

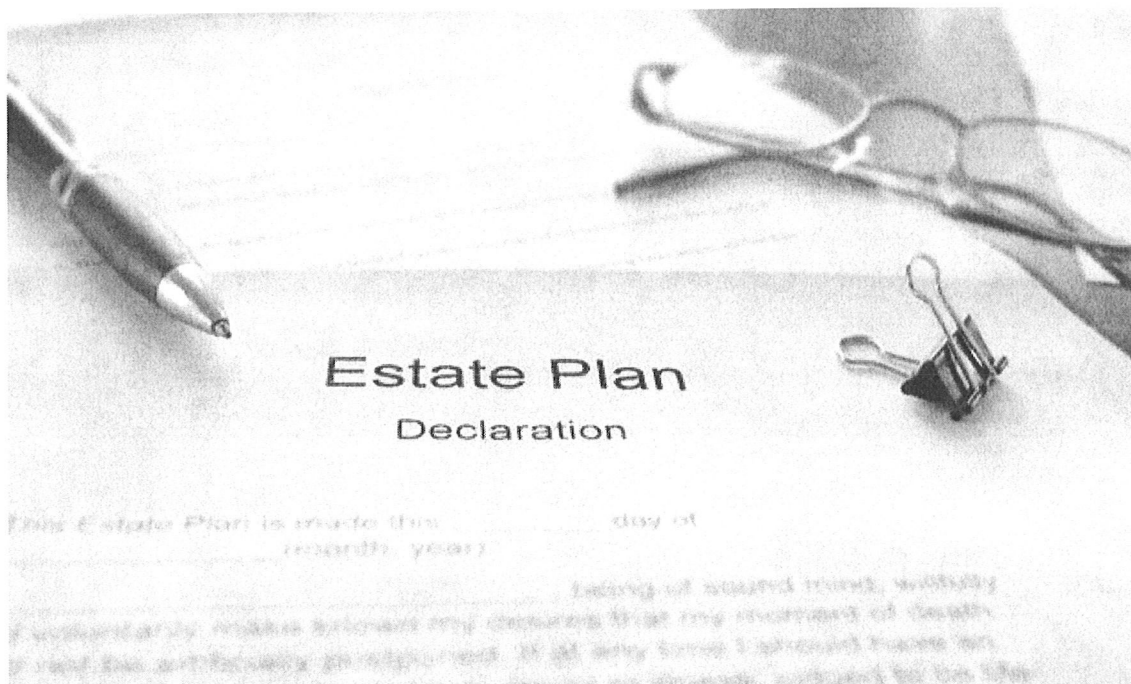
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# A New Trust Code for New York

There has not been any thorough consideration of the entire body of trusts and estates law on the scale of the Bennett Commission, which was funded by public funds, in part because there has been no similar allocation of such funds to the effort. Almost all that has been accomplished since then has been the work of dedicated volunteers. The volunteers have been busy again and have proposed a new trust code for New York.

By **Renee R. Roth and William P. LaPiana** | January 16, 2020



New York's statutory law of wills and trusts has remained fundamentally the same in organization and in content since the Bennett Commission completed its work in the late 1960s, except for piecemeal changes made to various areas such as the elective share, the default rules governing principal and income, and enactment of the

prudent investor rule. There has not been any thorough consideration of the entire body of trusts and estates law on the scale of the Bennett Commission, which was funded by public funds, in part because there has been no similar allocation of such funds to the effort. Almost all that has been accomplished since then has been the work of dedicated volunteers.

The volunteers have been busy again and have proposed a new trust code for New York (NYTC). It is a reorganization, limited modernization, and codification of current New York trust law and, if enacted, will replace most of Article 7 of the EPTL and will become Article 7-A. Some of the most important innovations are provisions that would allow questions in a trust to be resolved without having to go to court; somewhat expanded possibilities for modification of trusts on consent; and express approval of reformation even where the terms of the trust are not ambiguous. Authorizing the creation of a trust by declaration and clarification of the level of capacity needed to create a revocable trust settled two outstanding questions under current law, and the authorization of the use of a certification of trust should simplify a trustee's dealings with third parties.

The NYTC in some respects follows the organization of the Uniform Trust Code (UTC) promulgated by the Uniform Law Commission in 2000. The Commission, founded in 1892 as the National Conference of Commissioners on Uniform State Laws, is made up of volunteer commissioners appointed by state governments and has been the source of many widely adopted model statutes, most important the Uniform Commercial Code. The UTC has been one of the more successful efforts, according to the Commission's account, having been adopted in 35 jurisdictions, although with greater or lesser changes. New York, however, has created its own version.

The provisions of the NYTC are default rules that can be varied by the terms of the trust. There are a few exceptions, including the rules governing the rights of creditors of trust beneficiaries, the rules for creating and amending trusts, and certain basic trustee's duties such as those relating to recordkeeping and the rules governing the rights of beneficiaries to information about the trust, which can be modified only during the lifetime of the survivor of the settlor and the settlor's spouse, thus for the first time clearly allowing the creation under New York law of a trust about which the beneficiaries know nothing (often called a "quiet trust").

A brief discussion of the most important of the NYTC's default rules follows, which apply to both newly created and existing trusts, avoiding the need to have two sets of rules.

