

**NEW YORK STATE BAR ASSOCIATION
TRUSTS AND ESTATES LAW SECTION**

Proposed Legislation

It is recommended that EPTL § 11-1.7 be amended to read as follows:

(a) The attempted grant to an executor, testamentary trustee, or inter vivos trustee, or the successor of either, of any of the following enumerated powers or immunities is contrary to public policy:

(1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.

(2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.

(b) The attempted grant in any will or trust of any power or immunity in contravention of the terms of this section shall be void but shall not be deemed to render such will or trust invalid as a whole, and the remaining terms of the instrument shall, so far as possible remain effective.

(c) Any person interested in an estate or trust may contest the validity of any purported grant of any power or immunity within the purview of this section without diminishing or affecting adversely his or her interest in the estate or trust any provision in any will or trust to the contrary notwithstanding.

The foregoing amendments shall be effective upon enactment, and shall apply to all wills or trusts executed on or after the effective date.

Memorandum in Support

Exoneration clauses excuse fiduciaries, most notably executors and trustees, from liability for the failure to exercise reasonable care.¹ Although exoneration clauses in testamentary instruments have been deemed void as against public policy, pursuant to Estates, Powers and Trusts Law (“EPTL”) § 11-1.17, there is no analogous statutory prohibition concerning the enforceability of similar provisions in inter vivos trusts. The absence of such statutory guidance has left courts to reach divergent views concerning the enforceability of exoneration clauses in lifetime trust instruments. In order to create uniformity in terms of the

¹ Cf. Margaret Valentine Turano, Commentary: N.Y. E.P.T.L. § 11-1.7 (2008) (discussing exoneration clauses).

duties that fiduciaries (whether they be executors, trustees of testamentary trusts, or trustees of inter vivos trusts) owe and to remedy the omission of any reference to inter vivos trusts from EPTL § 11-1.7, it is proposed that § 11-1.7 should be amended in the form annexed to this memorandum.

History of EPTL § 11-1.7

Estate and trust fiduciaries owe a duty of undivided, absolute loyalty to the beneficiaries whose interests they protect.² This “inflexible” duty of fidelity is akin to the highest standards of honor, not just honesty alone.³ It obligates fiduciaries to administer the estate or trust for the benefit of the beneficiaries, with undivided loyalty and without regard to self-interest.⁴ The legal responsibilities arising from that fiduciary status cannot generally be divested by agreement or other means.⁵

Despite that duty, however, testators and grantors have attempted to insulate their fiduciaries from liability for breaching their obligations.⁶ These attempts come in the form of exoneration clauses, which purport to exculpate fiduciaries for breaching the duty of undivided loyalty and failing to account.⁷ Yet, these provisions are not universally enforceable.

More than a century ago, in *Crabb v. Young*, the Court of Appeals first addressed the issue of whether exoneration clauses are enforceable.⁸ In *Crabb*, the decedent’s will exempted the trustees of a testamentary trust from liability for “any loss or damage . . . except [that which

² *Boles v. Lanham*, 55 A.D.3d 647, 647-68, 865 N.Y.S.2d 360 (2d Dep’t 2008); 41 N.Y. Jur. 2d Decedents’ Estates § 1450 (2009); Ian W. MacLean, “Exculpatory Clauses in Inter Vivos Trusts: What Remains of a Trustee’s Duty of Undivided Loyalty”, 37 NYSBA Trusts & Estates L. Section Newsl. 5, 5 (Fall 2004).

³ *In re Wallens*, 9 N.Y.3d 117, 122-23, 847 N.Y.S.2d 156 (2007).

⁴ *See id.*

⁵ *See id.*

⁶ MacLean, *supra* note 2, at 5.

⁷ Robert Whitman, “Exoneration Clauses in Wills and Trust Instruments,” 4 Hofstra Prop. L. J. 123, 124-25 (1992).

