof of service. Within twenty days of the death of an incapacitated person, the guardian shall:

1. serve a copy of the statement of death upon the court examiner and either the duly appointed personal representative of the decedent's estate, or, if no personal representative has been appointed, then upon the personal representative named in the decedent' s will if known and upon the public administrator or the chief fiscal officer of the county in which the guardian was appointed, and

2. file the original statement of death, together with proof of service upon the personal representative and/or public administrator or chief fiscal officer, as the case may be, with the court that issued letters of guardianship.

(d) Delivery of guardianship property. Within sixty days of the death of the incapacitated person, the guardian shall serve upon the personal representative of the decedent's estate, or where there is no personal representative, upon the public administrator or chief fiscal officer, a statement of assets and notice of claim and, except for property retained to secure administrative costs of the guardianship pursuant to subdivision (e), shall deliver all guardianship property to:

1. the duly-appointed personal representative of the deceased incapacitated person's estate, or

2. the public administrator or chief fiscal officer given notice of the filing of the statement of death, where there is no personal representative.

(e) Property retained by guardian to secure claim for administrative costs. The guardian may retain, pending the settlement of his or her final report, guardianship property equal in value to the claim for administrative costs, unless otherwise ordered by the court upon motion by the guardian on notice to the person or entity to whom guardianship property is deliverable and the court examiner.

(f) Judicial settlement of guardian's final report. Within ninety days of the incapacitated person's death, the guardian shall file his or her final report with the clerk of the court of the county in which annual reports are filed, and thereupon proceed to judicially settle the final report upon such notice as required by subdivision (c) of section 81.33 of this article, including notice to the person or entity to whom the guardianship property was delivered. There shall be no extension of the time to file a final report except by order of the court.

(g) Compulsory accounting and related relief. Upon failure of the guardian to comply with subdivision (d) or (f), any interested person may file a petition to compel the guardian to account, to suspend and/or remove the guardian, and to take and state the guardian's account.

§ 2. This act shall take effect immediately.

4. Incorporation by Reference, as a Testamentary Trust (EPTL 3-3.7(e))

The Committee recommends this measure to permit a testator to incorporate in a will, as a testamentary trust, the provisions of a preexisting inter vivos trust which has been revoked or terminated prior to the testator's death. This measure would allow the terms of the trust to remain valid even if not explicitly repeated in the will.

EPTL 3-3.7, the "pour-over" statute, permits a testator to dispose of or appoint by will all or part of his or her estate ("pour-over assets") to the trustee of an inter vivos trust that is amendable or revocable or both ("receptacle trust"). However, paragraph (e) provides that the revocation or termination of the receptacle trust before the testator's death, will cause the disposition or appointment "to fail, unless the testator has made an alternative disposition." The proposed measure would amend paragraph (e) of EPTL 3-3.7 to allow the testator, by an express direction, to create a testamentary trust to hold or dispose of the pour-over assets by simply incorporating by reference the terms of the revoked or terminated trust.

Under the proposed amendment, the possibility of fraud would not be of concern. EPTL 3-3.7 requires that the receptacle trust be executed in accordance with EPTL 7-1.17 and be in existence and identified by the will at its execution. Amendment or revocation of the trust would also be subject to EPTL 7-1.17. Thus, the terms of the trust instrument that are incorporated by reference in the will would be capable of validation, thereby eliminating the opportunity for fraud as to the terms of the testamentary trust.

Pour-over wills customarily provide for the disposition of the testator's entire probate estate or residuary estate to the trustee of an inter vivos trust created by himself or herself or by another person. *See*, for example, *Matter of Sackler*, 145 Misc. 2d 950 (Surr. Ct. Nassau Co., 1989); *Matter of Pozarny*, 177 Misc. 2d 752 (Surr. Ct. Kings Co., 2002). For this reason, if intestacy is to be avoided, it is imperative that the testator provide for an alternative disposition in the event that the pour-over is found invalid.

Many different circumstances may cause a receptacle trust to terminate or be revoked, the situation governed by paragraph (e). A trust for the testator's grandchildren may terminate and be distributed outright when they become 30 years of age. Or the trust for the testator's aunt, created by the testator's spouse, may be revoked without the testator's knowledge. Or a discretionary inter vivos trust may be

exhausted for the support or benefit of the beneficiaries. Or the trust may have been terminated for tax or other reasons, inadvertently or unknowingly, jeopardizing the original estate plan.

To cover such eventualities, attorneys often provide for an alternative testamentary trust with dispositions similar to those of the revoked inter vivos trust. However, without the benefit of the proposed amendment, it is necessary to recite in the will all of the dispositive and other essential terms of the revoked trust, in order to foreclose an argument by intestate takers or contingent beneficiaries that the provisions of the revoked trust cannot be "incorporated by reference." The rule prohibiting incorporations by reference was stated succinctly in *Booth* v *The Baptist Church of Christ*, 126 N.Y. 215, 247-248, 28 N.E. 238 (1891): "It is unquestionably the law of this state that an unattested paper which is of a testamentary nature cannot be taken as a part of the will even though referred to by that instrument."

However, the rule prohibiting incorporation by reference, "will not be carried to 'a dryly logical extreme.'" In *Matter of Rausch*, 258 N.Y. 327, 331, 179 N.E. 755 (1932), decided long before the enactment of EPTL 3-3.7, the testator gave one-fifth of his residuary estate to the corporate trustee of an inter vivos trust to be disposed of under the trust's agreement "which agreement is hereby made part of this my will." The Appellate Division had determined that the rule forbidding the incorporation of unattested documents had been violated and that, to that extent, the testator had died intestate. Finding that the legacy to the trustee was simply an enlargement of the subject matter of an existing trust, Judge Cardozo rejected the reasoning of the court below that this could not be done unless the terms of the deed of trust were repeated in the will.

