Report of the **Surrogate's Court Advisory Committee**

to the Chief Administrative Judge of the Courts of the State of New York

January 2004

TABLE OF CONTENTS

I. Introduction

The Surrogate's Court Advisory Committee is one of the Committees established, pursuant to section 212(1)(q) of the Judiciary Law, by the Chief Administrator of the Courts to assist him in the execution of the functions of his office. The Committee annually recommends to the Chief Administrator proposals related to the Estates, Powers and Trusts Law, the Surrogate's Court Procedure Act and legal issues involving the practice and procedure of the Surrogate's Courts. These recommendations are based on the Committee's own studies, examination of decisional law and suggestions received from the bench and bar. In addition to recommending its own annual legislative program, the Committee reviews and comments on other pending legislative measures concerning estates, trusts and other matters (e.g., adoptions, guardianships) that are within the subject matter jurisdiction of the Surrogate's Courts.

During the 2003 legislative session, the Committee had five of its proposed bills enacted:

- Chapter 631: Amends section 502 of the Surrogate's Court Procedure Act to extend the right to a jury trial to a party to a proceeding to determine the validity of a revocable lifetime trust. Effective: September 30, 2003; applies to proceedings to contest the validity of a revocable lifetime trust pending on or commenced after that date.

- Chapter 612: Amends section 709 of the Surrogate's Court Procedure Act to recognize a nominated co-fiduciary's standing to file objections to the grant of letters to a co-fiduciary. Effective: September 30, 2003.

- Chapter 633: Amends section 10-10.1 of the Estates, Powers and Trusts Law to allow the grantor of a trust, by express provision in the trust instrument, to provide that a trustee may make discretionary distributions, of income or principal, to herself or himself as a beneficiary. Effective: September 30, 2003.

- Chapter 632: Amends section 1726 of the Surrogate's Court Procedure Act to facilitate the appointment of standby guardians. Effective: January 1, 2004.

- Chapter 589: Amends section 2-1.11 of the Estates, Powers and Trusts Law and section 5-1502(G) of the General Obligations Law to clarify the circumstances

under which an attorney-in-fact may renounce a property interest of a disabled or non-disabled person and specify the instances in which prior court approval is required. Effective: September 1, 2003.

The Committee as presently constituted has 25 members. Its focus has been in the areas of legislation, adoption, guardianship, court rules, forms and technology, with the following four subcommittees of the Committee addressing each of these subjects:

Subcommittee on Legislation
Chair, Genevieve L. Fraiman, Esq.

Subcommittee on Adoptions
Chair, Hon. Joseph S. Mattina

Subcommittee on Guardianship
Chair, Hon. Robert L. Nahman

Subcommittee on Rules, Forms and Technology
Chair, John Schaefer, Esq.

In this report, the Committee sets forth its legislative proposals and the other projects that are being undertaken.

As part of its effort to focus its work on areas which would be of benefit to the legislature, courts, bar and litigants, the Committee welcomes comments and suggestions. Inquiries should be submitted to:

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

II. Legislation

A. New Measures

1. Restrictions on Exercise of Power to Make Discretionary Distributions (EPTL 10-10.1)

Last year, the Legislature passed the Committee's bill amending section 10-10.1 of the Estates, Powers and Trusts Law to authorize a trust grantor to permit a trustee to make a discretionary distribution of income or principal to herself or himself as beneficiary. Prior to signing the bill into law [chapter 633, Laws of 2003], however, the Governor expressed his belief that one minor aspect of the bill could potentially create an inadvertent conflict with federal tax law, to the unintended detriment of the estate of a donee or trustee. Accordingly, the Committee proposes this measure to ensure that the language of the statute is not capable of being misconstrued to create potential estate tax liability. The goal of this revision is thus consistent with the intent of the prior bill with respect to expanding the power of a trustee to make discretionary distributions to himself or herself as beneficiary without inadvertently causing negative estate tax consequences.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to restrictions on the exercise of a power to distribute principal or allocate income

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 10-10.1 of the estates, powers and trusts law, as amended by chapter 633 of the laws of 2003, is amended to read as follows:

§ 10-10.1. Power to distribute principal or allocate income; restriction on exercise. A power held by a person as trustee of an express trust to make a

discretionary distribution of either principal or income to such person as a beneficiary, or to make discretionary allocations in such person's favor of receipts or expenses as between principal and income, cannot be exercised by such person unless (1) such person is the grantor of the trust and the trust is revocable by such person during such person's lifetime, or (2) the power is a power to provide for such person's health, education, maintenance or support within the meaning of sections 2041 and 2514 of the Internal Revenue Code, [or any other ascertainable standard] or (3) the trust instrument, by express reference to this section, provides otherwise. If the power is conferred on two or more trustees, it may be exercised by the trustee or trustees who are not so disqualified. If there is no trustee qualified to exercise the power, its exercise devolves on the supreme court or the surrogate's court, except that if the power is created by will, its exercise devolves on the surrogate's court having jurisdiction of the estate of the donor of the power.

