

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

3790--A

2013-2014 Regular Sessions

I N S E N A T E

February 15, 2013

Introduced by Sen. BONACIC -- (at request of the Office of Court Administration) -- read twice and ordered printed, and when printed to be committed to the Committee on Judiciary -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the estates, powers and trusts law, in relation to the exercise of a power of appointment and an authorized trustee's authority to invade a trust

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

1 Section 1. The opening paragraph of paragraph (b) of section 10-6.6 of
2 the estates, powers and trusts law, as added by chapter 451 of the laws
3 of 2011, is amended to read as follows:
4 An authorized trustee with unlimited discretion to invade trust prin-
5 cipal may appoint part or all of such principal to a trustee of an
6 appointed trust for, and only for the benefit of, one, more than one or
7 all of the current beneficiaries of the invaded trust (to the exclusion
8 of any one or more of such current beneficiaries). The successor and
9 remainder beneficiaries of such appointed trust [shall] MAY be one, more
10 than one or all of the successor and remainder beneficiaries of such
11 invaded trust (to the exclusion of any one [or], more THAN ONE OR ALL of
12 such successor and remainder beneficiaries).
13 S 2. Subparagraphs 5 and 6 of paragraph (j) of section 10-6.6 of the
14 estates, powers and trusts law, as added by chapter 451 of the laws of
15 2011, are amended to read as follows:
16 (5) The receipt of a copy of the instrument exercising the power shall
17 not affect the right of any person interested in the invaded trust to
18 compel the authorized trustee who exercised the power [of appointment
19 pursuant to] UNDER paragraph (b) or (c) of this section to account for
20 such exercise and shall not foreclose any such interested person from
21 objecting to an account or compelling a trustee to account. WHETHER THE

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

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1 EXERCISE OF A POWER UNDER PARAGRAPH (B) OR (C) OF THIS SECTION BEGINS
2 THE RUNNING OF THE STATUTE OF LIMITATIONS ON AN ACTION TO COMPEL A TRUS-
3 TEE TO ACCOUNT SHALL BE BASED ON ALL THE FACTS AND CIRCUMSTANCES OF THE
4 SITUATION.

5 (6) A copy of the instrument exercising the power shall be kept with
6 the records of the invaded trust and the original shall be filed in the
7 court having jurisdiction over the invaded trust. Where a trustee of an
8 inter vivos trust exercises the power and the trust has not been the
9 subject of a proceeding in the surrogate's court, no filing is required.
10 THE INSTRUMENT SHALL STATE THAT IN CERTAIN CIRCUMSTANCES THE APPOINTMENT
11 WILL BEGIN THE RUNNING OF THE STATUTE OF LIMITATIONS THAT WILL PRECLUDE
12 PERSONS INTERESTED IN THE INVADED TRUST FROM COMPELLING AN ACCOUNTING BY
13 THE TRUSTEES AFTER THE EXPIRATION OF A GIVEN TIME.

14 S 3. Subparagraphs 1 and 4 of paragraph (s) of section 10-6.6 of the
15 estates, powers and trusts law, as added by chapter 451 of the laws of
16 2011, are amended to read as follows:

17 (1) The term "appointed trust" means an irrevocable trust which
18 receives principal from an invaded trust under paragraph (b) or (c) of
19 this section including a new trust created by the creator of the invaded
20 trust or by the trustees, in that capacity, of the invaded trust. For
21 purposes of creating the new trust, the requirement of section 7-1.17 of
22 this chapter that the instrument be [signed by the creator] EXECUTED AND
23 ACKNOWLEDGED BY THE PERSON ESTABLISHING SUCH TRUST shall be deemed
24 satisfied by the [signature] EXECUTION AND ACKNOWLEDGMENT of the trustee
25 of the appointed trust.

26 (4) The term "current beneficiary or beneficiaries" means the person
27 or persons (or as to a class, any person or persons who are or will
28 become members of such class) to whom the trustees may distribute prin-
29 cipal at the time of the exercise of the power, PROVIDED HOWEVER THAT
30 THE INTEREST OF A BENEFICIARY TO WHOM INCOME, BUT NOT PRINCIPAL, MAY BE
31 DISTRIBUTED IN THE DISCRETION OF THE TRUSTEE OF THE INVADED TRUST MAY BE
32 CONTINUED IN THE APPOINTED TRUST.

