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

March 17, 2012
University Club
Lansing, Michigan

Minutes

1. Call to Order

The Chair of the Section, George Gregory called the meeting to order at 10:33 a.m.

2. Attendance

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

George Gregory, Chair             Hon. David Murkowski
Mark Harder, Chair Elect          Hon. Darlene O’Brien
Amy Morrissey, Secretary         Pat Ouellette
Susan Allan                       Rebecca Schnelz
Josh Ard                           Jim Spica
Chris Ballard                      Jim Steward
George Bearup                      Ellen Sugrue-Hyman
Constance Brigman                  Bob Taylor
David Kerr                         Marlaine Teahan
Meg Lentz                          Nancy Welber

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

Shaheen Imami                      Tom Sweeney
Rob Tiplady

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

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

Bob Brower                         Michael McClory
Phil Harter                        Doug Mielock
Nancy Little
E. Others in Attendance

- J.V. Anderton
- Michael W. Bartnik
- Brittany Catterick
- Rhonda M. Clark-Kreuer
- Steve Elkins
- Carol M. Hogan
- Fred Hoops
- Loukas Kalliantasis
- Mark E. Kellogg
- David P. Lucas
- Katie Lynwood
- Jeanne Murphy
- Lorraine New
- Neal Nusholtz
- Shari L. Rolland Phillips
- Mike Rutkowski
- Jason A. Switzer

3. Internal Governance

A. Minutes of February 18, 2012 Meeting of the Council

Minutes of the February 18, 2012, meeting of the Council had been previously distributed for the meeting. Upon motion by Mark Harder with support from David Kerr, the minutes were approved.

B. Treasurer Report

The Treasurer’s Report through January 31, 2012 was previously distributed with the Agenda for the meeting (Attachment 1). George Gregory, reporting in Shaheen Imami’s absence, indicated that the fund balance as of the end of January 31, 2012 was approximately $262,835. Upon motion by Pat Ouellette with support from George Gregory, the Treasurer’s Report was accepted.

C. Chairperson’s Report

George Gregory reported that the Hon. Robert H. Pytell passed away; Council sent a donation on his behalf.

Mr. Gregory reported that IllinoisLegalAid.org may be looking for an advisor from our Section.

A draft definition of the Practice of Law was circulated with the meeting materials prior to the meeting. Several meeting participants commented on the definition. Concerns were expressed that the draft language cites specific examples, but the list is not exclusive. Language regarding negotiations of legal rights in subparagraph 4 does not have the same limitations as in subparagraph 3. Concern was expressed about overreach of the language (entities/corporations represent themselves in contracts and in court all the time; real estate developers seek zoning change, etc.). A comment was made that the selection of legal documents is the practice of law. There are also concerns in the context of property owned by a Trustee. When real estate is owned by a trust, in the eviction of a tenant, does the Trustee need counsel? A trusteed IRA is a legal document; there are wealth planners and bankers preparing
documents; realtors prepare deeds. There is a Federal tax case where CPA tried to draft docs for entity merger and harm was done.

Mr. Gregory reported that Rebecca Schnelz is participating in the legal self-help symposium.

Mr. Gregory noted that the Nominating Committee (consisting of Nancy Little, Doug Mielock and Harold Schuitmaker) is working on recommendations to fill two open Council positions and 1 open officer position in the Fall. Those interested may contact the Nominating Committee. Criteria for membership are posted on the Section webpage and were recently printed in the Journal. Mr. Gregory announced that Robert Tiplady resigned as co-chair of the CSP due to scheduling conflicts.

D. Standing Committee Reports

1. Committee on Special Projects (CSP)

Jim Steward moved that the Council support House substitute for Senate Bill 92 [S0101’91 11 (H-2) Draft 1] with the exception of the signature line and that Marguerite Lentz be authorized make changes to the signature line. David Kerr supported the motion. A hand vote of Council members present was taken: 19 in support; 0 opposed, 1 abstaining, 3 absent. Materials with the proposed modifications were circulated at the meeting.

Jim Steward moved to support in principle Senate Bills 978, 979 and 980 circulated prior to the meeting. David Kerr supported the motion; A hand vote of Council members present was taken: 20 support, 0 oppose, 0 abstain, 3 absent. The three bills contain changes to Estates and Protected Individuals Code and the Power of Appointment Act of 1967 concerning decanting of trusts.