⁸ *Crabb v. Young*, 92 N.Y. 56, 65-67 (1883).

occurred due to] their own willful default, misconduct or neglect.”⁹ When the trust suffered investment losses, the beneficiaries sought to be reimbursed by the trustee.¹⁰ Although both the trial court and intermediate appellate court ruled that the trustee had an obligation to replace the amount lost, the Court of Appeals reversed, relying upon the exoneration clause contained in the will.¹¹ In doing so, the Court explained that the decedent “had an absolute right to select the agencies by which his bounty should be distributed and to impose the terms and conditions under which it should be done.”¹² Since there was no evidence of willful default, misconduct, or negligence on the trustee’s part, the exoneration clause required that the fiduciary be excused from liability for the losses.¹³

Subject to the requirement that fiduciaries act honestly and in good faith, the rule in *Crabb* prevailed for more than five decades, until the Great Depression,¹⁴ when the Legislature enacted Decedent Estate Law (“DEL”) § 125 in 1936.¹⁵ DEL § 125 proscribed the enforcement of exoneration clauses that purported to excuse estate and testamentary trust fiduciaries from liability for failing to exercise reasonable care.¹⁶ In passing DEL § 125, the Legislature restricted the freedom of testation, which is strongly favored as a matter of public policy.¹⁷

DEL § 125 was necessitated by the “increasing practice of testamentary draftsmen and corporate fiduciaries in vesting in . . . fiduciaries almost unlimited powers, with a minimum of

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

¹² *See id.*

¹³ *See id.*

¹⁴ *Cf.* Henry A. Shinn, “Exoneration Clauses In Trust Instruments”, 42 Yale L. J. 359, 365 (1933) (discussing the rapid depreciation of trust assets).

¹⁵ *In re Clark’s Will*, 257 N.Y. 132, 138, 177 N.E.2d 397 (1931); *In re Balfe’s Will*, 243 A.D. 22, 24-25, 280 N.Y.S. 128 (2d Dep’t 1935); Turano, *supra* note 1.

¹⁶ *In re Stralem*, 181 Misc.2d 715, 719-20, 695 N.Y.S.2d 274 (Sur. Ct., Nassau County 1999).

¹⁷ Turano, *supra* note 1.

obligations.”¹⁸ As the legislative history reflects, this practice was “a serious potential menace . . . to the rights of . . . all persons interested in estates.”¹⁹ Additionally, “[t]he primary duties of ordinary care, diligence and prudence and of absolute impartiality among . . . beneficiaries [were] of the very essence of a trust, and any impairment of these or similar obligations of a fiduciary [was found to be] contrary to public policy.”²⁰

The same policy-based reasons governed thirty years later, when the Legislature enacted DEL § 125’s successor, EPTL § 11-1.7.²¹ Under EPTL § 11-1.7, a testator is prohibited from exculpating the executor or testamentary trustee nominated in a will from liability for failing to “exercise reasonable care, diligence and prudence.”²² Will provisions that purport to do so are void as against public policy and have no import.²³ Indeed, as explained in *In re Stralem*, “the attempted exoneration of the fiduciary [of an estate or testamentary trust] for any loss, unless occasioned by ‘willful neglect or misconduct’ is a nugatory provision amounting to nothing more than a waste of good white paper.”²⁴

Examples of cases in which courts have reached the same conclusion that the court did in *Stralem* abound.²⁵ For example, in *In re Lubin*, the decedent’s will provided that the executor of his estate would be relieved of liability “for any loss or injury to the property . . . except . . . as may result from fraud, misconduct or gross negligence.”²⁶ Describing that provision as a “toothless tiger,” the court held that it was unenforceable as against public policy.²⁷

¹⁸ *Stralem*, 181 Misc.2d at 719-20.

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² EPTL § 11-1.7(a)(1).

²³ EPTL § 11-1.7(a)-(b).

²⁴ *In re Stralem*, 181 Misc.2d 715, 719-20, 695 N.Y.S.2d 274 (Sur. Ct., Nassau County 1999).

