COUNCIL OF THE
PROBATE AND ESTATE PLANNING SECTION
OF THE
STATE BAR OF MICHIGAN

February 18, 2012
University Club
Lansing, Michigan

Minutes

1. Call to Order

The Chair of the Section, George Gregory called the meeting to order at 10:30 a.m.

2. Attendance

A. The following officers and members of the Council were in attendance:

   George Gregory, Chair        Meg Lentz
   Mark Harder, Chair Elect     Pat Ouellette
   Tom Sweeney, Vice Chair      Rebecca Schnelz
   Amy Morrissey, Secretary    Jim Spica
   Shaheen Imami, Treasurer     Jim Steward
   Susan Allan                 Ellen Sugrue-Hyman
   Josh Ard                    Marlaine Teahan
   Chris Ballard               Nancy Welber
   Constance Brigman

B. The following officers and members of the Council were absent with excuse:

   George Bearup                Hon. David Murkowski
   J. David Kerr                 Rob Tiplady
   Hon. Darlene O’Brien         Robert Taylor

C. The following officers and members were absent without excuse:

D. The following ex-officio members of the Council were in attendance:

   Hon. Philip Harter           Harold Schuitmaker
   Douglas Mielock              Susan Westerman
E. Others in Attendance

Sally Babbitt  
Michael W. Bartnik  
Chris Brigman  
W. Jerry Byrd  
Brittany Catterick  
Rhonda M. Clark-Kreuer  
Dan Cogan  
Keven DuComb  
Steve Elkins  
Belinda Fitzpatrick  
Kathleen Goetsch  
Jill Goodell  
Hon. Mike Jaconette  
Loukas Kallionta  
Michael Lichterman  
David P. Lucas  
Rick Mills  
Jeanne Murphy  
Melisa Mysliwiec  
Lorraine New  
Neal Nusholtz  
Shari L. Rolland Phillips  
Mike Rutkowski

3. Internal Governance

A. Minutes of January 21, 2012 Meeting of the Council

Minutes of the January 21, 2012, meeting of the Council had been previously distributed for the meeting. Upon motion by Rebecca Schnelz with support from Shaheen Imami, the minutes were approved, with amendment to the adjournment time, by a unanimous vote of all Council members present.

B. Treasurer Report

Shaheen Imami discussed the financial report through December 31, 2011, previously distributed with the Agenda for the meeting (Attachment 1). Mr. Imami indicated that the fund balance as of the end of December 31, 2011 was approximately $275,485.

Mr. Imami also requested that Council and committee members seeking reimbursement for expenses use the fillable Expense Reimbursement Form found on the State Bar of Michigan website to help mitigate errors.

C. Chairperson’s Report

George Gregory reported that the password protection issue for the Section Journal is on hold while the State Bar of Michigan seeks to develop a system by which the Journal can be accessed through the use of one common password.

Mr. Gregory stated that Gregory Conyers, Director of Diversity for the State Bar of Michigan, would be joining the Section meeting in April to discuss diversity and inclusion in the legal profession.

Mr. Gregory announced that the March 17 meeting of the Committee on Special Projects will again commence at 8:30 a.m. to allow ample time for a full agenda.
D. Standing Committee Reports

1. Committee on Special Projects

Jim Steward moved that the Council support House Substitute 1 for SB 92 [S01019’11 (H-1) Draft 2] with certain proposed amendments and grant Marguerite Lentz the authority to draft language that conforms with Council’s position (as attached to the minutes in Exhibit A); Marguerite Lentz supported the motion. A hand vote of Council members present was taken: 15 in support; 1 opposed, 1 abstaining, 6 absent. Materials with the proposed modifications were circulated at the meeting.

Jim Steward also moved that the Council oppose S04751’11 (S-2) Draft 1 Substitute for Senate Bill 907 (circulated with the meeting materials prior to the meeting) concerning modifications to MCL 211.7dd relative to the Michigan principal residence exemption; Jim Spica supported the motion. A hand vote of Council members present was taken: 17 in support; 0 opposed, 0 abstaining; 6 absent. It was noted that at the January meeting, Council adopted a position in support of the language that was subsequently introduced as the original SB 907.

2. Probate Institute

Tom Sweeney reported that the Dean of each of Michigan’s five law schools has been invited by the Section to attend the 54th Annual Probate & Estate Planning Institute at no cost. ICLE will cover the cost of three attendees. If more wish to attend, the Section will be asked to cover the cost.

