

MINUTES OF THE OCTOBER 19, 2011, MEETING OF THE MARYLAND STATE BAR
ASSOCIATION ESTATE AND TRUST LAW SECTION COUNCIL

The Section Council met on Wednesday, October 19, 2011, at King's Contrivance Restaurant in Columbia, Maryland. The following Section Council members were present: Sharon J. Ritter (Chair), Deborah A. Cohn (Chair-Elect), Mary Beth Beattie (Secretary), Richard T. Wright (Past Chair, voting), Matthew A. Mace (Past Chair, voting), Jack P. Edgar (Past Chair, voting), Walter S. B. Childs, Danielle M. Cruttenden, Michael W. Davis, David C. Dembert, Jay M. Eisenberg, Jonathan D. Eisner, Mary Alice Smolarek, Eileen D. O'Brien, Frank S. Baldino, Natalie B. Sherman, and Brian R. Della Rocca.

The following non-voting Past Chairs were also present: Robert C. Young, Edwin G. Fee, Jr., John A. Cogar, Lynn Wintress, Sheldon S. Satsky, Michael P. Donnelly, and Nancy G. Fax.

Members with excused absences: Charles S. Abell and Anne W. Coventry. Unexcused absence: Angela M. Vallario

The meeting was called to order by Sharon Ritter at 4:10 p.m. EDT.

Minutes. Minutes from the September, 2011, meeting were approved.

Publications. Mary Alice reported that articles for the next newsletter are due on October 30, 2011.

Website/Technology. Brian reported that the website has been updated and called for a replacement. Dave Dembert volunteered to take over this committee.

Liaison to Orphans' Court/Register of Wills. Jon reported that the next joint meeting of the Registers of Wills and Orphans' Court judges will be held at 10 am on October 27, 2011, at the Judicial Training Conference Center in Annapolis. Norm Evans will be attending the meeting. Jon reported that Grace Connolly is still concerned about the ability of the Registers to collect information on joint accounts and payable on death accounts, and she may be suggesting that Maryland adopt a statute similar to the one in Pennsylvania which requires financial institutions to report such accounts. Another topic for discussion at the meeting will be a possible expansion of the modified administration rules to allow the election where more remote family members are legatees or personal representatives.

Educational Programs. Frank reported that the MSBA is revising its copyright rules to allow dual copyrights for any materials used in MSBA educational programs.

Dinner Meetings and Section Council Meetings. Eileen reminded the council members of the SIPS obligation.

Probate Rules. Walter reported that new guardianship rules have been proposed which concern locating family members. He advised that he would circulate via email a copy of the agenda of the October 7, 2011, meeting of the Rules Committee.

Elder Law Section Liaison. Larry Adashek, the Elder Law Section Council liaison, reported that the Elder Law Section is focusing primarily on the programming and legislation which is being proposed by the Estate and Trust Section.

Estate and Gift Tax Study Group. Danielle reported that the first meeting of the study group will be Thursday, October 20, 2011, in Baltimore, simulcast, for the first time, in Potomac. Larry Adashek is scheduled to speak on the Medical Order for Life-Sustaining Treatment (MOLST), a new form which was discussed later in the meeting.

Legislation. The following was reported:

Trustee's Commission on Sales of Real Property. Mary Beth and Walter reported that several of the Circuit Court clerks and the auditors were contacted, and that John Cogar provided a list of rates for each of the circuits that was updated as of 2006. The council was still concerned that it would be difficult to find these rates and that we should either publish the rates, once they are confirmed, or consider Rich's proposed legislation to unify the rates. John Cogar indicated that the bankers would oppose any such legislation. Walter and Mary Beth were asked to confirm the rates provided by John and report back to the council.

Maryland Trust Code. Rich and Jack reported that the hearing before the House Judiciary Committee on Monday, October 17, 2011, went well. Del. Simmons had areas of concern and comments, but no major objections to the law were raised at the hearing. The concerns that were raised centered around clarifying the difference between the MTC and the existing Maryland law and the "loser pays" rule. John Cogar pointed out that even if this part of the law were to be omitted, that laches would still be available under common law. Some opposition came from the Maryland Association for Justice (formerly the Maryland Trial Lawyers Association). John thought all the issues raised so far could be addressed, and Rich suggested that more issues may be raised on the Senate side. Jack will ask Bob Enten to contact the Maryland Association for Justice and request written points of concern. Del. Kathleen Dumais, who attended the council meeting later to discuss other legislation raised two issues concerning the Maryland Trust Code: (1) whether applying the new law to existing trusts would cause problems; and (2) what standard of care is appropriate.

HB 633 (Changes to the Power of Attorney Act)

- Mike reported that after compiling a list of proposed changes suggested by listserv participants and other sources, the primary concerns about the current Power of Attorney Act center around the special instructions. Questions have been posed as to what the special instructions might include while maintaining a form which is "substantially the same." Also noted was the difficulty in naming a co-agent in the statutory form. The changes to the Power of Attorney Act will certainly include the amendment proposed by

the Pension Board that changing a beneficiary must be in the special instructions. Pros

and cons to the use of supplemental (additional) powers of attorney in conjunction with a statutory power were discussed.