CSP recommends pursuing a family consent law.

2. Legislation

Marlaine Teahan reported that the substitute for HB 4639, amending MCL 700.3206 and 700.3209, passed the Legislature and was presented to the governor; it is anticipated that he will sign the bill into law. This bill would create a priority of persons with authority to make funeral and burial decisions for members of the armed forces, reserves, and Michigan national guard. The presumptions are very similar to other statutes concerning priority to make funeral decisions for the general population.

3. Annual Probate Institute

Mike McClory reported on the bike outing which is an activity planned during the Institute. Mr. McClory requested that $200 be designated from Hearts and Flowers
fund to support the Cherry Capital Cycling Club which helps with the event. Council supported; 1 member abstained.

4. Section Journal

Nancy Little reported that there will be a procedure to allow members to elect to receive the Journal electronically or in hard copy. There was discussion concerning how such preference would be expressed by members. It was suggested that survey monkey be used. Nancy Little made a motion, supported by Marguerite Lentz, to authorize use of $300 from Section funds for this purpose; the motion was unanimously approved. The State Bar of Michigan has a survey monkey so there may be little or no cost. It was suggested that there be follow-up with those who do not respond rather than making assumptions.

Nancy Little has been talking to Liisa Speaker about potential appellate issues for the Journal.

Hon. David Murkowski reported that at a recent meeting of the Michigan Probate Judges, several judges praised articles that appeared in the Section Journal, particularly on estate recovery and review of case law on extrinsic evidence.

5. Ethics

David Kerr reported that the Master Lawyers Section Council is considering a change in Rule 2 of the State Bar of Michigan Rules which would require all attorneys to appoint another attorney to inventory files in the event of death or disability. It was suggested that SBM could have some forms to address this issue.

6. Court Rules/Forms

Marlaine Teahan reported that a committee of the Michigan Court of Appeals is looking at Michigan Court Rule 7.215 concerning the standards for publication of Michigan Court of Appeals cases. If there is no recommendation in the near future, our Section, the Appellate Practice Section and Family Law section have agreed to propose action.

An ad hoc committee of the Appellate Practice Section took a position on MCR 5.801 differing from our Section’s position, so we need to work on a unified approach to submit comment. Attorney Allan Falk has submitted a comment that the concept being proposed is unconstitutional. The comment period for changes to MCR 5.801 ends May 1.

E. Ad Hoc Committees

1. Insurance

In 2010, NCCUSL recommended language concerning insurable interests. Our Section Insurance Committee has drafted a bill that is ready to be introduced. Mark
Harder reported that in the language, a trustee of a trust would have an insurable interest if the person to be insured is the settlor of the trust or someone in whom the settlor had an insurable interest. The insurance proceeds must benefit someone who has an insurable interest or a person related to the third degree or closer or a stepchild. The only open question is whether the language that refers to persons related by “law” is clear. Should the word “affinity” replace “law”? The concept of affinity is well established. The proposed language does not address business interests, domestic partners, or charities.

A number of states have also introduced legislation that protects trustees from decisions concerning the purchase of life insurance.

2. Online Guidance for Non-Lawyers

It was suggested that an invitation be extended to participants on the listserv to participate in the discussion concerning online guidance for non-lawyers.

3. Statute of Repose

Doug Mielock moved that Council support the Committee’s recommended modified language of 09055’12 Draft 1 that was circulated to Council prior to the meeting; Nancy Little supported the motion. A hand vote of Council members present was taken: 19 in support; 0 opposed, 1 abstaining, 3 absent. See attached Exhibit A for the proposed language.

4. Transfer Tax

Lorraine New reported that most tax returns are not accepted at IRS offices; however, taxpayer services will accept certain individual returns and checks. Bulk returns must be filed by mail.

5. Guardianships, Conservatorships and End of Life

Connie Brigman reported that work on DNRPA is still in progress; details are being discussed among the interested groups, such as specific guardian ad litem duties and a guardian’s duty to communicate with the ward and to inform the court about DNR. Other interest groups are adding comments.