§2. This act shall take effect immediately.

2. Notice of Proceedings to Determine Validity and Enforceability of Claims (SCPA 1809)

The Committee recommends this measure to reduce unduly burdensome notice requirements in proceedings to determine the validity and enforceability of claims. By limiting the necessary parties to the claimant and the fiduciary, unless the court directs otherwise, the expense of serving process on all beneficiaries can be eliminated, to the benefit of the estate.

By far, the vast majority of creditors claims are resolved without judicial intervention. Executors and administrators routinely settle such claims as part of their day-to- day responsibilities of administering an estate. They do so without court approval and often without the consent or knowledge of the estate's beneficiaries. It is anomalous, then, that the procedure for adjudicating claims should include the estate's beneficiaries as interested and necessary parties. SCPA 1809(2) requires that notice be given to such beneficiaries if the contested claim exceeds the lesser of $10,000.00 or 25% of the estate.

The notice provisions of SCPA 1809(2) serve to compound the expense of litigation without providing a corresponding benefit to the estate. Beneficiaries often have little or no knowledge of the claim and their presence can be counterproductive should one or more seek to substitute their judgment for that of the fiduciary.

This proposal would limit the necessary parties in a proceeding to determine the validity or enforceability of a claim to the claimant and the fiduciary unless the court, in its discretion, directs otherwise. In doing so, this proposal would conform the notice provisions of SCPA 1809 with the notice provisions of SCPA 2101(3) applicable to the corollary proceedings for adjudicating administration expenses set forth in SCPA 2102(4).

Finally, this proposal eliminates the grace period of 8 days from the return day to serve and file an answer. The practice has few corollaries in the Surrogate's Court Procedure Act and is contrary to the general practice of filing responsive pleadings on the return day of process or on such subsequent day as directed by the court.

Proposal:

AN ACT to amend the surrogate's court procedure act, in relation to the notice requirements in a proceeding to determine the validity and enforceability of claims .

The People of the State of New York, represented in Senate and Assembly do enact as follows:

Section 1. Subdivision 2 of section 1809 of the surrogate's court procedure act, as amended by chapter 514 of the laws of 1993, is amended to read as follows:

2. If the petition be entertained process shall issue only to the claimant or possible claimant or fiduciary, as the case may be, [and, whenever the claim sought is in excess of ten thousand dollars or constitutes twenty-five percent or more of the estimated gross probate estate, whichever is the lesser, to any person whose rights or interests will be affected by allowance of the claim and the person cited may within 8 days from the return day, serve and file an answer] unless the court directs otherwise. The answer[, if] shall be filed on or before the return day of process or on such subsequent day as directed by the court. If filed by the claimant, the answer shall be accompanied by a copy of any notice of claim, supporting affidavit or other evidence of the claim, if any, filed with the fiduciary. If the fiduciary deems it necessary he or she may, within 5 days from the service upon him or her of a copy of the answer, serve and file a reply thereto. The claimant may also file a reply to an answer served by the fiduciary.

§2. This act shall take effect immediately and shall apply to future proceedings to determine the validity and enforceability of claims.

B. Previously Endorsed Measures

1. Harmonizing Inconsistent Distributions (EPTL 3-3.3)

The Committee recommends this measure to eliminate the conflict between EPTL 3-3.3 and EPTL 2-1.2 with respect to testamentary class gifts to the testator's issue, brothers, or sisters, and to harmonize the treatment of such gifts with that which would occur in intestacy under EPTL 4-1.1. This measure would eliminate the provision of EPTL 3-3.3 which treats testamentary class gifts to the testator's issue, brothers, or sisters as though such gifts were made to specifically named individuals. Instead, such gifts would be subject to the principle of "by representation" found in EPTL 1-2.16, with the result that each surviving member of the class would receive an equal share with other surviving members of the same generation, *i.e.*, the same result which occurs in intestacy under EPTL 4-1.1.

Under provisions of EPTL 3-3.3 and 2-1.2, a conflict can arise when a will disposes of property to the testator's "issue" or to the testator's "brothers," or "sisters," or "brothers and sisters."

Suppose, for example, a testator's will disposed of his or her estate to his or her "issue," and the testator was survived by one child, A, by a grandchild, GC1 (the child of the testator's predeceased child, B), and by grandchildren, GC2, GC3, and GC4 (the children of the testator's predeceased child, C). In such a case, under EPTL 3-3.3, A would take 1/3, GC1 would take 1/3, and GC2, GC3, and GC4 would each take 1/9. However, under EPTL 2-1.2, A would take 1/3, and all the grandchildren would share equally, *i.e.*, GC1, GC2, GC3 and GC4 would each take 1/6. This result under EPTL 2-1.2 is also the result that would occur under EPTL 4-1.1, if such testator had died intestate.

