

Explanatory Memorandum of Fiduciary Authority **Pertaining to a Decedent's Benefit Plan Act** **By NYSBA Trusts and Estates Law Section**

March 17, 2023

Sole proprietors often sponsor benefit plans, such as a 401(k) plan. Plan participants may, but need not, include individuals other than the proprietor.

A sole proprietor who sponsors a benefit plan is often the sole benefit plan administrator responsible for determining benefit entitlements and making benefit plan distributions. The same individual is often the sole trustee responsible for investing and otherwise safeguarding benefit plan assets, although some investment authority may be delegated to benefit plan participants and beneficiaries, particularly if the individual is not the sole participant. In such fiduciary capacity, the sole proprietor often directs third parties to invest or hold plan assets, make plan benefit distributions, keep plan records, and provide services to the benefit plan.

In many cases the sole proprietor designates no successor benefit plan administrator or trustee to succeed the proprietor following the proprietor's death. In almost all cases, the benefit plan terms provide that the sole proprietor and the proprietor's successor may amend the plan terms and nominate, remove, and replace the benefit plan fiduciaries, administrators, trustees, custodians, asset holders, record keepers, or service providers, or the persons who can nominate, remove, or replace those parties.

Nevertheless, some third-party benefit plan fiduciaries, benefit plan asset holders, benefit plan record keepers, and benefit plan service providers will refuse to recognize such authority. In particular, they may refuse, absent a court order, to follow instructions from the fiduciary of the estate of the sole proprietor or of a plan administrator or trustee appointed by such fiduciary to issue benefit checks or to make specified plan investments. The third parties will often base their refusal on the failure of the EPTL § 11-1.1(b) list of the explicit powers of a decedent's estate fiduciary to include such explicit authority, and refer to EPTL § 11-1.1(c) that gives courts the right to authorize estate fiduciaries to exercise any other power necessary for the proper administration of the decedent's estate.

The enactment of the Fiduciary Authority Pertaining to a Decedent's Benefit Plan Act would eliminate the costs needed to generate such a court order. The eliminated costs are not limited to the litigants' costs. They would also include the judicial costs of processing the request for the order and issuing the order. The Act will not change any benefit plan terms, but clarify that estate fiduciaries may exercise the sole proprietor's pre-death authority, such as the authority to appoint the plan fiduciaries who direct third parties to make benefit payments, unless there are contrary benefit plan terms. This authority is intended to give the person named by the fiduciary the same powers and authority as would be possessed by a person in the same position named by the deceased sole proprietor.

On March 17, 2023, the Trusts and Estates Law Section approved the proposed legislation.

On -----, ___ 2023, the Executive Committee of the New York State Bar Association approved the proposed legislation.

STATE OF NEW YORK

BILL NUMBER _____

IN _____

_____, 2023

Introduced by: _____

AN ACT to amend the estates, powers, and trusts law in relation to enacting the “Fiduciary Authority Pertaining to a Decedent’s Benefit Plan Act,” which would clarify the authority of fiduciaries of the estate of a decedent pertaining to any benefit plan the decedent sponsored when the decedent died.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Paragraph (b) of section 11-1.1 of the estates, powers, and trusts law, as amended by
2 L. 2011, ch. 62, § 104 (Part A), is amended to read as follows:
3

4 (b) In the absence of contrary or limiting provisions in the court order or decree appointing a
5 fiduciary, or in a subsequent order or decree, or in the will, deed or other instrument, every
6 fiduciary is authorized:

7 (1) To accept additions to any estate or trust from sources other than the estate
8 of the decedent or the settlor of a trust.

9 (2) To acquire the remaining undivided interest in the property of an estate or
10 trust in which the fiduciary, in his fiduciary capacity, holds an undivided interest.

11 (3) To invest and reinvest property of the estate or trust under the provisions
12 of the will, deed or other instrument or as otherwise provided by law.