33 S 4. Paragraph (s) of section 10-6.6 of the estates, powers and trusts
34 law is amended by adding a new subparagraph 10 to read as follows:

35 (10) THE CREATOR SHALL NOT BE CONSIDERED TO BE A BENEFICIARY OF AN
36 INVADED OR APPOINTED TRUST BY REASON OF THE TRUSTEE'S AUTHORITY TO PAY
37 TRUST PRINCIPAL TO THE CREATOR PURSUANT TO SECTION 7-1.1 OF THIS CHAPTER
38 OR BY REASON OF THE TRUSTEE'S AUTHORITY UNDER THE TRUST INSTRUMENT OR
39 ANY OTHER PROVISION OF LAW TO PAY OR REIMBURSE THE CREATOR FOR ANY TAX
40 ON TRUST INCOME OR TRUST PRINCIPAL THAT IS PAYABLE BY THE CREATOR UNDER
41 THE LAW IMPOSING SUCH TAX OR TO PAY ANY SUCH TAX DIRECTLY TO THE TAXING
42 AUTHORITIES.

43 S 5. Section 10-6.6 of the estates, powers and trusts law is amended
44 by adding a new paragraph (t) to read as follows:

45 (T) CROSS-REFERENCE. FOR THE EXERCISE OF THE POWER UNDER PARAGRAPH (B)
46 OR (C) OF THIS SECTION WHERE THERE ARE MULTIPLE TRUSTEES, SEE SECTIONS
47 10-6.7 AND 10-10.7 OF THIS ARTICLE.

48 S 6. Section 10-6.7 of the estates, powers and trusts law, as amended
49 by chapter 686 of the laws of 1967, is amended to read as follows:

50 S 10-6.7 Exercise by all donees; exceptions

51 Whenever a power of appointment, OTHER THAN A POWER IN A TRUSTEE TO
52 INVADe TRUST PRINCIPAL UNDER SECTION 10-6.6 OF THIS ARTICLE OR UNDER THE
53 TERMS OF THE DISPOSITIVE INSTRUMENT, is created in two or more donees,
54 all must unite in its exercise, unless the instrument creating such
55 power provides otherwise. But, if before its execution, one or more of
56 such donees dies or becomes incompetent, such power may be exercised by

1 the survivor or the competent donee, unless such exercise is explicitly
2 barred by the terms of the instrument creating such power.

3 S 7. Section 10-10.7 of the estates, powers and trusts law, as amended
4 by chapter 904 of the laws of 1973, is amended to read as follows:

5 S 10-10.7 Exercise of powers by multiple fiduciaries; joint and several
6 powers

7 Unless contrary to the express provisions of an instrument affecting
8 the disposition of property, a joint power other than a power of
9 appointment BUT INCLUDING A POWER IN A TRUSTEE TO INVADE TRUST PRINCIPAL
10 UNDER SECTION 10-6.6 OF THIS ARTICLE OR UNDER THE TERMS OF THE DISPOSI-
11 TIVE INSTRUMENT, conferred upon three or more fiduciaries, as that term
12 is defined in 11-1.1, by the terms of such instrument, or by statute, or
13 arising by operation of law, may be exercised by a majority of such
14 fiduciaries, or by a majority of survivor fiduciaries, or by the survi-
15 vor fiduciary. Such a power conferred upon or surviving to two such
16 fiduciaries may be exercised jointly by both such fiduciaries or by the
17 survivor fiduciary, unless contrary to the express terms of the instru-
18 ment creating the power. A fiduciary who fails to act through absence or
19 disability, or a dissenting fiduciary who joins in carrying out the
20 decision of a majority of the fiduciaries if his OR HER dissent is
21 expressed promptly in writing to his OR HER co-fiduciaries, shall not be
22 liable for the consequences of any majority decision, provided that
23 liability for failure to join in administering the estate or trust or to
24 prevent a breach of the trust may not thus be avoided. A power vested
25 in one or more persons under a trust of real property created in
26 connection with the salvaging of mortgage participation certificates may
27 be executed by one or more of such persons as provided in such trust.
28 This section shall not affect the right of any one of two or more
29 personal representatives of a decedent to exercise a several power.

30 S 8. This act shall take effect immediately.