

Memorandum in Support

TRUSTS AND ESTATES LAW SECTION

T&E #9

May 1, 2014

S. 7144

By: Senator Bonacic

A. 9355

By: M. of A. Santabarbara

Senate Committee: Judiciary

Assembly Committee: Judiciary

Effective Date: Immediately

AN ACT to amend the estates, powers and trusts law, in relation to renunciation of property interests

LAW & SECTION REFERRED TO: EPTL 2-1.11

THE TRUSTS AND ESTATES LAW SECTION SUPPORTS THIS LEGISLATION

Estates, Powers and Trusts Law (“EPTL”) § 2-1.11(d)(5) permits the fiduciary of a decedent’s estate to renounce property in which the decedent had a beneficial interest, but did not receive that property before death, provided that the fiduciary receives authorization to do so from the court having jurisdiction over the decedent’s estate. The Office of Court Administration’s Surrogate’s Court Advisory Committee (“OCA”) has proposed amendments to EPTL § 2-1.11(d)(5), which would eliminate the requirement that a fiduciary obtain court approval before renouncing on behalf of a decedent’s estate (the “Proposal”). For the reasons explained more fully below, the Trusts and Estates Law Section SUPPORTS this well-reasoned Proposal.

The Operation of EPTL § 2-1.11(d)(5)

As explained above, EPTL § 2-1.11(d)(5) authorizes the fiduciary of a decedent’s estate to renounce property to which the decedent was entitled, but did not receive prior to death, as long as the fiduciary obtains approval to do so from the court having jurisdiction over the decedent’s estate.¹ § 2-1.11(d)(5) is most useful when spouses bequeath their entire estates to each other, and provide that, if the beneficiary spouse does not survive the other spouse, to their descendants. In such circumstances, the estates’ ultimate beneficiaries will be the same, regardless of which spouse dies first.

¹ E.P.T.L. § 2-1.11(d)(5).

Absent a renunciation under EPTL § 2-1.11(d)(5), where both spouses die within a short span of time, the estate of the first spouse to die will pass into the estate of the second spouse to die, with the fiduciary of the estate of the second spouse to die distributing the assets of both spouses' estates to the beneficiaries of the estate of the second spouse to pass. In other words, even though the ultimate beneficiaries of both spouses estates would be the same, the property in the estate of the first spouse to die would be subject to administration expenses twice, once upon the death of the first spouse to die and again upon the second spouse's death.

However, if the second spouse's death occurs within nine months of the first spouse's death, the fiduciary of the second spouse's estate would be able to renounce the second spouse's right to the renounced property.² Such renunciation would ensure that the renounced property passes as part of the estate of first spouse to die, separate and apart from any administration expenses that otherwise might apply if the renounced property passed to the beneficiaries through the second spouse's estate. Such a disclaimer may also have the effect of reducing the overall estate taxes payable by the two estates.

The Proposal to Amend EPTL § 2-1.11(d)(5)

Considering that a renunciation under EPTL § 2-1.11(d)(5) has no effect on the identities of the beneficiaries of the spouses' estates; that the current requirement for court approval to renounce often results in unnecessary expense and delay; and that the delay associated with obtaining court approval can be unduly prejudicial (especially where a fiduciary's decision to renounce is close in time to the nine-month deadline set forth in Internal Revenue Code § 2518(6)), OCA has proposed that EPTL § 2-1.11(d)(5) be amended to eliminate the requirement for court approval to renounce. The Proposal does not absolve the renouncing fiduciary of the obligation to report the renunciation on his or her accounting; excuse the fiduciary from the duty to give notice of the renunciation to the fiduciary of the estate of the first spouse to die (who often will be the same person as the fiduciary of the estate of the second spouse to pass); or even preclude the fiduciary from applying for court approval to renounce, if the fiduciary wishes to do so. On the contrary, the Proposal merely provides that the fiduciary need not apply for court approval before renouncing property pursuant to EPTL § 2-1.11(d)(5).

Given that the Proposal will reduce the unnecessary expense and delay associated with obtaining court approval to renounce under the current version of EPTL § 2-1.11(d)(5), the Trusts and Estates Law Section supports the amendments to EPTL § 2-1.11(d)(5).

Conclusion

Based on the foregoing, the Trusts and Estates Law Section **SUPPORTS** this legislation.

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Chair of the Section: Ronald J. Weiss, Esq.

² See E.P.T.L. §2-1.11(a), I.R.C. §2518(6).