13 (4) To effect and keep in force fire, rent, title, liability, casualty or other
14 insurance to protect the property of the estate or trust and to protect the fiduciary.

15 (5) With respect to any property or any estate therein owned by an estate or
16 trust, except where such property or any estate therein is specifically disposed of:

17 (A) To take possession of, collect the rents from and manage the

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1 same.

2 (B) To sell the same at public or private sale, and on such terms as
3 in the opinion of the fiduciary will be most advantageous to those
4 interested therein.

5 (C) With respect to fiduciaries other than a trustee, to lease the
6 same for a term not exceeding three years and, in the case of a trustee, to
7 lease the same for a term not exceeding ten years although such term
8 extends beyond the duration of the trust and, in either of such cases,
9 including the right to explore for and remove mineral or other natural
10 resources, and in connection with mineral leases to enter into pooling
11 and unitization agreements.

12 (D) To mortgage the same.

13 (E) Any power to take possession of, collect the rent from,
14 manage, sell, lease or mortgage, granted by this subparagraph (5), which
15 is prohibited by the terms of the will, deed or other instrument or by the
16 provisions of this subparagraph (5), nonetheless exists, upon the
17 approval of the surrogate, where such power is necessary for the
18 purposes set forth in SCPA 1902.

19 (F) A fiduciary acting under a will may exercise all of the powers
20 granted by this subparagraph (5) notwithstanding the effect upon such
21 will of the birth of a child after its execution or of any election by a
22 surviving spouse.

23 (6) To make ordinary repairs to the property of the estate or trust.

24 (7) To grant options for the sale of property for a period not exceeding six
25 months.

26 (8) With respect to any mortgage held by the estate or trust (A) to continue the
27 same upon and after maturity, with or without renewal or extension, upon such terms
28 as the fiduciary deems advisable; (B) to foreclose, as an incident to collection of any
29 bond or note, any mortgage securing such bond or note, and to purchase the
30 mortgaged property or acquire the property by deed from the mortgagor in lieu of
31 foreclosure.

32 (9) To employ any bank or trust company incorporated in this state, any
33 national bank located in this state or any private banker duly authorized by the
34 superintendent of financial services of this state to engage in business here (who, as
35 private banker, maintains a permanent capital of not less than one million dollars) as
36 custodian of any stock or other securities held as a fiduciary, and the cost thereof,
37 except in the case of a corporate fiduciary, shall be a charge upon the estate or trust.
38 The records of such bank, trust company or private banker shall at all times show the
39 ownership of such stock or other securities. Such stock or other securities shall at all
40 times be kept separate from the assets of such bank, trust company or private banker
41 and may be kept by such bank, trust company or private banker

1 (A) in a manner such that all certificates representing the
2 securities from time to time constituting the assets of a particular estate,
3 trust or other fiduciary account are held separate from those of all other
4 estates, trusts or accounts; or

5 (B) in a manner such that, without certification as to ownership
6 attached, certificates representing securities of the same class of the same
7 issuer and from time to time constituting assets of particular estates,
8 trusts or other fiduciary accounts are held in bulk, including, to the extent
9 feasible, the merging of certificates of small denomination into one or
10 more certificates of large denomination, provided that a bank, trust
11 company or private banker, when operating under the method of
12 safekeeping security certificates described in this subparagraph (B), shall
13 be subject to such rules and regulations as, in the case of state chartered
14 institutions, the state superintendent of financial services and, in the case
15 of national banking associations, the comptroller of the currency may
16 from time to time issue. Such bank, trust company or private banker
17 shall, on demand by the fiduciary, certify in writing the securities held by
18 it for such estate, trust or fiduciary account.

