

EXHIBIT B

(Commentary)

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Book 17B

Estates, Powers and Trusts Law
EPTL 6-1.1 to 10-10.8

Cumulative Annual Pocket Part

For Use In 1969-1970

Replacing prior pocket part in back of volume

FORMS
For
ESTATES, POWERS AND TRUSTS LAW

See West's McKinney's Forms
Volumes 14 through 17
ESP—Estates and Surrogate Practice

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§ 8-1.1 ESTATES, POWERS AND TRUSTS LAW

75. Definiteness of beneficiary— Generally

Fact that remainder of income or corpus is payable to unnamed religious or charitable corporations did not render gift invalid by reason of indefiniteness of beneficiaries. In re Clark's Will, 1967, 54 Misc.2d 1015, 284 N.Y.S.2d 244.

143. Foreign trustee

In re Rose's Will, 1965, 48 Misc.2d 415, 265 N.Y.S.2d 91, main volume,

modified on other grounds 28 AD2d 815, 281 N.Y.S.2d 610.

145. Supervision by court, generally

A village may petition the probate surrogate's court for an order or decree directing that disposition of funds in its care and custody be administered and applied in such manner as in the judgment of the court will most effectively accomplish the general purposes of the trust in the locality under present conditions. In re State Compt. 68-940.

§ 8-1.2 Certain charitable trusts authorized

Practice Commentary

By Julius Greenfield

This section is somewhat anomalous in that it appears that such trusts were permissible from the time of the enactment of Personal Property Law § 12, and Real Property Law § 113 (Laws 1893, c. 701). The genesis of section 8-1.2 was in the Laws 1840, c. 318. The original statutes were enacted for the purpose of validating gifts in trust to incorporated educational and literary institutions for their general purposes as well as the establishment and maintenance of observatories, professorships, scholarships and places of burial. In re Potter's Will, 1954, 307 N.Y. 504, 121 N.E.2d 522; In re McGraw's Estate, 1888, 111 N.Y. 66, 19 N.E. 233; affirmed 136 U.S. 152, 10 Sup.Ct. 775. These statutes also authorized gifts in trust to common schools and school districts for the benefit of the schools. The present separate existence of this section may be explainable partly by the provisions authorizing the several institutions to accept and administer trusts, in respect to which there could be some question otherwise.

§ 8-1.3 Certain charitable trusts regulated

Practice Commentary

By Julius Greenfield

The forerunner of this section was enacted by Laws 1892, c. 516. Its purpose was to validate trusts for the purpose of founding, endowing and maintaining within the state a public library, museum or other educational institution, and also a chapel, crematory, board of trade or chamber of commerce. The original statute was enacted shortly after the adverse ruling in Tilden v. Green, 1891, 130 N.Y. 29, 28 N.E. 880. See also, Cottman v. Grace, 1889, 112 N.Y. 299, 19 N.E. 839. Except for the unusual provisions in this section it would appear that Real Property Law § 113 and Personal Property Law § 12, enacted by Laws 1893, c. 701, now EPTL 8-1.1, would equally apply to dispositions of this nature. However the section does make special provisions for the administration of these categories of trusts. Note in particular that this provision deals with inter-vivos dispositions. In addition to providing for fairly typical provisions, such as the nature, object and purpose of the institution, its name, the powers and accountability of the trustees and their succession, the creator is authorized to reserve the power to amend his disposition with respect to these administrative provisions. There is also an unusual provision, which appears to be contrary to accepted rules of trust administration. This is to the effect (sub-paragraph e) that the creator may reserve the right during his lifetime to exercise complete control over the property subject to the disposition, without obligation to account therefore in any manner. He may also reserve a similar control for his spouse during her lifetime. There is an additional provision (sub-paragraph g) which forbids the maintenance

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of any action or proceeding to affect, impair or defeat such a disposition, or to affect the title to the property or the right to possession unless the action or proceeding is commenced within two years from the time the disposition is recorded. Appropriate provisions is made for execution, acknowledgment and recording of the disposition (sub-paragraph f).

