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**REPORT ON PROPOSED LEGISLATION BY THE  
COMMITTEE ON TRUSTS, ESTATES & SURROGATE'S COURTS  
RECOMMENDING AMENDMENT TO EPTL §7-1.17**

To create a valid lifetime trust under EPTL 7-1.17, there must be a writing that is executed by the initial creator and at least one trustee, either in the presence of two witnesses or acknowledged before a notary public. However, under some circumstances it is preferable to create a trust using a declaration of trust which is only signed by the trustee, and sometimes the trustee is not the person who contributed assets to the trust (the settlor). To translate into the terminology of the EPTL, sometimes the trustee of a trust created by declaration is not the creator<sup>1</sup> who makes a disposition<sup>2</sup> to the trust.

In such a case, because EPTL 7-1.17 requires the signature of the “initial creator,” unless the trustee in this context is (or can be considered to be) the initial creator, the statute might raise a question about the use of a declaration of trust. There are at least two contexts in which this may arise: 1) where the trustee is exercising a power of appointment, such as a decanting or pourover power, by creating a new trust and thus the trust is not created by a “disposition” (so there is no “creator”), and 2) where a settlor wants to remain anonymous.

This memorandum will propose a clarification and correction to existing law in order to avoid unfavorable, albeit unintended, consequences in these situations. We believe that, unless corrected, the problems identified below could lead to more trusts being created outside of the state of New York because of questions as to the validity of trusts created through a declaration by the trustee and the resulting risk of tax and trust litigation. Since most other states do not have this requirement (as discussed below), trustees will be driven to create trusts in this category in these other states. This will lead to a negative fiscal impact on New York that could be avoided by a simple clarification and correction to 7-1.17.<sup>3</sup>

Creation of Trust by the Exercise of a Trustee's Power of Appointment

Under EPTL 10-6.6, trustees who have an unrestricted right to invade principal may exercise that right by appointing these assets to a new trust. In addition, sometimes the original trust agreement (or Will, in the case of a testamentary trust) itself will authorize a similar procedure. The new trust can be pre-existing, it can be created by the original settlor concurrently with the trustee's pourover, or, if the settlor is unavailable due to death or incapacity, a common procedure is for the trustee to create the new trust through a declaration of

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<sup>1</sup> EPTL 1-2.2.

<sup>2</sup> EPTL 1-2.4.

<sup>3</sup> EPTL 7-1.17 was enacted in 1997 in response to the Fourth Report of the EPTL-SCPA Legislative Advisory Committee.

trust, and then to decant or pour the old trust assets over to the new trust. The effect of 7-1.17 on the use of a declaration of trust in this context is uncertain.

There is a serious argument that 7-1.17 would not apply to trusts created by the exercise of powers of appointment<sup>4</sup> because of the relation-back doctrine. Under the relation-back doctrine for powers of appointment, any trust created through an exercise of the power is deemed to be created under the original trust and by the initial trust creator.<sup>5</sup> In effect, no new trust is being created. Instead, what looks like a new trust is nothing more than an amended continuation of the old trust. Therefore, 7-1.17 would not apply because it only applies to the execution of a new trust. From this perspective, 7-1.17 is potentially misleading because its inapplicability to trusts created through powers of appointment is not at all evident on its face. By amending 7-1.17 so that it is evident that the requirement that the initial creator execute a writing would not apply to trusts created by exercise of a power of appointment, it would clear up this ambiguity and make certain that the relation-back doctrine applies in this context.

The critical question is whether the relation-back doctrine will be applied to the creation of a trust by exercise of a power of appointment without amendment of 7-1.17. Equitable principles would suggest that such a trust should not be invalidated, but the outcome of a challenge to its validity is uncertain because the doctrine is not universally applied.<sup>6</sup> If the trust receiving the poulover (that is, the appointment) is not seen as an extension of the old trust, but instead is characterized as an independent new trust that must satisfy 7-1.17 on its own, the validity of the new trust might be questioned because the trustee is apparently not the initial “creator” as defined in the EPTL: “A creator is a person who makes a disposition of property.”<sup>7</sup> In turn, “A disposition is a transfer of property by a person during his lifetime or by will.”<sup>8</sup> That sounds like the creator is disposing of his own property, which of course is not what happens when the trustee exercises a power to pour over or decant property from one trust into another. And if that is true, then the trustee-signed declaration of trust will not satisfy the formality requirements of 7-1.17 because it will not have been signed by the creator (indeed, there will be no creator of such a trust at all because no one will have made a disposition, that is, a transfer of his own property to the trust).

