



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item # 6(a)

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Trusts and Estates Law Section to amend Estates, Powers, and Trusts Law ("EPTL") § 11-1.7 with respect to fiduciary exoneration clauses in inter vivos trusts.

Attached are proposed legislative language, a supporting memorandum, and a resolution from the Trusts and Estates Law Section relating to EPTL 11-1.7.

Exoneration clauses excuse fiduciaries from responsibility for failing to exercise reasonable care, diligence, and prudence. Pursuant to EPTL 11-1.7, an exoneration clause in a testamentary instrument (*i.e.*, a will) is invalid as contrary to public policy. EPTL 11-1.7 is silent as to the validity of exoneration clauses in inter vivos trusts. (A will is a trust that is created upon the *death* of the trust's creator, while an inter vivos trust is created – and may make distributions – during the creator's *lifetime*.) The absence of statutory guidance has resulted in divergent views by the courts about the enforceability of exoneration clauses in inter vivos trusts.

The Trusts and Estates Law Section proposes to create uniformity in the law by amending EPTL 11-1.7 to clarify that exoneration clauses in inter vivos trusts also are invalid as contrary to public policy, regardless of the parties' expressed intentions. A primary rationale for this amendment is as follows: public policy necessitates that exoneration clauses in wills and inter vivos trusts should be treated similarly because fiduciaries for both types of instruments owe the same duty of absolute, undivided loyalty to the beneficiaries whose interests they protect.

This report was circulated for comment on March 23, 2012. As of this writing, no comments have been received.

Robert M. Harper, vice chair of the sections' Committee on Legislation and Government Relations, will present the proposal at the June 21-22 meeting.