The 1967 enactment of EPTL 3-3.7 statutorily validated the pour-over of estate assets by will to a properly executed inter vivos trust that was in existence both at the date of the testator's will and at the testator's death.[1]

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[1] Moreover, EPTL 3-3.7, paragraph (d), validated dispositions or appointments to the trustee of an inter vivos trust made by testators who died prior to the effective date of this section by simply providing that such disposition or appointment "shall be construed to create a testamentary trust under and in accordance with the terms of the trust instrument which the testator originally intended should embrace the property disposed of or appointed, as such terms appear in such trust instrument at the date of the testator's death." In other words, in the case of testators who died prior to the effective date of the statute, EPTL 3-3.7(d) created a testamentary trust by incorporating the terms of the intended receptacle trust.

However, whether the terms of a trust that has been terminated or revoked before the death of the testator can be incorporated by reference to create a testamentary trust may raise issues of first impression. For this reason, without the enactment of the proposed amendment of paragraph (e), the better practice would require repetition of all of the terms of the terminated or revoked trust in the text of the will. The proposed amendment to paragraph (e) would enable the testator to create a testamentary trust as an alternate disposition without undue repetition and prolixity.

This measure, which would have no fiscal impact upon the State, would apply to pending or future proceedings involving the interpretation of wills or instruments exercising a power of appointment made by a testator who died on or after the effective date of EPTL 3-3.7.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to pour-over trusts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (e) of section 3-3.7 of the estates, powers and trusts law, as added by chapter 952 of the laws of 1966, is amended to read as follows:

(e) A revocation or termination of the inter vivos trust before the death of the testator shall cause the disposition or appointment to fail, unless the testator has made an alternative disposition; provided, however, that the testator may, by express direction, provide that the disposition or appointment of all or part of his or her estate to such revoked or terminated trust shall be deemed to create a testamentary trust under and in accordance with the terms of such inter vivos trust at the time of the execution of the will or, if the testator so directs, including amendments made thereto prior to such

revocation or termination, and such testamentary trust and the dispositions of income and principal thereunder shall be valid even though the terms of such inter vivos trust are not recited in the will.

§ 2. This act shall take effect immediately; provided, however, that the amendments to section 3-3.7 of the estates, powers and trusts law as added by section 1 of this act shall apply only to the estates of decedents who shall have died on or after such effective date.

5. Renunciation of Specific Compensation in Favor of Statutory Commissions (SCPA 2307(5)(b))

The Committee recommends this measure to prevent a fiduciary from avoiding a will's directive that he or she receive specific compensation in lieu of statutory commissions. The measure would require that where a will provides for specific compensation, the fiduciary who elects to serve is not entitled to any other allowances for his or her services as fiduciary.

Under present law there is an unwarranted discrepancy between the provisions of the Surrogate's Court Procedure Act governing the compensation of *executors* and those governing the compensation of *trustees*.

On the one hand, with respect to executors, section 2307 provides that "Where the will provides a specific compensation to a fiduciary other than a trustee he is not entitled to any allowances for his services unless by an instrument filed with the court within four months from the date of his letters he renounces the specific compensations."

On the other hand, with respect to individual trustees (both testamentary trustees and trustees of lifetime trusts) sections 2308 and 2309 both provide that "Where the will provides a specific compensation to a trustee he is not entitled to any other allowances for his services." Similarly, with respect to corporate trustees, section 2312 provides that "If the will or lifetime trust instrument makes provisions for specific rates or amounts of commissions (other than a general reference to commissions allowed by law or words of like import) for a corporate trustee, or, if a corporate trustee has agreed to accept specific rates or amounts of commissions, a corporate trustee shall be entitled to be compensated in accordance with such provisions or agreement, as the case may be."

As a result of this discrepancy, executors have been held to have the right to renounce "specific compensation" and take statutory commission, even where the statutory commissions were larger than the "specific compensation" (*see Matter of Carlisle*, 142 Misc 2d 657, 659-660, *aff'd sub nom Butler v Mander*, 159 AD2d 379). Trustees, on the other hand, are prohibited from exercising such right (*see Estate of Hillman*, 2/28/96 NYLJ 29).

The proposed measure would eliminate the discrepancy between section 2307 and sections 2308, 2309 and 2312.

Firstly, on the basis of the legislative history, it appears that the discrepancy is the result of an oversight that occurred in 1948 when the predecessors of sections 2308 and 2309 were amended to remove the right of a trustee to renounce "specific compensation." This 1948 amendment was a minor part of a bill which (1) substantially revised the treatment of trustees' commissions but (2) was not at all concerned with executors (*see* L. 1948, c. 694). The legislative history was set forth by Surrogate Bloom in *Hillman*, *supra*, as follows:

> "... [U]nlike SCPA §2307, SCPA §2309 does not provide for the renunciation of a specific bequest in favor of the statutory commission where trustees are concerned.
>
> This was not always the case. Prior to 1948, testamentary trustees could renounce specific compensation in a will and take instead the statutory commission, just as executors, administrators and guardians could (*see, e.g.*, SCA §285, Commissions of executor, administrator, guardian or testamentary trustee [L. 1923, c. 649]; *see also, Matter of Larney*, 148 Misc 871, 872; *Matter of Bolton*, 143 Misc 769, 771). Even when the SCA was amended in 1943 and §285-a was added (L. 1943, c. 694], thus separating the provisions for the commissions of the other fiduciaries (executors, administrators and guardians [§285] from those of the testamentary trustee, subsection (7) of §285-a still permitted a trustee to timely renounce (within four months) a specific bequest in favor of the statutory commission.
>
> In 1948, however, the original SCA §285-a was repealed and a new §285-a was added [L. 1948, c. 582]. For the first time, subsection (11) of the statute treated trustees differently from other fiduciaries in that it prohibited them from renouncing specific compensation in favor of the statutory commission. It stated in full that '[w]here the will provides a specific compensation to a trustee, he is not entitled to any other allowances for his services.' In its Report No. 280 included in the bill jacket for L. 1948, c. 582, the Committee on the Surrogate's Court of the New York County Lawyers Association commented that although subdivision (11) of the proposed law was among those "requiring further serious consideration by the legislature," it was approving the new law anyway because it "over[came] so many of the objections of the existing

law" (at p. 8). The Committee on State Legislation for the New York State Bar Association merely pointed out the "material difference" between subdivision 7 of the old SCA §285-a and subdivision (11) of the proposed law, *i.e.*, the extinction of the right of renunciation of specific compensation, without offering further comment (at p. 48).

The language employed in 1948 was repeated in 1956 in both SCA §285-a (11), pertinent to trustees' commissions under wills of persons dying, or under lifetime trusts created, on or before August 31, 1956, and in §SCA 285-b (10), added by L. 1956, c. 931, and pertinent to trustees' commissions under wills of persons dying, etc., after August 31, 1956. Finally, the same language was repeated in 1966 when the comparable sections of the current statute, SCPA §§2308 and 2309, were enacted (L. 1966, c. 953, effective September 1, 1967). Thus, in its present form, a trustee nominated after August 31, 1956, as here, must accept the specific compensation provided by the will or renounce his appointment entirely (SCPA §2309 (10))."

Secondly, there appears to be no reason that the rule applied to trustees in sections 2308, 2309 and 2312 should not also apply to executors under section 2307. The rule applied to trustees is essentially a default rule. Like other default rules, it is ultimately subject to the principle that specific provisions of the will or trust instrument are determinative. Thus, for example, if the will said that, "My executor shall receive no compensation under this will or under section 2307" the executor would have to serve without compensation or not serve at all (*see* cases discussed in *Carlisle*, *supra*).

In amending the predecessors of sections 2308 and 2309 in 1948, the Legislature was adopting the view that most testators who provided "specific compensation" to a trustee would not want such trustee to get any more compensation for serving as trustee. Thus, as with other default statutes (*see e.g.* EPTL 3-3.3 or 5-1.4), a will that provides "specific compensation" to a *trustee* was being legislatively construed — in this case a saying "and no more, no matter what." There does not appear to be any reason that the Legislature would interpret a provision for specific compensation to an *executor* any differently.

It is therefore proposed that section 2307 be amended to conform it with sections 2308, 2309 and 2312. (The proposal also incorporates a technical amendment to sections 2308 and 2309 to clarify that those statutes apply where the provision for "specific compensation" is contained in a lifetime trust instrument.)

Under this measure, if a testator or a grantor of a lifetime trust provides "specific compensation" to a fiduciary (including an executor, testamentary trustee or trustee of a lifetime trust):

(1) The fiduciary would not receive both the "specific compensation" and statutory commissions, and

(2) The fiduciary would not receive statutory commissions, even if the fiduciary renounces the "specific compensation."

This measure also recognizes that since a fiduciary may renounce (in whole or in part) the "specific compensation" provided for in a will or trust, the fiduciary may effectively (although not formally) take the *lesser* of the specific compensation or the statutory commissions where the statutory commissions are less than the specific compensation.

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to compensation of certain fiduciaries

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (b) of subdivision 5 of section 2307 of the surrogate's court procedure act, such subdivision as amended by section 56 of chapter 514 of the laws of 1993, is amended to read as follows:

(b) $100,000 or more but less than $300,000 each fiduciary is entitled to the full compensation for receiving and paying out principal and income allowed herein to a sole fiduciary unless there are more than 2 fiduciaries in which case the full compensation for receiving and paying out principal and income allowed herein to 2

fiduciaries must be apportioned among them according to the services rendered by them respectively, unless the fiduciaries shall have agreed in writing between or among themselves to a different apportionment which, however, shall not provide for more than one full commission for any one of them. Where the will provides a specific compensation to a fiduciary other than a trustee, he or she is not entitled to any other allowance for his or her services [unless by an instrument filed with the court within 4 months from the date of his letters he renounces the specific compensation]. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters of administration are issued to a person who has previously been appointed a temporary administrator, he or she is entitled to a total compensation equal to the compensation allowed for the full administration of the estate by a fiduciary acting in a single capacity only. Such total compensation shall be payable in such proportions and upon such accounting as shall be fixed by the court settling the account of the person holding successive or different letters but no paying out commissions shall be allowed except upon such sums as shall actually have been paid out at the time of the respective decrees for debts, expenses of administration or to beneficiaries.

§ 2. Subdivision 11 of section 2308 of the surrogate's court procedure act, as added by chapter 953 of the laws of 1966, is amended to read as follows:

11. Where the will or lifetime trust provides a specific compensation to a trustee, he or she is not entitled to any other [allowances] allowance for his or her services.