Apart from the plain language of the statutory definitions, there are two reasons that the “creator” arguably must be a person who has transferred his or her own assets into the trust (which would effectively exclude the decanting trustee from being the “creator”). First, in Matter of the Application of Beth E. Mills, the Department of Social Services argued that a supplemental needs trust created on behalf of an injured infant using her settlement from an

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<sup>4</sup> Exercise of the decanting power of EPTL 10-6.6 is considered the exercise of a special power of appointment. EPTL 10-6.6(f).

<sup>5</sup> “According to [the relation back] doctrine, the exercise of the power [of appointment] is regarded as a part of the instrument creating the power. The appointee is said to take the property from the donor and not from the donee.” Simes, Lewis M., Handbook of the Law of Future Interests, 128 (2d ed.1966)

<sup>6</sup> Although courts have sometimes disregarded the relation-back doctrine in certain areas, *see e.g.*, In the Matter of Lynch, 120 Misc.2d 679, 682, 493 N.Y.S.2d 742, 745 (1985); In Re Will of Smith, 79 Misc.2d 105, 107, 359 N.Y.S.2d 209, 212 (1974) (holding the relation-back doctrine was obsolete and could not be the basis for denying paying-out commissions to trustees that distribute principal to new trusts created under a donee’s power of appointment), the relation-back doctrine remains intact in at least one area of New York law as evidenced by EPTL 10-8.1(a)(2) (upon exercise of a limited power of appointment, the perpetuities period is dated from the original instrument creating the power, not from the date of exercise).

<sup>7</sup> EPTL 1-2.2.

<sup>8</sup> EPTL 1-2.4.

accident was void because it was a self-settled trust under 7-3.1,<sup>9</sup> which declares that “A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.” The Court determined that the infant could not be considered a creator of the trust because she had no legal right to the settlement proceeds at the time the trust was approved.<sup>10</sup> Therefore, the Court interpreted “creator” to mean someone who owns the assets that constitute the corpus of the trust at the time the trust is created. Clearly, in the case of a pourover, the trustee exercising the power does not own the assets.

Second, the exercise of the decanting right under 10-6.6 is declared by the statute to “be considered the exercise of a special power of appointment . . . ,” which, as noted above, is not a “disposition.” And, most specifically, EPTL 10.6-3 states that “a power of appointment can be exercised only by a written instrument which would be sufficient to dispose of the estate intended to be appointed if the donee were the actual owner.” Thus, 10-6.3 suggests that the donee of the power is *not* the “actual owner” but the mechanics of exercise must nevertheless mirror those applicable to an actual owner. Because the donee of the power (the trustee) is not the actual owner, as 10-6.3 suggests, therefore under Matter of the Application of Beth E. Mills the donee is not the creator and as a consequence, under 7-1.17, the donee’s signature is insufficient to create a trust.

There seems little reason not to clarify the ambiguity and potential misreading of this statute. The argument that the trustee is not the creator and that the creator must sign would present an opportunity to challenge the validity of the new trust, particularly in the situation where a new trust that is created under a power of appointment is less favorable to a particular beneficiary or if there are significant tax consequences to the creation of the new trust (and the decanting, if applicable). It is hard to envision the constituency against clarification of the statute, as long as the policy behind it is preserved (as will be discussed below).

#### Declaration of Trust by Trustee to Preserve the Settlor’s Anonymity

The second circumstance in which a problem with EPTL 7-1.17 arises is where a creator wishes not to be named as the settlor of a trust for perfectly unobjectionable privacy reasons. Examples of these situations would include where the settlor would like to provide anonymously for another person, or if the settlor would like to enter into a real estate transaction using a trust to protect his identity from the public record (without hiding it from the beneficiaries interested in the trust or the parties to the transaction). In these instances, a declaration of trust by the trustee would provide the desired anonymity, but because 7-1.17 requires the creator to sign, if the trust instrument is signed by only the non-settlor trustee it would be invalid. Even though in such a case the policy behind 7-1.17 could be satisfied in ways other than requiring the settlor to sign the trust instrument, as demonstrated in the discussion of our proposal below, under the literal reading of the statute there is no way for the creator to establish the trust anonymously. Since the possibility of invalidating these types of trusts was an unintended consequence not within the legislature’s contemplation when this statute was enacted (as we have confirmed with Judge Radigan, who heads the EPTL-SCPA Legislative Advisory Committee, and John Barnosky, who was the Reporter for the Fourth Report), a retroactive amendment to 7-1.17 would correct the potential problem.

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<sup>9</sup> In the Matter of the Application of Beth E. Mills, 156 Misc.2d 676, 685; 594 N.Y.S.2d 537, 543 (Sup. Ct. 1993).

<sup>10</sup> *Id.* at 543.