Similar disparities between the result under EPTL 3-3.3, and that under EPTL 2-1.2 and 4-1.1, can arise where a decedent is survived only by grandchildren. If, in the above hypothetical, the testator were survived only by GC1, GC2, GC3, and GC4, the result under EPTL 3-3.3 would be 1/2 to GC1 (as the only child of predeceased B), and 1/6 to each of GC2, GC3, and GC4, whereas under EPTL 2-1.2 (or under 4-1.1, if the testator had died intestate) GC1, GC2, GC3, and GC4 would each take 1/4.

The same disparities can occur when the testamentary disposition is to the class of brothers or sisters, rather than to issue.

These disparities are not justified by any deliberate legislative policy. To the contrary, since all three statutory provisions (EPTL 2-1.2, 3-3.3, 4-1.1) are "default" statutes, *i.e.*, capable of being overridden by the testator's will, the results should be uniform since, as stated by Surrogate Holzman in Estate of Lambiase, NYLJ July 28, 1993, p. 23 (Sur. Ct. Bronx County), in enacting such statutes "the Legislature steps in and provides for a disposition based upon the presumption that this is the distribution most decedents would want under the circumstances."

This measure would amend EPTL 3-3.3 so that the results of its application are the same as they would be under 2-1.2 (or 4-1.1 in case of intestacy). The effect of the measure is to harmonize the results through the use of the EPTL 1-2.16 principle of "by representation," a principle which currently is present in all three statutory provisions and which reflects the legislative determination that most decedents prefer that relatives of the same generation share equally.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to class distributions to issue or brothers or sisters of testator

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (a) of section 3-3.3 of the estates, powers and trusts law is amended to read as follows:

(a) Unless the will whenever executed provides otherwise:

(1) Instruments executed prior to September first, nineteen hundred ninety-two. Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue

surviving such testator, such disposition does not lapse but vests in such surviving issue, per stirpes. The provisions of this paragraph shall apply to a disposition made to issue, brothers or sisters as a class, and such issue, brothers or sisters shall take per stirpes.

(2) Instruments executed on or after September first, nineteen hundred ninety-two. Whenever a testamentary disposition is made to the issue or to a brother or sister of the testator, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, by representation. The provisions of this paragraph shall apply to a disposition made to issue, brothers or sisters as a class, and such issue, brothers or sisters shall take by representation.

[(3) The provisions of subparagraphs (1) and (2) apply to a disposition made to issue, brothers or sisters as a class as if the disposition were made to the beneficiaries by their individual names, except that no benefit shall be conferred hereunder upon the surviving issue of an ancestor who died before the execution of the will in which the disposition to the class was made.]

§2. This act shall take effect immediately.

2. Termination of Uneconomical Trusts
(EPTL 7-1.19)

The Committee recommends that a new section 7-1.19 be added to the Estates, Powers and Trusts Law to permit, on application to the Surrogate's Court, the early termination of certain uneconomical trusts.

Under this measure, any trustee or beneficiary of a lifetime or testamentary express trust (other than a wholly charitable trust[1] or a supplemental needs trust[2]) may, by application to Surrogate's Court, seek early termination of the trust if the expense of its administration is uneconomical. If the court finds that (a) continuation of the trust is economically impractical, (b) its early termination is not prohibited by the express terms of the disposing instrument, and (c) such termination would not defeat the specified trust purposes and would be in the best interests of its beneficiaries, the court may make an order or decree terminating the trust and directing the distribution of the trust assets to and among the current and future beneficiaries of the trust. Such order or decree terminating the trust prior to the term specified in the disposing instrument may be made notwithstanding EPTL 7-1.5 and 7-2.4.[3]

This measure would bypass EPTL 7-1.5(a)(1)[4], which limits the ability of an income beneficiary to transfer his or her interest unless the governing instrument provides otherwise. Some courts have held that this statutory provision renders the trust indestructible, and would prevent its early termination, even though all the interested parties consent. *Matter of Wentworth,* 230 NY 176 (1920); *Matter of Sanders,* 158 Misc 2d 606 (Sur. Ct. Nassau Cty., 1991); *Matter of Knauss,* 204 Misc 207 (Sur. Ct. Yates Cty., 1953); *Matter of Caswell,* 185 Misc. 599 (Sur. Ct. Oneida Cty., 1944); *Matter of Freiberger,* 177 Misc. 592 (Sur. Ct. New York Cty., 1941). In *Matter of Hanna,* 155 Misc. 833 (Sur. Ct. New York Cty., 1935), the Surrogate denied

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[1] Proposed EPTL 7-1.19, as proposed in this measure, would not apply to a wholly charitable trust or to any trust if the income, gift, estate or generation-skipping transfer tax charitable deduction for a partial interest would be jeopardized.