F. Specialty Areas and Liaisons

1. Charitable

Chris Ballard reported that there was a recent change to the Michigan income tax rules which requires withholding for pensions and that such rule change may affect charitable gift annuities.
2. ICLE

Jeanne Murphy reported that 80% of the work on content for the Section website has been completed. She expects to give a presentation in April.

3. Family Law/Liaison to Family Law Section

Pat Ouellette talked to the Family Law Section Council about forms for do-it-yourself divorces and concerns were expressed.

4. Tax Section Liaison

Fred Hoops reported that the Annual Tax Section conference is May 1; it’s the 25th anniversary; it will include topics on estates and trusts.

5. Consumer Law Section

Josh Ard discussed the potential development by the Section of a program about debt issues that arise in estate recovery in decedent’s estates.

G. Other Business

Janet Welch, Executive Director of the State Bar of Michigan (SBM), was present to address concerns raised in recent emails on the Section listerv about the SBM’s role in online legal form development and the assertion that the promotion of such forms is undermining the practice of law.

Ms. Welch reported that the presence of the online form Durable Power of Attorney for Health Care posted on the Elder Law & Disability Section webpage is what appears to have prompted the listerv discussion concerning the SBM’s role in form development. Ms. Welch noted that the SBM itself is not advertising the availability of these forms to the public. Rather, the forms in question were posted on the Elder Law & Disability webpage. The SBM has tried to limit its regulation of content posted by Sections on their webpages.

Ms. Welch expressed to the meeting participants that this issue of form availability on the webpage of a Section of the SBM is arising at the same time that the Supreme Court has created the Solutions on Self Help Task Force (SOSTF) to explore the creation of a legal self-help website; the SBM is not sponsoring this effort, but the State Bar Foundation has provided some of the funding (initial, not ongoing funding), and staff of the SBM have been appointed to the SOSTF, including Ms. Welch. It was noted that Linda Rexer, Executive Director of the State Bar Foundation, is co-chair of the SOSTF.

Ms. Welch explained that the SOSTF was established to address the finding that more individuals are coming to court unrepresented due to the lack of resources to provide free legal aid for the indigent and affordable legal services for all others. The SOSTF is working on addressing the overflow at the court. Ms. Welch expressed that
it is her personal hope is that it might be possible to craft a carefully designed website that will attract the market that is now flocking to for-profit online legal websites. If we can lure the public away from those sites, and educate them about the value of professional legal services, explaining the risks of attempting to proceed without a lawyer. Ms Welch mentioned the self-help project in Illinois, and there is a general belief that Illinois practitioners like it.

Comments from Section members present at the meeting were as follows: David Kerr sees problems with online forms covering matters that are not immediately going to court because problems arising from use of the forms may not become apparent immediately. Nancy Little raised a concern about the Durable Power of Attorney available on the Elder Law & Disability Section webpage; she pointed out this particular form has a springing power but no language making the power durable. Members of the Elder Law & Disability Section present at the meeting expressed that they would convey these concerns to the Council of the Elder Law & Disability Section. Mark Harder conveyed concerns expressed by practitioners that the SBM is not supporting the fight against the unauthorized practice of law. Mr. Harder supports educating the public about need for attorneys, but believes that our Section should not participate in the development of forms. Other Section members present expressed concerns about how forms and related instructions would be kept current. Jeanne Murphy from ICLE mentioned that ICLE has paid staff members who continually review ICLE’s formbank for necessary updates; this is an ongoing task. Who is going to do this task for the Solutions on Self Help website and ensure the information is both accurate and current? Could there be liability resulting from posting the forms? Misuse of online forms can create significant harm. Legal advice is needed to decide which forms to use. It was noted that non-attorneys are not permitted to access probate forms in Kansas.

There needs to be more analysis of the content on Section websites. Ms. Welch stated that neither the Board of Commissioners nor the Representative Assembly has weighed in on the forms issue, but the Representative Assembly has addressed unauthorized practice of law issues. Concerns about the Solutions on Self Help Task Force website should be directed to Linda Rexer.

H. Adjournment

There being no other business brought before the Council, Marguerite Lentz moved to adjourn and Mark Harder supported the motion. The meeting was adjourned at 12:40 p.m.

Respectfully submitted,

Amy Morrissey
Secretary