S T A T E O F N E W Y O R K

7183

I N S E N A T E

May 1, 2012

Introduced by Sen. BONACIC -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary

AN ACT to amend the estates, powers and trusts law, in relation to the role and duties of advisors in trust agreements

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 11-2.2-a to read as follows:

S 11-2.2-A ADVISORS

(A) ADVISORS.

(1) WHERE ONE OR MORE PERSONS ARE GIVEN AUTHORITY BY THE TERMS OF A GOVERNING INSTRUMENT TO DIRECT, CONSENT TO OR DISAPPROVE A FIDUCIARY'S ACTUAL OR PROPOSED INVESTMENT DECISIONS, DISTRIBUTION DECISIONS OR OTHER DECISION OF THE FIDUCIARY, SUCH PERSONS SHALL BE CONSIDERED TO BE ADVISORS AND FIDUCIARIES WHEN EXERCISING SUCH AUTHORITY UNLESS THE GOVERNING INSTRUMENT OTHERWISE PROVIDES.

(2) IF A GOVERNING INSTRUMENT PROVIDES THAT A FIDUCIARY IS TO FOLLOW THE DIRECTION OF AN ADVISOR, AND THE FIDUCIARY ACTS IN ACCORDANCE WITH SUCH A DIRECTION, THEN EXCEPT IN CASES OF WILLFUL MISCONDUCT ON THE PART OF THE FIDUCIARY SO DIRECTED, THE FIDUCIARY SHALL NOT BE LIABLE FOR ANY LOSS RESULTING DIRECTLY OR INDIRECTLY FROM ANY SUCH ACT.

(3) IF A GOVERNING INSTRUMENT PROVIDES THAT A FIDUCIARY IS TO MAKE DECISIONS WITH THE CONSENT OF AN ADVISOR, THEN EXCEPT IN CASES OF WILLFUL MISCONDUCT OR GROSS NEGLIGENCE ON THE PART OF THE FIDUCIARY, THE FIDUCIARY SHALL NOT BE LIABLE FOR ANY LOSS RESULTING DIRECTLY OR INDIRECTLY FROM ANY ACT TAKEN OR OMITTED AS A RESULT OF SUCH ADVISOR'S FAILURE TO PROVIDE SUCH CONSENT AFTER HAVING BEEN REQUESTED TO DO SO BY THE FIDUCIARY.

(4) WHENEVER A GOVERNING INSTRUMENT PROVIDES THAT A FIDUCIARY IS TO FOLLOW THE DIRECTION OF AN ADVISOR WITH RESPECT TO INVESTMENT DECISIONS, DISTRIBUTION DECISIONS, OR OTHER DECISIONS OF THE FIDUCIARY, THEN, EXCEPT TO THE EXTENT THAT THE GOVERNING INSTRUMENT PROVIDES OTHERWISE, THE FIDUCIARY SHALL HAVE NO DUTY TO:

(A) MONITOR THE CONDUCT OF THE ADVISOR;

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(B) PROVIDE ADVICE TO THE ADVISOR OR CONSULT WITH THE ADVISOR; OR

(C) COMMUNICATE WITH OR WARN OR APPRISE ANY BENEFICIARY OR THIRD PARTY CONCERNING INSTANCES IN WHICH THE FIDUCIARY WOULD OR MIGHT HAVE EXERCISED THE FIDUCIARY'S OWN DISCRETION IN A MANNER DIFFERENT FROM THE MANNER DIRECTED BY THE ADVISOR.

ABSENT CLEAR AND CONVINCING EVIDENCE TO THE CONTRARY, THE ACTIONS OF THE FIDUCIARY PERTAINING TO MATTERS WITHIN THE SCOPE OF THE ADVISOR'S AUTHORITY (SUCH AS CONFIRMING THAT THE ADVISOR'S DIRECTIONS HAVE BEEN CARRIED OUT AND RECORDING AND REPORTING ACTIONS TAKEN AT THE ADVISOR'S DIRECTION), SHALL BE PRESUMED TO BE ADMINISTRATIVE ACTIONS TAKEN BY THE FIDUCIARY SOLELY TO ALLOW THE FIDUCIARY TO PERFORM THOSE DUTIES ASSIGNED TO THE FIDUCIARY UNDER THE GOVERNING INSTRUMENT AND SUCH ADMINISTRATIVE ACTIONS SHALL NOT BE DEEMED TO CONSTITUTE AN UNDERTAKING BY THE FIDUCIARY TO MONITOR THE ADVISOR OR OTHERWISE PARTICIPATE IN ACTIONS WITHIN THE SCOPE OF THE ADVISOR'S AUTHORITY.

(B) COURT JURISDICTION.

BY ACCEPTING APPOINTMENT TO SERVE AS ADVISOR, THE ADVISOR SUBMITS TO THE JURISDICTION OF THE COURTS OF THIS STATE EVEN IF THE ADVISORY AGREEMENT OR OTHER RELATED AGREEMENTS PROVIDE OTHERWISE, AND THE ADVISOR MAY BE MADE A PARTY TO ANY ACTION OR PROCEEDING RELATING TO DECISIONS, ACTIONS OR INACTIONS OF THE ADVISOR.

(C) COMPENSATION.

(1) THE ADVISOR SHALL BE ENTITLED TO SUCH COMPENSATION AS MAY BE REASONABLE, AND THE COURT, UPON APPLICATION OF A PERSON INTERESTED IN THE TRUST, MAY REVIEW THE REASONABLENESS OF SUCH COMPENSATION.

(2) THE FIDUCIARY SHALL BE ENTITLED TO COMMISSIONS IN ACCORDANCE WITH ARTICLE TWENTY-THREE OF THE SURROGATE'S COURT PROCEDURE ACT.

(D) DEFINITIONS. AS USED IN THIS SECTION:

(1) "ADVISOR" SHALL INCLUDE A "PROTECTOR" WHO SHALL HAVE ALL OF THE POWER AND AUTHORITY GRANTED TO THE PROTECTOR BY THE TERMS OF THE GOVERNING INSTRUMENT, WHICH MAY INCLUDE BUT SHALL NOT BE LIMITED TO:

(A) THE POWER TO REMOVE AND APPOINT TRUSTEES, ADVISORS, TRUST COMMITTEE MEMBERS, AND OTHER PROTECTORS;

(B) THE POWER TO MODIFY OR AMEND THE GOVERNING INSTRUMENT TO ACHIEVE FAVORABLE TAX STATUS OR TO FACILITATE THE EFFICIENT ADMINISTRATION OF THE TRUST; AND

(C) THE POWER TO MODIFY, EXPAND, OR RESTRICT THE TERMS OF A POWER OF APPOINTMENT GRANTED TO A BENEFICIARY BY THE GOVERNING INSTRUMENT.

(2) "INVESTMENT DECISION" MEANS, WITH RESPECT TO ANY INVESTMENT, THE RETENTION, PURCHASE, SALE, EXCHANGE, TENDER OR OTHER TRANSACTION AFFECTING THE OWNERSHIP THEREOF OR RIGHTS THEREIN, AND AN ADVISOR WITH AUTHORITY WITH RESPECT TO SUCH DECISIONS IS AN INVESTMENT ADVISOR.

S 2. This act shall take effect immediately and shall apply to all trusts which come into existence after this act shall have become a law, provided, however, those trusts incorporate this section by reference within the trust agreement.