[2] Proposed EPTL 7-1.19 likewise would not apply to a supplemental needs trust described in EPTL 7-1.12.

[3] EPTL 7-2.4 states that "every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void."

[4] EPTL 7-1.5 was derived from Personal Property Law §15 and Real Property Law §105.

termination of a small trust because: "It is of no importance whatsoever that the trust is small in amount, being approximately $7,000. It has been repeatedly held that no act of the parties interested nor any decree or judgment of any court may terminate a valid trust before the expiration of the time designated by the testator."

Early termination of a trust has been allowed, however, when it was authorized by the governing instrument. *See Matter of Sheffield*, 97 N.Y.S. 2d 248 (Sur. Ct., Broome Cty. 1950) [will provided for termination of the trust upon the written requests of all the "recipients"]; *Matter of Louis*, 68 Misc. 2d 722 (Sur. Ct. Cortland Cty. 1971) [destruction of trust decreed when the life beneficiary's "right of encroachment" of principal was "absolute and unrestricted"].

Moreover, termination of a trust prior to completion of the term fixed by its creator has been allowed where the testator's purpose cannot be accomplished because it is economically impractical to administer the trust. *Matter of Wynperle,* NYLJ, March 24, 1989, at 27, col. 4 ["where the corpus of the trust becomes so negligible that its retention in trust become more costly than beneficial to the beneficiary, the courts indulge in the legal fiction that the purpose of the trust is no longer capable of being accomplished and have decreed its termination. ... Termination of the trust is accordingly justified to avoid erosion of what remains by the payment of administration expenses which are disproportionate to the benefits conferred."]; *Matter of Shipley,* NYLJ, July 7, 1997, at 32, col. 2 [termination authorized "where, as here, the testator's purpose cannot be accomplished because of economic impracticalities."]; *Estate of Linsky,* December 22, 1998, at 26, col. 4 [termination permitted where "it is not economically feasible to administer such trust"]; *Matter of Nedlin,* January 11, 2000, at 31, col. 1 ["there is precedent for permitting the assets of a trust to be distributed outright where its continued administration is economically impractical]; *Matter of Bethune,* NYLJ, September 13, 2002, at 20, col. 6 [trust terminated "where its administration is not economically feasible"]; *Matter of Johnson*, March 3, 2003, at 21, col. 2 [where "trust being economically unfeasible to administer," termination authorized]. *See also*, *Matter of Frank,* 57 Misc. 2d 446 (Sur. Ct. Kings Cty. 1968) [authorizing termination of a trust when "the purpose for which a trust is created has been accomplished or has become impossible of accomplishment, or if continuance of the trust is unnecessary to carry out the purpose of the trust."[5]].

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[5] EPTL 7-.2 provides: "When the purpose for which an express trust is created ceases, the estate of the trustee also ceases."

This measure would codify those cases allowing early termination of uneconomical trusts and confirm that Surrogates have the authority and discretion, without regard to EPTL 7-1.5 and 7-2.4, to terminate a trust when its continuance would be uneconomical and would defeat its creator's purpose to benefit the designated trust beneficiaries.

This measure would apply to testamentary and lifetime express trusts whenever created, and would take effect immediately.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the termination of uneconomical trusts

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The estates, powers and trusts law is amended by adding a new section 7-1.19 to read as follows:

§7-1.19 Application for termination of uneconomical trust. (a) Notwithstanding sections 7-1.5 and 7-2.4 of this article or any other contrary provision of law:

(1) Any trustee or beneficiary of a lifetime or testamentary express trust (other than a wholly charitable trust) may, by application to the surrogate's court having jurisdiction over the trust, seek a termination of such trust when the expense of administering the trust is uneconomical.

(2) If, upon such application, the court finds that continuation of the trust is economically impracticable, that the express terms of the disposing instrument do not prohibit its early termination, and that such termination would not defeat the specified purpose of the trust and would be in the best interests of the beneficiaries, the court may make an order or decree terminating the trust and directing the distribution of the trust assets to and among those beneficiaries who at the time are entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust and those beneficiaries who would be entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust if it were to terminate immediately before such order or decree. The distribution of the trust assets shall be made in such manner, proportions and shares as in the judgment of the court will effectuate the intention of the creator.

(b) Notice of the application shall be given to such persons and at such time and in such manner as the court, in its discretion, may direct.

(c) If the application or the possibility of the application of this section to any trust would reduce or eliminate a charitable deduction otherwise available to any person under the income tax, gift tax, estate tax or generation-skipping transfer tax provisions of the United States Internal Revenue Code, or the laws of any state of the United States or of the District of Columbia, this section shall not apply to such trust.

