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REPORT BY THE COMMITTEE ON TRUSTS, ESTATES AND SURROGATES COURTS

AMENDMENT TO EPTL §3-3.7(E)

In prior sessions of the Legislature, bills[1] were introduced to amend Section 3-3.7(e) of the New York Estates, Powers and Trusts Law ("EPTL") by allowing a testator to incorporate in a Will, as a testamentary trust, the provisions of a pre-existing inter vivos trust that was revoked or terminated prior to the testator's death.

Although no such bill presently is pending before the Legislature, the Trusts, Estates and Surrogate's Courts Committee of the New York City Bar Association would offer its support for the reintroduction of Assembly Bill A.8509, which provided as follows:

> "AN AMENDMENT to amend the estates, powers and trusts, law in relation to pour-over trusts.
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> The People of the State of New York represented in Senate and Assembly, do enact as follows:
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> (e) A revocation or termination of the inter vivos trust before the death of the testator shall cause the disposition or appointment to fail, unless the testator has made an alternative disposition; provided, however, that the testator may, by express direction, provide that the disposition or appointment of all or part of his or her estate to such revoked or terminated trust shall be deemed to create a testamentary trust under and in accordance with the terms of such inter vivos trust at the time of the execution of the Will or, if the testator so directs, including amendments made thereto prior to such revocation or termination, and such testamentary trust and the dispositions of income and principal thereunder shall be valid even though the terms of such inter vivos trust are not recited in the Will."

[1] A.10719 was introduced in April of 2006 and A.8509 was introduced during the 2007-2008 Session. The latest bill was introduced at the recommendation of the OCA Advisory Committee.

DISCUSSION

A. Introduction

In recent years, the revocable trust, generally employed as a Will substitute for all or a portion of a testator's estate, has become an increasingly popular and important estate planning tool. It is commonly executed with a Will that directs, or "pours over," the testator's probate assets to the revocable trust, allowing such assets to be disposed of pursuant to the trust's provisions. EPTL §3-3.7 permits such a "pour over" to a revocable trust, notwithstanding the fact that the trust may be amended after the execution of the Will. However, while the disposition to a revocable trust is permissible under Section 3-3.7, New York law, in contrast to the laws of the majority of States, currently does not permit the testator to incorporate by reference the terms of the trust into the Will. This often leaves the attorney-draftsman, concerned with avoiding intestacy if the revocable trust is not in existence at the testator's death or has been revoked prior to the testator's death, to laboriously restate the terms of an existing trust in the Will as an alternate disposition. A bill as proposed above would prevent this situation by allowing the testator, *if the testator so chooses*, to incorporate by reference in his or her Will the terms of a trust that is revoked subsequent to the Will's execution, either as the trust existed at the time of execution of the Will or as it existed at the time of revocation (including any amendments made prior to revocation).

B. History of Doctrine of Incorporation by Reference in New York

New York's longstanding rule against incorporation by reference for testamentary dispositions prohibits the inclusion into a Will of extrinsic, unattested writings, which are of a testamentary nature.[2] This rule stems from generally accepted common law and was articulated as early as 1857 by the Court of Appeals.[3] The basis for the rule against incorporation by reference is "judicial distrust of extraneous writings" not executed with the formalities required for the execution of Wills and a fear of the possibility of fraud.[4] Despite New York's rule against incorporation by reference, there have been many judicially created exceptions. Most notably, bequests to revocable trusts have been approved notwithstanding the rule against incorporation by reference because the trust structure provides adequate safeguards against fraud.[5] In *Matter of Fowles*, Judge Benjamin Cardozo stated that the rule against incorporation by reference was a flexible one, "designed as a safeguard against fraud and mistake," and should not be taken to a "dryly logical extreme."[6] He advocated that each case be reviewed for its substance, while keeping in mind the "evils which [the rule] aims to remedy.[7] In *Matter of Rausch*, he upheld a

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[2] In re Fowles' Will, 222 N.Y. 222, 118 N.E.611 (1918).

[3] Langdon v. Astor's Ex'rs, 16 N.Y. 9, 26 (1857).

[4] Warren's Heaton on Surrogate's Court § 41-01 (Linda Hirschson et al.eds., Lexis Nexis Matthew Bender 6th ed.2003); Langdon, supra.

[5] *See* In re Fowles' Will, supra; In re Rausch's Will, 258 N.Y. 327, 179 N.E. 755 (1932); In re Snyder's Will, 125 N.Y.S.2d 459 (Sur. Ct.1953); In re Ivie's Will, 4 N.Y.2d 178, 149 N.E.2d 725 (1958); *But see* President and Directors of Manhattan Co. v. Janowitz, 260 A.D. 954, 21 N.Y.S.2d 232 (2nd Dept.1940).