19 (10) To cause any stock or other securities (hereinafter referred to as
20 “securities”) held by any bank or trust company, when acting as fiduciary, whether
21 alone or jointly with an individual, with the consent of the individual fiduciary, if
22 any (who is hereby authorized to give such consent), to be registered and held in the
23 name of a nominee of such bank or trust company without disclosure of the fiduciary
24 relationship; and, in the case of an individual acting as fiduciary, to direct any bank
25 or trust company incorporated under the laws of this state, any national bank located
26 in this state or any private banker duly authorized by the superintendent of financial
27 services of this state to engage in business here (who, as private banker, maintains a
28 permanent capital of not less than one million dollars) to register and hold any
29 securities deposited with such bank, trust company or private banker (hereinafter
30 referred to as “bank”) in the name of a nominee of such bank. The bank shall not
31 redeliver such securities to the individual fiduciary, who authorized their registration
32 in the name of a nominee of the bank, without first registering the securities in the
33 name of the individual fiduciary, as such. But, any sale of such securities by the bank
34 at the direction of the individual fiduciary shall not be treated as a redelivery. The
35 bank may make any disposition of such securities which is authorized or directed by
36 an order or decree of the court having jurisdiction of the estate or trust. Any such
37 bank shall be absolutely liable for any loss occasioned by the acts of its nominee
38 with respect to the securities so registered. The records of the bank shall at all times
39 show the ownership of any such securities and of those held in bearer form. Such
40 securities and those held in bearer form shall at all times be kept separate from the
41 assets of the bank and may be kept by such bank.

42 (A) in a manner such that all certificates representing the
43 securities from time to time constituting the assets of a particular estate,
44 trust or other fiduciary account are held separate from those of all other

1 estates, trusts or accounts; or

2 (B) in a manner such that, without certification as to ownership
3 attached, certificates representing securities of the same class of the same
4 issuer and from time to time constituting assets of particular estates,
5 trusts or other fiduciary accounts are held in bulk, including, to the extent
6 feasible, the merging of certificates of small denomination into one or
7 more certificates of large denomination, provided that a bank, when
8 operating under the method of safekeeping security certificates described
9 in this subparagraph (B), shall be subject to such rules and regulations as,
10 in the case of state chartered institutions, the state superintendent of
11 financial services and, in the case of national banking associations, the
12 comptroller of the currency may from time to time issue. Such bank or
13 trust company shall, on demand by any party to an accounting by such
14 bank or trust company as fiduciary or on demand by the attorney for
15 such party, certify in writing the securities held by such bank or trust
16 company as such fiduciary.

17 (11) In the case of the survivor of two or more fiduciaries, to continue to
18 administer the property of the estate or trust without the appointment of a successor
19 to the fiduciary who has ceased to act and to exercise or perform all of the powers
20 given to the original fiduciaries unless contrary to the express provision of the will,
21 deed or other instrument.

22 (12) A successor or substitute fiduciary, to succeed to all of the powers, duties
23 and discretion of the original fiduciary, with respect to the estate or trust, as were
24 given to the original fiduciary, unless the exercise of such powers, duties or
25 discretion of the original fiduciary are expressly prohibited by the will, deed or other
26 instrument to any successor or substituted fiduciary.

27 (13) To contest, compromise or otherwise settle any claim in favor of the
28 estate, trust or fiduciary or in favor of third persons and against the estate, trust or
29 fiduciary.

30 (14) To vote in person or by proxy, discretionary or otherwise, shares of stock
31 or other securities held by him as fiduciary.

32 (15) To pay calls, assessments and any other sums chargeable or accruing
33 against or on account of shares of stock, bonds, debentures or other corporate
34 securities held by a fiduciary, whenever such payments may be legally enforceable
35 against the fiduciary or any property of the estate or trust or the fiduciary deems
36 payment expedient and for the best interests of the estate or trust.

37 (16) To sell or exercise stock subscription or conversion rights, participate in
38 foreclosures, reorganizations, consolidations, mergers or liquidations, and to consent
39 to corporate sales, leases and encumbrances. In the exercise of such powers the
40 fiduciary is authorized to deposit stocks, bonds or other securities with any protective
41 or other similar committee under such terms and conditions respecting the deposit
42 thereof as the fiduciary may approve.