3. State Bar Journal

Council discussed potential topics for a 2013 theme issue of the State Bar Journal. Powers of attorney is a potential theme topic.

4. Pamphlets

The Committee is working on revisions to the final three pamphlets to be revised and hopes to circulate them next month for comment.

5. Ethics

Josh Ard reported that the Committee is looking at current ethical issues concerning attorneys performing “ancillary” services to clients, such as selling insurance or burial spaces. Also, the Committee is exploring potential ethical issues that arise when an attorney is serving as a guardian or conservator.
6. Unauthorized Practice and Multidisciplinary Practice

George Gregory suggested that the Committee research the Michigan Supreme Court’s decisions concerning the definition of the practice of law as it relates to probate and estate planning. It was noted that the State Bar of Michigan has a committee that is currently reviewing Michigan law and exploring the practice of law definition.

7. Court Rules, Procedures and Forms

Marlaine Teahan reported that there will be a public hearing in May on ADM File No. 2011-30, which is an administrative order concerning changes to Michigan Court Rules covering appeals from probate court. The Section Council has already taken a position concerning the rules covered by this ADM.

Ms. Teahan also reported that our Section has been added to a committee of the Appellate Section and others formed to review MCR 7.215 for potential modifications concerning standards for publication of court opinions.

E. Ad Hoc Committees

1. Updating Michigan Estate/Trust Law

The Committee is working on adding commentary to the provisions being modified.

2. Insurance

Tom Sweeney reported that the Committee has given Becky Bechler of PAA draft language concerning insurable interests.

3. Online Guidance for Non-Lawyers

Rebecca Schnelz reported that the State Bar of Michigan self-help webpage (Michigan Online Legal Self-Help Center) will be taken down in the near future. There is a Solutions on Self Help Taskforce that was established by Justice Kelly of the Michigan Supreme Court and which is creating a dynamic site for users (lay persons) to obtain legal information and populate forms. The Taskforce is starting with family, housing, expungement and consumer matters but is hoping to have probate and estate planning information (and forms) available by the end of the year and is planning to engage attorneys to assist. In consideration of the status of the SBM website, the Committee was instructed to not do further work on proposed changes the SBM site other than to see to it that our Section pamphlets are made available and to relay the Section’s concerns about the use of forms.
4. Decanting

Jim Spica reported that there is an ABA taskforce to explore the tax effect of decanting. The U.S. Treasury is exploring this issue. Due to time constraints, the materials circulated with the February meeting agenda will be taken up in March.

5. Power of Attorney

See Committee on Special Projects report.

6. Transfer Tax

Lorraine New reported that Form 8949, which is a supplement to Schedule D, replaces Schedule D-1 for 2011 tax reporting. A handout was circulated. Ms. New also reported that for decedent’s dying in the first half of 2011, there may be an extension available to file a Federal estate tax return electing portability.

7. Guardianships, Conservatorships and End of Life

Connie Brigman reported that the Committee is still working on the DNRPA bill. Drafting of family consent legislation is on a slow track. Josh Ard noted that much of the focus of drafting a family consent statute is on the Patient Advocates authority, the extent to which end of life decisions should be restricted to certain persons, notice and timing of notice to family and whether a bill is desired at all.

Connie Brigman reported that the transfer of foreign guardianship legislation that was taken up by the Council in 2011 is currently in the House Judiciary Committee.

F. Specialty Areas and Liaisons

1. Probate Registers

Rebecca Schnelz noted the death of Jeanne Takenaga, Wayne County Probate Court Register.

2. Elder Law/Liaison to Elder Law Section

Several individuals at the meeting noted a problem with the tactics of HMS, a company on contract with DHS to pursue Medicaid recovery from the estates of deceased former Medicaid recipients. It was noted that Lauretta Murphy wrote an article on the topic of estate recovery which should be considered for publication in the Section Journal.

3. Family Law/Liaison to Family Law Section

Pat Ouellette offered to explore with the Family Law Section its reaction to the Solutions on Self-Help Taskforce plan to offer forms in the family law area on its
website. Pat also offered to join the Access to Records Workgroup and report on developments that may affect our Section.

4. Liaison to SCAO Forms Committee

Harold Schuitmaker raised the question concerning how to handle the filing with the probate court of old Wills that have a social security number on them. It was noted that there is a rule by which the Probate Court is required to redact part of the social security number.