§ 8-1.4 Supervision of trustees for charitable purposes

(b) The registration and reporting provisions of this section do not apply to (1) the United States, any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico or to any of their agencies or governmental subdivisions, (2) any trustee which is required by any other provision of law to render a full, complete and itemized annual report to the congress of the United States or to the legislature of this state, (3) corporations organized under the religious corporations law and other religious agencies and organizations, and charities, agencies and organizations operated, supervised or controlled by or in connection with a religious organization, (4) educational institutions incorporated under the education law or by special act, (5) any hospital, (6) fraternal, patriotic, veterans, volunteer firemen, social or alumni organizations and historical societies chartered by the New York state board of regents, (7) a trust for which there is a corporate trustee acting as sole trustee or co-trustee under the terms of a will of a decedent who died domiciled in a state other than New York or a trust instrument executed by a non-resident of the state of New York, (8) any trust in which and so long as the charitable interest is deferred or contingent, (9) any person who, in his capacity as an officer, director or trustee of any corporation or organization mentioned in this paragraph, holds property for the religious, educational or charitable purposes of such corporation or organization, (10) any cemetery corporation subject to the provisions of article nine of the membership corporations law.

As amended L.1968, c. 263; L.1969, c. 504, eff. May 10, 1969.

Subd. (b) amended L.1968, c. 263, eff. May 14, 1968; L.1969, c. 504, eff. May 10, 1969. L.1968 added clause 10. L.1969, in clause (7), substituted "a trust for which there is a corporate trustee acting as sole trustee or co-trustee" for "a corporate trustee acting."

Effective date of L.1968, c. 263. Section 2 of L.1968, c. 263 provides:

"This act [adding clause 10 to subd. (b)] shall take effect immediately and the provisions of subdivision (b) of section 8-1.4 of the estates, powers and trust law as amended by this act shall be retroactive to and shall be deemed to have been in full force and effect from and after September first, nineteen hundred sixty-seven."

Practice Commentary

By Julius Greenfield

This section was originally enacted by Laws of 1966, c. 831, as Personal Property Law § 12-b and Real Property Law § 113-a, effective January 1, 1967. These sections were combined and re-enacted in its present form by Laws 1967, c. 686, § 87.

The public nature of charitable dispositions and the fiduciary responsibility of charitable trustees and administrators were recognized early in the English law of charities. In the Statute of Charitable Uses, 43 Eliz. c. 4, enacted in 1601, the chancellor was authorized to set up a commission to inquire into the abuses, breaches of trust and misgovernment of property given for charitable uses. The method of commission inquiry was discontinued after a time and thereupon the responsibility of enforcing charitable dispositions was carried out by the Attorney General. The Tilden Act, enacted by Laws 1893, c. 701, now EPTL 8-1.1, recognized this duty and responsi-

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bility and it provided, as it does now, that the Attorney General shall represent the beneficiaries of charitable dispositions and it is his duty to enforce the rights of such beneficiaries by appropriate court proceedings. As to the scope and manner of carrying out these duties and responsibilities, see the commentary on section 8-1.1(f).

The intention of the legislature to require the Attorney General to enforce the broad spectrum of charitable dispositions, whether they be in absolute form or in trust, inter-vivos or testamentary, administered by charitable corporations or executors or trustees, is further exemplified by additional existing statutory duties. For example, the Attorney General is required to be given notice of: (1) applications for judicial approval of certificates of incorporation or charitable corporations and for any amendment of their purposes and powers, Membership Corporations Law §§ 10(8) and 30(d) (f); applications for judicial approval of the consolidation of two or more charitable corporations, Membership Corporations Law § 52(1) and applications for judicial approval of the disposition of the remaining assets of a dissolved charitable corporation, Membership Corporations Law § 56(5). The Attorney General is also authorized to institute an action to enjoin a charitable corporation from soliciting or collecting funds if it employs any device, scheme or artifice to defraud or to obtain contributions by false pretense, representation or promise. Social Services Law, § 482-c.