1 (17) To execute and deliver agreements, assignments, bills of sale, contracts,
2 deeds, notes, receipts and any other instrument necessary or appropriate for the
3 administration of the estate or trust.

4 (18) In the case of a trustee, to hold the property of two or more trusts or parts
5 of such trusts created by the same instrument as an undivided whole without
6 separation as between such trusts or parts, provided that such separate trusts or parts
7 shall have undivided interests and provided further that no such holding shall defer
8 the vesting of any estate in possession or otherwise.

9 (19) When a legacy, a distributive share, the proceeds of any action brought as
10 prescribed by 5-4.1, or the proceeds of a settlement of an action brought in behalf of
11 an infant for personal injuries are payable to an infant, incompetent, conservatee or
12 person under disability and the sum does not exceed ten thousand dollars, to make
13 payment thereof to the father or mother or to some competent adult person with
14 whom the infant, incompetent, conservatee or person under disability resides or who
15 has some interest in his welfare for the use and benefit of such infant, incompetent,
16 conservatee or person under disability. If the sum payable to a patient in an
17 institution in the state department of mental hygiene is not in excess of the amount
18 which the director of the institution is authorized to receive under section 29.23 of
19 the mental hygiene law, to make payment of such sum to such director for use as
20 provided in that section.

21 (20) To make distribution in cash, in kind valued at the fair market value of
22 the property at the date of distribution, or partly in each, without being required to
23 make pro rata distributions of specific property.

24 (21) To join with the surviving spouse or the executor of his will or the
25 administrator of his estate in the execution and filing of a joint income tax return for
26 any period prior to the death of a decedent for which he has not filed a return or a gift
27 tax return on gifts made by the decedent's surviving spouse, and to consent to treat
28 such gifts as being made one-half by the decedent, for any period prior to a
29 decedent's death, and to pay such taxes thereon as are chargeable to the decedent.

30 (22) In addition to those expenses specifically provided for in this paragraph,
31 to pay all other reasonable and proper expenses of administration from the property
32 of the estate or trust, including the reasonable expense of obtaining and continuing
33 his bond and any reasonable counsel fees he may necessarily incur.

34 (23) In the case of any benefit plan sponsored by the decedent, the authority
35 the decedent had under the benefit plan terms immediately before the decedent's
36 death, unless there are contrary benefit plan terms.

37
38 Section 2. The provisions of this act shall be severable, and if any clause, sentence, paragraph,
39 subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to
40 be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be
41 confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof
42 directly involved in the controversy in which such judgment shall have been rendered.

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2 Section 3. This act shall take effect immediately.

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NEW YORK STATE _____
MEMORANDUM IN SUPPORT OF LEGISLATION
Submitted in accordance with Assembly Rule III, Sec 1(f)

BILL NUMBER: _____

SPONSOR: _____

TITLE OF BILL: **AN ACT** to amend the estates, powers, and trusts law in relation to enacting the “Fiduciary Authority Pertaining to a Decedent’s Benefit Plan Act,” which would clarify the authority of fiduciaries of the estate of a decedent pertaining to any benefit plan the decedent sponsored when the decedent died.

Sole proprietors often sponsor benefit plans, including, but not limited to pension plans, retirement plans, profit-sharing plans, stock bonus plans, or other deferred compensation plans, death benefit plans, and life insurance plans. Plan participants may, but need not, include individuals other than the proprietor.

A sole proprietor who sponsors a benefit plan is often the sole benefit plan administrator responsible for determining benefit entitlements and making benefit plan distributions. The same individual is often the sole trustee responsible for investing and otherwise safeguarding benefit plan assets, although some investment authority may be delegated to benefit plan participants and beneficiaries, particularly if the individual is not the sole participant. Benefit plan assets are often held by financial institutions, who need not be benefit plan fiduciaries, in which case they must be appointed by benefit plan fiduciaries. Benefit plans often also have third-party service providers, such as record keepers, who need not be benefit plan fiduciaries, in which case they also must be appointed by benefit plan fiduciaries.

