New York State Bar Association
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Memorandum in Opposition

TRUSTS AND ESTATES LAW SECTION

T&E #6 March 18, 2020

S. 5959-C By: Senator Savino
Senate Committee: Finance
Effective Date: 180th day after it shall have become a law

AN ACT to amend the civil rights law, in relation to establishing the right of publicity and to providing a private right of action for unlawful dissemination or publication of a sexually explicit depiction of an individual.

LAW & SECTION REFERRED TO: Section 50-f of the civil rights law.

TRUSTS AND ESTATES LAW SECTION OPPOSES THIS LEGISLATION

I. Introduction

The Trusts & Estates Law Section (the "Section") of the New York State Bar Association has been asked to comment on Senate Bill S5959-C (the "Bill"), which would amend section 50 of the Civil Rights Law to establish the right of publicity in the State of New York. The Bill was introduced by Senator Savino, and is co-sponsored by Senators Benjamin, Harckham and Jackson. We have been advised that the Bill is being introduced as part of this year's budget.

As set forth below, the Section opposes the Bill. The Bill rewrites longstanding New York intestacy law.

II. Analysis

A. The Bill Unnecessarily Rewrites the Law of Intestacy.

Section 3 of the Bill provides that the right of publicity is a "property right[], freely transferable or descendible, in whole or in part, by contract, license, gift or by means of any trust or any other testamentary instrument." Section 3 further provides that in the event the rights are not transferred expressly in a testamentary instrument, they shall become part of the residue.

Section 5 of the Bill concerns the disposition of the right to publicity in the event of intestacy. However, Section 5 is not consistent with the New York law of intestacy. Section 5 provides that in the event of intestacy, "the rights under this section

shall belong to the following person or persons," and are controlled by those "entitled to more than a one-half interest in the rights:"

a. All to the surviving spouse, unless the Decedent also had surviving children or grandchildren, in which case, the surviving spouse receives one-half of the interest in the rights. (§5(a))

b. All to the children and "surviving children of any dead child" of the Decedent, unless the Decedent also had a surviving spouse, in which case, the children and grandchildren receive one-half of the interest in the rights. (§5(b)).

c. In the event the Decedent is not survived by a spouse or children, the entire interest belongs to "the surviving parent or parents." (§5(c))

d. In the event the Decedent does not transfer his rights by contract, trust or testamentary instrument, and there are no surviving spouse, issue, or parents, the rights "shall terminate." (§6)

This statutory scheme does not comport with EPTL § 4-1.1, which sets forth how a decedent's property "not disposed of by will" passes. While the provisions of EPTL § 4-1.1 concerning a decedent's spouse, issue, and parents are similar to Section 5 of the Bill, EPTL § 4-1.1 goes much further, and provides for how property passes by intestacy in the event a decedent is not survived by a spouse, issue or parents. By contrast, Section 6 of the Bill extinguishes these rights in the event the closest surviving relative is more distant than a parent. Moreover, while Section 5(d) states that the rights among the children and grandchildren are divided "by representation," the Bill does not define "by representation," nor does it refer to EPTL §1-2.16.

By terminating the rights in the event the decedent is not survived by a spouse, issue or parents, it disinherits the decedent's siblings, nieces, nephews, grandparents, cousins in the event they are distributees, and creates a scheme where there are differing laws of intestacy depending on the nature and character of the property and rights. This is contrary to long-standing trusts and estates law, and would open the door for other forms assets to be treated differently under the laws of intestacy, thwarting the purpose of EPTL § 4-1.1.

B. The Bill Creates an Asset That is Difficult to Value.

Even as applied to a decedent who has died testate (with a will), with a fiduciary appointed specifically for the management of this asset, estate administration issues will likely arise. The value of the property right will be particularly difficult for estate tax purposes and for income tax (capital gains) purposes if the rights are later sold. In determining whether an estate tax return is required to be filed, and if required to be filed, whether and to what extent a Federal or New York estate tax will be due as well as calculation of capital gains, hinges on the date of death value of the assets included in a decedent's estate for estate tax purposes. Marketable securities, cash and many real

property interests are easily valued for these purposes; however, interests in closely held entities, or other assets for which a commercial market is not readily available, pose a challenge in terms of fixing value. This new class of asset will certainly fall into the latter group of valuation purposes. This will increase the time and cost of estate administration, burdening fiduciaries and adding additional assessment and audit responsibilities for state and federal tax authorities. In any estate with more than a single beneficiary of this newly created asset, the implications of multiple managing the asset can be fodder for estate litigation (burdening the Surrogate's Courts) and causing undue burden on the fiduciary and unnecessary administration costs.

III. Conclusion

Based on the forgoing, NYSBA's Trusts and Estates Law Section **OPPOSES** this legislation in it current form.