



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item #7

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Trusts and Estates Law Section.

Attached is proposal from the Trusts and Estates Law Section to amend Articles 4 and 6 of the Estates Powers and Trusts Law (EPTL) and Articles 10, 13 and 17 of the Surrogate's Court Procedure Act (SCPA). As set forth in the memorandum accompanying the proposal, the Marriage Equality Act adopted in 2011 provides, in relevant part, that all provisions of law that use gender-specific terms in reference to marriage, or are otherwise inconsistent with the Act, are to be construed in a gender-neutral manner or in a manner necessary to effectuate the Act. However, the Section is concerned that the Act does not cover lineal and lateral family relationships, and the proposed amendments are intended to provide this coverage. The proposals may be summarized as follows:

- EPTL Article 4, which addresses descent and distribution of an intestate estate, uses terminology such as "paternal" and "maternal," which relate to parentage rather than marriage. The proposed amendments would refer to the sides of the family in a gender-neutral manner.
- EPTL Article 6, dealing with rules governing estates in property and which currently refers to "husband and wife," would be amended to include descriptions of dispositions to same-sex couples.
- SCPA Article 10, relating to intestate administration, would be amended to refer to "either parent" instead of "father or mother."
- SCPA Article 13, relating to small estates, would be amended to refer to "either parent" in place of "father or mother."
- SCPA Article 17, which relates to guardians and custodians, would be amended to replace "mother and father" with "parents."

The report will be presented at the January 24 meeting by Darcy M. Katris, c-chair of the Section's Ad Hoc Committee on Impact of Marriage Equality Act.

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: May 3, 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 amendments.

It is recommended that EPTL 4-1.1(a)(6) be amended to read as follows:

(6) One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving [paternal] grandparent or grandparents of one parental side, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving [maternal] grandparent or grandparents of the other parental side, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.

It is recommended that EPTL 4-1.1(a)(7) be amended to read as follows:

(7) Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the [paternal] grandparents of one parental side, per capita, and the other one-half to the great-grandchildren of the [maternal] grandparents of the other parental side, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of the grandparents on the other side, in the same manner as the one-half.

It is recommended that EPTL 6-2.2(d) be amended to read as follows:

(d) A disposition of real property, or a disposition on or after January first, nineteen hundred ninety-six of the shares of stock of a cooperative apartment corporation allocated to an apartment or unit together with the appurtenant proprietary lease, to persons who are not legally married to one another but who are described in the disposition as husband and wife, spouses, husbands, or wives creates in them a joint tenancy, unless expressly declared to be a tenancy in common.

It is recommended that SCPA 1001(1) be amended to read as follows:

1. Letters of administration must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order:
 - (a) the surviving spouse,
 - (b) the children,
 - (c) the grandchildren,
 - (d) [the father or mother] either parent,
 - (e) the brothers or sisters,
 - (f) any other persons who are distributees and who are eligible and qualify, preference being given to the person entitled to the largest share in the estate, except as hereinafter provided:
 - (i) Where there are eligible distributees equally entitled to administer the court may grant letters of administration to one or more of such persons.
 - (ii) If the distributees are issue of grandparents, other than aunts or uncles, on only one side, then letters of administration shall issue to the public administrator or chief financial officer of the county.

It is recommended that SCPA 1310(3) be amended to read as follows:

3. Not less than thirty days after the death of a creditor, unless otherwise provided by a designation of a beneficiary which is then in effect, it shall be lawful for the debtor to pay not more than fifteen thousand dollars of the debt to
 - (a) the surviving spouse,
 - (b) one or more of the children eighteen years of age or older,
 - (c) [the father or mother] either parent,
 - (d) the brother or sister,
 - (e) the niece or nephew of the decedent, preference being given in the order named if request for payment shall have been made by more than one such person,
 - (f) a creditor of the decedent or to a person who has paid or incurred the funeral expense of the decedent, upon the request of the surviving spouse or of one of such relatives.

Payment under this subdivision may be made upon an affidavit by the surviving spouse or relative to whom or at whose request the payment is made, showing

- (i) the date of the death of the decedent,
- (ii) the relationship of the affiant to the decedent,
- (iii) that no fiduciary has qualified or been appointed,
- (iv) the names and addresses of the persons entitled to and who will receive the money paid, and
- (v) that such payment and all other payments made under this section by all debtors, known to the affiant, after diligent inquiry do not in the aggregate exceed fifteen thousand dollars. This subdivision does not limit the right of a debtor to make payment to a surviving spouse within less than thirty days after the death of the creditor as provided in subdivision two.