(d) This section shall not apply to a supplemental needs trust which conforms to the provisions of 7-1.12 of this article.

§2. This act shall take effect immediately and shall apply to proceedings to terminate a trust whenever created.

3. Disqualification of a Tenant by the Entirety (EPTL 4-1.7)

Modified slightly to clarify the nature of the excluded property, this measure would add a new section 4-1.7 to the Estates, Powers and Trusts Law (EPTL) to disqualify a person who holds property as a tenant by the entirety with his or her spouse from receiving any share in such property or monies derived therefrom where he or she is convicted of murder in the first or second degree, or manslaughter in the first or second degree, of his or her spouse. He or she may, however, receive any fractional portion of property contributed by him or her from his or her separate property, except that such convicted spouse shall not be entitled to more than the value of a life estate in one-half of such property held as tenant by the entirety.

In New York, it has been long held that one who wrongfully takes the life of another is not permitted to profit thereby *(see, Riggs v. Palmer,* 115 NY 506, 511). A conviction of a person for any crime, however, does not work a forfeiture of any property, real or personal, or any right or interest therein. Civil Rights Law §79-b.

In the case of *Matter of Hawkin's Estate,* 213 NYS2d 188 (Sur. Ct. Queens County 1961), the court recognized that a surviving tenant who murdered her spouse may not enlarge her interest in the property held as tenants by the entirety as a result of the homicide. However, it further decided that the surviving spouse was entitled to the commuted value of the net income of one-half of the property for her life-expectancy, based upon former section 512 of the Penal Law, which was the forfeiture statute. This holding was continued in the cases *Matter of Pinnock,* 83 Misc.2d 233 (Sur. Ct. Bronx County 1975), *Matter of Busacca,* 102 Misc.2d 567 (Sur. Ct. Nassau County 1980) and *Matter of Nicpon's Estate,* 102 Misc.2d 619 (Sur. Ct. Erie County 1980).

This holding was held to be a 'legal fiction" and was rejected by the court in *Citibank v. Goldberg,* 178 Misc.2d 287 (Sup. Ct. Nassau County 1998). That court held that the intentional slaying of a spouse by the other acts as a voluntary repudiation of the essence of an ownership by the entireness, thereby alienating the surviving spouse from any interest in the property. The court further held that section 79-b of the Civil Rights Law never addressed shared interests in property, or the creation of new and different interests from those that existed at the time of the crime. *Accord Matter of the Estate of Mary Mathew,* NYLJ, April 26, 1999, p. 32, col. 5 (Sur. Ct. Rockland County), *reversed* 270 AD2d 416 (2nd Dept. 2000).

This proposed addition to the EPTL would not allow anyone to inherit or succeed to property as the result of his or her own wrongful act, but would entitle the

convicted spouse to his or her fractional portion of separate property contributed by him or her. Furthermore, this is consistent with the present section 4-1.6 of the EPTL, which provides that if one joint tenant of a bank account is convicted of murder of the other joint tenant, the murderer forfeits all rights in the account except those monies he or she contributed to the account.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to the disqualification of tenants by the entirety in certain instances

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The estates, powers and trusts law is amended by adding a new section 4-1.7 to read as follows:

§4-1.7. Disqualification of tenant by the entirety in certain instances. Notwithstanding any other provision of law to the contrary, a tenant by the entirety in real property, or in a cooperative apartment as defined in paragraph (c) of section 6-2.2 of this chapter, where the spouses resided or any residences of the spouses, who is convicted of murder in the second degree as defined in section 125.25 of the penal law, or murder in the first degree as defined in section 125.27 of the penal law, or manslaughter in the first degree as defined in subdivision one or two of section 125.20 of the penal law or manslaughter in the second degree as defined in subdivision one of section 125.15 of the penal law of the other spouse, shall not be entitled to any share in such real property or monies derived therefrom, except for any fractional portion

thereof contributed by the convicted spouse from his or her separate property as defined by paragraph d of subdivision one of part B of section two hundred thirty-six of the domestic relations law, except that such convicted spouse shall not be entitled to more than the value of a life estate in one-half of such property held as tenant by the entirety or monies derived therefrom.

§ 2. This act shall take effect immediately.

4. Disqualification of a Surviving Spouse (EPTL 5-1.2(a))

The Committee recommends that section 5-1.2(a) of the Estates, Powers and Trusts Law be amended to disqualify as surviving spouses persons who for a prolonged period prior to a decedent's death were married to the decedent in name only.