The most novel provisions are found in Part 9, which enacts the New York Directed Trust Act, a comprehensive scheme governing trusts in which the trustee must take direction from "trust directors" to whom the trust terms give authority over decisions that would otherwise be made by the trustee—for example investment or distribution decisions. The trustee must follow the instructions of a trust director who has the same duties a trustee would have if the authority given such director were given to a trustee. A separate provision authorizes another way to achieve the same result. The NYTC includes an "excluded co-trustee provision" allowing a settlor to give authority to a co-trustee that can be exercised without the participation of other co-trustees who have no responsibility for how the empowered co-trustee exercises the granted authority.

Another novel provision allows a court to reform the terms of a trust, even if the terms are unambiguous, if it can be shown by clear and convincing evidence that the terms do not conform to the settlor's intent and were affected by a mistake, either of law or of fact. In one of the few changes to law outside of that contained in current Article 7, the proposal adds a new EPTL 3-3.10 allowing reformation of wills generally based on the same standard. The standard for reformation is more relaxed if the aim is to achieve the settlor's tax objectives or to make the trust a supplemental needs trust, a provision which codifies existing case law. It is necessary to show only that the reformation would conform to the settlor's "probable intention." The rationale for the use of reformation in these two situations without any other requirement is the belief that settlors intend to minimize tax obligations and not to use trust property to supplant governmental benefits to which a beneficiary is otherwise entitled.

Also new to New York law is a provision providing an alternative to going to court by allowing the use of binding non-judicial settlement agreements among interested persons, generally defined as those who would be parties to a judicial proceeding taking into account virtual representation (SCPA 315).

The NYTC also authorizes the creation of a sort of trust not now possible under New

York law, a trust that does not have an ascertainable beneficiary, e.g., a trust to distribute income to “my friends.” The trust may not last, however, for more than 21 years, the “period in gross” under New York’s Rule Against Perpetuities which is still alive and well. Trusts for animals are a sort of purpose trust and the NYTC continues the current provisions for “pet trusts.”

The provisions governing the termination and modification of trusts generally reenact existing law, allowing termination on consent of the creator and the beneficiaries but also allow the court to terminate a trust on consent of the creator of the trust and of fewer than all of the beneficiaries if the court believes that had all the beneficiaries consented the trust could have been modified or terminated and that the rights of beneficiaries who do not consent are adequately protected. Unlike the UTC, the NYTC *does not allow* termination or modification on the consent of the beneficiaries only.

Modification of dispositive terms of the trust or termination are also possible if the court finds that changed circumstances not anticipated by the settlor mean modification or termination will further the purposes of the trust. A more forgiving standard, new to our law, governs modification of the administrative terms of the trust (such as forbidding the sale of trust property), usually called “equitable deviation,” which the court may order for “any compelling reason” including a change in circumstances not anticipated by the settlor so long as the modification will further the purposes of the trust.

The rules governing the rights of creditors of beneficiaries are among the most controversial aspects of the law of trusts. The NYTC continues the statutory default rule making income interests inalienable and codifies existing case law making interests in principal inalienable as well. The proposal also expressly states the long-standing rule prohibiting the beneficiary of a discretionary trust from transferring his or her interest and prevents the beneficiary’s creditors from reaching such interest. The rule that property of a revocable trust is always subject to the claims of the creditors of the person holding the right to revoke continues, but the proposal defines such right differently from current law. Under current law, the rule applies to trusts only over which the creator has an “unqualified” power to revoke, that is a power the exercise of which does not require the consent of *any* other person. Under the NYTC, a power to revoke in this context will include a power held with another

person unless that person holds a substantial adverse interest in the trust.

As mentioned above, two outstanding questions about the law of revocable trusts are settled by the NYTC. First, the proposal expressly provides that the capacity needed to create, amend, revoke, or add property to a revocable trust is the same as that required to make a will. On the other hand, the capacity needed to irrevocably release a power to revoke or amend a trust is the same as that needed to make a gift. Second, the NYTC makes it clear that a lifetime trust can be created by a declaration by the settlor that he or she holds certain property in trust. In addition, the proposal codifies the rule that the trustee of a revocable trust must follow the direction of the person with the power to revoke and although such person is not the only beneficiary, the trustee owes fiduciary duties only to that person. It is noted that rules for contesting the validity of a revocable trust are also addressed.

The NYTC codifies existing law with respect to fiduciary responsibilities of trustees and also includes an expanded list of default trustee's powers. Another important change allows a trustee to resign on notice to the beneficiaries without the need for court approval. However, such resignation does not discharge the trustee from any potential liability.

Finally, the NYTC codifies existing New York's law of damages for breach of trust, affirms that the trustee is accountable to the beneficiaries for any profit made from administering the trust even if no breach is involved, and continues existing protections for third parties who deal with the trustee in good faith. Another new provision authorizes a trustee to deliver a certification of trust to anyone who requires information about the trust and protects a person receiving such certification (and who lacks knowledge that the certification is incorrect) from liability to anyone for acting on the information in the certification.

None of these provisions is truly revolutionary, nor do they constitute a complete reconsideration of all of the law of trusts like that completed almost 60 years ago. Without the commitment of public funds and authority, change, important as it is, will be incremental and piecemeal, at least when seen in the largest context. In short, the NYTC is hopefully not the end of making New York's law of wills and trusts better.

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