

MINUTES

MSBA PROBATE & TRUST LAW SECTION COUNCIL MEETING

April 16, 2009

Meeting held at MSBA Offices
Minneapolis, MN

Section Council Meeting

Members Present: Dale Schoonover, Bob McLeod, Tom Woessner, Susan Link, Peter Hatinen, Scott Nelson, Mary Shearen, Tom Rauenhorst, (and by phone: Chad Roggeman, Julie Haseman and Michael Cowles).

Others Present: Mavis Van Sambeek, Jane Kiker, Richard Bunin, and Bridget Logstrom Koci.

1. Meeting called to order: 3:40 p.m.
2. Minutes of December 18, 2008 meeting were approved. (Meaghan can post the minutes).
3. **Treasurer's Report.** Period ending February 28, 2009 approved.

Dale detailed possible obligations of the Section for the upcoming year.

4. **Education Committee.** Tom Woessner reports that:

The Probate and Trust Section Conference (June 8-9) sign ups are ahead of what they were last year. A breakfast meeting is scheduled for the Council on the second morning of the conference. The breakfast meeting will be start at 7:30am this year (instead of 7:00am).

Melinda Greer, Brad Hanson, and Kip Steincross, will discuss filling the spots on the Council that will be opening up this year. Tom highlighted some of the speakers and the presentations that are scheduled.

5. **Legislation Committee.** Scott Nelson and Mavis VanSambeek report that:

Our probate and disclaimer bills have passed through the committees in both the House and Senate, and are on their way to votes in both chambers.

The Uniform Adult Guardianship and Protective Proceedings Act appears to also be heading for a floor vote after committee hearings in both chambers, while the committee continues to work on the modifications to the guardian/conservatorship statute that will incorporate a new

Ward Bill of Rights. The next hearing is scheduled on Monday, April 20 at 4:30 in House Judiciary.

Scott also circulated the e-mail he received yesterday from Senator Tom Bakk, Chair of the Senate Tax Committee, in response to Scott's e-mail about a sales tax on legal services. It provides a good overview of the current status of all tax-related issues so we have included it in the minutes:

"From Sen. Tom Bakk

Thank you for contacting my office about the proposed taxation of legal services.

As you know, the state is facing a \$6.4 billion budget deficit. That has provided a significant challenge to legislators seeking to balance the immediate budget and pass policies that position Minnesota for economic recovery and success. There are a variety of ideas on the table to address these challenges, one of which is expanding the state's sales tax to apply to certain services such as legal assistance.

This measure is not part of the Senate's preliminary budget plan that has been proposed. Rather, it is part of individual bills moving through the legislature at this time. There are a variety of ideas making their way through legislative committees right now to allow lawmakers an opportunity to thoroughly review and discuss any budget-related items.

As I said, we need a variety of ideas to solve this problem and at this point, we are unwilling to discard anything until we have had the chance to hear the pros and cons.

The Senate Tax Committee heard testimony on the proposal to tax legal services on April 2. The committee spent a good amount of time hearing arguments in support and in opposition to the proposal. The committee did not take any immediate action on the bill.

As Chair of the Tax Committee, I look forward to continuing the discussion around this subject, and I will keep your views in mind as it comes time to make a final decision on the topic. I understand your opinion that imposing this tax could create difficulties for many Minnesotans, and I will remember that point as I consider the entire debate."

Scott also briefly mentioned the bill introducing a Minnesota gift tax. There has been no activity.

Dale Schoonover then talked about the meeting of the Section Council Chairs that he attended where Leo Brisbois explained what is going on with the Tax on Legal Services bill. He said that they are asking the Section Chairs and Vice Chairs to, as the members of their respective councils, write their respective legislators about all of the negative aspects of the bill. The council members should also send e-mails and letters to chair of House and Senate Tax Committees. Dale suggested that when you write your own legislators, you should state that you are one of their constituents, and that when you write to the tax committee chairs, you should state that you are a member of the Probate and Trust Section Council.

Scott Nelson noted that he feels that that if a tax on legal services were implemented, there would be enforcement issues.