§ 3. Subdivision 10 of section 2309 of the surrogate's court procedures act, as added by chapter 953 of the laws of 1966, is amended to read as follows:

10. Where the will or lifetime trust provides a specific compensation for a trustee, he or she is not entitled to any other [allowances] allowance for his or her services.

§ 4. This act shall take effect immediately; provided, however, that the amendments to subdivision 5 of section 2307 of the surrogate's court procedure act as added by section 1 of this act shall apply only to the estates of persons dying on or after such effective date.

6. Notice of Proceedings to Determine Validity and Enforceability of Claims (SCPA 1809)

The Committee recommends this measure to reduce unduly burdensome notice requirements in proceedings to determine the validity and enforceability of claims. By limiting the necessary parties to the claimant and the fiduciary, unless the court directs otherwise, the expense of serving process on all beneficiaries can be eliminated, to the benefit of the estate.

By far, the vast majority of creditors claims are resolved without judicial intervention. Executors and administrators routinely settle such claims as part of their day-to- day responsibilities of administering an estate. They do so without court approval and often without the consent or knowledge of the estate's beneficiaries. It is anomalous, then, that the procedure for adjudicating claims should include the estate's beneficiaries as interested and necessary parties. SCPA 1809(2) requires that notice be given to such beneficiaries if the contested claim exceeds the lesser of $10,000.00 or 25% of the estate.

The notice provisions of SCPA 1809(2) serve to compound the expense of litigation without providing a corresponding benefit to the estate. Beneficiaries often have little or no knowledge of the claim and their presence can be counterproductive should one or more seek to substitute their judgment for that of the fiduciary.

This proposal would limit the necessary parties in a proceeding to determine the validity or enforceability of a claim to the claimant and the fiduciary unless the court, in its discretion, directs otherwise. In doing so, this proposal would conform the notice provisions of SCPA 1809 with the notice provisions of SCPA 2101(3) applicable to the corollary proceedings for adjudicating administration expenses set forth in SCPA 2102(4).

Finally, this proposal eliminates the grace period of 8 days from the return day to serve and file an answer. The practice has few corollaries in the Surrogate's Court Procedure Act and is contrary to the general practice of filing responsive pleadings on the return day of process or on such subsequent day as directed by the court.

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to the notice requirements in a proceeding to determine the validity and enforceability of claims

The People of the State of New York, represented in Senate and Assembly do enact as follows:

Section 1. Subdivision 2 of section 1809 of the surrogate's court procedure act, as amended by chapter 514 of the laws of 1993, is amended to read as follows:

2. If the petition be entertained process shall issue only to the claimant or possible claimant or fiduciary, as the case may be, [and, whenever the claim sought is in excess of ten thousand dollars or constitutes twenty-five percent or more of the estimated gross probate estate, whichever is the lesser, to any person whose rights or interests will be affected by allowance of the claim and the person cited may within 8 days from the return day, serve and file an answer] unless the court directs otherwise. The answer[, if] shall be filed on or before the return day of process or on such subsequent day as directed by the court. If filed by the claimant, the answer shall be accompanied by a copy of any notice of claim, supporting affidavit or other evidence of the claim, if any, filed with the fiduciary. If the fiduciary deems it necessary he or she may, within 5 days from the service upon him or her of a copy of the answer, serve and file a reply thereto. The claimant may also file a reply to an answer served by the fiduciary.

§2. This act shall take effect immediately and shall apply to future proceedings to determine the validity and enforceability of claims.

7. Harmonizing Inconsistent Distributions (EPTL 3-3.3)

The Committee recommends this measure to eliminate the conflict between EPTL 3-3.3 and EPTL 2-1.2 with respect to testamentary class gifts to the testator's issue, brothers, or sisters, and to harmonize the treatment of such gifts with that which would occur in intestacy under EPTL 4-1.1. This measure would eliminate the provision of EPTL 3-3.3 which treats testamentary class gifts to the testator's issue, brothers, or sisters as though such gifts were made to specifically named individuals. Instead, such gifts would be subject to the principle of "by representation" found in EPTL 1-2.16, with the result that each surviving member of the class would receive an equal share with other surviving members of the same generation, *i.e.*, the same result which occurs in intestacy under EPTL 4-1.1.

Under provisions of EPTL 3-3.3 and 2-1.2, a conflict can arise when a will disposes of property to the testator's "issue" or to the testator's "brothers," or "sisters," or "brothers and sisters."

Suppose, for example, a testator's will disposed of his or her estate to his or her "issue," and the testator was survived by one child, A, by a grandchild, GC1 (the child of the testator's predeceased child, B), and by grandchildren, GC2, GC3, and GC4 (the children of the testator's predeceased child, C). In such a case, under EPTL 3-3.3, A would take 1/3, GC1 would take 1/3, and GC2, GC3, and GC4 would each take 1/9. However, under EPTL 2-1.2, A would take 1/3, and all the grandchildren would share equally, *i.e.*, GC1, GC2, GC3 and GC4 would each take 1/6. This result under EPTL 2-1.2 is also the result that would occur under EPTL 4-1.1, if such testator had died intestate.

Similar disparities between the result under EPTL 3-3.3, and that under EPTL 2-1.2 and 4-1.1, can arise where a decedent is survived only by grandchildren. If, in the above hypothetical, the testator were survived only by GC1, GC2, GC3, and GC4, the result under EPTL 3-3.3 would be 1/2 to GC1 (as the only child of predeceased B), and 1/6 to each of GC2, GC3, and GC4, whereas under EPTL 2-1.2 (or under 4-1.1, if the testator had died intestate) GC1, GC2, GC3, and GC4 would each take 1/4.

