

Memorandum in Support

TRUSTS AND ESTATES LAW SECTION

T&E #5

May 13, 2016

S. 5620

By: Senator Bonacic
Senate Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the estates, powers and trusts law, in relation to trust accounting income and principal.

LAW AND SECTION REFERRED TO: Section 11-A-4.4 of the Estates, Powers and Trusts Law.

THE TRUSTS AND ESTATES LAW SECTION SUPPORTS THIS LEGISLATION

This bill would amend Estates, Powers and Trusts Law (“EPTL”) § 11-A-4.4, as it relates to trust accounting income and principal. For the reasons explained more fully below, the Trusts and Estates Law Section supports this well-reasoned legislation.

“Recent increases in tax rates applicable to realized capital gains and the enactment of the new 3.8% tax on undistributed net investment income (which includes realized capital gains)” necessitated the Proposal (*see* Sponsor’s Memo in Sup). Indeed, in light of the aforementioned tax changes, it has become increasingly important that a trustee have the authority to determine whether to treat realized capital gains as taxed against the current beneficiaries or to the trust itself (thereby adversely impacting the interests of the remainder beneficiaries) (*see id.*).

The determination of whether the trust itself or the current beneficiaries will be taxed on capital gains depends on whether the gains are “excluded” or “included” in “distributable net income” (“DNI”) under Internal Revenue Code § 643(a) (*see id.*). If the gains are excluded from DNI, the gains will be taxed at the trust level (*see id.*). If the gains are included in DNI, “the amounts distributed (or required to be distributed) to the current beneficiaries will be considered, partially or fully, to ‘carry out’ such gains and cause them to be taxed to such beneficiaries” (*see id.*).

This bill would amend EPTL § 11-A-4.4 to clarify that, “unless the instrument provides otherwise, a trustee has the powers set forth in the regulations which would permit a reasonable and impartial allocation of realized capital gains to income and