## Proposed Amendment

The proposed amendment to 7-1.17 would have two elements. First, when a trust is to be created by a decanting transfer of assets from a pre-existing trust or another exercise of a power of appointment, so that there is no “initial creator,” execution by the initial creator is not required.<sup>11</sup> All other requirements of 7-1.17 would still be in place for the new trust, so the trustee of the new trust would have to sign the new trust instrument. Of course all other formalities required outside of 7-1.17 remain in place, whether under other statutes (e.g., 7-1.18, 10-6.3, and 10-6.6) or the instrument creating the power. As a result of the amendment, it is clear that the 10-6.6 decanting power, or a similar power under the trust instrument, could still be used even if the creator is unavailable.

Second, the amendment would provide that when the trust is funded by a “disposition” from the creator (rather than a poulover or exercise of a power of appointment), which is the standard case contemplated by the current statute, the creator’s signature on *either* the transfer documentation (upon any one transfer to the trust) *or* the trust instrument would be sufficient to create the trust.<sup>12</sup> Under this proposed new rule, a declaration of trust signed by only the trustee could create a valid trust as long as the creator signs the transfer documentation.

Our proposal to (1) eliminate the need for a creator to sign the trust document when no one is making a disposition into the trust, and (2) when there is a disposition, require the creator’s signature on only one of these two documents (the transfer document or the trust instrument), will not run afoul of the concerns expressed in the legislative history of 7-1.17.<sup>13</sup> The Legislative Advisory Committee proposed the current formalities in 7-1.17 because they would convey the serious nature of the document to the creator, discourage last minute changes and protect against fraud. There was no precise rationale addressed in the report for requiring the creator’s signature on the actual trust instrument, as opposed to a signature on some other formal document such as we recommend.<sup>14</sup> Since the instrument of conveyance will have to comply with certain formalities in order to effect the transfer of property, allowing the creator to sign this instrument instead of the trust instrument will be sufficient to communicate the serious nature of the transaction to the creator and to protect against fraud. Additionally, this is a step that should take place anyway and thus adds no obstacles to normal practice. And if there is no “disposition” (transfer of the creator’s property during lifetime or by will) into the new trust, there is certainly no risk of fraud or frivolity.

A different approach to this problem that has been suggested would be an amendment that instead expands the definition of “creator” to include a third-party trustee. If this were the case, then a declaration of trust signed by someone who did not actually contribute to the trust (e.g., a decanting trustee) could still create a valid trust under 7-1.17. However, categorizing the third-party trustee as a “creator” would have unintended and unappealing consequences in other areas of the EPTL. For example, the creator of the trust has the ability to revoke or amend under

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<sup>11</sup> See proposed EPTL § 7-1.17(a)(3), at page 7 of this report. Because the trustee of the old trust is already required to sign the poulover or decanting documents, we thought it unnecessary to require that the old trustee also sign the new trust (when he is not also the new trustee).

<sup>12</sup> See proposed EPTL § 7-1.17(a)(2), at page 7 of this report.

<sup>13</sup> App. 4.01 Fourth Report of the EPTL-SCPA Legislative Advisory Committee, p. 2 (1995); New York Bill Jacket, 1997 S.B. 4223 Ch. 139, p. 7 (1997).

<sup>14</sup> *Id.*

EPTL 7-1.9, and the creator's domicile has jurisdictional repercussions under EPTL 7-1.10. Additionally, this would have adverse implications for the self-settled trust doctrine under EPTL 7-3.1 in certain circumstances. Even if the use of this expanded definition of "creator" were limited to 7-1.17 only, there is always the risk that a court may misapply this new provision. For those reasons we do not recommend this approach.

The Uniform Trust Code, which is under consideration in New York, does not contain the requirement that the creator sign the trust instrument; indeed, it does not require a written instrument at all.<sup>15</sup> It actually requires only that the settlor have capacity, the settlor manifest an intention to create the trust, the beneficiaries are definite, the trustees have duties to perform, and the same person is not the sole trustee and the sole beneficiary.<sup>16</sup>

Research reveals no other compelling reason why the creator must sign specifically the trust document. The Restatement of Trusts states, and the Uniform Trust Code provides, that inter vivos trusts of personal property may be created orally,<sup>17</sup> which was the law in New York until 7-1.17 was enacted.<sup>18</sup> Furthermore, a comprehensive review of all states' statutes show that only three states actually require a creator to sign the trust instrument for inter vivos trusts of personal property, and two of these states require the creator's signature only in certain instances.<sup>19</sup> Even those trusts of real property that a statute of frauds would require to be in writing can be created through a writing signed by the trustee alone.<sup>20</sup> For example, if the trustee states the terms of the trust and signs his name in an instrument effecting transfer or in a separate document, this writing would be sufficient to satisfy a statute of frauds.<sup>21</sup>

### Effective Date

The proposed amendment is a clarification and codification of existing law applicable to trusts created by exercise of a power of appointment, and a correction to the unintended overbroad implications of 7-1.17 as applied to declarations of trust not signed by an actual creator. It should be applicable to all affected trusts whenever created. We believe that many trusts have been created since 1997 in reasonable reliance on prior law and, on the arguments noted above, that such trusts are perfectly valid.