It is recommended that SCPA 1704(2) be amended to read as follows:

2. The names of the [father and the mother] parents whose consent to the adoption of a child would have been required pursuant to section one hundred eleven of the domestic relations law or who was entitled to notice of an adoption proceeding pursuant to section one hundred eleven-a of the domestic relations law, and whether or not they are living or have had their parental rights terminated pursuant to section three hundred eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law or section six hundred thirty-one of the family court act, and if living, their domiciles, the name and address of the person with whom the infant resides and the names and addresses of the nearest distributees of full age who are domiciliaries, if both [mother and father] parents are dead.

It is recommended that SCPA § 1752(3) be amended to read as follows:

3. the names of the [father, the mother] parents, children, adult siblings if eighteen years of age or older, the spouse and primary care physician if other than a physician having submitted a certification with the petition, if any, of the mentally retarded or developmentally disabled person and whether or not they are living, and if living, their addresses and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead;

The foregoing amendments shall be effective upon enactment.

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

Resolution Prepared by: Darcy M. Katris

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

Section Chair: Ilene S. Cooper

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

**MEMORANDUM IN SUPPORT OF A BILL TO MAKE AMENDMENTS
TO ARTICLES 4 AND 6 OF THE ESTATES POWERS AND
TRUSTS LAW AND ARTICLES 10, 13 AND 17 OF
THE SURROGATE'S COURT PROCEDURE ACT
IN RESPONSE TO THE MARRIAGE EQUALITY ACT**

The Trusts and Estates Law Section of the New York State Bar Association, for the reasons set forth in this memorandum, supports amendments to Articles 4 and 6 of the Estates Powers and Trusts Law and Articles 10, 13 and 17 of the Surrogate's Court Procedure Act in response to the Marriage Equality Act (the "Act").

On June 24, 2011, Governor Andrew Cuomo signed into law a bill that became the current Section 10-a of the Domestic Relations Law. The statute is recorded as New York Laws, 2011, Chapter 95 and became effective on July 24, 2011.

Domestic Relations Law § 10-a, the Marriage Equality Act, provides the following:

1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.
2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

The legislative intent of DRL § 10-a is as follows:

It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law. The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner

or in any way necessary to effectuate the intent of this act (emphasis added).¹

The Act provides that the marriages of same-sex and different-sex couples are to be treated equally in all respects under the law. All provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with the Act, shall be construed in a gender-neutral manner or in a way necessary to effectuate the intent of the Act.

While the intent of the Legislature is plain—all provisions of law should be interpreted neutrally with respect to marriage—the Act’s scope is ostensibly limited to laws affecting the marital relationship. Of course, there are relationships that extend naturally from the marital relationship, e.g., lineal and lateral familial relationships. The effect of the Act does not cover laws relating to these natural extensions of the marital relationship. Our concern is ensuring that the Estates, Powers and Trusts Law (the “EPTL”) and the Surrogate’s Court Procedure Act (the “SCPA”) indubitably contemplate different-sex and same-sex marriages, and their families, alike. In addition, rules governing dispositions of estates in property to persons of the same-sex should be the same as those which apply to persons of different sex. The sections of the EPTL and the SCPA requiring amendment are as follows:

ESTATES, POWERS, AND TRUSTS LAW

Article 4: Descent and Distribution of an Intestate Estate

EPTL 4-1.1(a)(6), which is part of the statute governing intestate distribution, currently contains the following language: “one-half to the surviving paternal grandparent or grandparents, or if neither or them survives the decedent, to their issue, by representation, and the other one-half to the surviving maternal grandparent or grandparents,” EPTL 4-1.1(a)(7) uses similar terminology. The words “paternal” and “maternal” do not relate to marriage, they deal with parentage. Therefore the Act would not apply. A child of a same-sex marriage may have two

¹ MARRIAGE EQUALITY ACT, 2011 Sess. Law News of N.Y. Ch. 95 (A. 8354) (McKinney’s 2011).

mothers or two fathers. Therefore Article 4 of the EPTL should be amended to refer to the "maternal" and "paternal" sides of a family in a gender neutral manner.

1. EPTL 4-1.1(a)(6) should be amended so that it reads as follows:

"One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents, one-half to the surviving [paternal] grandparent or grandparents of one parental side, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving [maternal] grandparent or grandparents of the other parental side, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents."

2. EPTL 4-1.1(a)(7) should be amended to read as follows:

"Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the [paternal] grandparents of one parental side, per capita, and the other one-half to the great-grandchildren of the [maternal] grandparents of the other parental side, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of the grandparents on the other side, in the same manner as the one-half."