²⁵ *In re Lang*, 60 Misc.2d 232, 234-35, 302 N.Y.S.2d 954 (Sur. Ct., Bronx County 1969); *In re Egerer*, 30 Misc.3d 1229(A), at *3, 923 N.Y.S.2d 308 (Sur. Ct., Suffolk County 2006).

²⁶ *In re Lubin*, 143 Misc.2d 121, 122, 539 N.Y.S.2d 695 (Sur. Ct., Bronx County 1989).

²⁷ *See id.*

Another noteworthy case is *In re Allister*, in which the decedent's will authorized her testamentary trustee to invest the trust principal "irrespective of whether the same may be authorized by the laws of [this] State . . . as investments for fiduciaries and without the duty to diversify and without any restrictions placed upon fiduciaries by any present or future applicable law."²⁸ However, the court found that the exoneration provision contravened EPTL § 11-1.7, reasoning that the provision "would elevate the fiduciary above the law", if effectuated.²⁹

Although EPTL § 11-1.7 unquestionably applies to testamentary instruments, the statute is silent with respect to inter vivos trust instruments.³⁰ That silence has left courts to reach their own, sometimes divergent, views on the issue and necessitates the amendments discussed in this memorandum.

Exoneration Clauses in Inter Vivos Trust Instruments

As EPTL § 11-1.7 does not address inter vivos trusts, the issue of the enforceability of exoneration clauses in such instruments has been left to the discretion of the courts.³¹ In exercising their discretion, however, courts have reached conflicting conclusions as to the applicability of EPTL § 11-1.7 to inter vivos trust instruments and the enforceability of the exculpatory provisions contained in them.³²

Absent statutory guidance declaring exoneration clauses in inter vivos trust instruments void as against public policy, most courts have, historically speaking, enforced them, applying a

²⁸ *In re Allister*, 144 Misc.2d 994, 997-98, 545 N.Y.S.2d 483 (Sur. Ct., Nassau County 1989).

²⁹ *See id.*

³⁰ *In re Shore*, 19 Misc.3d 663, 665-67, 854 N.Y.S.2d 293 (Sur. Ct., New York County 2008); *In re Francis*, 19 Misc.3d 536, 541-43, 853 N.Y.S.2d 245 (Sur. Ct., Westchester County 2008).

³¹ *See Turano, supra* note 1.

³² *In re Mednick*, 155 Misc.2d 115, 116, 587 N.Y.S.2d 127 (Sur. Ct., New York County 1992) (noting that "the limitations on the powers and immunities of testamentary trustees under EPTL 11-1.7 do not apply to *inter vivos* trustees"); *In re Shore*, 19 Misc.3d 663, 665, 854 N.Y.S.2d 293 (Sur. Ct., New York County 2008).

“more liberal rule” to such provisions than to exculpatory clauses in testamentary instruments.³³

“The rationale for this difference . . . is said to be the nature of an *inter vivos* transaction and the contracting freedom of the [grantor] and trustee to define the scope of the latter’s powers and liabilities.”³⁴

Notwithstanding a grantor’s freedom to contract as he or she wishes, several courts have found that EPTL § 11-1.7 governs in cases involving *inter vivos* trusts.³⁵ Indeed, even the courts that have applied a more liberal standard to exoneration clauses in *inter vivos* trust instruments have held that there are limitations to the enforceability of such provisions.³⁶

It is beyond dispute that the “trustee of a lifetime trust who is guilty of wrongful negligence, impermissible self-dealing, bad faith or reckless indifference to the interests of beneficiaries will not be shielded from liability by an exoneration clause.”³⁷ Nor will the courts enforce exculpatory provisions that seek to render a trustee completely unaccountable;³⁸ to excuse the fiduciary of an *inter vivos* trust from the duty to account;³⁹ to absolve an attorney-fiduciary who drafted the trust instrument of liability for all conduct other than acts committed in

³³ *In re Mankin*, File No. 330328, 2010 N.Y. Misc. LEXIS 3091, at *3-4 (Sur. Ct., Nassau County 2010), *aff’d*, 88 A.D.3d 717, 930 N.Y.S.2d 79 (2d Dep’t 2011).

