

MINUTES

MSBA PROBATE & TRUST LAW SECTION COUNCIL MEETING

September 18, 2008

Meeting held at MSBA Offices
Minneapolis, MN

Section Council Meeting

Members Present: Dale Schoonover, Bob McLeod, Peter Hatinen, Drew Baese, Jane Kiker, Tom Woessner, Mary Shearen, Tom Rauenhorst, Susan Link, Scott Nelson, Julie Frommelt, and Michael Cowles.

Others Present: Brad Hanson, Richard Bunin, Richard Hawke, Bridget Logstrom Koci, Mavis Van Sambeek and Meaghan Harper

1. Meeting called to order: 3:30 p.m.
2. Minutes of June 10, 2008 meeting were approved.
3. **Treasurer's Report.** Period ending June 30, 2008 approved.
4. **Education Committee.** Tom Woessner reports that:
 - Attorney General Lori Swanson will give a speech on Elder Abuse and the American Equity settlement and the ongoing litigation with the American Family Legal Plan on September 24, 2008.
 - The planning for next year's conference is underway and encouraged people to submit topics for presentations.
 - We discussed the need to facilitate ethics and elimination of bias presentations relevant to trust and estate practitioners either through luncheon presentations during the year or at the Section Conference.
 - We discussed possible topics for a fall and spring luncheon CLEs that will be held at the Dorsey offices.
5. **Legislation Committee.** Scott Nelson and Mavis VanSambeek report that:
 - Lloyd Grooms has informed us that October 31st is the deadline for sections to have legislative proposals to the MSBA Legislation Committee. We will have this year's proposed legislation ready for review at the next Council meeting currently scheduled for October 16th. We intend to circulate the proposals in advance for your review.

- **Legislation this Year.**

- a. Viatical/Life Settlements (Sub-Committee Chair: Shane Swanson) – this subcommittee has reviewed the competing bills that have been proposed by the insurance industry and summarized their conclusions. The Industry continues to negotiate an acceptable statute to all parties, and the Legislative Committee will continue to monitor their progress.
- b. Tangible Personal Property Lists (Sub-Committee Chair: Joseph Theigs) – a request was made to the committee to study the possibility of allowing tangible personal property lists independent of a Will, primarily in an intestate or revocable trust context. Jennifer Anderson and Joseph Theigs will be proposing a suggested change to our statute to allow this.
- c. Successor Trustee Liability (Sub-Committee Chair: Mavis Van Sambeek) – Mavis and Jolene Cutshall have been discussing the possibility of statutorily relieving a successor trustee from liability for the acts of its predecessor. Preliminary review of the Uniform Trust Code position and the Illinois approach has been conducted.
- d. Uniform Disclaimer of Property Act (Sub-Committee Chair: Jennifer Anderson) – this subcommittee submitted its proposal last session, which was approved by Council and the MSBA. The Legislative Committee is working with Lloyd Grooms to make sure the subcommittee’s draft is proposed this Session. In the last session, the Uniform Act was introduced by a legislator, but no action was taken.
- e. Demand for Notice (Sub-Committee Chair: Jane Godfrey) – the subcommittee is looking at two possible solutions for a situation where a demandant fails to file a satisfaction of claim. This issue has arisen in several cases where a health provider files demands for notice on a routine basis, in some cases when there is no claim or the claim is satisfied during the administration, but fails to remove them.
- f. Rationale for Repeal of § 525.02 (Sub-Committee Chair: Shane Swanson) – In 2006, the statute, which provided the Court with the power to correct, modify, vacate, or amend its records, orders and decrees, was mysteriously repealed. Shane has studied the statutes, and will be providing a report to the Legislative Committee.
- g. Collection of Personal Property (Sub-Committee Chair: Joseph Theigs) – Joe has completed preliminary research regarding increasing the threshold for collection of personal property by affidavit. North Dakota, South Dakota, and Wisconsin have \$50,000, while Iowa has \$25,000. After a full survey of all states, the Legislative Committee may propose an increase to Minnesota’s current \$20,000 value limit.
- h. Darlene Luther Anatomical Gift Act (Sub-Committee Chair: Scott Nelson) – the Probate and Trust Section had proposed changes to the Act prior to the last session, and the primary sponsor, LifeSource, had indicated that they would remain neutral or

support the suggested changes to conform the Act to the mortician statute, and to expand the effective date to include gifts designated by a person on their driver's license or elsewhere prior to the new Act to be governed by the new Act. Scott contacted LifeSource to confirm that their position remains the same, and will propose the changes, if acceptable to LifeSource. LifeSource opposed the Legislative Committee's suggestion to add a provision that would allow a person to register a refusal to donate with an organ procurement organization.

- i. Trustee Release/Trustee Discharge (Sub-Committee Chair: Lynn Lindsay) – Todd Andrews wishes to propose a statutory clarification of trustee discharge, release and termination of duties. The sub-committee will look at the proposed change, and possibly consider joining the change with the successor trustee liability issue. This issue has arisen because of disagreement with the Hennepin County referees' belief that "discharging" a trustee is the same as "releasing" a trustee.