The same disparities can occur when the testamentary disposition is to the class of brothers or sisters, rather than to issue.

These disparities are not justified by any deliberate legislative policy. To the contrary, since all three statutory provisions (EPTL 2-1.2, 3-3.3, 4-1.1) are "default"

statutes, *i.e.*, capable of being overridden by the testator's will, the results should be uniform since, as stated by Surrogate Holzman in Estate of Lambiase, NYLJ July 28, 1993, p. 23 (Sur. Ct. Bronx County), in enacting such statutes "the Legislature steps in and provides for a disposition based upon the presumption that this is the distribution most decedents would want under the circumstances."

This measure would amend EPTL 3-3.3 so that the results of its application are the same as they would be under 2-1.2 (or 4-1.1 in case of intestacy). The effect of the measure is to harmonize the results through the use of the EPTL 1-2.16 principle of "by representation," a principle which currently is present in all three statutory provisions and which reflects the legislative determination that most decedents prefer that relatives of the same generation share equally.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to class distributions to issue or brothers or sisters of testator

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (a) of section 3-3.3 of the estates, powers and trusts law is amended to read as follows:

(a) Unless the will whenever executed provides otherwise:

(1) Instruments executed prior to September first, nineteen hundred ninety-two. Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, per stirpes. The provisions of this paragraph shall apply to a disposition made to

issue, brothers or sisters as a class, and such issue, brothers or sisters shall take per stirpes.

(2) Instruments executed on or after September first, nineteen hundred ninety-two. Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, by representation. The provisions of this paragraph shall apply to a disposition made to issue, brothers or sisters as a class, and such issue, brothers or sisters shall take by representation.

[(3) The provisions of subparagraphs (1) and (2) apply to a disposition made to issue, brothers or sisters as a class as if the disposition were made to the beneficiaries by their individual names, except that no benefit shall be conferred hereunder upon the surviving issue of an ancestor who died before the execution of the will in which the disposition to the class was made.]

§2. This act shall take effect immediately.

8. Disqualification of a Tenant by the Entirety (EPTL 4-1.7)

Modified slightly to clarify the nature of the excluded property, this measure would add a new section 4-1.7 to the Estates, Powers and Trusts Law (EPTL) to disqualify a person who holds property as a tenant by the entirety with his or her spouse from receiving any share in such property or monies derived therefrom where he or she is convicted of murder in the first or second degree, or manslaughter in the first or second degree, of his or her spouse. He or she may, however, receive any fractional portion of property contributed by him or her from his or her separate property, except that such convicted spouse shall not be entitled to more than the value of a life estate in one-half of such property held as tenant by the entirety.

In New York, it has been long held that one who wrongfully takes the life of another is not permitted to profit thereby *(see, Riggs v. Palmer,* 115 NY 506, 511). A conviction of a person for any crime, however, does not work a forfeiture of any property, real or personal, or any right or interest therein. Civil Rights Law §79-b.

In the case of *Matter of Hawkin's Estate,* 213 NYS2d 188 (Sur. Ct. Queens County 1961), the court recognized that a surviving tenant who murdered her spouse may not enlarge her interest in the property held as tenants by the entirety as a result of the homicide. However, it further decided that the surviving spouse was entitled to the commuted value of the net income of one-half of the property for her life-expectancy, based upon former section 512 of the Penal Law, which was the forfeiture statute. This holding was continued in the cases *Matter of Pinnock,* 83 Misc.2d 233 (Sur. Ct. Bronx County 1975), *Matter of Busacca,* 102 Misc.2d 567 (Sur. Ct. Nassau County 1980) and *Matter of Nicpon's Estate,* 102 Misc.2d 619 (Sur. Ct. Erie County 1980).

This holding was held to be a 'legal fiction" and was rejected by the court in *Citibank v. Goldberg,* 178 Misc.2d 287 (Sup. Ct. Nassau County 1998). That court held that the intentional slaying of a spouse by the other acts as a voluntary repudiation of the essence of an ownership by the entireness, thereby alienating the surviving spouse from any interest in the property. The court further held that section 79-b of the Civil Rights Law never addressed shared interests in property, or the creation of new and different interests from those that existed at the time of the crime. *Accord Matter of the Estate of Mary Mathew,* NYLJ, April 26, 1999, p. 32, col. 5 (Sur. Ct. Rockland County), *reversed* 270 AD2d 416 (2nd Dept. 2000).

This proposed addition to the EPTL would not allow anyone to inherit or succeed to property as the result of his or her own wrongful act, but would entitle the

convicted spouse to his or her fractional portion of separate property contributed by him or her. Furthermore, this is consistent with the present section 4-1.6 of the EPTL, which provides that if one joint tenant of a bank account is convicted of murder of the other joint tenant, the murderer forfeits all rights in the account except those monies he or she contributed to the account.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the disqualification of tenants by the entirety in certain instances

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The estates, powers and trusts law is amended by adding a new section 4-1.7 to read as follows:

§4-1.7. Disqualification of tenant by the entirety in certain instances. Notwithstanding any other provision of law to the contrary, a tenant by the entirety in real property, or in a cooperative apartment as defined in paragraph (c) of section 6-2.2 of this chapter, where the spouses resided or any residences of the spouses, who is convicted of murder in the second degree as defined in section 125.25 of the penal law, or murder in the first degree as defined in section 125.27 of the penal law, or manslaughter in the first degree as defined in subdivision one or two of section 125.20 of the penal law or manslaughter in the second degree as defined in subdivision one of section 125.15 of the penal law of the other spouse, shall not be entitled to any share in such real property or monies derived therefrom, except for any fractional portion

thereof contributed by the convicted spouse from his or her separate property as defined by paragraph d of subdivision one of part B of section two hundred thirty-six of the domestic relations law, except that such convicted spouse shall not be entitled to more than the value of a life estate in one-half of such property held as tenant by the entirety or monies derived therefrom.