This measure would amend section 5-1.2(a) of the Estates, Powers and Trusts Law by adding a subdivision 7 to provide for the disqualification of a person as the decedent's surviving spouse if the decedent and the survivor had lived separate and apart for a period of at least one year prior to the decedent's death and the total time that they lived separate and apart exceeded the total time that they cohabited as spouses. Disqualification under such circumstances will not occur, however, if the survivor can show any one of the following: the reason that the couple lived separate and apart was due to an illness or injury which required that one or both spouses be cared for in a facility; or that the survivor departed from the marital abode because the decedent had abused the survivor or another member of the marital household; or that, as a result of voluntary, contractual or court-ordered support, an economic relationship continued between the spouses notwithstanding their separation. The survivor will be allowed to testify about communications or transactions with the decedent even though such testimony would otherwise be barred by CPLR 4519 because the survivor might be the only person who can establish that the separation was caused by abuse or that the decedent voluntarily provided support.

This measure is intended to preclude "laughing" surviving spouses, i.e., those who for a prolonged period of time prior to the decedent's death were married to the decedent in name only, from being unjustly enriched by having the right to take an intestate share of the decedent's estate under section 4-1.1 of the EPTL or an elective share under sections 5-1.1 or 5-1.1-A of the EPTL. As is the case with all other disqualifications under section 5-1.2, these "laughing" spouses would also be disqualified under sections 5-1.3, 5-3.1 and 5-4.4.

Under present law, a spouse would not be disqualified under EPTL 5-1.2 if both spouses had consented to their separation one week after their marriage and they continued to live separate and apart until the decedent died 70 years after they had separated. The reason that this would not constitute a disqualification on the grounds of abandonment under subdivision 5 is because there can be no abandonment if the departure was with the consent of the other spouse (*Schine v. Schine*, 31 N.Y.2d 113; *Solomon v. Solomon*, 290 N.Y. 337; *Matter of Maiden*, 284 N.Y. 429). Furthermore, it is very difficult for the estate to prove that the departure was other than consensual

because death has sealed the decedent's lips and there frequently is no one else who witnessed the events leading to the departure.

The public policy supporting the amendment is that, if the surviving spouse was willing to live for a prolonged period of time prior to the decedent's death without having had anything whatsoever to do with the decedent, the survivor should also be willing to do without any rights to the decedent's property after the decedent's death. The disqualification only applies to spouses who voluntarily had nothing to do with the decedent for a prolonged period of time. There is no disqualification if the separation was caused by abuse, or the need of at least one of the spouses to be cared for in a facility due to injury or illness. There is also no disqualification where, after the separation, there was voluntary, contractual or court-ordered support. This measure will result in reduced litigation because in numerous cases where there is presently a question of whether an abandonment can be established under subparagraph 5, it will now be clear that the spouse is disqualified under subparagraph 7.

The proposed amendment would take effect immediately and apply to the estates of decedents dying on or after its effective date.

Proposal:

AN ACT to amend the estates, powers and trusts law, in relation to disqualification as a surviving spouse.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of section 5-1.2 of the estates, powers and trusts law is amended by adding a new subparagraph (7) to read as follows:

(7) The survivor and the decedent have continuously lived separate and apart for a period of at least one year prior to the date of the decedent's death and that the total time that they have lived separate and apart exceeds the total time that they cohabited as

a married couple, unless the survivor can establish any one of the following: the reason that the parties lived separate and apart was due to illness or injury which required one or both of the spouses to need the care of a facility; or, the survivor was actually receiving support from, or paying support to, the decedent or was entitled to receive support from the decedent pursuant to court order or agreement; or, that the abuse of the decedent towards the survivor or another member of the household was the reason that the survivor stopped cohabiting with the decedent. For the purpose of this subparagraph, the court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

§ 2. This act shall take effect immediately and shall apply to the estates of decedents dying on or after its effective date.

5. Legitimacy of Children Born to a Married Couple Using Assisted Reproduction Techniques (DRL 73)

Section 73 of the Domestic Relations Law recognizes the legitimacy of children born to married couples by means of artificial insemination. The Committee recommends that section 73 be amended to extend such recognition to children who are born to married couples by more advanced means of assisted reproduction, such as in vitro fertilization.

Section 73 of the Domestic Relations Law now provides that "[a]ny child born to a married woman by means of artificial insemination . . . [by a licensed physician] . . . with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes." Thus, a child conceived by a married woman with the sperm of a person other than her husband would nevertheless be the husband's legitimate, natural child if the procedures required by section 73 were followed.

Recent advances in medical technology, however, have expanded the methods and opportunities for married infertile couples to have children by new techniques of assisted reproduction, including in vitro fertilization (IVF) and gamete intrafallopian transfer (GIFT) that may involve donated gametes (sperm, eggs) or embryos (fertilized eggs). Use of donated semen and eggs could raise issues of the rights, duties and responsibilities of the donor (biological parent) under our present laws.[6] Moreover, cryopreservation allows frozen gametes or frozen embryos to be implanted in a married woman for this purpose even after the death of the donors.[7] Accordingly, it is imperative that section 73 of the Domestic Relations Law include children born by any method of assisted reproduction now in use or developed in the future, so that these children will be deemed the legitimate, natural children of the wife and her consenting husband, regardless of whether their own or donated gametes or embryos are used.