- **Legislation Under Further Study.**

- a. Uniform Power of Attorney Act (Sub-Committee Chair: Lynn Lindsay) – the subcommittee identified a number of issues with the Uniform Act, discussed other potential changes to our current Act and sent its memo to the MSBA prior to the last legislative session. The Legislative Committee expects the Uniform Act to be introduced again, and the committee will continue to analyze the Act and make recommendations.
- b. Children Defined/Assisted Reproduction/Gestational Carrier Act (Sub-Committee Chair: Sheryl Morrison) – this is a multi disciplinary task force with family law members, and is continuing to meet. They will now incorporate the proposed changes to the Uniform Probate Code into their deliberations.
- c. Statute of Limitations (Sub-Committee Chair: Peter Hatinen) – the subcommittee has reviewed a proposal from Bob McLeod to add language to our general statute of limitation to specify that a cause of action for drafting malpractice for wills, antenuptial agreements, revocable trusts, and irrevocable trusts would begin as of the date the document is executed. This would codify recent Minnesota Supreme Court rulings, including *Antone v. Mirviss*. The Legislative Committee clerk is researching the statutes of limitations in other states for similar provisions, and we will move cautiously to make sure that the proposed change would have legislative support.
- d. Uniform Probate Code (Sub-Committee Chair: TBD) – the Uniform Law Commissioners have proposed a number of amendments to the Uniform Probate Code, and the Legislative Committee will be forming a subcommittee to study the proposed changes. Andrea Breckner was on the previous UPC subcommittee, and has volunteered to be involved in reviewing these new amendments.
- e. Uniform Estate Tax Apportionment Act (Sub-Committee Chair: TBD) – the Legislative Committee will be forming a new subcommittee to review the recently

adopted version of this Act. The Uniform Laws Committee approved the most recent version in July, 2008.

- f. Uniform Principal and Income Act (Sub-Committee Chair: TBD) – the Uniform Law Commissioners have also proposed amendments to the Uniform Principal and Income Act (UPIA) and Lynn Lindsay had previously suggested adding a definition of “short-term capital gains” to our version for RIC’s and REIT’s. The Legislative Committee believes that it would be best to have a subcommittee meet during the next fiscal year to review all of the proposed amendments to the UPIA, and incorporate any additional changes with the proposed change for short-term capital gains.
- g. Uniform Omnibus Probate Bill (Various) – Jack Davies has circulated a so-called omnibus probate bill that he intends to champion. The bill includes: (1) the Uniform Probate Code Amendments; (2) the Uniform Estate Tax Apportionment Act; (3) the Uniform Disclaimer of Property Interest Act (our version); (4) the Uniform Power of Attorney Act; and (5) the Uniform Multiple-Person Accounts Act.
- h. Probate Court Rules (Joseph Theigs) – Joe has proposed an amendment to the General Rules of Practice for the District Courts, Title V (Probate Rules), which the Council can submit to the Supreme Court Rules committee for consideration. The proposed amendment is to eliminate paragraph (g) from Rule 417.02. Trust beneficiaries would retain all of the legal rights and remedies under current law, and the only change would be to eliminate the requirement of reporting specific assets that realize a net income of less than 1% of the inventory value or acquisition cost

The Legislative Committee will draft a letter to the Rules Committee suggesting language to replace the term “illegitimate” in the Probate Committee Comment (to the rule on Application contents) negative allegation example statements, and to eliminate the reference to the old elective share (i.e. 1/3) in Rule 404(b) covering Notice of Proceedings.

6. Newsletter Committee. Peter Hatinen reported the he will be assisting Krista Durrwachter with the first newsletter. If you have any suggestions for Articles, please get them to Krista Durrwachter.

7. Federal Taxation Committee. Richard Hawke reports that:

- Charitable Organizations – Filing Requirements. The IRS revised Publication 557, Tax Exempt Status for Your Organization (Rev. June 2008) to reflect changes made by the Pension Protection Act of 2006. New filing requirements such as the reporting of \$1,000 or more of gross unrelated business income by any exempt organization are explained. New filing requirements for exempt organizations with gross receipts of less than \$25,000 are also explained, as well as some of the exceptions to the filing requirements and mandatory electronic filing requirements now imposed.

