

MINUTES OF THE NOVEMBER 9, 2011, MEETING OF THE MARYLAND STATE BAR ASSOCIATION ESTATE AND TRUST LAW SECTION COUNCIL

The Section Council met on Wednesday, November 9, 2011, at Martin's West, Baltimore, Maryland. The following Section Council members were present: Sharon J. Ritter (Chair), Deborah A. Cohn (Chair-Elect), Mary Beth Beattie (Secretary), Mary Alice Smolarek, Michael W. Davis, Danielle M. Cruttenden, Walter S. B. Childs, David C. Dembert, Charles S. Abell, and Frank S. Baldino, and Matthew A. Mace (Past Chair, voting).

The following Section Council members had excused absences: Richard T. Wright (Past Chair, voting), Jack P. Edgar (Past Chair, voting), Anne W. Coventry, Jonathan D. Eisner, Jay M. Eisenberg, Natalie B. Sherman, Angela M. Vallario, Eileen D. O'Brien, and Brian R. Della Rocca.

Also attending were: Edwin G. Fee, Jr. (Past Chair, Non-voting) and Allan Gibber (Past Chair, Non-voting).

The meeting was called to order by Sharon Ritter at 5:50 p. m. EST.

Minutes. Minutes from the Section Council meeting on October 19, 2011, were approved.

Publications. Mary Alice reported that all articles have been submitted and that the newsletter should be mailed to Section members before Christmas. The newsletter will be on the website before it comes out in the print version. An email will go out to the membership notifying them that the newsletter is on the website. Ed Fee agreed to summarize the Advanced Tax Institute Estate Planning Day program for the next issue.

Liaison to Registers of Wills and Orphan's Court. Debbie reported on the Joint Committee meeting held in October in Annapolis. The group discussed our proposed legislation to include the cost of a repast as a funeral expense. The Registers and Orphans' Court judges did not appear to be opposed to the legislation.

The Committee discussed proposed HB 769, which permits the Orphans' Court to hear uncontested cases for guardianship of a minor, even in counties where the Orphans' Court has no judges who are attorneys. The Council discussed this legislation, and Mary Beth raised the issue that the Court may not know until the show cause hearing whether or not the case is uncontested. One solution would be to allow the Orphans' Court to hear the case only if all the interested persons sign consents. Allan mentioned later in the meeting that the definition of "uncontested" could be addressed as a change to the Maryland Rules.

The Committee also discussed a change to the Maryland law permitting the Orphans' Court to allow assets to be placed in an UTMA account in lieu of a guardianship, even if no Maryland probate estate is open. Allan commented that this might already be allowed by the law, but that a simple amendment to Est. & Trusts Article § 13-301 adding the Orphans' Court as

a permissible court would solve any question as to jurisdiction. Walter agreed to draft this change to the statute.

The Committee again raised the concern that inheritance tax on joint accounts (and other non-probate assets) is not being paid by the recipients and that a change should be made to Maryland law similar to Pennsylvania's law requiring banks to report these assets. The Committee believes that the bankers would oppose such a law. One alternative is to change the Information Report to require reporting of all non-probate assets. Allan was asked if this change might be made as a Probate Rule amendment. Allan said that the Rules Committee would likely consider it a change for the legislature but that he would discuss this with the Rules Committee before any further action is taken on this proposal.

Another proposal discussed by the Committee was qualification for modified administration. The Committee proposed expanding the definitions to include estates where the residuary legatee is a trust the trustee for which is someone other than the decedent's spouse or children, if the beneficiaries of the trust are limited to the spouse and/or children of the decedent. One Council member suggested that the beneficiaries could be expanded to include any persons not subject to inheritance tax. Allan pointed out that the real issue is that, currently, the trustee of a revocable trust may be the only interested person in the estate and that, perhaps, modified administration could be allowed where all the beneficiaries of the trust, as well as the trustee, consent. Ed added that this requirement of consent should not be required where the trustee and the personal representative are limited to the spouse and/or children of the decedent. Charles and Allan agreed to draft legislation for consideration by the Council next year.