³⁴ *See id.*

³⁵ *In re Goldblatt*, 162 Misc.2d 888, 893, 618 N.Y.S.2d 959 (Sur. Ct., Nassau County 1994) (in the context of an SCPA Article 17-A guardianship proceeding, holding that an exoneration clause contained in a proposed supplemental needs trust was violative of public policy); *Shore*, 19 Misc.3d at 665 (finding that “the public policy in EPTL 11-1.7 against exonerating a fiduciary from liability for the failure to exercise reasonable care, diligence and prudence applies equally to *inter vivos* trust where by its terms there is no one in a position to protect the beneficiaries from the actions of the trustee”).

³⁶ *In re Tydings*, 32 Misc.3d 1204(A), at *6 (Sur. Ct., Bronx County 2011) (citations omitted); *see also O’Hayer v. de St. Aubin*, 30 A.D.2d 419, 420-28, 293 N.Y.S.2d 147 (2d Dep’t 1968) (addressing the application of an exoneration clause in an *inter vivos* trust instrument); *In re Cowles*, 22 A.D.2d 365, 76-78, 255 N.Y.S.2d 160 (1st Dep’t 1965), *aff’d*, 17 N.Y.2d 567, 215 N.E.2d 509 (1966).

³⁷ *Tydings*, 32 Misc.3d 1204(A), at *6; *see also Boles v. Lanham*, 55 A.D.3d 647, 648, 865 N.Y.S.2d 360 (citations omitted) (2d Dep’t 2008) (opining that a “trustee is liable if he or she commits a breach of trust in bad faith, intentionally, or with reckless indifference to the interests of the beneficiaries.”).

³⁸ *In re Rivas*, 30 Misc.3d 1207(A), at *4 (Sur. Ct., Monroe County 2011).

³⁹ *In re Shore*, 19 Misc.3d 663, 665, 854 N.Y.S.2d 293 (Sur. Ct., New York County 2008); *Stansbury v. Stansbury*, N.Y.L.J., May 21, 2007, at 45, col. 1 (Sur. Ct., Kings County).

bad faith;⁴⁰ or to require beneficiaries to resolve disputes with the fiduciary through arbitration, rather than litigation in the Surrogate's Court.⁴¹ Even under the more liberal standard discussed above, the beneficiaries of an inter vivos trust are entitled to some level of protection, as loyalty, accountability and reasonableness are hallmarks of a trustee's fiduciary relationship.⁴²

Additionally, case law suggests that an exoneration clause contained in an inter vivos trust instrument is not enforceable when the fiduciary is involved, either directly or indirectly, in drafting or creating it.⁴³ The court recognized as much in *In re Shore*, where it found that an exculpatory clause contained in an inter vivos trust drafted by the trustee was void and unenforceable.⁴⁴

In the absence of statutory guidance, the issue of the enforceability of exoneration clauses in inter vivos trust instruments has been left to the discretion of the courts and resulted in what appear to be decisional inconsistencies. The inconsistencies, when taken in conjunction with the public policies discussed below, warrant legislative action, declaring broad exculpatory clauses in inter vivos trust instruments exonerating fiduciaries from the duties of reasonable care, diligence, and prudence void as against public policy.

Additional Policy-Based Reasons to Amend EPTL § 11-1.7

While the freedom of contract, much like the freedom of testation, generally is favored,⁴⁵ it is not so sacred as to render enforceable a contract provision that contravenes public policy.⁴⁶

⁴⁰ *Tydings*, 32 Misc.3d 1204(A), at *6.

⁴¹ *In re Mede*, 177 Misc.2d 974, 982, 677 N.Y.S.2d 707 (Sur. Ct., Kings County 1998).

⁴² *Shore*, 19 Misc.3d at 666.