In many cases, the sole proprietor designates no successor benefit plan administrator or trustee to succeed the proprietor following the proprietor’s death. In almost all cases, the benefit plan terms provide that the sole proprietor and the proprietor’s successor may amend the plan terms, and nominate, remove, or replace the benefit plan administrators, trustees, custodians, asset holders, record keepers, or service providers, or the persons who can nominate, remove, or replace those parties. In some cases, even though there is a third party in such benefit plan role following the individual’s death, it is appropriate to remove and replace such third party because the third party is no longer adequately fulfilling its benefit plan responsibilities.

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The Act would clarify that estate fiduciaries may exercise the sole proprietor's pre-death authority, such as the authority to appoint the plan fiduciaries who direct third parties to make benefit payments, unless there are contrary benefit plan terms. This authority is intended to give the person named by the fiduciary the same powers and authority as would be possessed by a person in the same position named by the deceased sole proprietor. Those benefit plan terms almost always permit the benefit plan sponsor or the sponsor's successor to amend the plan terms. Such amendments may be needed to maintain the plan's tax qualification, adjust the plan sponsor's contributions, or to change benefit plan administrators, trustees, custodians, asset holders, record keepers, or service providers.

Nevertheless, under current law, some third-party benefit plan asset holders, benefit plan record keepers, and benefit plan service providers will refuse to recognize the authority of the fiduciary of the estate of the sole proprietor or of a plan administrator or trustee appointed by such fiduciary. In particular, these third parties, who may, but need not, be plan fiduciaries, may refuse, absent a court order, to follow instructions from successor plan fiduciaries to issue benefit checks or to make specified plan investments. The third parties will often base their refusal on the failure of the EPTL § 11-1.1(b) list of the explicit powers of a decedent's estate fiduciary to include such explicit authority, and refer to EPTL § 11-1.1(c) that gives courts the right to authorize the estate fiduciaries to exercise any other power necessary for the proper administration of the decedent's estate.

It may take considerable time and expense to generate such a court order, even though such orders appear to be granted in almost all cases because the authority is consistent with the authority of estate fiduciaries either (1) to wind up the financial affairs of a decedent, which would include winding up and distributing all the assets of any benefit plan the decedent had sponsored, in concert with the winding up of the individual's businesses, or (2) to continue any or all of the decedent's businesses and their benefit plans pursuant to the terms of the will or to SCPA Section 2108.

After the enactment of the amendment, the fiduciary could show the requisite authority in the same manner any duly appointed estate fiduciary can now show the authority to vote estate stock. In particular, reference may be made to the explicit powers set forth in the EPTL § 11-1.1 list.

The enactment of the amendment would eliminate the costs needed to generate such a court order because EPTL § 11-1.1 would explicitly set forth the requisite authority. The eliminated costs are not limited to litigants' costs. The judicial costs of processing the order request and issuing the order would also be eliminated. Thus, the amendment would also promote judicial efficiency and economy.

The amendment would not apply to a benefit plan for which the benefit plan sponsor was not the decedent. The amendment is not needed in most such cases, because either (a) the benefit plan sponsor has other co-owners with the requisite benefit plan appointment, removal, and replacement authority, or (2) the benefit plan sponsor is a solely-owned entity, such as an LLC, for which the estate fiduciary otherwise has the authority to appoint the entity's persons with the requisite benefit plan authority.

LEGISLATIVE HISTORY:

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None. New proposal.

FISCAL NOTE:

There would be no revenue impact from implementing the bill.

EFFECTIVE DATE AND SEVERABILITY:

The bill shall take effect immediately.

The bill also includes a severability section.