[6] In re Fowles' Will, supra at 233.

[7] Id.

pour-over provision, noting that the existing trust document, the identification of the trustee and the subject matter of the trust addressed any concerns of fraud.[8]

Later courts struggled over the validity of a pour-over bequest to a pre-existing inter vivos trust where such trust was amended after the execution of the Will. In *Matter of Ivie*, the Court of Appeals resolved the issue when it upheld the validity of such a bequest.[9] The Court indicated that even if a trust document is modified subsequent to the Will's execution, a pour-over to such a trust would be given effect provided that "adequate safeguards are employed" to prevent fraud.[10] As mentioned above, New York has since codified the pour-over exception to the rule against incorporation by reference in EPTL §3-3.7. That section provides that a testator may make a disposition to a trust that is valid under New York law, provided that the trust instrument is identified in the Will and executed prior to or contemporaneously with the execution of the Will.[11] The statute provides further that pour-over bequests are valid even though the trust instrument is amendable or revocable, or both, provided that amendments, if any, are made with the same formalities required for the execution of the trust, and provides that the disposition shall be given effect in accordance with the terms of the revocable trust, including amendments to the trust, where the testator so directs.[12] Nevertheless, the statute does not permit the testator to incorporate by reference the terms of the trust into the Will in the event that the trust is not in existence, or is later revoked or terminated.

Despite the Legislature's enactment of EPTL §3-3.7, the rule against incorporation by reference with respect to testamentary dispositions still stands. For example, in Estate of Lew, N.Y.L.J. Dec. 2, 2002 at 19, col.3, Surrogate Preminger held that the testator's attempt to incorporate a separate dispositive instrument in the Will must fail as being violative of the rule against incorporation by reference.

As can be seen, the application of the law has not been absolute and has changed over time, yielding uncertainty. Many pour-over Wills written in New York today provide that if the recipient trust is not in existence or has been revoked, then the terms of that trust are incorporated by reference in the Will. The attorney-draftsmen of such documents apparently assume that, if a construction proceeding results due to the revocation of the recipient trust, a judicial exception to the rule against incorporation by reference would be upheld.

C. Reasons Why EPTL §3-3.7 Should be Amended to Include Subsection (e) as Proposed in Prior Legislation

1. Relief is Limited – Current Law Remains In Effect Absent Affirmative Action by Testator; Provision Provides Simple, Easy Remedy to Avoid Possible Intestacy.

The amendment does not allow for the doctrine of incorporation by reference in all instances; indeed, it provides for only very limited application. As proposed, the exception would apply *only* with respect to Wills that direct gifts to an existing revocable trust validly executed under

[8] In re Rausch's Will, supra at 332.

[9] In re Ivie's Will, supra at 182.

[10] Id.

[11] EPTL §3-3.7 (McKinney 1998).

[12] Id. at §3-3.7(b)(1).

New York law, and *only* if the testator expressly elects for it to apply. Codifying the amendment will allow two tangible benefits: first, it will provide practitioners with a clear rule of law, avoiding the need for judicial construction and conserving valuable Court resources (as well as paper by obviating the need for pages of repetitive drafting); second, it will bring New York more in line with the realities of current estate planning practices and the views of a majority of other jurisdictions.

As proposed, the amendment does not set incorporation by reference as a default standard but requires the testator affirmatively to "opt in" to such a regime. If the decision to opt in is made, the testator may either: (a) incorporate by reference the terms of the trust as they exist at the time of the execution of the Will or (b) incorporate by reference the terms of the trust as they exist at the time of the revocation or termination of the trust, including amendments made to the trust subsequent to the date of execution of the Will.

Allowing this option gives New York testators an easy way to deal with a risk of revocable trusts that, in our view (informed anecdotally or by our own real-world practice), is an increasing hazard: that is, if a testator has not repeated the entire terms of the revocable trust in his or her Will or otherwise provided for an alternative disposition (which is often the case), and the trust has been revoked or terminated after Will execution and anytime prior to death, then an intestacy, which the law abhors, is a real possibility. We have seen instances where trusts are revoked years after the execution of the pour-over Will – either unwittingly by the client or on the advice of a different estate planning attorney in the context of other planning – without a realization or desire on behalf of the testator to create intestacy or have such a profoundly powerful effect on his or her overall estate plan. (While clear to us, the interrelation of various estate planning documents and the unique character of revocable trusts as testamentary in nature often are lost on clients – certainly so years after the execution ceremonies have passed.) Allowing incorporation by reference would provide an efficient and effective mechanism for avoiding intestacy under such circumstances.

