

MINUTES OF THE DECEMBER 14, 2011, MEETING OF THE MARYLAND STATE BAR ASSOCIATION ESTATE AND TRUST LAW SECTION COUNCIL

The Section Council met on Wednesday, December 14, 2011, at the offices of Saul Ewing, 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, Jonathan D. Eisner, Jay M. Eisenberg, Natalie B. Sherman, Angela M. Vallario, Eileen D. O'Brien, Brian R. Della Rocca, Matthew A. Mace (Past Chair, voting), Richard T. Wright (Past Chair, voting), Allan Gibber (Past Chair, Non-voting) and Edwin G. Fee, Jr. (Past Chair, Non-voting).

In attendance by phone was Frank S. Baldino.

The following Section Council members had excused absences: Jack P. Edgar (Past Chair, voting), Anne W. Coventry, and Charles S. Abell.

The meeting was called to order by Sharon Ritter at 3:10 p.m. EST.

Minutes. Minutes from the Section Council meeting held on November 9, 2011, were approved with one amendment.

Website/Technology. Dave reported that he has had some success in updating the website. The October and November minutes will be submitted. Dave will be archiving some of the outdated documents currently on the website.

Liaison to Registers of Wills and Orphans' Courts. Jay reported that Norman Evans is interested in attending the Joint Committee meetings but is concerned that the committee might be involved in legislation, which would preclude him from attending. Sharon suggested that the committee typically comes to the Council for its legislative ideas.

Publications. Mary Alice reported that the newsletter has been sent to the printer and will be on the Section's website soon.

Educational Programs. Frank reported that no new programs are on the agenda. Frank will meet with Mary Alice to plan the 2012 Advanced Estate Planning Institute for May. Frank asked the Council for suggestions for speakers and topics. Rich suggested a piece on ILIT's, and Mary Alice added that the topic could be broadened to life insurance in general. Jay suggested GRATs and sales to IDGTs as a topic. In other education news, the Basic Estate Planning program will be held in March, and Angela is chairing this program. Allan asked about the 6-week courses. Frank indicated that Andrea Terry at the MSBA had not received authorization to hold longer programs, citing staffing as an issue with the longer programs. The alternative of a webinar for the longer programs was raised, and Frank will discuss this matter with Andrea again.

Meetings. The next Section Council meeting was scheduled for January 11, 2012, but the Council agreed to postpone the meeting until January 18, 2012, due to a conflict with the Heckerling Institute. Natalie will check with the Severn Inn in Annapolis for the February 8 meeting, as that is our typical February dinner meeting location. The January 18 meeting is a lunch meeting in Montgomery County.

Probate Rules. No report.

Elder Law Liaison. Danielle attended the Elder Law Section meeting the previous evening and reported that the section holds a quarterly study group focusing on special needs trusts, which may be of some interest to the Section members. With respect to legislation, Danielle indicated that NAELA typically does the footwork on legislative matters and meets with the Elder Law Section Council, which in turn meets with the legislature in February. One issue raised with respect to the Power of Attorney Act changes was that the legal description of real property is not included in either of the statutory forms.

Estate and Gift Tax Study Group. Brian and Danielle reported that the next meeting, scheduled for December 15, has 84 registered in Baltimore and 32 registered in Potomac. Jay Eisenberg is scheduled to speak in Potomac. The remaining dates and topics are:

January 19	Michael Kitces - All Around Tax Update
February 16	Ashley Short - Heckerling Summary
March 15	Fred Franke - The Terms of the Trust: Where Drafting & Litigation Intersect
April 19	TBD
May 17	JoRhea Wright - Estate Planning for Farming Clients
June 20 (Wed)	Howard Zaritsky - Topic TBD

Legislation. The following legislative changes were discussed:

Maryland Trust Act

- The lobbyist for the Maryland Association of Justice has indicated that its client has some problems with the Act, including the statute of limitations provision and limits to liability. Rich believes that the association is not understanding the difference between law and equity. Delegate Simmons is listening to the objections, however, so the Council will need to respond. Rich will contact Dave Scull with the goal of preparing a uniform response to the objections raised by the association.