### Conclusion

Our proposed amendment to 7-1.17 would concisely resolve the issues raised above. The amendment would assure there would be no interference with the use of a power of appointment to create a trust, including a trustee's 10-6.6 (or other) power of decanting, and permit settlors to maintain some level of privacy from outside parties. The statute's formalities would still serve the purposes discussed by the Legislative Advisory Committee in its Fourth Report when proposing 7-1.17. Additionally, with these proposed formalities, New York law would continue

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<sup>15</sup> See UTC §407 (2000).

<sup>16</sup> UTC §402 (2000).

<sup>17</sup> Restatement (Third) of Trusts §20, at 318 (2003); UTC § 407 (2000).

<sup>18</sup> See App. 4.01 Fourth Report of the EPTL-SCPA Legislative Advisory Committee, p. 1 (1995).

<sup>19</sup> See Exhibit One. In addition, Delaware requires certain trusts (if they create a beneficial interest that is contingent on surviving the settlor) must be signed either by the settlor or a non-beneficiary trustee.

<sup>20</sup> Restatement (Third) of Trusts §23, Comment on Subsection (2), Clause (b), p.3-4 (2003); Bogert, *The Law of Trusts And Trustees* §82 (5), p.2-3 (2008).

<sup>21</sup> *Id.*

to be robust by requiring more than is required to create a trust by the Uniform Trust Code, the Restatement of Trusts and the law of a majority of other states. Lastly, according to our informal discussions with the drafters of the statute, the initial legislation was not intended to apply to the circumstances we have addressed and our proposal is congruent with the Fourth Report's goals.

Alan S. Halperin, Chair  
Trusts, Estates & Surrogate's Courts Committee

June 2009

## Proposed Amendment to EPTL 7-1.17

### 1. 7-1.17: Execution, amendment and revocation of lifetime trusts

(a) ~~E~~ (1) Except as provided below, every lifetime trust shall be in writing and shall be executed and acknowledged by the initial creator and, unless such creator is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

(2) Execution of the trust by the initial creator shall not be required if the initial creator executes (in the manner required for such transfer to be effective) a writing that effects any transfer of assets from the initial creator to the trust under 7-1.18.

(3) Execution of the trust by the initial creator shall not be required where the trust is created through, or funded by, an exercise of a power of appointment pursuant to Part 6 of Article 10.

(b) [no change]

2. **Effective date:** The amendment to this statute shall have the same effective date as L. 1997, c. 139, §3 (December 25, 1997).

## Exhibit One

<b>Type of Law</b>	<b>States that have adopted such law</b>
<p>Uniform Trust Code</p> <p>(The Uniform Trust Code does not require a writing to create a trust. It only requires that the settlor have capacity and manifest an intention to create the trust, that there be a definite beneficiary, that the trustee has duties to perform, and the same person is not the sole trustee and the sole beneficiary.)</p>	<p>Alabama, Arkansas, Florida, Kansas, Maine, Missouri*, Nebraska, New Hampshire*, New Mexico, North Carolina, Ohio*, Oregon, Pennsylvania, South Carolina, Tennessee, Utah*, Virginia, Wyoming, District of Columbia</p> <p>*These statutes have slight changes to the UTC language.</p>
<p>Silent Statutes or Registration Proceedings</p>	<p>Alaska, Arizona, Colorado, Connecticut, Hawaii, Idaho, Kentucky*, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Rhode Island, Vermont, Washington, Wisconsin, Oklahoma*</p> <p>*Case law specifically states that trusts of personal property need not be in writing. <i>Girdner v. Girdner</i>, 337 P.2d 741 (1959); <i>St. Catherine's Cemetary v. Fidelity Trust Co.</i>, 152 KY. 797 (1913).</p>
<p>Requirement of manifestation of settlor's intent</p>	<p>California, Montana, Nevada, South Dakota</p>
<p>Requirement that settlor sign</p>	<p>Indiana, West Virginia (only declarations of trust where the conveyance is to the settlor himself), Texas (only if the trustee is also the settlor or beneficiary).</p>
<p>Writing required</p>	<p>Georgia, Iowa, Illinois</p>
<p>Writing required for only those trusts which create any beneficial interest contingent on surviving the settlor which must be signed either by settlor or by non-beneficiary trustee</p>	<p>Delaware</p>