The Committee also discussed increasing probate fees, but Allan did not think the increase would be proposed in this legislative session. Norm Evans, who also attended the Committee meeting, expressed a concern that where an estate consists of no assets other than unclaimed property can often be too expensive to administer. Allan suggested that probate under these circumstances could be accomplished with an affidavit, similar to the one currently available for federal savings bonds.

Del. Feldman will be submitting proposed legislation increasing the limit for a small estate from \$30,000/50,000 to \$50,000/100,000. The limitation on funeral expenses could be raised at the same time. Allan also raised the question of allowing a nominal bond in a small estate, which does not appear to be allowed by the law currently. Debbie will try to get the nominal bond issue resolved as part of Del. Feldman's legislation.

Website/Technology. Dave reported that he has spoken to Brian and is getting up to speed on the website. He has asked John Anderson to post the minutes and the study group schedule, and he will be following up with John on those items.

Educational Programs. Frank reported that 70 attorneys had registered for the day's program on Estate Planning at the Advanced Tax Institute. The program on November 15 on Using and Drafting Trusts has 60+ attendees at this time, and the previous week's seminar on Fiduciary Litigation was well attended with 75 in attendance.

Meetings. No report.

Probate Rules. No report.

Elder Law Liaison. No report.

Tax Study Group. Danielle reported that the first teleconference study group meeting was held in Baltimore with 75 registered at that location and another 25 registered via live feed in Potomac. The next study group meeting will be held in Potomac on November 17, and the speaker will be discussing annuities. Danielle indicated that the materials for the study group meetings will be provided via email to the study group members in an effort to conserve trees.

Legislation. The following legislative changes were discussed:

Amendments to the Maryland Power of Attorney Act

- Mike has combined the various concerns raised about the Maryland Power of Attorney Act into 5 proposed changes for purposes of discussion. First, questions have been raised as to whether the special instructions could be used to incorporate another power of attorney. The Council members had concerns whether a change to the Act allowing this would be tantamount to creating a long form from the short form and whether it would be acceptable to the legislature. Some members expressed support for deleting the forms from the statute as Florida has done. Concern was expressed that Del. Simmons might object to deletion of the forms and that, perhaps, such a dramatic change should be considered a few years down the road.
- Mike suggested that the forms be changed to allow co-agents to be named. The Council members discussed this proposal, and a number of ideas emerged. The form could be changed by adding blanks for co-agents, although this could be confusing, for example, if the principal would like to name one primary agent and two persons to serve jointly or independently, as co-agents. The form could also be changed to have boxes like a beneficiary designation form, or perhaps it would be best to leave the form as is and allow the drafter to make adjustments to the form. Mary Alice suggested that the address and telephone number lines be omitted from the form.
- The third change was merely the relocation of the subject heading, and the fourth change was the language to deal with pension benefits which was proposed last year.
- The final change proposed was to conform the provision concerning nomination of guardians in the short form to the provision currently in the long form. Perhaps the removal of the lines for the addresses and phone numbers could be done at the same time.
- The Council discussed other concerns, including: (1) checking that all IRC references in the forms are correct; (2) adding a provision stating that the power is durable, perhaps to the "Effectiveness" paragraph; (3) adding a provision stating that the power revokes all

other powers, perhaps with the use of a check-the-box provision. The revocation provision provoked a lively discussion of how the statutory powers are being used by the Council members and whether the revocation of other powers would cause problems where the attorney is preparing both a statutory power and a proprietary power of attorney at the same time.

Remaining Legislation

- Debbie will be sending drafts of the funeral expense legislation and the amendments to the Principal and Income Act to the Council members via email. Council members should review these proposals before the next meeting and respond to the Council member in charge - Rich for the funeral expense and Dave for the Principal and Income Act.
- Walter reported that he is in the process of contacting all auditors for the Circuit Courts requesting the local rule on trustees' commissions and will be making a report at the next Council meeting.
- Any Council member responsible for a particular piece of legislation should report any revisions to Debbie, and she will prepare a briefing book in advance of the next meeting.

The next meeting of the Section Council is scheduled for 3:00 p.m. on Wednesday, December 14, 2011, at the offices of Saul Ewing in Baltimore, Maryland.

The meeting was adjourned at 6:38 p.m.