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[6] For example, under Estates, Powers and Trusts Law, section 4-1.2(a)(2)(D), a father's non-marital child would be considered a legitimate child so that the child and the child's issue would inherit from the child's father and the child's paternal kindred if, inter alia "a blood genetic marker test had been administered to the father which together with other available evidence establishes paternity by clear and convincing evidence."

[7] Under sections 2-1.3(a)(2), 5-3.2 and 6-5.7 of the EPTL, children of the donor-biological parent born after his or her death may have certain rights.

After an intensive, comprehensive examination of assisted reproduction, the New York State Task Force on Life and the Law, appointed by executive order in 1985, issued its report, Assisted Reproductive Technologies, Analysis and Recommendations for Public Policy in April 1998,[8] recommending, inter alia, at p. xxvi that:

> New York's Domestic Relations Law should be amended to provide that when a married woman undergoes any assisted reproductive procedure using donor semen, the woman's husband is the legal father of any child who results, provided the procedure was performed by a licensed physician with the husband's consent.
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> * * *
>
> New York law should provide that a woman who gives birth to a child is the child's legal mother, even if the child was not conceived with the woman's egg.

The proposed amendment to section 73 of the Domestic Relations Law would provide that a married woman and her consenting husband would be deemed the natural parents of the child for all purposes, whether the child resulted from semen, egg or embryo donated by persons then living or who have died. Such child and his or her issue would also be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for purposes of intestacy and class designations in wills or other instruments.

The proposal would also clarify that the donor or donors of the genetic material (and their families) would be relieved of all parental duties and responsibilities and would have no rights over the child or to receive property from or through such child by intestacy or class designations in wills or other instruments.

The term "class designations in wills or other instruments" will be broadly defined to include, unless otherwise provided in the disposing instrument, a class designation under a will, trust indenture, deed, an instrument exercising a power of appointment, a beneficiary designation or contractual arrangement with respect to the disposition of a bank or brokerage account, insurance, pension, retirement plan, stock bonus or profit-sharing plan or any other instrument disposing of real or personal property.

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[8] See also, Chapter 12, "Determining Parental Rights and Possibilities," pp. 327-334.

The Committee believes that the public policy of the State of New York strongly supports the desire of infertile married couples to have children, using any available technique of assisted reproduction, and recognizing these children as the natural children of the married woman and her husband by operation of law. Conversely, the donor or donors of genetic materials and their families would be divested of any rights, duties or responsibilities with respect to such children.

The proposal would apply to children described in section 73 of the Domestic Relations Law whether born by artificial insemination, in vitro fertilization or any other technique of assisted reproduction before, on or after the effective date of the act.

Proposal:

AN ACT to amend the domestic relations law, in relation to children born to a married couple by any means of assisted reproduction

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 73 of the domestic relations law is amended to read as follows:

§73. Legitimacy of children born by [artificial insemination] assisted reproduction. 1. Any child born to a married woman by means of artificial insemination, in vitro fertilization or any other technique of assisted reproduction, whether with the genetic material of the woman and her husband or with genetic material donated by others, performed in accordance with the laws of the jurisdiction where such assisted reproduction occurs by persons duly authorized to practice medicine or by any other person or persons under the supervision of a person duly

authorized to practice medicine, and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes. Such child and his or her issue shall be deemed the legitimate, natural issue of the husband and his wife and the legitimate, natural issue of the respective ancestors of the husband or his wife for all purposes, including without limitation the right to receive real and personal property by intestacy and class designations in wills or other instruments, and such child and his or her issue shall have no rights to receive real and personal property from and through the donor or donors of genetic material and their respective kindred by any means, including without limitation intestacy and class designations in wills or other instruments.

2. The donor or donors of genetic material shall be relieved of all parental duties toward and of all responsibilities for such child, and the donor or donors and their respective kindred shall have no rights to receive real and personal property from and through such child by any means, including without limitation by intestacy and class designations in wills or other instruments.

3. The phrase "class designations in wills or other instruments" shall include without limitation unless otherwise provided in the disposing instrument, a class designation under a will, trust instrument, deed, an instrument exercising a power of appointment, a beneficiary designation or contractual arrangement with respect to the disposition of a bank or brokerage account, insurance, pension, retirement plan, stock

bonus or profit-sharing plan, or any other instrument disposing of real or personal property.

4. The [aforesaid] written consent required by subdivision one shall be executed and acknowledged before or at any time after the birth of the child by both the husband and the wife and the physician who performs the technique (or if the physician has died or is unavailable, any person who assisted the physician) or the person who performed the technique under the supervision of the physician, who shall certify in writing that he or she had rendered the service at the time, date and place set forth in the certification.