⁴³ *Cf. In re Tydings*, 32 Misc.3d 1204(A), at *6 (Sur. Ct., Bronx County 2011) (citations omitted) ("Nonetheless, it is clear that where, as here, a trustee was neither directly nor indirectly involved in drafting or creating the trust, and may be presumed to have relied upon the explicit provisions of an exoneration clause contained in a lifetime trust instrument before agreeing to serve as fiduciary, generally the trustee will not be held liable for acts specified in the exoneration clause.")..

⁴⁴ *In re Shore*, 19 Misc.3d 663, 666-67, 854 N.Y.S.2d 293 (Sur. Ct., New York County 2008).

⁴⁵ *The Bajan Gr., Inc. v. Consumers Interstate Corp.*, 28 Misc.3d 1227(A), at *7 (Sup. Ct., Albany County 2010) ("After all, even in commercial contracts between sophisticated business entities, a covenant against competition is

It has been restricted on public policy grounds in several contexts, including disputes concerning attorneys' fees;⁴⁷ collective bargaining conflicts involving public employees;⁴⁸ and cases concerning contractual provisions exonerating caterers from liability for damages resulting from the caterer's negligence.⁴⁹ Moreover, as the law is anything but static, the courts have recognized that contract provisions which "were valid in one era may be wholly opposed to the public policy of another."⁵⁰

In the trusts and estates context, the freedom of testation – which, much like the freedom of contract, is strongly favored – has already been restricted, yielding to public policy concerns that executors and trustees under testamentary instruments not be absolved of the duty of reasonable care.⁵¹ There exists no public policy-based justification for differentiating between the standards of care owed by fiduciaries acting under testamentary and inter vivos trust instruments. On the contrary, public policy requires that fiduciaries acting pursuant to testamentary and inter vivos trust instruments alike adhere to the standards of reasonable care, diligence, and prudence,⁵² as they are, unquestionably, bound by the same duty of undivided loyalty.⁵³

subject to a rule of reason that requires courts to balance the competing public policies in favor of robust competition and freedom of contract.”).

⁴⁶ *Lustig v. Congregation B’Nai Israel of Midwood*, 65 Misc.2d 1052, 1054, 319 N.Y.S.2d 994 (Sup. Ct., Kings County 1971) ; see also *Brown v. Sup. Ct. I.O.F.*, 175 N.Y. 132, 137, 68 N.E. 145 (1903) (opining that despite “the general rule that the law permits great freedom of action in making contracts, there are some restrictions placed upon that right by legislation by public policy and by the nature of things”).

⁴⁷ *Samuel v. Druckman & Sinel, LLP*, 50 A.D.3d 322, 324, 855 N.Y.S.2d 90 (1st Dept 2008).

⁴⁸ *Niagara Wheatfield Admin. Ass’n v. Niagara Wheatfield Cen. Sch. Dist.*, 44 N.Y.2d 68, 72 (1978).

⁴⁹ *Lustig*, 65 Misc.2d at 1057-58.

⁵⁰ See *id.* at 1054.

⁵¹ EPTL § 11-1.7.

⁵² Hon. C. Raymond Radigan, “New Uniform Trust Code to be Submitted to Legislature”, N.Y.L.J., available at: http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202537636765&New_Uniform_Trust_Code_to_Be_Submitted_to_Legislature (last viewed January 12, 2012).

⁵³ *Boles v. Lanham*, 55 A.D.3d 647, 648, 865 N.Y.S.2d 360 (2d Dep’t 2008); see also *In re Quatela*, No. 355511, 2010 WL 4466757 (Sur. Ct., Nassau County Sept. 30, 2010) (citations omitted) (“A trustee is duty-bound to act in good faith in the administration of a trust, with honesty and undivided loyalty to the beneficiaries and avoid any circumstances whereby the trustee’s personal interest will come in conflict with the interest of the beneficiaries. The

This is especially true in the case of a revocable trust. As a revocable trust is a substitute for a will,⁵⁴ a fiduciary acting under a revocable trust should be bound to the same duty of reasonable care, diligence and prudence that is imposed upon an executor or testamentary trustee.