Article 6: Classifications, Creation, Definition of, and Rules Governing Estates in Property

Subdivision (d) of EPTL 6-2.2 defines the type of estate received by two unmarried parties described in a disposition of real estate or shares of a cooperative apartment as husband and wife. It should be amended to include descriptions of dispositions to same-sex couples.

3. EPTL 6-2.2(d) should be amended to read as follows:

"A disposition of real property, or a disposition on or after January first, nineteen hundred ninety-six of the shares of stock of a cooperative apartment corporation allocated to an apartment or unit together with the appurtenant proprietary lease, to persons who are not legally married to one another but who are described in the

disposition as husband and wife, spouses, husbands, or wives creates in them a joint tenancy, unless expressly declared to be a tenancy in common."

SURROGATE'S COURT PROCEDURE ACT

Article 10: Intestate Administration

4. SCPA 1001(1)—Order of priority for granting letters of administration—should be amended to provide gender neutrality in the relationship of parent and child as follows:
 - "1. Letters of administration must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order:
 - (a) the surviving spouse,
 - (b) the children,
 - (c) the grandchildren,
 - (d) [the father or mother] either parent,
 - (e) the brothers or sisters,
 - (f) any other persons who are distributees and who are eligible and qualify, preference being given to the person entitled to the largest share in the estate, except as hereinafter provided:
 - (i) Where there are eligible distributees equally entitled to administer the court may grant letters of administration to one or more of such persons.
 - (ii) If the distributees are issue of grandparents, other than aunts or uncles, on only one side, then letters of administration shall issue to the public administrator or chief financial officer of the county."

Article 13: Small Estates

5. SCPA 1310(3)—Payment of certain debts without administration—should be amended to provide gender neutrality in the relationship of parent and child as follows:
 - "3. Not less than thirty days after the death of a creditor, unless otherwise provided by a designation of a beneficiary which is then in effect, it shall be lawful for the debtor to pay not more than fifteen thousand dollars of the debt to
 - (a) the surviving spouse,
 - (b) one or more of the children eighteen years of age or older,
 - (c) [the father or mother] either parent,
 - (d) the brother or sister,

- (e) the niece or nephew of the decedent, preference being given in the order named if request for payment shall have been made by more than one such person,
- (f) a creditor of the decedent or to a person who has paid or incurred the funeral expense of the decedent, upon the request of the surviving spouse or of one of such relatives.

Payment under this subdivision may be made upon an affidavit by the surviving spouse or relative to whom or at whose request the payment is made, showing

- (i) the date of the death of the decedent,
- (ii) the relationship of the affiant to the decedent,
- (iii) that no fiduciary has qualified or been appointed,
- (iv) the names and addresses of the persons entitled to and who will receive the money paid, and
- (v) that such payment and all other payments made under this section by all debtors, known to the affiant, after diligent inquiry do not in the aggregate exceed fifteen thousand dollars. This subdivision does not limit the right of a debtor to make payment to a surviving spouse within less than thirty days after the death of the creditor as provided in subdivision two."

Article 17: Guardians and Custodians

- 6. SCPA 1704(2)—Petition for appointment; contents—should be amended to provide gender neutrality in the relationship of parent and child as follows:

"2. The names of the [father and the mother] parents whose consent to the adoption of a child would have been required pursuant to section one hundred eleven of the domestic relations law or who was entitled to notice of an adoption proceeding pursuant to section one hundred eleven-a of the domestic relations law, and whether or not they are living or have had their parental rights terminated pursuant to section three hundred eighty-three-c, section three hundred eighty-four or section three hundred eighty-four-b of the social services law or section six hundred thirty-one of the family court act, and if living, their domiciles, the name and address of the person with whom the infant resides and the names and addresses of the nearest distributees of full age who are domiciliaries, if both [mother and father] parents are dead."

- 7. SCPA § 1752(3)—Petition for appointment; contents—shall be amended as follows:

"3. the names of the [father, the mother] parents, children, adult siblings if eighteen years of age or older, the spouse and primary care physician if other than a physician having submitted a certification with the petition, if any, of the mentally retarded or

developmentally disabled person and whether or not they are living, and if living, their addresses and the names and addresses of the nearest distributees of full age who are domiciliaries, if both parents are dead;"

CONCLUSION

The proposed amendments to the EPTL and SCPA will insure that the legislature's intent in enacting the Marriage Equality Act to provide gender equality between the rights of same-sex and different-sex spouses will also provide gender neutrality in the relationships of parties to a same-sex marriage and their children and in dispositions of estates.

Dated: April 30, 2012

Respectfully Submitted,



Darcy M. Katris, Co-Chair,
Ad Hoc Committee On Impact of
Marriage Equality Act