§2. This act shall take effect immediately and shall apply to any child described in subdivision one of section 73 of the domestic relations law as amended pursuant to this act, whenever he or she is born.

6. The Effect on Inheritance Rights of Adoption by an Unrelated Person (DRL 117; EPTL 2-1.3(a)(1))

This measure would amend section 117 of the Domestic Relations Law and section 2-1.3(a)(1) of the Estates, Powers and Trusts Law, to ensure that, where an adoptive child continues to reside with the natural parent, as in the case in step-parent adoptions and adoptions pursuant to *Matter of Jacob* and *Matter of Dana*, 86 N.Y.2d 651 (1995), such adoptive child is not penalized by losing inheritance rights either from his or her natural parent(s) under EPTL 4-1.1 or from a lifetime or testamentary disposition from his or her natural family as a member of a class under EPTL 2-1.3. This amendment neither endorses nor rejects the policy issues discussed in the above cited cases.

Proposal:

AN ACT to amend the domestic relations law and the estates, powers and trusts law, in relation to the effect of an adoption by an unrelated person

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 117 of the domestic relations law is amended by adding a new subdivision 4 to read as follows:

4. Notwithstanding subdivisions one and two of this section, if a parent having custody of a child consents that the child be adopted by an unrelated adult who resides with such parent, after the making of an order of adoption the consenting parent shall retain all parental duties and responsibilities and all rights with respect to such child, and neither such consent nor the order of adoption shall affect:

(a) the rights of such child to inheritance and succession from and through either natural parent, or

(b) the right of the child and his or her issue to take under any wills or lifetime instruments executed by either natural parent or natural relatives of either natural parent.

§2. Paragraph (1) of subdivision (a) of section 2-1.3 of the estates, powers and trusts law, as amended by chapter 248 of the laws of 1990, is amended to read as follows:

(1) Adopted children and their issue in their adoptive relationship. The rights of adopted children and their issue to receive a disposition under wills and lifetime instruments as a member of such class of persons based upon their natural relationship shall be governed by the provisions of [subdivision] subdivisions two and four of section one hundred seventeen of the domestic relations law.

§3. This act shall take effect immediately and shall apply to adoptions on or after such effective date, to estates of decedents dying on or after such effective date and to wills and lifetime instruments whenever executed.

III. Future Matters

The Committee is drafting legislation in a number of areas. Among the matters being addressed are:

1.	EPTL 3-3.7	Incorporation by Reference As a Testamentary Trust

This measure would amend EPTL 3-3.7(e) to permit a testator to incorporate in a will, as a testamentary trust, the provisions of a preexisting inter vivos trust which has been revoked or terminated prior to the testator's death. This measure would allow the terms of the trust to remain valid even if not recited in the will.

2.	SCPA 2108	Answers in Proceedings by Fiduciary for Continuation of a Business

This measure would amend SCPA 2108 to require that an answer in a proceeding by a fiduciary for continuation of a business be filed by the return date of the petition, or at such subsequent time as the court may direct. This measure would bring the procedure in this type of proceeding into conformity within general Surrogate's Court practice.

3.	SCPA 2307	Renunciation of Specific Compensation in Favor of Statutory Commissions

This measure would amend SCPA 2307 to prevent a fiduciary from avoiding a will's directive that he or she receive specific compensation in lieu of statutory commissions. The proposal would require that where a will provides for specific compensation, the fiduciary who elects to serve is not entitled to any other allowances for his or her services as fiduciary.

4.	EPTL 7-1.14; GOL 5-1502	Use of a Power of Attorney to Create, Modify or Revoke a Lifetime Trust

This measure would circumscribe the use of the statutory short form power of attorney to create, modify or revoke a lifetime trust. Currently, a principal may not

even be aware that he or she is authorizing this rather obscure power with respect to lifetime trusts, giving rise to a potential for its misuse by an unscrupulous agent.

In addition to the above legislation, the Committee is also studying proposals related to:

1. Protection of beneficiaries of bank-run mutual funds, via periodic accountings and other possible procedures.

2. The voiding of wills of incapacitated persons by Article 81 courts.

3. The creation of a simplified convenience bank account that would permit an agent to sign checks for the account holder without creating a right of survivorship.

4. Reformations and modifications of wills and lifetime trusts.

5. The tax treatment of capital gains in unitrust distributions.

6. Statutory rates of compensation for attorneys.

7. A method for the orderly transfer of assets from a guardian to an executor or administrator.

8. Amendment of CPLR 4519, the Deadman's Statute.

9. Changing or eliminating the Rule against Perpetuities.

10. The use of attorney-certified death certificates in voluntary administrations.

11. Possible conflicts between SCPA 2309(5) and the prudent investor rule.

Respectfully submitted,

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