



**NEW YORK
CITY BAR**

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**REPORT ON LEGISLATION BY THE
TRUSTS, ESTATES AND SURROGATE'S COURTS COMMITTEE**

**A.6555
S.4852**

**M. of A. Lavine
Sen. Bonacic**

AN ACT to amend the estates, powers and trusts law, in relation to the disposition to issue or brothers or sisters of testator not to lapse and the application to class dispositions.

THIS BILL IS APPROVED

This memorandum is offered by the Trusts, Estates and Surrogate's Courts Committee of the New York City Bar Association in support of A.6555/S.4852, which would amend Section 3-3.3 of the Estates, Powers, and Trusts Law ("EPTL"). The Committee supports the proposed amendment on the premise that it would (i) resolve a discrepancy between EPTL 3-3.3, New York's anti-lapse statute, and EPTL 2-1.2, which provides that a distribution to issue is to be by representation (as defined in EPTL 1-2.16), and (ii) clarify that the anti-lapse statute applies to a lapse of a disposition of a future estate.

BACKGROUND

EPTL 3-3.3 generally provides that if a testamentary disposition is made to a descendant or sibling of the testator who was living when the testator executed the Will but subsequently predeceased the testator and left surviving descendants, the surviving descendants take the share that would have passed to the predeceased descendant or sibling. This is a default provision that can be overridden in the Will (e.g. if a bequest is made "to my sister, if living").

PROPOSED LEGISLATION

The proposed amendment would make two principal changes to the anti-lapse statute:

1. Eliminate Conflict with EPTL 2-1.2. The first change arises out of the fact that EPTL 3-3.3 currently provides that the anti-lapse provisions apply not only to a disposition to a named beneficiary but also to a disposition to a class (e.g. "my siblings," "my children," or "my issue"). A problem can arise when EPTL 3-3.3 is applied to a multigenerational class (as can be the case with a disposition to "my issue," "my descendants," and other like terms): the result from applying EPTL 3-3.3 can be different than the result reached by applying EPTL 2-1.2. This discrepancy can come about in two ways—one is if, at the time the Will is executed, the testator has a deceased child who

has left surviving children (i.e. grandchildren of the testator), and the testator makes a disposition to “issue.” EPTL 3-3.3 could be interpreted to mean that such grandchildren are not entitled to any of the disposition, because their parent was deceased at the time of the execution of the Will, rendering the anti-lapse provisions inapplicable. This would contrast with EPTL 2-1.1, under which a disposition to issue is by representation (often referred to as “per capita”) and would include the children of a deceased child regardless of whether the deceased child died before or after the execution of the testator’s Will.

The second way a distortion can arise is if a testator has multiple children who (i) are living at the time of execution of the Will, (ii) later predecease the testator, and (iii) leave surviving descendants. To illustrate, if, at the time of execution of the Will, the testator has living children A, B, and C, and A survives the Testator, B predeceases the Testator and has one child (GC1), and C predeceases the Testator and has two children (GC2 and GC3), a different result is reached depending on whether you apply EPTL 2-1.2 or EPTL 3-3.3. Under EPTL 2-1.2, issue take by representation, meaning that the initial division of property occurs at the eldest generation in which someone is living, and every person entitled to take in each subsequent generation receives an equal share. So under EPTL 2-1.2, Child A would receive 1/3 of the disposition, and GC1, GC2, and GC3 would split the remaining 2/3 (so they would receive 2/9 each). If, instead, EPTL 3-3.3 was applied, Child A would still receive 1/3 of the disposition, but GC1 would take Child B’s share and GC2 and GC3 would split Child C’s share (so GC1 would receive 1/3, and GC2 and GC3 would receive 1/6 each), essentially leading to a per stirpes distribution rather than a per capita one. The way the proposed amendment would eliminate this discrepancy is by providing that the provisions of EPTL 3-3.3 do not apply to a disposition to any class that can be multi-generational (i.e. issue, descendants, etc.). This ensures that such a disposition will be by representation according to the provisions of EPTL 2-1.2.

2. Clarify that Anti-Lapse Provisions Apply to Dispositions of Future Estates. The other principal change encompassed in the proposed amendment is to clarify that the anti-lapse statute applies to a disposition of a future estate. As an example, assume that under a Will, the testator makes a disposition to a marital trust for the benefit of the testator’s surviving spouse, with the remainder passing to the testator’s siblings. If the testator’s brother was living at the time the Will was executed but predeceases the testator, such brother’s descendants (if any) would receive the brother’s share of the trust remainder. Like all provisions of the anti-lapse statute, this would only be a default rule—so if the Will made clear that the brother was only to receive his share of the trust remainder if he survived the testator, the anti-lapse provisions would not be applicable.

For these reasons, the Committee supports A.6555/S.4852 and urges its enactment.

Committee on Trusts, Estates & Surrogate’s Courts
Sharon L. Klein, Chair

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