For some time it had been apparent that this chain of responsibility could not be enforced adequately without the receipt of regular reports from the administrators of charitable dispositions. Furthermore, the rapid growth of charitable corporations, foundations and inter-vivos and testamentary charitable dispositions, sponsored in considerable part by personal tax considerations and underwritten by the public to a large degree through the medium of charitable deductions and exemptions, accentuated the responsibility of appropriate government agencies to actively and effectively represent the public interest in these dispositions. This section is designed for that purpose.

Subdivision (a) defines the word "trustee" as any individual, corporation or other legal entity holding and administering property for charitable purposes, whether pursuant to any will or other instrument, court appointment or otherwise pursuant to law, over which the Attorney General has supervisory or enforcement powers. Accordingly, whenever the word "trustee" is used hereafter in this commentary it refers to this definition. It should be noted that this is an extension of and consistent with the holdings that although an absolute gift to a charitable corporation does not create a technical trust, a trust is implied in the sense that the disposition will be required to be devoted effectively to the purposes for which it was given. *Sherman v. Richmond Hose Co.*, 1921, 230 N.Y. 462, 130 N.E. 613. The term "trustee" also applies to non-profit domestic corporations organized for charitable purposes and to a similar foreign corporation doing business or holding property in this state. With respect to a foreign corporation or a trustee acting under the will or other instrument executed by a non-resident of this state, the mere maintenance of a bank, custody, investment or similar account in this state does not render them subject to the provisions of the section.

Subdivision (b) provides for exemptions from the registration and reporting provisions of the section. Most of these provisions are self-explanatory. Among those which require some comment are the religious and educational exemptions. Certain charitable activities are exempted in conjunction with the exemption of religious organizations. It should be noted, however, that these charities must be operated, supervised or controlled by or in connection with a religious organization. The provision exempting educational institutions incorporated under the education law or by special act does not extend to foundations, trusts and corporations which administer funds for scholarship or other educational purposes unless they are qualified as educational institutions. A trust in which and so long as the charitable interest is deferred or contingent is excepted from the registration and reporting provisions, but becomes subject to these provisions when the contingency occurs or the intervening life inter-

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ests expire. The exemption relating to persons who, in their capacities as officers, directors or trustees of exempt organizations, hold property for the purposes of such organizations is a recognition of the fact that these persons act in those capacities, *co nomine*, for the exempt organizations. By Laws 1968, c. 263, a new provision was added exempting cemetery corporations which are subject to the jurisdiction of the Cemetery Board under Article 9 of the Membership Corporations Law. By Chapter 504 of the Laws of 1969, subdivision (b) (7) was substantially revised. As originally drafted, this provision exempted a corporate trustee acting under the terms of a will of a decedent who died domiciled in a state other than New York, or under a trust instrument executed by a non-resident. The new subdivision (b) (7) makes it clear that the exemption runs to the entire trust in the above specified instances, and applies irrespective of whether the corporate Trustee is a sole or co-Trustee. This removes the ambiguity that may have otherwise arisen on this question.

Subdivision (c) requires the Attorney General to maintain a registry of all trustees and authorizes him to conduct investigations and to obtain from public records, taxing authorities, trustees and other sources copies of instruments, reports and records required for the information necessary to establish and maintain the register.

Subdivision (d) requires each trustee to register with the Attorney General within six months after any property or the income therefrom is required to be applied to charitable purposes. Trustees holding and administering property for charitable purposes at the time of the effective date of the statute, January 1, 1967, were required to register within six months of that date. The registration is accomplished by the submission of form NYCF-1, which requires the submission of the following information: (1) identification of the trust and whether established by will, trust instrument, certificate of incorporation or other instrument; (2) description of assets and liabilities; (3) names and addresses of trustees, officers and directors; (4) date of last judicial accounting and the file number in the court in which submitted; (5) other detailed information including copies of the creating instruments, last decree settling the accounts and (6) information respecting the tax exempt status of the registrant. See: Codes, Rules and Regulations of the State of New York, Law, Part 100, § 100.2.

