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Memorandum in Support

TRUSTS AND ESTATES LAW SECTION

T&E #6 May 31, 2016

A. 7868 By: M. of A. Weinstein
Assembly Committee: Judiciary
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to the privilege between a personal representative and the attorney to lifetime trustees.

LAW AND SECTION REFERRED TO: Section 4503 of the Civil Practice Law and Rules.

THE TRUSTS AND ESTATES LAW SECTION SUPPORTS THIS LEGISLATION

INTRODUCTION

The attorney-client privilege, the oldest among common-law evidentiary privileges, fosters the open dialogue between lawyer and client that is deemed essential to effective representation.[1] CPLR § 4503, which codifies this privilege, was amended in 2002 to abolish the "fiduciary exception" to the attorney-client privilege with respect to communications between counsel and a defined class of fiduciaries, including executors and testamentary trustees. Omitted from this class of fiduciaries, however, were trustees of lifetime trusts. As the law recognizes revocable lifetime trusts as the equivalent of wills and holds lifetime trustees to the same fiduciary standards as executors, it is incongruous for the law to confer the benefits of the attorney-client privilege on an executor, yet deprive the same benefit to a trustee of a revocable trust.

This bill has been proposed at the recommendation of the Chief Administrative Judge, upon the recommendation of the Surrogate's Court Advisory Committee, to amend CPLR § 4503 to include lifetime trustees in the definition of fiduciaries to whom the attorney-client privilege would apply. The bill further provides that a fiduciary does not waive the privilege by merely asserting he or she relied upon the advice of counsel when acting in such capacity. For the reasons explained more fully below the Section SUPPORTS this legislation.

[1] *Spectrum Systems Intern. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991).

ANALYSIS

A. NY CPLR § 4503

CPLR § 4503 (a)(1) provides, in sum, that "an attorney…shall not disclose" confidential communications between the attorney and a client arising "in the course of professional employment", absent a waiver by the client.

Prior to the 2002 amendment to CPLR § 4503, case law recognized a "fiduciary exception" to the attorney-client privilege allowing disclosure of communications between an attorney and the fiduciary-client upon a showing of "good cause" or where the communication was made before litigation was contemplated.[2]

This line of cases was overturned by the 2002 legislation so that CPLR § 4503(a)(2) now provides:

> 2. Personal representatives.
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> (A) For purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:
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> (i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and
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> (ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the

[2] *See, e.g.*, *Hoopes v. Carota*, 74 N.Y.2d 716, 717-18 (1989) ("It appears from the submissions that defendant consulted the attorneys, at least in part, in his capacity as trustee of the trust of which plaintiffs are beneficiaries. Under these circumstances, where a fiduciary relationship is present, some courts have held that the attorney-client privilege does not attach at all while other courts have held that the privilege attaches but that it may be set aside by a showing of good cause. We agree with the Appellate Division that "good cause" is present here. Therefore, the communications are not privileged in any event.") (internal citations omitted); *Estate of Baker*, 139 Misc.2d 573, 577 (Sur. Ct. Nassau Co. 1988) ("This court is of the opinion that a fiduciary has an obligation to disclose the advice of counsel with respect to matters affecting the administration of the estate. This is subject to the limitation that the fiduciary should have the protection of the privilege when litigation has commenced or is anticipated.") (internal citations omitted).

personal representative who is the client.

> (B) For purposes of this paragraph, "personal representative" shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator or trustee to whom letters have been issued within the meaning of subdivision thirty-four of section one hundred three of the surrogate's court procedure act, and (ii) the guardian of an incapacitated communicant if and to the extent that the order appointing such guardian under subdivision (c) of section 81.16 of the mental hygiene law or any subsequent order of any court expressly provides that the guardian is to be the personal representative of the incapacitated communicant for purposes of this section; "beneficiary" shall have the meaning set forth in subdivision eight of section one hundred three of the surrogate's court procedure act and "estate" shall have the meaning set forth in subdivision nineteen of section one hundred three of the surrogate's court procedure act.
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> (emphasis added)

The emphasis supplied above shows how trustees of lifetime trusts are excluded from the class that includes administrators, executors, preliminary executors, and testamentary trustees, among others.

B. The Substantial Similarity Between Lifetime Trusts and Wills

Revocable lifetime trusts have become increasingly popular among people planning their estates. As the usage of such instruments increased, the Surrogate's Courts have had occasion to consider these instruments and recognize their similarity to wills.

For example, in *Estate of Tisdale*,[3] Surrogate Roth confronted the issue of whether there is a right to a jury in a proceeding to set aside a revocable trust created by a settlor who has since died, as there would be in a probate contest (SCPA § 502(1)). The Surrogate reviewed the similarities between the functions of a will and revocable trust and the issues concerning a challenge to each instrument. The Court concluded:

> The substantial similarity between revocable trusts and wills…mandates the conclusion that the nature of the relief requested in a proceeding to set aside a trust is the same as the nature of the relief requested in a proceeding to set aside a will.[4]

[3] 171 Misc.2d 716 (1997).
[4] *Id*. at 720.

