

**Washington State Bar Association
WSBA Legislative Committee Meeting
WSBA Seattle
October 9, 2009**

Minutes taken by Richard Bartholomew

Members present: Kathleen Coghlan, Chair; Rick Bartholomew, Vice-chair; Pat Aylward; Watson Blair; John Cary; Janet Chung; Fred Corbit; Marilyn Endriss; Claudia Gowan; Ryan Patrick Harkins; Kenneth Henrikson; Taudd Hume; Ray W. Kahler; Peter Karademos; Martha Lantz; Donald Law; C. Dean Little; Merrilee MacLean; Cynthia Morgan; Sean O'Donnell; Jon Ostlund; Geoffrey Revelle; Sally Savage; Klaus Snyder; Brian Sommer.

Members not in attendance: Lisa Brodoff; Lise Ellner; Michael Guadagno; Mark Matthew Miller; D. Roger Reed; Mark Rising; Suchi Sharma; Connie Wan

Also present: N. Elizabeth McCaw, WSBA Real Property, Probate & Trust Section; Kathleen Schmidt, WSBA Family Law Section; Karen Boxx; WSBA Real Property, Probate & Trust Section; Gail Stone; Jeanne Cushman; Diane Froslic

Meeting opened at 1:10 p.m.

Introductions were made and a roster of current members was distributed.

Third meeting upcoming: November 6 at SeaTac Radisson. Legal Stakeholders are invited to exchange information regarding their 2010 legislative proposals. Stakeholder meeting at 10:00 AM and Legislative Committee meeting begins at 1:00 PM.

1. Proposed revisions to RCW 6.15. Beth McCaw and Claudia Gowan. RPPT Section.

Primary section changes.

1. 6:15.010. Certain education savings accounts are protected from attachment. GET program funds are protected. There are two other plans, available to college professors in sections 529 and 530 of the IRC. Bill would expand exemptions to these two plans.

Huge public policy in favor of savings.

There is a two-year window in the statute. Exemption would only apply to contributions made two years before.

Creditor Debtor people are in support of the bill.

2. 6.15.020. This statute protects retirement savings and employee benefits. Medical savings are exempt. Health savings accounts are not. This bill would cover both accounts. Health savings accounts are under different sections of the IRS code.

403(b) plans (medical annuities) are also covered. You can put money in custodial accounts as well as annuity contracts. The bill would cover both instead of only one.

IRA annuities are not included and this statute would include them. This is to be consistent throughout the statute.

Some of these plans were probably inadvertently excluded when the Bar worked on this law previously, or the plans were developed after our current statute was in effect.

We cannot affect ERISA plans because of pre-emption.

Case law will not allow a statute to refer to future federal legislation so we need an amendment every time the IRS code on these issues is changed.

The bill started as an estate planning issue and then the Estates and Trusts Section started cleaning up the other sections. Some of the bill is cleanup, as opposed to substantive change. The section would like the WSBA to sponsor the bill.

Motion to sponsor made by Fred Corbett and seconded by Dean Little:

In favor: 24

Opposed: 0

Abstentions: 0 Passed.

2. Creditor Debtor Rights Section exemption proposal pulled from agenda; will be discussed next month.

3. Proposed revisions to Washington Trust Code. Beth McCaw and Karen Boxx of RPPT Section.

Bill has been to American College of Trust and Estate, Elder Law, King County, and other stakeholders, including Judges' Association and banker's.

Received comments from some groups.

Task force was to look at Uniform Trust Code, adopted in 2000. Was to clarify trust law. There were clarifications more than changes.

UTC (Uniform Trust Code) is nine years old. Several states have adopted it wholesale. Workgroup looked at it and decided not to take approach of adopting UTC and tweaking what they didn't like. They decided instead to take what they liked out of UTC and change WA law.

Primary changes are pointed out in the memo included with the meeting materials.

1. Clarification of trustee's duty to give notice.

A lot of trust lawyers thought trustees did not have to tell beneficiaries that trust existed, but common law requires it. The bill picks up this duty, but has safe harbors. Now have to give notice, but clarifies who you have to give notice to, and how to limit who gets notice. Regularly got input from RPPT section. Took votes at mid-year meetings in June. This section spells out duty to give notice and provides safe harbor regarding ongoing duty of notice, which was not in UTC. Changed statute re doctrine of virtual representation in 11.96A – you can give notice to someone higher up on the chain, which is sufficient for notice to those lower on the chain if same interests. This is expanded to simplify and narrow who gets notice. e.g., contingent beneficiaries may not need notice.

Power of appointment can be kept secret if they don't want beneficiary to know; e.g., grandparents setting up trusts for grandchildren. You can draft the trust to limit notice.