§ 2. This act shall take effect immediately.

9. Disqualification of a Surviving Spouse (EPTL 5-1.2(a))

The Committee recommends that section 5-1.2(a) of the Estates, Powers and Trusts Law be amended to disqualify as surviving spouses persons who for a prolonged period prior to a decedent's death were married to the decedent in name only.

This measure would amend section 5-1.2(a) of the Estates, Powers and Trusts Law by adding a subdivision 7 to provide for the disqualification of a person as the decedent's surviving spouse if the decedent and the survivor had lived separate and apart for a period of at least one year prior to the decedent's death and the total time that they lived separate and apart exceeded the total time that they cohabited as spouses. Disqualification under such circumstances will not occur, however, if the survivor can show any one of the following: the reason that the couple lived separate and apart was due to an illness or injury which required that one or both spouses be cared for in a facility; or that the survivor departed from the marital abode because the decedent had abused the survivor or another member of the marital household; or that, as a result of voluntary, contractual or court-ordered support, an economic relationship continued between the spouses notwithstanding their separation. The survivor will be allowed to testify about communications or transactions with the decedent even though such testimony would otherwise be barred by CPLR 4519 because the survivor might be the only person who can establish that the separation was caused by abuse or that the decedent voluntarily provided support.

This measure is intended to preclude "laughing" surviving spouses, i.e., those who for a prolonged period of time prior to the decedent's death were married to the decedent in name only, from being unjustly enriched by having the right to take an intestate share of the decedent's estate under section 4-1.1 of the EPTL or an elective share under sections 5-1.1 or 5-1.1-A of the EPTL. As is the case with all other disqualifications under section 5-1.2, these "laughing" spouses would also be disqualified under sections 5-1.3, 5-3.1 and 5-4.4.

Under present law, a spouse would not be disqualified under EPTL 5-1.2 if both spouses had consented to their separation one week after their marriage and they continued to live separate and apart until the decedent died 70 years after they had separated. The reason that this would not constitute a disqualification on the grounds of abandonment under subdivision 5 is because there can be no abandonment if the departure was with the consent of the other spouse (*Schine v. Schine*, 31 N.Y.2d 113; *Solomon v. Solomon*, 290 N.Y. 337; *Matter of Maiden*, 284 N.Y. 429). Furthermore, it is very difficult for the estate to prove that the departure was other than consensual

because death has sealed the decedent's lips and there frequently is no one else who witnessed the events leading to the departure.

The public policy supporting the amendment is that, if the surviving spouse was willing to live for a prolonged period of time prior to the decedent's death without having had anything whatsoever to do with the decedent, the survivor should also be willing to do without any rights to the decedent's property after the decedent's death. The disqualification only applies to spouses who voluntarily had nothing to do with the decedent for a prolonged period of time. There is no disqualification if the separation was caused by abuse, or the need of at least one of the spouses to be cared for in a facility due to injury or illness. There is also no disqualification where, after the separation, there was voluntary, contractual or court-ordered support. This measure will result in reduced litigation because in numerous cases where there is presently a question of whether an abandonment can be established under subparagraph 5, it will now be clear that the spouse is disqualified under subparagraph 7.

The proposed amendment would take effect immediately and apply to the estates of decedents dying on or after its effective date.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to disqualification as a surviving spouse.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of section 5-1.2 of the estates, powers and trusts law is amended by adding a new subparagraph (7) to read as follows:

(7) The survivor and the decedent have continuously lived separate and apart for a period of at least one year prior to the date of the decedent's death and that the total time that they have lived separate and apart exceeds the total time that they cohabited as

a married couple, unless the survivor can establish any one of the following: the reason that the parties lived separate and apart was due to illness or injury which required one or both of the spouses to need the care of a facility; or, the survivor was actually receiving support from, or paying support to, the decedent or was entitled to receive support from the decedent pursuant to court order or agreement; or, that the abuse of the decedent towards the survivor or another member of the household was the reason that the survivor stopped cohabiting with the decedent. For the purpose of this subparagraph, the court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

§ 2. This act shall take effect immediately and shall apply to the estates of decedents dying on or after its effective date.

10. Legitimacy of Children Born to a Married Couple Using Assisted Reproduction Techniques (DRL 73)

Section 73 of the Domestic Relations Law recognizes the legitimacy of children born to married couples by means of artificial insemination. The Committee recommends that section 73 be amended to extend such recognition to children who are born to married couples by more advanced means of assisted reproduction, such as in vitro fertilization.

Section 73 of the Domestic Relations Law now provides that "[a]ny child born to a married woman by means of artificial insemination . . . [by a licensed physician] . . . with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes." Thus, a child conceived by a married woman with the sperm of a person other than her husband would nevertheless be the husband's legitimate, natural child if the procedures required by section 73 were followed.

