

Memorandum in Support

TRUSTS AND ESTATES LAW SECTION

T&E #7

May 13, 2016

A. 9879

By: M. of A. Buchwald

Assembly Committee: Judiciary

Effective Date: 1st day of January next succeeding the date on which it shall have become a law.

AN ACT to amend the surrogate's court procedure act, in relation to the commissions of donees of a power in trust, including donees of a power during minority.

LAW AND SECTION REFERRED TO: Section 2306 of the Surrogate's Court Procedure Act.

THE TRUSTS AND ESTATES LAW SECTION SUPPORTS THIS LEGISLATION

This bill would amend various portions of the Surrogate's Court Procedure Act ("SCPA") to include "donee of a power during minority" and "donee of a power in trust." Specifically, the Proposal seeks to create clear rules concerning the question of compensation of such donees of powers in trust by adding the terms to the current provisions governing commissions of trustees, *i.e.* SCPA 2306, 2307, 2308, 2309, 2312 and 2313.

For the reasons explained more fully below, the Section SUPPORTS this bill.

Background

Powers in trust are long established common law powers which include the power to manage property vested in an infant, as well as other powers. Such a power is sometimes given to an executor or a trustee to avoid the appointment of a guardian. If a power to manage property vested in an infant is given, title to the property vests in the infant, but the executor or trustee can continue to manage the funds for the infant's benefit until they reach the age of majority. Powers in trust can also be given in other circumstances. For example, at common law powers to manage property for an adult were recognized. *Matter of Allen*, 111 Misc 93 (Surr Ct Westchester Co 1920), *affirmed*, 202 AD 810 (2d Dep't 1922), *modified on other grounds*, 236 NY 503 (1923)(permitting trustee to retain the money of an adult, who at the time was deemed mentally deficient, as donee of a power in trust); see also *Matter of Schaper*, 151 Misc.2d 923, 574 N.Y.S.2d 137 (Surr Ct New York Co 1991).

There is a reference to a donee of a power during minority in SCPA 10-3.1. The current Estate Powers and Trust Law (“EPTL”) and SCPA do not contain any specific references to powers in trust or donees of a power in trust, but EPTL 10-1.1 states that

The common law of powers as embodied in this article and as to matters not included herein, as heretofore established, is retained as the law of this state except as modified by the provisions of this article.

Relying, in part, upon this statutory provision, the New York County Surrogate’s Court addressed a power to manage property vested in an incapacitated person in *Matter of Schaper*, 151 Misc2d 923 (Surr Ct New York Co 1991). The provisions of the will at issue created a trust for decedent’s son until age 40, but further stated:

[I]f any portion of the principal of any trust shall upon termination vest in a minor or in any person during his physical, mental or any other disability... my executors and/or trustees are empowered to retain same as donees of a power in trust to invest and reinvest such principal during minority of the minor or during the said disability as above stated of such person....

The Court upheld the power and otherwise directed that the trustee, who was the donee of the power in trust, be governed by all laws applicable to trustee’s commissions and that any discretion to the trustee vested under other provisions of the will would continue. *Id.* Other cases have ordered that the calculation of commissions should be the same as those for trustees under SCPA, however this is not codified. As stated in *Matter of Golding*, 129 Misc2d 952 (Surr Ct New York Co 1985)(concerning a request by a donee of a power during minority for advance commissions):

Whether the fiduciary assumes the office of donee under the terms of a will or pursuant to the terms of a lifetime indenture, a donee takes on all the duties and responsibilities of the previous fiduciary. If the minor happens to be very young, the donee of a power during minority will exercise such functions as investing assets, receiving and collecting income and reporting and paying taxes for a long period. Surely for these services a donee is entitled to commissions.

Id. at 954-55.

The bill would amend the SCPA to make the provisions applicable to trustees’ commissions to also be applicable to all donees of powers in trust, which is a codification of the common law.