Some attorneys thought you did not need to notify beneficiaries. This has caused litigation, especially in other states. This proposed legislation clarifies the need for notice and gives safe harbor.

2. Statute of limitations on trustees' liability is now hooked to this notice requirement. Triggers statute of limitations if notice given at certain times.

The statute of limitations in the bill is one year once the trustee has sent a report of trust activity that adequately discloses the existence of a potential claim. Are there tolling provisions? Some people not very sophisticated and won't figure out there was a problem in a year. Is there any protection that allows for tolling? You only get benefit of statute if basis of claim is fully disclosed.

Statute of limitations is a good concept, but one year is very short. Negligence is three years, fraud is four. Statute does not say what kind of claim is limited by the statute of frauds. Extending this a little bit might be a good idea.

Under current law, the trustee can do an accounting, and if judge approves accounting that is the trustee's safe harbor. If we need a longer statute of limitations, then let's do that.

The problem that this is trying to solve is that if there is a trust that is 30 years old, a negligent 1972 investment can be brought up. Only way around that is to get a court approved accounting, which is expensive because an outside person has to look at it. On the east coast that is the practice, which is why trusts are more expensive there. The UTC has a one year statute of limitations to protect the trustees without costing the trust too much.

The language does say that report must adequately disclose the existence of a potential claim.

Comment: More comfortable with three years instead of one. This is also a situation where trustee has control over the situation. What does "disclosure of potential claim" mean? This is defined at page 12 of the materials.

Sec 7(b) states that a report is presumed to provide sufficient information if it meets the statutory criteria.

No negative feedback from stakeholders on this section. Elder Law Section specifically supported the one year statute of limitations.

3. Revocable living trusts – 11.120 – new chapter.

This is an alternate estate plan that is becoming more popular. UTC has a separate section on rules applicable to revocable living trusts. There was a lot of support for this. e.g., how you revoke a revocable living trust.

Statute of limitation on attacking a revocable living trust is in the bill. The UTC addressed this and we picked up on it. This mirrors provisions re closing probate with a will.

Capacity to sign a revocable living trust is covered.

There is an "industry" that creates revocable living trusts, perhaps the unlicensed practice of law. They may be upset about this. No new authority for them in the bill.

4. Trust situs: Venue 11.96A.050 – The bill has a major change in this area.

New section added to 11.98. This defines situs of trust. WA instrument of trust, and some connections here, and the connections are defined here. If trust is silent regarding governing law or situs, you can register the trust (created a trust registry) as a WA trust. Give notice to beneficiaries who can object. Gives access to WA court and WA laws. The trustor is supposed to make the call as to situs. If not, then the trustee and beneficiaries can determine situs. There is also a default provision if there is no agreement.

If a trust is registered as a WA trust, a certificate must be filed with the court, which generates a filing fee. You have to terminate the registration if you move the trust. There were

no comments from the courts on this. May need to talk to court clerks about this. Should there be a sunset provision or renewal on trust registrations? Notice to clerk when trust terminates?

We can talk to the clerks about this issue. What do to with certificates, renewals, etc?

Venue coordinates with this as well under the bill.

Used UTC provisions for changing trust situs.

5. Duty of loyalty – Section 32 of the bill. Taken from UTC. Not codified in WA. UTC codified it. Departed from UTC’s definition somewhat. UTC clarifies when a trustee can use the defense of fairness and when the “no further inquiry” rule applies. Attempt to draw clear lines around self-dealing as opposed to duty of care. Safe harbors are there that banks like. If no self-dealing, banks still wants to be able to use their bank side when they are trustees. And this is spelled out in the statute.

Cut out language regarding transactions between beneficiary and trustee that have nothing to do with trust, which would be voidable by trustee under UTC unless trustee can prove the transaction was fair. There is case law where there is liable if trustee violates his trust even in agreements not related to trust, if trustee threatens something about trust unless beneficiary does something in the unrelated transaction.

There is already language in statute regarding the trustee’s duty of impartiality among beneficiaries.

6. Wrap up provisions

Reformation to correct mistakes – UTC Sec 415

To conform the trust to the trustor’s intent. May be reformed by court or by non-judicial agreement is the proposal. This is a change, but it is the trend. Uniform Probate Code has this provision for wills so we should add it to trusts. Right now if mistake is made, the court must enforce the trust or come up with creative ways to try to fix the trust.