Recent advances in medical technology, however, have expanded the methods and opportunities for married infertile couples to have children by new techniques of assisted reproduction, including in vitro fertilization (IVF) and gamete intrafallopian transfer (GIFT) that may involve donated gametes (sperm, eggs) or embryos (fertilized eggs). Use of donated semen and eggs could raise issues of the rights, duties and responsibilities of the donor (biological parent) under our present laws.[2] Moreover, cryopreservation allows frozen gametes or frozen embryos to be implanted in a married woman for this purpose even after the death of the donors.[3] Accordingly, it is imperative that section 73 of the Domestic Relations Law include children born by any method of assisted reproduction now in use or developed in the future, so that these children will be deemed the legitimate, natural children of the wife and her consenting husband, regardless of whether their own or donated gametes or embryos are used.

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[2] For example, under Estates, Powers and Trusts Law, section 4-1.2(a)(2)(D), a father's non-marital child would be considered a legitimate child so that the child and the child's issue would inherit from the child's father and the child's paternal kindred if, inter alia "a blood genetic marker test had been administered to the father which together with other available evidence establishes paternity by clear and convincing evidence."

[3] Under sections 2-1.3(a)(2), 5-3.2 and 6-5.7 of the EPTL, children of the donor-biological parent born after his or her death may have certain rights.

After an intensive, comprehensive examination of assisted reproduction, the New York State Task Force on Life and the Law, appointed by executive order in 1985, issued its report, Assisted Reproductive Technologies, Analysis and Recommendations for Public Policy in April 1998,[4] recommending, inter alia, at p. xxvi that:

> New York's Domestic Relations Law should be amended to provide that when a married woman undergoes any assisted reproductive procedure using donor semen, the woman's husband is the legal father of any child who results, provided the procedure was performed by a licensed physician with the husband's consent.
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> * * *
>
> New York law should provide that a woman who gives birth to a child is the child's legal mother, even if the child was not conceived with the woman's egg.

The proposed amendment to section 73 of the Domestic Relations Law would provide that a married woman and her consenting husband would be deemed the natural parents of the child for all purposes, whether the child resulted from semen, egg or embryo donated by persons then living or who have died. Such child and his or her issue would also be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for purposes of intestacy and class designations in wills or other instruments.

The proposal would also clarify that the donor or donors of the genetic material (and their families) would be relieved of all parental duties and responsibilities and would have no rights over the child or to receive property from or through such child by intestacy or class designations in wills or other instruments.

The term "class designations in wills or other instruments" will be broadly defined to include, unless otherwise provided in the disposing instrument, a class designation under a will, trust indenture, deed, an instrument exercising a power of appointment, a beneficiary designation or contractual arrangement with respect to the disposition of a bank or brokerage account, insurance, pension, retirement plan, stock bonus or profit-sharing plan or any other instrument disposing of real or personal property.

The Committee believes that the public policy of the State of New York strongly supports the desire of infertile married couples to have children, using any available

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[4] See also, Chapter 12, "Determining Parental Rights and Possibilities," pp. 327-334.

technique of assisted reproduction, and recognizing these children as the natural children of the married woman and her husband by operation of law. Conversely, the donor or donors of genetic materials and their families would be divested of any rights, duties or responsibilities with respect to such children.

The proposal would apply to children described in section 73 of the Domestic Relations Law whether born by artificial insemination, in vitro fertilization or any other technique of assisted reproduction before, on or after the effective date of the act.

Proposal:

AN ACT to amend the domestic relations law, in relation to children born to a married couple by any means of assisted reproduction

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 73 of the domestic relations law is amended to read as follows:

§73. Legitimacy of children born by [artificial insemination] assisted reproduction. 1. Any child born to a married woman by means of artificial insemination, in vitro fertilization or any other technique of assisted reproduction, whether with the genetic material of the woman and her husband or with genetic material donated by others, performed in accordance with the laws of the jurisdiction where such assisted reproduction occurs by persons duly authorized to practice medicine or by any other person or persons under the supervision of a person duly authorized to practice medicine, and with the consent in writing of the woman and her

husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes. Such child and his or her issue shall be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for all purposes, including without limitation the right to receive real and personal property by intestacy and class designations in wills or other instruments, and such child and his or her issue shall have no rights to receive real and personal property from and through the donor or donors of genetic material and their respective kindred by any means, including without limitation intestacy and class designations in wills or other instruments.

2. The donor or donors of genetic material shall be relieved of all parental duties toward and of all responsibilities for such child, and the donor or donors and their respective kindred shall have no rights to receive real and personal property from and through such child by any means, including without limitation by intestacy and class designations in wills or other instruments.

3. The phrase "class designations in wills or other instruments" shall include without limitation unless otherwise provided in the disposing instrument, a class designation under a will, trust instrument, deed, an instrument exercising a power of appointment, a beneficiary designation or contractual arrangement with respect to the disposition of a bank or brokerage account, insurance, pension, retirement plan, stock

bonus or profit-sharing plan, or any other instrument disposing of real or personal property.

4. The [aforesaid] written consent required by subdivision one shall be executed and acknowledged before or at any time after the birth of the child by both the husband and the wife and the physician who performs the technique (or if the physician has died or is unavailable, any person who assisted the physician) or the person who performed the technique under the supervision of the physician, who shall certify in writing that he or she had rendered the service at the time, date and place set forth in the certification.

§2. This act shall take effect immediately and shall apply to any child described in subdivision one of section 73 of the domestic relations law as amended pursuant to this act, whenever he or she is born.

