New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

MEMORANDUM IN OPPOSITION

ELDER LAW AND SPECIAL NEEDS SECTION

ELDER #1-A March 7, 2025

S.4549-A By: Senator Skoufis

Senate Committee: Judiciary

Effective Date: 30th day after it shall have become law

AN ACT to amend the General Obligations Law, in relation to requiring principals and beneficiaries to notify co-trustees and co-beneficiaries of the signing of a power of attorney.

LAW AND SECTION REFERRED TO: Section 5-1515 of General Obligations Law.

THE ELDER LAW AND SPECIAL NEEDS SECTION OPPOSES THIS LEGISLATION

This memorandum is submitted on behalf of the Elder Law and Special Needs ("ELSN") Section of the New York State Bar Association in opposition to S.4549-A (Skoufis), which adds a new requirement on principals of a power of attorney ("POA") who are trustees or beneficiaries, to put co-trustees and co-beneficiaries on notice that they signed a POA. Although the sponsor's memorandum offers a commendable purpose of increasing"transparency in certain financial matters," the legislation is seriously flawed. Most notably, it is not clear that there is ever a legal scenario where a trustee is permitted to delegate any authority through a POA. As Governor Hochul noted in her veto message in 2022, the legislation makes certain assumptions that are inconsistent with existing legal precedent regarding authority of a trustee to delegate duties to an agent through a power of attorney. Given this fundamental flaw, the ELSN Section is compelled to oppose this legislation.

Background

If enacted, S.4549 would add a new section to the New York's General Obligations Law ("GOL"): "§ 5-1515. Duty to notify other trustees and beneficiaries," imposing a duty on certain principals.

The "principal" is the individual who signs the power of attorney and designates someone else (the "agent") to act on the principal's behalf.

Proposed GOL § 5-1515(1) imposes a duty of notice on:

1. a trustee;
2. of a trust that has at least one other trustee (a "co-trustee");
3. who signs a New York power of attorney (i.e., the trustee becomes a principal);
4. that empowers the agent of the power of attorney to act on behalf of the principal as trustee or change the trust ("to affect such trust"); and
5. that agent is not a co-trustee.

For example, under this legislation, "A" and "B" are co-trustees, and "A" signs a power of attorney naming "C" as the agent and empowering the agent to act on behalf of "A" with respect to the trust. The trustee-principal ("A"), would have to put the other co-trustees ("B") on written notice, which states that "A" signed a power of attorney and that "C" can act on behalf of "A" to "affect" the trust.

Similarly, the proposed GOL § 5-1515(2) imposes a duty of notice on a beneficiary of a trust who signs a power of attorney that names someone other than a "co-beneficiary" as the agent. So, "A" and "B" are "co-beneficiaries" of a trust, and "A" signs a power of attorney naming "C" as the agent. The co-beneficiary/principal ("A") has to put "B" on written notice, which states that "A" signed a power of attorney and that "C" can act on behalf of "A." This legislation would require that when all of these conditions are met, the principal-trustee must notify, in writing, all other co-trustees of the fact that the principal signed a power of attorney and the name of the agent(s) in that power of attorney.

Concerns

The ELSN Section anticipates several problems with ***proposed GOL § 5-1515(1):***

1. Current law is unsettled with respect to a fiduciary's ability to delegate duties using a general power of attorney. The view is generally that such delegation is *not* permitted. *See* ***Matter of Jones***, 1 Misc. 3d 688, 765 N.Y.S.2d 756 (Sup. Ct. Broome County 2003) ("A fiduciary cannot delegate the whole responsibility for the administration of the estate, even to a co-fiduciary." . . . "[T]he duty of a fiduciary is personal and cannot be divested by delegation.") A fiduciary who does so is liable for breach of trust and potentially subject to surcharge. (Woodbridge v Bockes, 59 App. Div. 503, 69 N.Y.S. 417 [4th Dept 1901]; Matter of Badenhausen, 38 Misc. 2d 698, 237 N.Y.S.2d 928 [Sur Ct, Richmond County 1963]; Matter of Ringler & Co. 70 Misc. 576, 127 N.Y.S. 934 [Sup Ct, NY County 1911]; Restatement [Second]of Trusts § 171, Comment c; 2a Scott on Trusts § 171.1, at 439 [Fratcher 4th ed].)

   In contrast, the Appellate Division First Department has allowed a trustee to delegate duties to a third party. Burton v. PNC Bank, 12 A.D. 3d 264, 784 N.Y.S.2d 544 (1st Dep't 2004).

This legislation would not harmonize this distinction, but rather it seems to implicitly imply that trustees can delegate their fiduciary powers by using a power of attorney, as long as proper notice is given. Instead of providing needed clarity on a fiduciary's duty to delegate, GOL § 5-1515 further muddies things by suggesting that one fiduciary (a trustee) can delegate duties, using a general POA, while not addressing other fiduciaries. Such a contentious issue should be addressed explicitly.

2. A principal who signs a POA without the assistance of an attorney might not know about the required notice duty.

3. As drafted, the bill does not explain any of the consequences of failing to notify a co-trustee or co-beneficiary. Does the failure to put them on notice invalidate the power of attorney creating a non-statutory POA? What is the penalty for non-compliance?

There are additional problems with ***proposed GOL § 5-1515(2):***

1. It is not clear how requiring a beneficiary to notify "co-beneficiaries" does anything to protect anyone's interests. The "co-beneficiaries" still have no standing and no power to interfere with the agent's actions. It would seem the only authority that could be delegated might be to consent to the revocation or modification of a trust by a grantor or to renounce a beneficial interest in a trust. Yet, the ability of an agent *to renounce* on behalf of a beneficiary is already authorized in NY GOL § 5-1502G and NY EPTL § 2-1.11.

2. Pursuant to NY EPTL § 7-1.9(a), a creator of a trust can revoke or amend an otherwise irrevocable trust upon the written consent of all the persons beneficially interested in the trust property. The notification required in S.4549 would serve no purpose since all the other beneficiaries are required to consent, yet a beneficiary may not even be aware of the other beneficiaries.

3. What happens in a so-called "quiet" trust, where the "co-beneficiaries" might not even be known? The beneficiary may be unaware that he or she is a beneficiary of the trust. The notice requirements could easily be violated without any intent or knowledge. For example, if a number of different unrelated individuals are named as remainder beneficiaries, it is possible that the beneficiaries would not even know each other, and may not know of their interest until the settlement of the trust.

Although we commend the sponsor for looking for opportunities to increase transparency of financial transactions, this legislation would not achieve that goal.

For the reasons laid out above, the New York State Bar Association's Elder Law and Special Needs Section **OPPOSES** S.4549.