

CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

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

**MEMORANDUM IN SUPPORT OF AMENDMENTS TO
SECTIONS 7-6.1 AND 7-6.20 OF THE ESTATES, POWERS, AND TRUSTS LAW
PROPOSED BY THE NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION**

This memorandum is offered by the Trusts, Estates and Surrogate's Courts Committee (the "Committee") of the New York City Bar Association in support of amendments to Estates, Powers and Trust Law ("EPTL") Sections §7-6.1 and 7-6.20 proposed by the New York State Bar Association ("NYSBA") Trusts and Estates Law Section.

BACKGROUND

New York's Uniform Transfers to Minors Act ("UTMA"), set forth in EPTL §7-6, provides a mechanism under which gifts can be made to a minor without the drawbacks sometimes associated with a guardianship arrangement or trust, such as legal fees, court supervision, or tax complexities. UTMA accounts can be used to receive annual exclusion gifts or other transfers. A custodianship may be created by making an irrevocable transfer of property to an adult or trust company "as Custodian for" a named minor and referencing New York's UTMA statute. Although the property is indefeasibly vested in the minor, the custodian retains all of the authority over the property until the minor reaches the age of twenty-one. Subject to the applicable duty of care, the custodian may use the property as the custodian deems advisable for the use and benefit of the minor.

DISCUSSION

New York's UTMA statute requires that the property being held for the minor's benefit pass to the minor at age twenty-one. In cases where it has become clear that the beneficiary lacks the maturity necessary to properly handle the funds at age twenty-one or where circumstances have otherwise changed since the date of funding, it may be desirable and in the best interests of the beneficiary to delay or restrict the minor's access to UTMA account funds. In response to this concern, a number of states have amended their UTMA statutes to explicitly allow a custodian to use custodial assets to fund a trust that satisfies the requirements of §2503(c) of the Internal Revenue Code (a "§2503(c) trust") for the benefit of the minor. The property and income of a §2503(c) trust must be used for the minor's benefit until the minor reaches age

twenty-one and if the minor dies before reaching age twenty-one, the property must pass to the minor's estate or pursuant to the minor's exercise of a general power of appointment. A trust may comply with the requirement that assets are paid to the beneficiary at age twenty-one by granting the beneficiary the opportunity to withdraw the assets from the trust upon reaching that age. Most often, the trust provisions grant the beneficiary a right for a limited period (such as 60 or 90 days) to terminate the trust and withdraw the assets. If this right is not exercised, the trust will continue until a later age or until the beneficiary's death.

The proposed amendment to EPTL §7-6.1 would add a new definition of a "Qualified Minor's Trust" to the definitions section of the statute. Under that definition, a "Qualified Minor's Trust" is a trust (1) that satisfies the provisions of IRC §2503(c), (2) of which the minor is the sole beneficiary, and (3) that provides if the beneficiary dies after age 21, the assets are either payable to the beneficiary's estate or pursuant to the beneficiary's general power of appointment.

In addition, EPTL §7-6.20, which sets forth how a custodianship may be terminated, would be amended to include termination by the custodian transferring the custodial property to a qualified minor's trust, with the exception that custodial property created under a testamentary instrument may not be so transferred unless the transfer is expressly authorized by the instrument.

These amendments would mirror amendments made to UTMA statutes in other states and make explicit the custodian's authority to transfer all or part of the custodial property to a §2503(c) trust. Such a transfer would allow for delay in the minor's receipt of the property until the minor is capable of properly managing the assets. The custodian's right to transfer property to a §2503(c) trust does not limit the custodian's power to transfer all or part of the custodial property in any other manner consistent with New York's UTMA statute.

PROPOSED AMENDMENTS SUPPORTED BY THE COMMITTEE¹

Suggested additions to New York's UTMA statute are underlined below.

¹ The Committee, together with the Estate and Gift Tax Committee of the New York City Bar Association prepared similar proposed legislation in mid-2014. There are two substantive differences between the Committee's original proposal and the NYSBA proposal that the Committee now supports. First, the current NYSBA proposal includes a restriction that a custodial account created under a testamentary instrument may not be transferred to a Qualified Minor's Trust unless such transfer is expressly authorized by the testamentary instrument. This is meant to protect the intention of a testator who may not have considered or expected a bequest to be held for a minor after the minor turned 21 and is consistent with other provisions §7-6. Second, the definition of a Qualified Minor's Trust states that the beneficiary must be the sole income and principal beneficiary of the trust and the trust must provide that if the beneficiary dies after age 21, the assets are either payable to the beneficiary's estate or pursuant to the beneficiary's general power of appointment. This is meant to ensure that the trust would be for the sole benefit of the beneficiary for whom the custodial account was held. The Committee agrees and supports these revisions and is in full support of the current NYSBA proposal.

§7-6.1. Definitions

...

“(n) “Qualified Minor’s Trust” means any trust, including a trust created by a custodian, (1) that satisfies the requirements of section 2503(c) of the United States Internal Revenue Code of 1986, as amended, (2) of which the minor is the sole income and principal beneficiary during the existence of the trust and (3) provides that if the trust continues after the minor attains the age of twenty-one (“the beneficiary”), upon the death of the beneficiary, the assets shall be payable to the beneficiary’s estate or as the beneficiary may appoint under a general power of appointment as defined in section 2514 (c) of the United State Internal Revenue Code of 1986, as amended.

[n](o) “State” includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

[o](p) “Transfer” means a transaction that creates custodial property under 7-6.9.

[p](q) “Transferor” means a person who makes a transfer under this part.

[q](r) “Trust company” means a financial institution, corporation, or other legal entity, authorized to exercise general trust powers in this state.”

§7-6.20 Termination of Custodianship

“(a) The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor’s estate upon the earlier of:

[a](1) the minor’s attainment of twenty-one years of age with respect to custodial property transferred under 7-6.4 or 7-6.5;

[b](2) the minor’s attainment of age eighteen or other statutory age of majority of New York with respect to custodial property transferred under 7-6.6 or 7-6.7; or

[c](3) the minor’s death.

(b) At any time, a custodian may transfer part or all of custodial property to a Qualified Minor's Trust without court order, provided that custodial property created under a testamentary instrument may not be so transferred unless such transfer is expressly authorized by the instrument. A transfer under this paragraph terminates the custodianship to the extent of the transfer."

Committee on Trusts, Estates & Surrogate's Courts
John Olivieri, Chair

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