6. Newsletter Committee. No Report.

7. Federal Taxation Committee. Richard Hawke reports that:

- CRT Early Termination Not Self-Dealing. The lifetime payout beneficiary proposes to sell her interest to the charitable remainder person for an amount equal to the present value. The Service ruled that early termination of the trust will not constitute an act of self-dealing under § 4941, even though the income beneficiary is both the trustee and a donor to the charitable remainder person. The Service also ruled that early termination will not result in a § 507 termination tax. Although the income beneficiary was a disqualified person, the buyout qualifies for an exception to the self dealing rules where the interest distributed equals the actuarial value of the income interest and takes into account the net-income provisions of the trust. And because the transaction will vest both the income and remainder interest in the remainder beneficiary, there is no split-interest issue under § 507.
- Form 1041 Instructions for 2008 Reflect Numerous Changes. The IRS has released the general instructions for Form 1041 for 2008 on its website. They reflect numerous law and administrative changes including (1) a schedule for alternative minimum tax, (2) separate instructions for some schedules, (3) automatic extension (five months), (4) sales tax deduction extended, (5) forthcoming Regs. for the 2% floor for miscellaneous itemized deductions, (6) bankruptcy estates, and (7) qualified disability trusts.
- Ambiguous Tax-Appportionment Clause. In *McCoy v. CIR*, T.C. Memo. 2009-61, the Tax Court determined that ambiguous drafting of the tax-apportionment clause led to additional assessment of estate tax. The original trust had provided for apportionment of the estate tax to the non-marital share of the estate. In a subsequent amendment of the trust, the document failed to apportion the taxes and simply stated that “the Trustee...shall pay all estate taxes, if any, attributable to Settlor’s entire taxable estate...” The Tax Court found that absent specific guidance to the contrary, estate taxes are to be apportioned between the various beneficiaries under state law.
- Shares of Endowment - No UBTI. A tax-exempt educational organization maintains a diversified endowment, and also serves at no cost as a trustee of a number of charitable remainder trusts. The organization proposes to issue units of its endowment fund to the charitable remainder trust, and the units would pay the trust an amount based on the value of the units as determined by the organization on a monthly basis. The trust could choose either to reinvest part of the payout, or redeem additional units, depending on its cash requirements. All of the income paid to the trusts would be classified as ordinary income. The Service determined that the issuance of units would not result in the issuance of “unrelated business taxable income,” but that if the organization was charging a trustee’s

fee for its services, the income it derived from such services would give rise to unrelated business taxable income and the organization would be required to pay a tax on the income earned from such activity.

- No Charitable Deduction for Gift of Oklahoma City Bombing Papers. In *Sherrel Jones v. Commissioner*, No. 08-9001 (March 27, 2009), 129 T.C. 146 (2007), the 10th Circuit determined that attorney Leslie Steven Jones was not entitled to a charitable contribution deduction for gifts of the trial preparation materials he gathered in defense of Oklahoma City bomber Timothy McVeigh. The Tax Court had determined that the deduction was impermissible on two grounds. First, Jones did not own the materials prepared for the McVeigh trial. Second, under § 1221(a)(3)(A) the assets were not a capital asset. Therefore, the deduction was limited to the cost basis of taxpayer Jones, which was zero. The 10th Circuit said that the controlling provision was § 1221(a)(3)(B) which precludes a charitable deduction or capital gain treatment upon sale of materials that are typically produced by the government without any personal cost to the individual who ends up with the custody of the materials (“prepared or produced for the taxpayer”).
- Estate Tax Imposed on Family Limited Partnership by Reduced by Time-barred Overpaid Income Taxes. In *Estate of Erma v. Jorgensen*, T.C. Memo 2009-66, the Tax Court held that the assets an individual transferred to family limited partnerships were includable in her gross estate under § 2036. However, it applied the doctrine of equitable recoupment to allow the estate to reduce the increased estate taxes by time-barred income taxes that her beneficiaries had overpaid as a result of using the Decedent’s original cost basis, rather than the stepped-up basis allowed as a consequence of the Court’s decision, in figuring gain on stock sales.
- Trust is Eligible S Corporation Shareholder. In PLR 200912005, a trust was the sole shareholder of a corporation intending to elect S corporation status. There were a number of income and remainder beneficiaries of the trust, with the remainder beneficiaries including two trusts, one of which is a 501(c)(3) tax-exempt entity. When the last income beneficiary of the first remainder trust passes away, the corpus will be distributed to the other remainder (tax-exempt) trust. The Service determined that the tax exempt trust is not a CRT (S corporations are not allowed to have CRT’s as shareholders). The Service also ruled that the main Trust is eligible to be an “electing small business trust.”

8. Professional Responsibility/Consumer Protection Committee. No reports

- 9. Greater Minnesota Committee.** Chad Roggeman reports that they will be adding information to the website about the committee. Chad commented that the Wills for Heroes Program has given his group some legs and has caused them to be meeting more regularly and expanding into additional efforts as a group.
- 10. Technology Committee.** Richard Bunin reports that they are continuing to add new forms to Practicelaw.org.
- 11. Gene Daly Award.** Mary Shearen reports that she is compiling a list of prior people considered. She will be meeting with Andrea to obtain the information she has.
- 12. Litigation Committee.** Bridget Logstrom Koci reports that they are still working on having the Arbitration Task Force materials posted on the MSBA website. We discussed obtaining a scanned version, and that if it cannot be on our page, we should put it on practicelaw.org. Rick Bunin will check in to how to accomplish that. Bridget also talked about a coordinating a litigation seminar for the fall
- 13. Wills for Heroes Committee.** Susan Link reports that our Rochester Chapter is now up and running. The will be scheduling events in the Rochester area on the second Monday of each month. The group that we met with in Grand Rapids has approached the Blandin Foundation about donating laptops and printers so that we can get a group up and running in Central Minnesota so that we can begin regularly serving the responders in that area. To date we have prepared 1766 estate plans, and have events scheduled every Monday of the month and occasional Saturdays, until January, 2012.

General Meeting adjourned at 4:29 p.m.