Subdivision (e) is an extension and partial codification of case law requiring the Attorney General to be made a party in proceedings affecting charitable dispositions. It provides that whenever a trustee or other person holding property or income therefrom which may be at any time required to be devoted to charitable purposes, files a petition in any court: (A) for instructions relating to the administration or use of such property or income; (B) for construction; (C) for a determination respecting the disposition or distribution of such property or income or (D) any accounting, due notice of the action or proceeding shall be given to the Attorney General. The notice is not required if at the time of the institution of the action or proceeding the charitable interest is dependent upon the occurrence of an uncertain event. This subdivision also requires that due notice be served upon the Attorney General when a will making a charitable disposition is the subject of an application for denial of probate, objections to probate or a compromise agreement in respect to probate. See, *In re Lachat's Estate*, 1945, 184 Misc. 486, 52 N.Y.S.2d 445.

Subdivision (f) requires every trustee to file periodic written reports, under oath, setting forth information as to the nature of the assets and their administration, in accordance with rules and regulations adopted by the Attorney General. These regulations, promulgated by the Attorney General on January 12, 1967, require the submission of annual reports. The first report is required to cover a period of the last three years of operation, if existence covers that period. The reports are due within six months after the end of the fiscal year. The nature of the reports are specified in the regulations. See: Codes, Rules and Regulations of the State of New York, Law, Part 100, § 100.3. The Attorney General is authorized to suspend the filing of reports for a specified designated time, upon a finding that the interests of the beneficiaries will

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not be prejudiced thereby and that the reports are not required for proper supervision. It should be noted that the provision for suspension does not authorize discretionary exemptions. Filing of the reports does not absolve trustees from any responsibility for judicially accounting for the property or income held by them for charitable purposes.

Subdivisions (i) (j) and (k) provide the Attorney General with extensive investigating powers for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered. These include the power to subpoena trustees, agents, fiduciaries, beneficiaries or other witnesses, to examine them under oath and to require them to produce any books or records deemed relevant to the inquiry. The failure without reasonable cause to obey the mandate of the subpoena or the refusal without similar cause to be sworn or examined or to answer or produce books or papers when ordered to do so, renders the persons subpoenaed subject to proceedings under CPLR 2308(b).

Subdivision (l) provides for public inspection of the register, instruments and reports filed with the Attorney General, subject to rules and regulations which may provide for such limitations as the Attorney General may deem to be in the public interest. Copies or portions of reports which are required to be kept confidential by other provisions of law are not subject to public inspection.

Subdivisions (m) and (n) are designed to complement the supervisory functions of the Attorney General. He is authorized to institute appropriate court proceedings to secure compliance with this section and the proper administration of funds devoted to charitable purposes. The powers and duties provided in this section are in addition to the Attorney General's existing powers and duties. Subdivision (m) also provides that no court is authorized to modify or terminate the powers and responsibilities of any charitable trust, corporation or other relationship unless the Attorney General is a party to the proceeding. The failure of any trustee to register and file the required reports renders him subject to judicial removal. It should be noted that this provision is supplemental to the existing authority of the Attorney General to bring proceedings to compel judicial accountings and to obtain appropriate relief in such proceedings, including the imposition of personal surcharge. Subdivision (n) provides that this section applies regardless of any contrary provision in any instrument. This is consistent with the public policy declared in EPTL 11-1.7, imposing limitations on the powers and immunities of executors and testamentary trustees. See also, *In re Schechter's Estate*, 1962, 35 Misc.2d 371, 229 N.Y.S.2d 702.