A year later, Surrogate Roth was confronted with the novel issue of who has standing to challenge a revocable trust after the settlor's death and the procedures for bringing such a contest. The Court considered the similarities between a will and revocable trust in holding that if a distributee is entitled to object to probate of a will, the distributee should have standing to contest a revocable trust instrument after the settlor's death. The Court held:

> As this court concluded in [*Tisdale*], revocable trusts…function essentially as testamentary instruments (*i.e.*, they are ambulatory during the settlor's lifetime, speak at death to determine the disposition of the settlor's property, may be amended or revoked without court intervention and are unilateral in nature) and therefore must be treated as the equivalents of wills in the eyes of the law. On the premise that form must yield to substance in such matters, this court in Tisdale also concluded that the rights and remedies of the parties interested in a revocable trust must be consistent with the rights and remedies of the parties interested in a decedent's will, including the right to a jury trial. Thus, a distributee who is entitled to file objections to probate should also be accorded standing to commence an action to set aside a revocable trust, since the latter is but another part of the decedent's testamentary plan.[5]

C. The Substantial Similarity of Duties of a Lifetime Trustee and Other Fiduciaries

A trustee of a lifetime trust, whether acting during the settlor's lifetime or after death, is held to the same standard of undivided loyalty and accountability as an executor, administrator, preliminary executor or testamentary trustee (all of whom are covered by CPLR § 4503).[6] As the law does not hold a lifetime trustee to any less of a fiduciary standard, these fiduciaries should be afforded the same opportunity obtain legal advice, with the protection of the attorney-client privilege, to aid them in fulfilling their duties.[7]

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[5] *Estate of Davidson*, 177 Misc.2d 928, 930-931 (Sur. Ct. New York Co. 1998).

[6] *In re Malasky*, 290 A.D.2d 631 (3rd Dept. 2002) (holding that an attempt to completely excuse a trustee of a lifetime trust from accounting is void as against public policy).

[7] Whether or not the lifetime trust agreement contains an exoneration clause, and whether or not such clause is to be given any effect, should not relate to any consideration as whether an entire category of fiduciaries is to be excluded from the protections of CPLR § 4503. *See In re Shore*, 19 Misc.3d 663, 666 (Sur. Ct. New York Co. 2008) ("This public policy against exonerating testamentary fiduciaries from any and all accountability is equally applicable with respect to inter vivos trusts where, as is the case here, there is no one in a position to protect the beneficiaries' interests during the existence of the trust. Although some decisions might appear to hold that the references to testamentary fiduciaries in EPTL 11–1.7 signify that exoneration clauses in inter vivos trusts are not similarly forbidden [citations omitted], such a conclusion is not supportable. According to such decisions, the statute's prohibition was intended to apply to a decedent's estate and testamentary trust because the beneficiaries of such an entity were in

D. The Similarity of Powers of A Lifetime Trustee and Other Fiduciaries

Unless the instrument or a court order provides otherwise, EPTL § 11-1.1 sets forth the powers conferred upon a class of fiduciaries which includes trustees of lifetime trusts among administrators, executors, preliminary executors and testamentary trustees (who, again, are among the class covered by CPLR § 4503). Included among these powers is the power to pay "any reasonable counsel fees he may necessarily incur." EPTL § 11-1.1 (b)(22).

Thus, while a trustee of a lifetime trust has a statutory right equal to an executor, testamentary trustee and other fiduciaries to retain and compensate counsel, he does not enjoy the same statutory right to have his communications with that counsel governed by the attorney-client privilege.

E. The Legislation

The legislation simply includes a "lifetime trustee" among those fiduciaries who constitute a "personal representative" at CPLR § 4503(a)(2)(B) and, thereby, extends the benefits of the attorney-client privilege to a lifetime trustee.

Additionally, this measure makes clear that a fiduciary does not waive the privilege by merely asserting he or she relied upon the advice of counsel when acting in such capacity.

F. Reasons to Support the Legislation

The following arguments, advanced by the proponents of the 2002 amendment to CPLR § 4503 to overturn the judge-made "fiduciary exception," apply to extending that legislation now to include trustees of lifetime trusts among the fiduciaries covered by the attorney-client privilege:

1. the exception potentially chills candor in communications between the fiduciary and counsel;
2. it impedes counsel's duty of undivided loyalty to the his or her client (the fiduciary); and

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special need of protection given the fact that a decedent was not able to hold the fiduciary accountable. Such reasoning, however, is equally applicable to inter vivos trusts when the language of the trust attempts to relieve the trustee from any and all accountability during the trust's existence."); *In re Tydings*, 2011 WL 2556955 (Sur. Ct. Bronx Co. 2011) ("Nonetheless, it is clear that where, as here, a trustee was neither directly nor indirectly involved in drafting or creating the trust, and may be presumed to have relied upon the explicit provisions of an exoneration clause contained in a lifetime trust instrument before agreeing to serve as fiduciary, generally the trustee will not be held liable for acts specified in the exoneration clause [citations omitted].")

3. it presents a doctrinal anomaly in that fiduciaries should be entitled to consult with their attorneys on the same terms as any other client.[8]

By the 2002 amendment, the Legislature recognized that a broad class of fiduciaries administering estates and trusts should enjoy the benefits of the attorney-client privilege, yet omitted lifetime trustees from that class. As shown above, the law views lifetime trusts as the equivalent of wills, the fiduciary standards of a lifetime trustee as the equivalent of an executor, and the statutory powers of a lifetime trustee, including the retention and payment of legal counsel, as equivalent to those of an executor. There is no sound policy reason why, despite such similarities, lifetime trustees are uniquely excluded from the statute extending the attorney-client privilege to executors, testamentary trustees and other fiduciaries.

Little would be accomplished if, after allowing a fiduciary to enjoy the benefit of a privileged communication with legal counsel, that privilege is automatically waived if the fiduciary relies on the advice he or she then receives. Thus, that part of the Proposal as provides that a fiduciary does not waive the privilege by later asserting he or she relied on the advice of counsel and, instead, allowing the effect of the assertion of the privilege to be determined by the courts on a case by case basis, is a sound extension of the provisions of CPLR § 4503.

CONCLUSION

Based on the foregoing, the Trusts and Estate Law Section **SUPPORTS** this bill to amend CPLR § 4503.

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[8] McKinney's CPLR § 4503, *Practice Commentaries*, C4503:7 Decedents and Decedent's Estates.