Based upon the foregoing, EPTL § 11-1.7 should be amended to reflect that inter vivos trustees are subject to its provisions. Doing so will further the public interest of ensuring that fiduciaries acting under lifetime trusts exercise reasonable care, diligence, and prudence in connection with their fiduciary duties.

Conclusion

Since executors, testamentary trustees, and inter vivos trustees are held to the same standard of absolute, undivided loyalty to the beneficiaries whom they serve, public policy necessitates that they be treated similarly, especially in the context of exoneration clauses. EPTL § 11-1.7 should be amended to effectuate that purpose by filling the statutory silence with respect to inter vivos trust instruments, regardless of a grantor's expressed intentions. Doing so will ensure that the state's public policy concerns regarding reasonable fiduciary conduct are served and that the courts address this issue uniformly.

Section Chair: Ilene S. Cooper

Memorandum Prepared By: Ilene S. Cooper and Robert M. Harper

purpose of this rule is to ensure that the trustee's acts are above suspicion and that the trust receives the trustee's uninfluenced judgment.”).

⁵⁴ *In re Tisdale*, 171 Misc.2d 716, 720, 655 N.Y.S.2d 809 (Sur. Ct., New York County 1997); *see also In re Goetz*, 8 Misc.3d 200, 205, 793 N.Y.S.2d 318 (Sur. Ct., Westchester County 2005) (citations omitted) (“Further, revocable trusts are commonly employed as estate planning tools and are coordinated with the grantor's will, functioning in much the same manner as a will. Because the Goetz revocable trust was created as a part of the decedent's overall estate planning at the same time as his will, the trust can be deemed to ‘function[] as a will since it is an ambulatory instrument that speaks at death to determine the disposition of the settlor's property.’”); *In re Davidson*, 177 Misc.2d 928, 930, 677 N.Y.S.2d 729 (Sur. Ct., New York County 1998) (noting that “revocable trusts – used increasingly as devices to avert will contests – function essentially as testamentary instruments (*i.e.*, they are ambulatory during the settlor's lifetime, speak at death to determine the disposition of the settlor's property, may be amended or revoked without court intervention and are unilateral in nature) and therefore must be treated as the equivalents of wills in the eyes of the law”).

Resolutions

Trusts and Estates Law Section, New York State Bar Association

Opinions expressed are those of the Section preparing this resolution and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates.

Dated: March 10, 2012

To: NYSBA Executive Committee and House of Delegates

From: NYSBA Trusts and Estates Law Section

Re: Reports for June 23, 2012

RESOLVED, that the NYSBA Trusts and Estates Law Section supports the following amendment:

It is recommended that EPTL § 11-1.7 be amended to read as follows:

(a) The attempted grant to an executor, testamentary trustee, or inter vivos trustee, or the successor of either, of any of the following enumerated powers or immunities is contrary to public policy:

(1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.

(2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.

(b) The attempted grant in any will or trust of any power or immunity in contravention of the terms of this section shall be void but shall not be deemed to render such will or trust invalid as a whole, and the remaining terms of the instrument shall, so far as possible remain effective.

(c) Any person interested in an estate or trust may contest the validity of any purported grant of any power or immunity within the purview of this section without diminishing or affecting adversely his or her interest in the estate or trust any provision in any will or trust to the contrary notwithstanding.

The foregoing amendments shall be effective upon enactment, and shall apply to all wills or trusts executed on or after the effective date.

RESOLVED, that the NYSBA Trusts and Estates Law Section is in favor of the above amendment for the reasons set forth in the accompanying memorandum of support, without further comment.

Resolution Prepared By: Ilene S. Cooper and Robert M. Harper

Approved By: Vote of the Executive Committee of the NYSBA Trusts and Estates Law Section

Section Chair: Ilene S. Cooper