ACTEC Law Journal

Volume 43 | Number 2 Article 9

12-1-2018

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In New York, trusts and estates practitioners have historically relied primarily upon wills for estate planning and rarely resorted to the use of inter vivos revocable or irrevocable trusts as will substitutes. Probate was a relatively easy process in New York and practitioners did not experience the difficulties that may have been visited upon practitioners in other states.

The advent of more complicated gift and estate tax issues, together with clients enjoying more longevity and the need of assistance in the elder years, has lead New York practitioners to gradually implement lifetime trusts as compliments to wills in their practice. Despite this increased use of trusts, modernizing trust law to comply with new trends has been a slow process by the New York State Legislature and the bar. New York has always had rich case law concerning trusts, but there was very little statutory consideration for the issues that had to be addressed.

Professor William LaPiana's article *Social Control of Wealth in Antebellum New York*,[1] takes an interesting look at the early attempts at modernizing New York trust law in the 19th century. Indeed, *Coster v. Lorillard*,[2] discussed at length by Professor LaPiana, is a cautionary tale. Under the common law, the testamentary plan put into place by George Lorillard would have succeeded. Yet, the Revised Statutes of 1830 (which were promulgated by a small committee and then enacted by the New York State Legislature), rendered these same trusts invalid. The Revised Statutes of 1830 were viewed by the justices in the *Coster* case as "wholly abolish[ing]"[3] the common law, so that trusts were ". . .now

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1 William LaPiana, *Social Control of Wealth in Antebellum New York,* 42 ACTEC L.J. 279 (2017).

2 14 Wend. 265 (N.Y. 1835).

3 *Id.* at 369.

the creature of the statute. . .”[4] Less than fifteen years later, as explained by Professor LaPiana, the *Leggett v. Perkins* case softened some of the strong pronouncements of *Coster* when in upholding a trust provision the court stated “[i]t was so at the common law, and is so now.”[5]

We all know the sage advice of George Santayana that “[t]hose who cannot remember the past are condemned to repeat it.”[6] Hopefully, these early lessons detailed by Professor LaPiana will guide the current endeavors to modernize New York trust law.

The most recent undertaking to modernize New York trusts and estates law began in the 1960s. In 1961, New York Legislature created the Temporary State Commission on the Modernization, Revision and Simplification of the Laws of Estates, commonly referred to as the Bennett Commission.[7] Through several reports, the Bennett Commission analyzed the laws of trusts and estates which led to the enactment of what is today’s Estate Powers and Trusts Law (“EPTL”) and the Surrogate’s Court Procedure Act (“SCPA”).

In 1990, the New York State Senate and Assembly by joint resolution created the Advisory Committee to the Legislature on EPTL and SCPA (the “Advisory Committee”)[8] for the purposes of bringing the Bennett Commission’s work up to date. During the ensuing twenty-two years, the Advisory Committee issued six reports.[9] The Advisory Committee worked with representatives from various other organizations, such as the New York State and local bar associations and banking groups, to undergo an in-depth analysis of New York’s trust law. The sixth report looked specifically at the Uniform Trust Code (“UTC”) enacted by many states, and prepared an extensive comparison of the UTC with New York’s statutory and case law.

The Advisory Committee noted that there was no specific and concise statute which dealt with trusts within the EPTL. Most of New York’s trust law is not codified, but is instead found in case law. This

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4 *Id.* at 333.

5 2 N.Y. 297, 314 (1849).

6 2 GEORGE SANTAYANA, THE LIFE OF REASON: REASON IN SOCIETY, (Marianne S. Wokeck & Martin A. Coleman co-eds., MIT Press 2013) (1905).

7 1961 N.Y. Sess. Laws ch. 731, § 1 (McKinney).

8 C. Raymond Radigan was chair of the Advisory Committee.

9 *See, e.g.*, RAYMOND RADIGAN & LOUIS D. LAURINO, SECOND REPORT OF THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE (1992); RAYMOND RADIGAN, THIRD REPORT OF THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE, THE PROPOSED PRUDENT INVESTOR ACT IN NEW YORK (1993); RAYMOND RADIGAN & LOUIS D. LAURINO, FOURTH REPORT OF THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE, THE REVOCABLE LIFETIME TRUST (1994) PROF. IRA MARK BLOOM & PROF. WILLIAM LAPIANA, FINAL REPORT ON THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE’S 6TH REPORT (2016) [hereinafter FINAL REPORT].

creates challenges to practitioners seeking to locate a governing rule.[10] Some practitioners suggest that the failure of New York to have a modernized and consolidated trust law has lured significant business from New York which either directly or indirectly relates to trusts.[11] Many of the ideas of the UTC were already set forth in New York's law, but there were additional provisions that might improve New York law.

The Advisory Committee recommended to the New York Legislature that a New York Trust Code should be enacted so that practitioners could find within one statute all of the substantive practice and procedural law relating to trusts. The purpose of adopting a New York Trust Code would be to modernize the law, clarify existing law and provide greater accessibility for out of state lawyers, as well as New York practitioners. To the extent that uniformity of emerging trends across the country could be incorporated within the code, the Advisory Committee recommended such modification. This correlates to the recommendation of the Bennett Commission in the 1960s that determined New York should not adopt the Uniform Probate Code, but draft New York's own law regarding probate.[12]

This centralized statutory code would deal with both testamentary and inter vivos trusts. To the extent that SCPA does not set forth a practice and procedure for dealing with trusts, the proposed New York Trust Code can fill that gap.[13]

It is not intended that the New York Trust Code will supplant all existing trust and estate related statutes. The default approach would be that the existing statutes in the EPTL and SCPA would remain effective unless modified by the new code.

In 2012, the Trusts and Estates Section of the New York State Bar Association created a sub-section (the "NYUTC-Legislative Advisory Group") chaired by Professor William LaPiana and Professor Ira Bloom to coordinate a review of the sixth report and to propose a New York Trust Code, in conjunction with various other associations. This process remains ongoing.

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10 *See* Joseph T. LaFerlita, *Modernizing and Consolidating N.Y. Trust Law*, N.Y. L.J., Jan. 28, 2013.

11 *Id.* (citing APPLESEED, A MATTER OF TRUSTS: PRESERVING JOBS AND TAXES IN NEW YORK'S PERSONAL TRUST BUSINESS, REP. TO THE LOWER MANHATTAN DEV. CORP., Feb. 2005.).

12 *See* SIXTH & FINAL REPORT OF THE TEMPORARY COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES, 1967 N.Y. LEG. Doc. No. 19.

13 The proposed New York Trust Code does not address some issues which have yet to be fully analyzed by the New York State Legislature and New York's rich case law. This includes, but is not limited to, directed trusts, delegation, debtor protector trusts and other issues. *See generally* FINAL REPORT, *supra* note 9.

If the New York State Legislature adopts the recommendations of the Advisory Committee and the NYUTC-Legislative Advisory Group, it will join many other states in providing clarity and uniformity of trusts for our transient society, as well as bring together under a code New York statutory and case law dealing with trusts. Most importantly, New York will have learned the lessons of its prior attempts as detailed by Professor LaPiana, by merely supplementing existing law, rather than a wholesale abolishment.