This may open a Pandora’s Box of problems for disappointed people. But that has not been the experience in other states that have adopted the UTC. But it is similar to what can be done with wills with, for example, pretermitted heirs. But there is a clear and convincing burden of proof. Even the Restatement has gone this way. But could make litigation more expensive, unless these are subject to TEDRA, which the parties have to pay for (but not mandatory). Commenters were not worried about results but about the potential cost to courts. This concern did not come to fruition regarding pretermitted heirs.

Noncharitable trust without ascertainable beneficiaries

For example, a trust that provides a reward for a specific action but names no specific beneficiaries would now be allowed. Limits time period to 21 years.

Cy pres

Equitable power of court to reform a charitable trust. Loosens current language.

Elder Law Section concerns are addressed.

There will be more talk about statute of limitations and damages section.

This will be brought back for November meeting.

4. Family Law Section bill regarding child support – Kathleen Schmidt

The materials include Child Support 101 memo.

Lots of pro se litigants throughout the state. Over 70% of cases have neither party represented. The materials walk through what family law attorneys and pro ses do regarding child support.

Income shares model: Combine parents' income (WA uses net income). Some states use gross incomes. One issue is how to get to the net figure. WA law allows certain things be deducted to get to net. There is a Support Calculation program. Social Security, income tax, mandatory retirement can be deducted. Now can deduct up to \$5000 in voluntary retirement.

Current table starts at \$1000 and ends at \$12000 combined net incomes. Prior to that, the table was from \$600 to \$7000. 2000 census figures show a significant percentage of families had combined net income of over \$80,000.

We supported raising limit. We would like it to go to \$20,000.

The new table extrapolated from \$7000 to \$12000. Case law says that extrapolating when the table ended at \$7000 is not okay. But Rep. Moeller's bill does just that (but in the form of a statute).

Rep. Moeller wanted to make some real changes. As combined incomes increases, costs of raising children do not go up proportionately. At some point, this cost flat lines. Our proposal will reduce some of the changes that have been recently introduced.

Materials contain some scenarios regarding support. Page 4 – 10 of the materials shows the old table lined out. Each parent's percentage of total net income is utilized in various places.

Right now we have category A (up to age 11) and category B (over 11). New schedule eliminates the two categories. There is data to support the conclusion that the amount to raise younger children, middle age, and older children, is fairly the same.

Old schedule overstated the cost of rearing older kids and understated costs of younger children.

New schedule was determined by economists. Down for the older child and up for the younger child.

67% of all orders in WA are set for only one child, fewer than 10% of orders are for three kids or more, majority of people don't go back to modify support.

Current statute stops at \$12000. Court has discretion over that number but must consider all factors, including standard of living etc. Courts seldom go over the table's limit. A lot of people have combined incomes of over \$12000.

We are federally mandated to look at support every four years. The last time we did a study was 1991. States that do this regularly adopt more gradual changes.

Unusually courts do not go above top of schedule even if people have much higher incomes.

Our proposal comes from two economic studies.

We want to change some deviations to adjustments. Court can deviate now regarding kids from other relationships, split custody, shared time arrangements. We want to make these adjustments.

1. Shared time. Current statute says if you spend "significant amount of time" – not defined – you can have a deviation. We want a formula. Judges don't like our proposal, thinking that it would cause more litigation and limit their discretion. But we don't think so. We want to define these items. 50% is significant time. Is 40%? Is 30%? We are proposing an adjustment starting at 33% of the time. What is the measure of this time? Overnight?

Just during the day? We think overnights should be used. Under our proposal, there would be a credit if over 33% based on a formula. Without credit for having the kid, there is no recognition of the paying parent's expenses with respect to the child. Use 1.5 multiplier and cross credit. This is more fully explained in the materials and in the statute. Still, a standard to not adjust so it results in insufficient funds to meet the basic needs of the children.

2. Children of other relationships. DCS applies whole family formula. Recent case says need findings to look at circumstances. We want the statute to apply a formula but still use the insufficient funds standard. Judges are worried about what effect this has on "first" families.

At an annual meeting and on a family law publication, we asked the section about these issues. The consensus was these are issues that need to be addressed. We then had a summit at the WSBA office and the stakeholders also had a consensus that this needs to be done.

Politically, in family law, everyone has experience and an opinion.

Motion to sponsor by Pete Karademos, seconded by Don Law.

Question: What down side is there for the WSBA? Gail Stone said it will be a resource issue. Some stakeholders don't want to open this can of worms. We need a sponsor first. We believe this is good for kids and for families. The resource issue should be made at the BOG level.

Legislature passed last year's bill without a nay vote.

Is there a problem with the judges' association? Our obligation is to go forward with what we as a bar think is good even if we disagree with the judges.

Call for question:

In favor of sponsoring bill: 20

Opposed: 0

Abstain: 2

Adjourned at 5:10 p.m.