11. The Effect on Inheritance Rights of Adoption by an Unrelated Person (DRL 117; EPTL 2-1.3(a)(1))

This measure would amend section 117 of the Domestic Relations Law and section 2-1.3(a)(1) of the Estates, Powers and Trusts Law, to ensure that, where an adoptive child continues to reside with the natural parent, as in the case in step-parent adoptions and adoptions pursuant to *Matter of Jacob* and *Matter of Dana*, 86 N.Y.2d 651 (1995), such adoptive child is not penalized by losing inheritance rights either from his or her natural parent(s) under EPTL 4-1.1 or from a lifetime or testamentary disposition from his or her natural family as a member of a class under EPTL 2-1.3. This amendment neither endorses nor rejects the policy issues discussed in the above cited cases.

Proposal:

AN ACT to amend the domestic relations law and the estates, powers and trusts law, in relation to the effect of an adoption by an unrelated person

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 117 of the domestic relations law is amended by adding a new subdivision 4 to read as follows:

4. Notwithstanding subdivisions one and two of this section, if a parent having custody of a child consents that the child be adopted by an unrelated adult who resides with such parent, after the making of an order of adoption the consenting parent shall retain all parental duties and responsibilities and all rights with respect to such child, and neither such consent nor the order of adoption shall affect:

(a) the rights of such child to inheritance and succession from and through either natural parent, or

(b) the right of the child and his or her issue to take under any wills or lifetime instruments executed by either natural parent or natural relatives of either natural parent.

§2. Paragraph (1) of subdivision (a) of section 2-1.3 of the estates, powers and trusts law, as amended by chapter 248 of the laws of 1990, is amended to read as follows:

(1) Adopted children and their issue in their adoptive relationship. The rights of adopted children and their issue to receive a disposition under wills and lifetime instruments as a member of such class of persons based upon their natural relationship shall be governed by the provisions of [subdivision] subdivisions two and four of section one hundred seventeen of the domestic relations law.

§3. This act shall take effect immediately and shall apply to adoptions on or after such effective date, to estates of decedents dying on or after such effective date and to wills and lifetime instruments whenever executed.

III. Future Matters

The Committee is drafting legislation in a number of areas. Among the matters being addressed are:

1. SCPA 209(8) Failure to Prosecute

This measure would amend SCPA 209(8) to specifically authorize the court to dismiss proceedings for failure to prosecute where parties other than the petitioner are responsible for the non-prosecution of the matter. While the present statute permits such dismissals based on a petitioner's inaction, the measure would recognize the use of the same remedy where any other party, such as an objectant, fails to proceed diligently.

2. Attorney's Authority to Settle

This amendment to the Uniform Rules would require at a court conference the presence of an attorney or other person authorized to enter into a binding settlement. Under this rule, similar to one that presently exists in the Supreme Court, a party would be foreclosed from reneging upon a settlement agreement.

3. SCPA 2308, 2309 and 2312 Charitable Trust Commissions

This measure would amend the SCPA to provide for the computation of annual charitable trust commissions on the same basis as commissions on non-charitable trusts, i.e., based on principal rather than income collected. Under this measure, annual commissions on charitable trusts would be permitted at the same rate as on non-charitable trusts, except that the rate payable on principal in excess of $10 million would be set at $1.50 per $1,000. A trustee would not be entitled to commissions for paying out principal, except for 1% upon termination. Annual commissions would be payable from principal.

4. Convenience/Joint Bank Accounts

This measure would create a new type of agency bank account, which would be more consumer-friendly than the form power of attorney and permit banking transactions to be accomplished by an agent without creating a right of survivorship. It

is intended that such accounts would replace the little-known or used convenience accounts presently available.

5. SCPA 2110 — Charging Attorney's Fees Against a Frivolous Objectant

This measure would amend SCPA 2110 to allow attorney's fees incurred in defending against a frivolous objection to be charged against a beneficiary's share.

6. SCPA 2313 — Multiple Commissions

This measure would remove the present restriction on the number of commissions (two) that can be allowed for executors or trustees. The measure would eliminate statutory inconsistencies and benefit the estate planning process.

7. SCPA 2108 — Answers in Proceedings by Fiduciary for Continuation of a Business

This measure would amend SCPA 2108 to require that an answer in a proceeding by a fiduciary for continuation of a business be filed by the return date of the petition, or at such subsequent time as the court may direct. This measure would bring the procedure in this type of proceeding into conformity within general Surrogate's Court practice.

In addition to the above legislation, the Committee is also studying proposals related to:

1. The voiding of wills of incapacitated persons by Article 81 courts.

2. Creation of a statutory living will.

3. Authorizing appointment of attorneys to carry out duties of public administrator in counties where chief fiscal officers are presently required to carry out such duties.

4. Post-conceived child's ability to take.

5. The use of DNA in establishing a non-marital child's right to inherit from his or her father.

6. Extension of the time frame for exercising the right of election.

7. Voluntary administration of small estates by designees or personal representatives of distributees.

8. Protecting the elderly from the undue influence of unscrupulous persons who have insinuated themselves into relationships of a confidential nature.

9. Fiduciaries who become cognitively impaired.

10. Protection of beneficiaries of bank-run mutual funds, via periodic accountings and other possible procedures.

11. Identity theft and Surrogate's Court records, particularly with respect to electronic access to court databases.

12. Revision of the time frame under Uniform Rule 207.25 for completion of proof by a party seeking to establish kinship in an accounting proceeding.

13. Gift-giving powers of attorney.

14. Awarding interest on pecuniary legacies when not paid by a reasonable date.

15. The elimination of obsolete Uniform Rules.

16. The tax treatment of capital gains in unitrust distributions.

17. Statutory rates of compensation for attorneys.

18. The use of attorney-certified death certificates in voluntary administrations.

19. Possible conflicts between SCPA 2309(5) and the prudent investor rule.

Respectfully submitted,

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