



NEW YORK
CITY BAR

**COMMITTEE ON TRUSTS, ESTATES &
SURROGATES COURTS**

JOHN OLIVIERI

CHAIR

1155 AVENUE OF THE AMERICAS
NEW YORK, NY 10036
PHONE: (212) 819-8200
FAX: (212) 354-8113
jolivieri@whitecase.com

KERRY O'ROURKE PERRI

SECRETARY

1155 AVENUE OF THE AMERICAS
NEW YORK, NY 10036
PHONE: (212) 819-7918
FAX: (212) 354-8113
kperri@whitecase.com

March 15, 2016

Hon. Renee R. Roth
Chair, Surrogate's Court Advisory Committee
Office of Court Administration
25 Beaver St., Suite 1170
New York, NY 10004

**Re: Proposed amendment to the SCPA §§2306, 2307, 2308,
2309, 2312 and 2313 governing commissions of donees of a
power in trust including donees of powers during minority**

Your Honor:

I write on behalf of the Trusts, Estates and Surrogate's Courts Committee of the New York City Bar Association. We submit this letter as a comment in support of the proposal in the January 2016 Report of the Surrogate's Court Advisory Committee to amend SCPA 306, 2307, 2308, 2309, 2312 and 2313.

SUMMARY OF PROPOSAL

The Advisory Committee proposes to amend SCPA §§ 2306, 2307, 2308, 2309, 2312 and 2313 to formalize rules governing the commissions of donees of powers in trust, including donees of powers during minority and incapacity, in order to conform the calculation of such commissions to the existing rules governing the commissions of trustees.

DISCUSSION

"Powers in trust" under New York law refers to powers granted under a will, excluding powers of appointment, to manage property vested in an infant or an incapacitated person. *See* EPTL §10-3.1(b). Such powers seek, in part, to avoid the necessity for the appointment of a guardian to manage the subject property during the period of minority or incapacity. The powers, rights, responsibilities and liabilities of a donee of a power in trust are often similar to those granted to a trustee under a will. *See* Matter of Hitchcock, 9 Misc. 2d 393, In Re Martin's Will, 32 Misc. 2d 555.

While compensation of donees of powers in trust is not clearly referenced in the SCPA, case law has often resulted in the commissions of such powerholders being calculated under SCPA §2307, which governs commissions paid to fiduciaries other than trustees. One court's opinion (referenced by the OCA in its proposal), however, noted it would be more appropriate

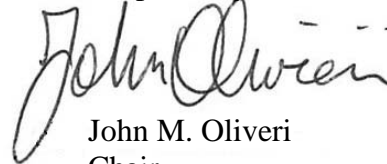
for such commissions to be calculated under SCPA §2308 and §2309, which govern commissions for trustees, given the similarities between the two roles. *See Matter of Chase Manhattan Bank (Golding)*, 129 Misc. 2d 952.

Generally speaking, the role of a donee of a power in trust implies an ongoing fiduciary relationship during the time period in which the power exists. Though the property subject to the power is not vested in the donee, as would be the case with a trust, the same responsibilities and risks would apply to the donee as would apply to a trustee. Thus, despite technical differences that exist between the two roles, each is acting in a fiduciary capacity and should be compensated accordingly.

RECOMMENDATION

Based on the foregoing, it is recommended that the proposed changes to SCPA §§ 2306, 2307, 2308, 2309, 2312 and 2313 be adopted.

Respectfully,

A handwritten signature in black ink, appearing to read "John Oliveri". The signature is written in a cursive style with a large, looping initial "J".

John M. Oliveri
Chair