Amendments to the Maryland Power of Attorney Act

- Mike looked at other state statutes to see how the “substantially the same” language of the uniform act had been addressed, and found little, other than the statute in Texas which added “complied substantially” as part of the definition. Debbie suggested that another interpretation of the “substantially the same” language could be that it is in substantially

the same *form*, regardless of the substance, and she suggested that we attempt to define the language this way. Allan suggested creating statutory powers and incorporating them into the powers of attorney, but Rich warned that the bankers might have a problem with this. The Council agreed that the statute should not be rewritten to this extent at this time.

- Mike's proposed change allowing co-agents to be named in the special instructions drew some concern that co-agents may have already been named or will be named up front where the primary agent is named. Discussion among the Council members ensued as to whether the default rule should be co-agents acting jointly or independently, with members expressing preferences from both sides. The Council opted for a default provision for co-agents to act jointly, unless otherwise provided in the power of attorney. Dave added that the proposed language be changed to "one or more" co-agents. Mike will change the provision and circulate it to the Council via email.
- Sharon will check with Rachel Cohen to be sure that the change made to address pensions will be acceptable.
- No change to the forms will be made to address durability or revocation, as they are already addressed in the statute. The limited power of attorney will be changed to add the same guardianship language which is in the personal power of attorney.

Small Estate Limitation and Funeral Expenses

- Debbie suggested that the proposed legislation on raising the amount which qualifies for a small estate and the inclusion of meals in funeral expenses be presented as two separate bills. Sharon indicated that the bills should be reviewed by the Registers of Wills, as these new rules will affect other aspects of the Maryland Code, including notice requirements. Published notices are expensive in some jurisdictions, and whether the notice will be published once or three times may be significant. Some Council members wondered whether \$100,000 is too high an amount for a small estate. After discussion, the Council decided to propose raising the amount for a small estate to \$50,000, generally, and \$100,000 for an estate passing solely to a surviving spouse. Bond will be required in estates over \$25,000 only.
- Rich will make the appropriate changes to the proposed funeral expense legislation to make it a separate bill from the bill increasing the small estate limitation.

Retirement Plans paid to Marital Trusts

- Debbie asked that the Section Council members review the summary of this legislation and contact her with comments.

Other Legislation

- Frank reported on legislation amending Section 13-301(e) of the Estates and Trusts Article to give the Orphans' Courts jurisdiction to make a transfer to an UTMA account for a minor even if no probate estate were opened. The Orphans' Court judges were interested in making this change.
- Sharon reported on the proposed legislation to allow an Orphans' Court which does not have an attorney on the panel to appoint the guardian of the property of a minor in an uncontested case. Jon mentioned that Senator Frosh will need to be consulted about this legislation.

Old Business

- Walter distributed a chart with the responses he had received to date from the auditors of the various counties as to the trustees' commissions allowed in sales under local rules. He raised the concern that, in some circuits, the counties in the same circuit used different methods of calculating commissions. Walter and Mary Beth will continue to work on the chart, and Sharon reminded the Council that the goal is to publish the findings on the Section's website.
- Mary Alice reported that the Board of Governors had reached a compromise on the issue of adding governors for the larger sections of the MSBA. Two additional governors will be assigned to the MSBA's eight larger substantive law sections to be selected by the section's council and to rotate alphabetically. A third additional governor will be assigned to the remaining substantive law sections, also rotating alphabetically. All three additional governors will serve for one year. Mary Alice also reported that the Board of Governors is now requiring each section to amend its bylaws to ensure representation of Young Lawyers on each council.

New Business

- Ed had circulated before the meeting a request by a Mark Scuti for support of the Marriage Equality bill which will be considered by the Maryland legislature this session. A rousing discussion ensued, and many issues were raised, including, but not limited to: (1) whether opining on this legislation was appropriate for the Section Council; (2) whether this legislation is or is not in the best interests of our clients; (3) whether the Section Council should speak for the Section members on this issue; and (4) how this legislation affects other aspects of our practice, such as inheritance, estate taxes, and creation of state-only QTIP trusts. Sharon suggested that the discussion be tabled, after a motion to support the legislation had been withdrawn.

The next meeting of the Section Council is scheduled for 12:00 p.m. on Wednesday, January 18, 2012, at the office of Lerch Early in Bethesda, Maryland.

The meeting was adjourned at 6:00 p.m.