Admittedly, there are rare circumstances in which the proposed amendment might run counter to the wishes of a hypothetical testator. In the event a testator (i) affirmatively opted in to incorporation by reference, (ii) subsequently revoked a recipient trust seeking to create intestacy, and (iii) did not subsequently revoke or amend his or her Will, then the testator's intent of intestacy would not be achieved. In our opinion and experience, however, it is only in the rarest of cases, if ever, where a testator, after spending the time and incurring the expense to formulate an estate plan, would revoke a pour-over recipient trust in order to subject his or her estate to intestacy. Furthermore, for the rare scenario where that is in fact the goal, the testator could achieve intestacy even if he or she had opted in to incorporation by reference by either (i) amending or renouncing the Will, or (ii) by amending the trust to provide for intestate distribution (rather than revoking it – a very simple change to effect).

Some practitioners have raised a further concern that this proposal might frustrate a testator's intent: that is, if the testator later decides to revoke the pour-over trust, why should a provision in his or her Will prevent the testator from doing so? This concern is addressed by the fact that incorporation by reference is made optional under the proposed amendment. If a client determines that it is helpful to incorporate a trust by reference to avoid a later inadvertent failure of the Will's residuary clause, the lawyer can advise the client that the client must amend his or her Will to effectively revoke the trust. If the client declines to incorporate the trust, then the

client is free to later revoke the trust document without revoking the Will. Based on our experience, we believe this to be a largely hypothetical risk and one far less probable than the real risk of inadvertent revocation resulting in an undesired intestacy and substantial change to the testator's wishes and overall estate plan.

2. Similar Legislation is in Place in a Majority of States.

Every state has adopted legislation regarding "pour-over" provisions in Wills.[13] The genesis for such legislation has been the Uniform Testamentary Additions to Trusts Amendment ("UTATA"). UTATA was originally drafted in 1960 and was revised in 1991.[14] Among the revisions made to UTATA in 1991 was the shift from language prohibiting in all cases incorporation by reference into a Will of the terms of a revoked or terminated inter vivos trust to language allowing for the validity of such incorporation by reference if the testator so provided. The 1991 amendment provides that "Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise to lapse." New York's law is based on the 1960 UTATA and did not keep pace with the 1991 amendment. The proposed amendment will conform the law in New York to that of the majority of states.

3. Proposed Legislation Avoids Needless Repetition of Language and Reduces Drafting Expense and Risk of Error.

Under current law the inability to incorporate by reference results in many practitioners repeating the sometimes very lengthy terms of the trust in a testator's Will. Moreover, if there is to be an amendment to the trust terms in such cases, the testator also is required to modify his or her Will. Both of these practices increase the possibility of drafting errors and result in additional legal expense. If the proposed amendment were to be adopted, a testator only would need to amend the trust, thereby reducing the risk of drafting errors and avoiding unnecessary legal fees.

4. Proposed Legislation Adequately Safeguards Against the Risk of Fraud or Mistake.

The proposed amendment adequately safeguards against the risk of fraud or mistake because EPTL § 3-3.7 already requires that the recipient trust be executed in accordance with the requirements of EPTL §7-1.17 and be in existence and identified by the Will at its execution. Amendments or revocations of the trust also are subject to the requirements of that section. New York law already recognizes various Will substitutes that permit the disposition of property without the same formalities required for the execution of Wills, including Totten trusts, joint bank accounts, transfer on death accounts, insurance policies, IRAs, annuity contracts, partnership agreements and LLC operating agreements. The proposed amendment to EPTL§ 3-3.7(e), in allowing incorporation by reference in this limited instance, would be consistent with existing policy permitting Will substitutes, and would have greater safeguards against fraud than some other Will substitutes already approved under existing law.

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[13] *See* Restatement (Third) of Prop.: Wills and Donative Transfers §3.8 (1999).

[14] Unif. Testamentary Additions to Trusts Amendment (1960); Unif. Testamentary Additions to Trusts Amendment (amended 1991).

CONCLUSION

The proliferation of the use of pour-over Wills and revocable trusts mandates the need for a change to New York's long-standing rule against incorporation by reference. The judicial exceptions to the rule create uncertainty for estate planning practitioners. Permitting incorporation by reference of the terms of a pre-existing inter vivos trust (including a revocable trust) will help to further the intent of the testator in cases where such trust is later revoked, terminated or not in existence at the date of testator's death.

We propose that the legislation would take effect upon enactment, provided, however that the amendment would apply only to the estates of decedents who die on or after such effective date.

Respectfully Submitted,

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