



**NEW YORK
CITY BAR**

**REPORT ON LEGISLATION BY THE
COMMITTEE ON ESTATE & GIFT TAXATION AND THE
COMMITTEE ON TRUSTS, ESTATES & SURROGATES' COURTS**

**A.7729
S.5519**

**M. of A. Weinstein
Sen. Bonacic**

AN ACT to amend the estates, powers and trusts law, in relation to certain formula clauses to be construed to refer to the federal estate and generation-skipping transfer tax laws applicable to estates of decedents dying after December 31, 2009 and before January 1, 2011.

THIS BILL IS APPROVED

This memorandum is offered by the Trusts, Estates and Surrogates' Courts Committee and the Estate and Gift Taxation Committee of the New York City Bar Association (the "Committees") in support of A.7729/S.5519 (the "Bill"), which would modify Section 2-1.13 of the Estates, Powers and Trusts Law ("EPTL"). Given the time-sensitive nature of the issues addressed in the Bill, the committees urge the enactment of the Bill this legislation session.

BACKGROUND

EPTL 2-1.13, which was passed in 2010 and which addresses formula clauses¹ in Wills of decedents dying during 2010, was passed during a time of great uncertainty regarding the Federal estate tax law. In order to deal with this uncertainty, the resolution reached in New York, and in several other states, was to enact a statutory presumption tying such formula clauses to the Federal estate and generation-skipping transfer (GST) tax laws as they existed on December 31, 2009, the day before the Federal estate and GST taxes became inapplicable. After the enactment of EPTL 2-1.13, the Federal estate tax laws for 2010 were modified in ways not necessarily anticipated at the time EPTL 2-1.13 was enacted, thereby creating additional uncertainty with respect to formula clauses of Wills of New York decedents dying during 2010. Accordingly, now that the Federal law for 2010 has been settled, it is important that the Bill amending and clarifying EPTL 2-1.13 be enacted so that executors of the estates of 2010 decedents will be able to distribute such decedents' property to estate beneficiaries, including surviving spouses.

SUMMARY OF BILL PROVISIONS

1. The Bill makes clear that, for decedent's dying in 2010, will, trust and beneficiary designation formula clauses referring to the Federal estate tax exemption will be taken to refer to the Federal estate tax exemption of \$5 million, which was enacted in December of 2010 (retroactive to January 1, 2010), regardless of whether the estate has elected to be subject to the Federal estate tax regime.

2. The Bill clarifies the application of EPTL 2-1.13 to beneficiary designations.
3. The Bill clarifies the application of EPTL 2-1.13 to bequests and other dispositions referring to the GST exemption.
4. The Bill extends the time for bringing a judicial proceeding to determine a decedent's intent.

RECOMMENDATION:

For the foregoing reasons, the Committees recommend enactment of the Bill this legislative session.

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¹ By way of background, a formula clause is a common tax-driven drafting technique whereby a decedent sets aside an amount (based on a formula) to take advantage of the Federal estate tax exemption. Some Wills also employ a similar drafting technique with respect to the Federal generation-skipping transfer, or GST, tax exemption. Many formula clauses did not contemplate the inapplicability of the Federal estate tax or the ability to "opt out" of the Federal estate tax, and the interpretation of such clauses in such circumstances could dramatically alter the disposition of a 2010 decedent's assets.