- Automatic Extension Requests starting with tax returns due on or after January 1, 2009. The IRS has announced that it will reduce automatic extension periods from six to five months for forms 1041, 1065, and 8804. Notice 2008-084.
- CRT UBTI Reg. 1.664-1. This Reg. was finalized to implement the change enacted in the Tax Relief and Healthcare Act of 2006. Total loss of exempt status for a CRT that has UBTI is now changed to imposing a 100% excise tax on such income.
- Tax Court rejects IRS indirect and step transaction theories. Taxpayers set up a FLP, transferred stock to the FLP and then made limited partnership interest gifts to their children. The gift tax returns claimed significant discounts on the valuation of the shares transferred. The IRS disallowed the discounts under both an indirect transfer and under step-transaction theories. Although the US Tax Court rejected both arguments, the Court found that the FLP had no business purpose and reduced the discounts. This, however, is a good case to read to get the issues involved in both the indirect transfer and step transaction arguments and for business purpose analyses. *Holman, Jr. v. Comm.*, 130 T.C. 12 (5/27/2008).
- Musings on the Street: Estate tax reform. The Kiplinger Tax Letter reports that Obama supports a \$3.5 Million Dollar exemption and a tax rate of 45% and McCain favors a \$5 Million Dollar exemption with a maximum rate of 15%. It predicts new legislation to set the exemption some where within that range, a top rate at the higher end of the two preferences, and the lifetime gift tax exemption raised to the same exemption level as for estate taxes. Kiplinger Tax Letter also predicts a repeal of the carryover basis provisions, but failure to revive the estate tax credit.
- Prorata Division of Charitable Remainder Trusts okayed. The IRS approved prorata divisions of CRTs in Rev. Rul. 2008-41.
- IRS rejects discount for Restricted Management Accounts. In Rev. Rul. 2008-35 the IRS rejected any discount on assets owned by a decedent which were held in an account with a bank where withdrawals were restricted for several years for management purposes.
- Tax Court confirms no deduction without separate written receipt. The US Tax Court showed no mercy to a couple who made substantial charitable contributions to their church, but failed to get written confirmation of the gifts prior to the filing of their income tax return. The fact of the contributions was not contested. The cancelled checks were produced and written acknowledgment was received from the Church, but after the filing of their income tax return, but the Court ruled that those items did not meet the substantiation requirements required by the Code. *Gomez v. Commissioner*, T.C. Summary 2008-93 (7/30/08).
- Alternate Estate Valuation. The IRS announced a proposed regulation in 73 Fed. Reg. 22,300 (42508) in response to their loss in *Kohler v. Commissioner*, T.C. Memo. 2006-152, to limit the benefit taxpayers may obtain from using the alternate valuation date. In

Kohler, the Tax Court allowed the taxpayer to benefit from a reduction in stock price that resulted from restrictions imposed upon closely-held corporate stock under a post-death reorganization. The proposed Reg would limit any reduction in value from the alternative valuation date to strictly marketplace reductions in value.

- Charitable Lead Trusts. The IRS has published sample Charitable Lead Unitrust agreements in Rev. Proc. 2008-45 and 2008-46 for inter vivos and testamentary situations.
- Substantiation of Charitable Gifts. The IRS issued proposed Reg. 1.170A-15 discussing the substantiation of reporting requirements for cash and non-cash charitable contributions which were added by the American Jobs Creation Act of 2004 and the Pension Protection Act of 2006. This Reg. discusses the written substantiation requirements now of all charitable gifts, including the need for a canceled check or receipt for gifts under \$250, written acknowledgment by the charity for gifts over \$250, and qualified appraisals for donated property of over \$5,000. A very limited reasonable cause exception is included, but replaces the good faith omission exception. Comments are being accepted through November 5, 2008.

8. Professional Responsibility / Consumer Protection Committee. Jane Kiker reports that:

- Attorney General Lori Swanson will give a speech on Elder Abuse and the American Equity settlement and the ongoing litigation with the American Family Legal Plan on September 24, 2008.
- Jane told us about a fraud protection strategy that allows consumers to freeze access to their credit reports. Jane would like to put information about this strategy in the newsletter.
- Jane also talked about reminding our clients about using their one (1) free credit report annually to see what is on their reports.

9. Greater Minnesota Committee. No report.

10. Technology Committee. Richard Bunin reports that:

- Derrick and Richard are working on additional content for the website and also finding speakers for the luncheon CLEs.

11. Gene Daly Award. No report.

12. Litigation Committee. Bridget Logstrom Koci reports that:

- The committee is discussing topics for upcoming CLEs such as “A View from the Bench”; a panel of Trust and Estate lawyers and litigators; Appeal rights; elimination of bias seminars and ethics topics relative to our section members. If anyone has suggested topics, they should get them to Bridget.

13. Wills for Heroes Committee. Susan Link reports that:

- To date the program has served 1146 Minnesota First Responders and trained 264 volunteers.
- Tom Rauenhorst will now be assisting the Wills for Heroes Committee with fundraising efforts for the upcoming year to fund the program for fiscal year 2008-2009. Tom asked the Council to make a donation of \$7,500 to the Minnesota Volunteer Attorney Program Wills for Heroes Fund this year, and asked that the Council commit to a \$7,500 donation for next fiscal year. The donations were approved by the Council.

14. Old Business.

- The Foreign Translation Committee is continuing to meet.

15. New Business.

- Meaghan Harper reminded the Council of the 4th Annual MSBA Reception for law student that will be held on October 23, 2008. Council members to attend the reception were identified.

General Meeting adjourned at 4:55 p.m.