G. Adjournment

There being no other business brought before the Council, George Gregory moved to adjourn; Shaheen supported. The meeting was adjourned at 11:43 a.m.

Respectfully submitted,

Amy Morrissey
Secretary
Exhibit A

The Section Council voted to support House Substitute 1 for Senate Bill 92 with the following amendments:

Section 2 be modified so that instead of two witnesses, a notary be required and that the language concerning execution by the principal be consistent with language concerning execution in the statutes dealing with deeds and the statute concerning notaries. Marguerite Lentz was charged with drafting language for this and the proposed draft language is as follows:

(2) A DURABLE POWER OF ATTORNEY UNDER THIS SECTION SHALL BE SIGNED VOLUNTARILY BY THE PRINCIPAL OR SIGNED BY A NOTARY PUBLIC ON THE PRINCIPAL’S BEHALF PURSUANT TO SECTION 33 OF THE MICHIGAN NOTARY PUBLIC ACT (MCL 55.293). THE DURABLE POWER OF ATTORNEY SHALL BE ACKNOWLEDGED BY THE PRINCIPAL BEFORE A NOTARY PUBLIC. THE NOTARY PUBLIC TAKING THE ACKNOWLEDGMENT SHALL ENDORSE ON THE DURABLE POWER OF ATTORNEY A CERTIFICATE OF THAT ACKNOWLEDGMENT AND THE TRUE DATE OF TAKING THE ACKNOWLEDGMENT.

Sections 3(D) and 4(D): add at the end of each section: "or by judicial order."

Sections 3(E) and 4(E): change "court order" to "judicial order."

Section 3(G): replace what is in the House Substitute with the following language:

(G) THE ATTORNEY-IN-FACT MAY BE LIABLE FOR ANY DAMAGE OR LOSS TO THE PRINCIPAL, AND MAY BE SUBJECT TO ANY OTHER AVAILABLE REMEDY, FOR BREACH OF FIDUCIARY DUTY OWED TO THE PRINCIPAL. IN THE DURABLE POWER OF ATTORNEY, THE PRINCIPAL MAY EXONERATE THE ATTORNEY-IN-FACT OF ANY LIABILITY TO THE PRINCIPAL FOR BREACH OF FIDUCIARY DUTY EXCEPT FOR ACTIONS COMMITTED BY THE ATTORNEY-IN-FACT IN BAD FAITH OR WITH RECKLESS INDIFFERENCE. AN EXONERATION CLAUSE IS NOT ENFORCEABLE IF INSERTED AS THE RESULT OF AN ABUSE BY THE ATTORNEY-IN-FACT OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP TO THE PRINCIPAL.

Section 4(G) be changed to conform with the change to Section 3(G). Marguerite Lentz was charged with drafting such language and the proposed draft is as follows:

(G) I MAY BE LIABLE FOR ANY DAMAGE OR LOSS TO THE PRINCIPAL, AND MAY BE SUBJECT TO ANY OTHER AVAILABLE REMEDY, FOR BREACH OF FIDUCIARY DUTY OWED TO THE PRINCIPAL. IN THE POWER OF ATTORNEY, THE PRINCIPAL MAY EXONERATE ME OF ANY LIABILITY TO THE PRINCIPAL FOR BREACH OF FIDUCIARY DUTY EXCEPT FOR ACTIONS COMMITTED BY ME IN BAD FAITH OR WITH RECKLESS INDIFFERENCE. AN EXONERATION CLAUSE IS NOT ENFORCEABLE IF INSERTED AS THE RESULT OF AN ABUSE BY ME OF A FIDUCIARY OR CONFIDENTIAL RELATIONSHIP TO THE PRINCIPAL.
Section 5 be modified to add "in good faith" in the second line after "complied" so that the first two lines read as follows:

(5) A THIRD PARTY IS NOT LIABLE TO THE PRINCIPAL OR ANY OTHER PERSON BECAUSE THE THIRD PARTY HAS COMPLIED IN GOOD FAITH WITH . . . .

This change will make the statute similar to the Michigan Trust Code, MCL 700.7912. (E.g., 700.7912(1) states that "A person other than a trust beneficiary who in good faith assists a trustee . . . ." 700.7912(2): "A person other than a trust beneficiary who in good faith deals with a trustee . . . ."