New York State Bar Association
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Memorandum in Support

T&E #3 May 9, 2019

S. 5513 By: Senator Hoylman
A. 7519 By: M. or A. Stirpe
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: Immediately

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.

LAW & SECTION REFERRED TO: Section 3-3.7 of the Estates, Powers and Trusts Law.

TRUSTS AND ESTATES LAW SECTION

Overview:

The New York State Bar Association ("NYSBA") Trusts and Estates Section (the "Section") supports the proposed changes to EPTL 3-3.7, which relates to wills that "pour over" a decedent's probate assets to a trust created during the decedent's lifetime (hereinafter, a "pour over trust"). Specifically, the proposed amendments to EPTL 3-3.7 (i) address the ambiguity concerning whether the pour over bequest is effective if the pour over trust was not funded during the decedent's lifetime and (ii) eliminate the requirement under current law that a trustee or co-trustee other than the grantor, if any, must execute the trust agreement contemporaneously with or prior to the execution of the decedent's will.

Funding of Pour Over Trusts:

EPTL 3-3.7 sets forth the requirements for a pour over trust and a valid bequest in favor of a pour over trust. The statute provides that the trust instrument must be "executed in the manner provided for in 7-1.17, prior to or contemporaneously with the execution of the will, and such trust instrument [must be]…identified in such will." Due to New York's longstanding policy against incorporation of unattested instruments into wills by reference, only a pour over specifically permitted by statute is effective.[1] First enacted in 1965 as section 47-g of the Decedent Estate Law ("DEL"), the statute that is now EPTL 3-3.7 codified, consolidated, and expanded upon various New York statutes that allowed pour over structures for certain trusts such as charitable trusts and insurance trusts.

[1] *See Booth v. Baptist Church*, 126 N.Y. 215, 28 N.E. 238 (1891).

At that time, New York required no specific execution formalities for lifetime trusts; however, in 1997, the Legislature enacted a number of provisions pertaining to lifetime trusts, including EPTL 7-1.17, which provides, in pertinent part, as follows:

> Every lifetime trust shall be in writing and shall be executed and acknowledged by the initial creator and, unless such creator is the sole trustee, by at least one trustee thereof, in the manner required by the laws of [New York] . . . for the recording of a conveyance or real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

Concurrently with the enactment of EPTL 7-1.17, the Legislature revised EPTL 3-3.7 to its current version, which provides that any pour over trust must be executed in accordance with the formalities of EPTL 7-1.17.

One of the other new statutes enacted in 1997 is EPTL 7-1.18, which provides that a lifetime trust is "valid as to any assets therein to the extent the assets have been transferred to the trust." While EPTL 3-3.7 does provide that the pour over trust is valid regardless of "the existence, size or character of the corpus of such insurance trust or other trust", the existence of EPTL 7-1.18 has raised some questions as to whether a pour over trust is valid if it is not funded during the lifetime of the decedent.

If EPTL 7-1.18 were to be interpreted to mean that no pour over trust is valid except to the extent that its assets were transferred to the trust during the decedent's lifetime, the purpose of a pour over will and pour over trust, which is to transfer a decedent's assets to the pour over trust *upon* the death of the decedent, would be frustrated to a degree that renders the pour over structure ineffective. This was not the intent of the Legislature. As the Office of Court Administration Report 2017-35 in support of this proposal notes, when enacting EPTL 3-3.7's predecessor, DEL 47-g, in 1965, the Legislature "specifically considered whether the trust to which the will would pour over had to be funded during lifetime" and "decided against requiring such funding." Furthermore, when it enacted in 1997 the lifetime trust reforms, the Legislature revised EPTL 3-3.7 to incorporate the execution formalities of EPTL 7-1.17, but did not make any change to EPTL 3-3.7 to impose the funding requirements of EPTL 7-1.18.

The proposal to revise EPTL 3-3.7 provides that the new legislation shall apply to "all testamentary dispositions to a trustee occurring on or after such effective date." The Section suggests that the statement regarding the effective date be revised to clarify that the new EPTL 3-3.7 shall apply to any pour over bequest taking effect upon the death of a decedent who dies on or after the effective date of the legislation, provided that the decedent executed a pour over trust in accordance with the requirements of EPTL 3-3.7 during his or her lifetime.

Subject to the suggested change to the effective date language, the Section supports this change to EPTL 3-3.7 to clarify that a valid pour over trust need not be funded during the lifetime of the decedent.

Execution of Pour Over Trust:

The proposed revisions to EPTL 3-3.7 also would clarify the execution requirement for trustees other than the grantor of the trust. This change is being proposed as a result of the harsh result in the case *Matter of D'Elia*, 40 Misc. 3d 355 (Surrogate's Court, Nassau County 2013). As noted above, EPTL 3-3.7 requires that the pour over trust instrument be "executed in the manner provided for in 7-1.17, prior to or contemporaneously with the execution of the will", and EPTL 7-1.17 requires that, if any person besides the grantor is named as a trustee or co-trustee, at least one such trustee or co-trustee must execute the trust instrument in order to create a valid lifetime trust.

In *D'Elia*, the decedent executed a pour over will and created a pour over trust, naming himself and his son as trustees. Because the grantor's son executed the trust seven days after the grantor, the trust was determined not to be in existence contemporaneously with or prior to the execution of the will and the purported pour over of the decedent's assets upon his death was not effective. This result is unduly harsh and frustrates the intent of the grantor. The grantor had fully complied with the required execution formalities and the pour over would have been effective if the grantor was the only trustee. There is no valid public policy reason to have a pour over effective in the one situation (where grantor/trustee executed the trust in accordance with the statute) but not in the other (where grantor/trustee executed the trust in accordance with the statute, but the co-trustee did not execute the trust right away). However, requiring the co-trustee to execute the trust in accordance with EPTL 3-3.7 prior to the grantor's death is appropriate so the acceptance of the trustee of his or her responsibilities has occurred before the assets fully pour over at death.

The Section suggests that EPTL 3-3.7 clarify the meaning of the word "contemporaneously" as used in the statute. EPTL 3-3.7 requires that the person establish the trust "prior to or contemporaneously with the execution of the Will." "Contemporaneously", as defined in the Merriam-Webster Dictionary means "existing, occurring, or originating during the same time." As most practitioners would execute the trust and the Will during the same meeting with the testator, it should be clarified that execution of the trust and Will during the same meeting satisfies the "contemporaneously" requirement.

Subject to the Section's suggestion regarding clarification of the meaning of the word "contemporaneously", the Section supports the additional change to EPTL 3-3.7 to provide that, in a situation where a trustee (other than the grantor) is named as a trustee or co-trustee, a valid pour over trust will be created as long as the trustee or co-trustee executes the trust agreement before the death of the testator/grantor. That is, the trust is in existence before the pour over occurs at death under the terms of the Will.

Based on the foregoing, NYSBA's Trusts and Estates Law Section **SUPPORTS** this legislation.