Subdivision (o) directs every agency of the state or its political subdivisions, receiving applications for exemption from taxation, to file annually with the Attorney General a list of such applications and a statement of suspension or revocation of a tax exempt status previously granted. Similar information is being made available to the office of the Attorney General by the Internal Revenue Service.

Subdivision (p) provides for a filing fee in conjunction with the annual reports, based upon net worth at the close of the period for which the report is submitted.

Index to Notes

Generally 1
Trustee within section 2

1. Generally

When entire residuary estate is bequeathed for charity, executor during stewardship of the estate is "individual holding and administering property for charitable purposes" within subdivision (a) of this section imposing upon Attorney General duty to

supervise any individual holding and administering property for charitable purposes. *In re Stanley's Estate*, 1969, 59 Misc.2d 232, 299 N.Y.S.2d 47.

2. Trustee within section

Within this section imposing upon Attorney General the duty to supervise trustees for charitable purposes "trustee" includes executors. *In re Stanley's Estate*, 1969, 59 Misc.2d 232, 299 N.Y.S.2d 47.

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§ 8-1.5 Trusts for cemetery purposes

Practice Commentary

By Julius Greenfield

The original form of this section was enacted in Laws 1909, c. 218, as Personal Property Law § 13-a and Real Property Law § 114-a. Prior to that enactment it had been held that a trust for perpetual care and maintenance of a cemetery lot and monument was not for a charitable purpose and violated the rule against perpetuities. In re DeWitt's Will, 1906, 113 App.Div. 790, 99 N.Y.S. 415, affirmed 188 N.Y. 567, 80 N.E. 1108. This and similar cases proceeded on the theory that trusts of this nature were for a private purpose. The section provides that these trusts shall be deemed to be for "charitable and benevolent" purposes and are not to be deemed invalid by reason of the indefiniteness of beneficiaries or as violating any existing rule against perpetuities. The existing power of the courts to determine the reasonableness of the amount of such dispositions is retained. See, In re Baeuchle's Will, 1948, 82 N.Y.S.2d 371, affirmed 276 App.Div. 925, 94 N.Y.S.2d 582, affirmed 301 N.Y. 582, 93 N.E.2d 491. Cemetery associations are authorized to act as trustees of these trusts, whether or not their corporate powers include this authority.

6. Care of graves

Where a testator unequivocally makes a gift of residue of his estate to a person or corporation for purpose of his burial and maintenance of his grave, such a gift is valid and will be enforced even though in minds of some persons it seems to be an improvident disposition. In re Getman's Will, 1968, 30 A.D.2d 257, 291 N.Y.S.2d 395.

Where a testator directs his executor to provide for perpetual care of his burial lot, either the established contract price for such care, or if none, the fair and reasonable value

thereof must be paid, and no more. Id.

Testator who directed that his debts and funeral expenses be paid and gave residue of his estate to his brother for life and remainder to directors of cemetery association to be used for perpetual care of two lots intended association to have full use and disposition of funds, and under circumstances there was no occasion for court to intervene and exercise its discretion as to reasonable amount needed to accomplish testator's purpose. Id.

§ 8-1.6 Deposit of money in trust by owner of lots in private unincorporated cemetery

Practice Commentary

By Julius Greenfield

This provision was originally enacted in 1928. Its provisions require no clarification, but note that the trust is to be administered by banking institutions other than savings banks and that the amount of the trust is limited to four hundred dollars. Note also that SCPA 103(22) includes among funeral expenses provisions for perpetual care of a decedent's grave and see, In re Delafield's Estate, 1932, 142 Misc. 536, 255 N.Y.S. 85, so construing such a testamentary provision.

§ 8-1.7 Authority of trustee to accumulate income

Practice Commentary

By Julius Greenfield

This section is the re-enactment of Personal Property Law § 16-a and Real Property Law § 16-a, which were enacted by Laws 1961, c. 866. Its purpose is to permit accumulations in all charitable trusts in the discretion of the trustees, subject to express or implied limitations

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