HB 471 (Providing for a record to be made at the Orphans' Court level with an appeal to the Court of Special Appeals, rather than the current trial de novo at the Circuit Court level)

- Del. Kathleen Dumais and Roy Neidermayer from Paley Rothman attended the meeting to discuss this proposed legislation. Kathleen suggested a new proposal where either side in litigation could elect to have the case heard by the Circuit Court rather than the Orphans' Court. This would differ from current law where requests for specific issues are transmitted to the Circuit Court upon request (although council members did indicate that they had been involved in cases which were heard by the Circuit Court in their entirety). Concerns were raised by the council that the Orphans' Court judges may feel that their court would become outmoded. Another concern was whether such a change would even be constitutional under Maryland law. Rich suggested a jurisdictional amount required for transferring the case, such as \$5 million, but it was mentioned that valuation issues are often the subject of litigation, and a dispute could arise as to the jurisdictional amount. Kathleen agreed to do additional research before the session begins and provide the council with a draft of any legislation she intends to propose.
- Also discussed was the original legislation which allows the record to be made at the Orphans' Court level, rather than allow a trial de novo at the Circuit Court level. Roy indicated that this would solve game playing among attorneys where certain aspects of the client's case might be withheld at the Orphans' Court level, knowing the appeal will be de novo. He also pointed out the clients have difficulty understanding why the case is permitted to be tried twice. He also raised the concern that a case might be tried de novo at the Circuit Court, be sent back to the Orphans' Court, and the whole process repeated.
- The council had several concerns about both proposals. John Cogar asked what percentage of cases have issues transmitted to the Circuit Court and also what percentage of cases are tried de novo there. He suggested that perhaps a new law could provide that once a case has gone up to the Circuit Court on appeal that it not be permitted to come back to the Orphans' Court.
- Council members defended the current system as one that is accessible to citizens acting pro se, and with fewer strict rules, cases are often resolved in the Orphans' Court with less time and expense. Mike also queried whether Maryland's system is one-of-a-kind or if other jurisdictions functioned in the same manner.

Portability of Maryland Estate Tax. Bob reported that this might have a fiscal note and that as Maryland does not, technically, have an "exemption," the whole Maryland estate tax law would need to be changed. Rich commented that we might want to wait until we see whether portability survives as the federal level before trying it in Maryland.

Decanting. This project is on hold until next year.

Uniform Principal and Income Act. Brian proposed a change to the Maryland Principal and Income Act to conform to the current version of the Uniform Principal and Income Act as concerns the required minimum distributions paid from retirement plans to a marital trust. Current Maryland law states that only 10% of each payment is income, where the new law would allow the trustee to demand the greater of income or the minimum required distribution. Debbie suggested that the current version of the uniform act be examined for any other changes which should be made at this time.

Legislative Booklet. Sharon announced that the 2011-2012 legislative booklet would include the Maryland Trust Code, the legislation treating meal expenses as funeral expenses, the changes to the Power of Attorney Act, and the changes to the Principal and Income Act.

Medical Orders for Life-Sustaining Treatment (MOLST). Larry Adashek commented on the MOLST form, and in defense of the form, stated that the form itself states how the physician communicated the contents of the form to the patient, surrogate or health care agent, and that emergency medical personnel would now have only one form to follow in emergency situations. Mike reported that the comment period was to end the next day (October 20) and cited concerns that the MOLST might conflict with a patient's advance directive or the surrogate's decisions.

Old Business.

- Mary Alice reported that the proposed rule adding 6 new members from the largest practice Sections to the MSBA Board of Governors was presented to the Board on October 18 but that no vote was taken. At the meeting on November 20, the Board will decide on alternative approaches, including one allowing a single person to rotate as representative among the smaller jurisdictions. In September, the Board determined that voting could be done via email, but the bylaws may not allow this. Sharon mentioned that Jack Orrick had asked for the council's support of this new rule, and Mary Alice commented that the new rule would be beneficial to the estates and trusts bar, as the Board tends to be made up primarily of litigators.

New Business.

- Sharon reported that Terri Lawler, current chair of the Conference of Orphans' Court Judges, has given her a "wish list" for legislative changes including: (1) HB 351, concerning the Orphans' Court jurisdiction over guardianships of the person; (2) a Constitutional amendment requiring judges of the Baltimore County Orphans' Court to be attorneys; (3) change to Rule 17-101 including the Orphans' Court in requiring ADR; and (4) including the Orphans' Court in appointing a successor to a custodian under E & T Section 13-301(e).

The meeting was adjourned at 6:20 p.m. The next Section Council meeting will be at 5:00 p.m. on November 9, 2011, at Martin's West, Baltimore, Maryland, following the Advanced Tax Institute's Estate Planning Day.