

**Washington State Bar Association  
WSBA Legislative Committee Meeting  
WSBA Seattle  
September 16, 2010**

**Minutes taken by Kathleen Kim Coghlan**

**Members present:** Pat Aylward; Watson Blair; Lisa Brodoff; John Cary; Kathleen Kim Coghlan; Fred Corbit; Marilyn Endriss; Claudia Gowan; Ryan Patrick Harkins; Kenneth Henrikson; Taud Hume; Ray W. Kahler; Martha Lantz; Donald Law; C. Dean Little; Sean O'Donnell, Vice Chair; Amit Ranade; D. Roger Reed; Geoffrey Revelle; Kyle Sciuchetti; Suchi Sharma; Klaus Snyder; Brian Sommer; Carrie Valladares; Connie Wan; Sara L. Watkins.

**Members not in attendance:** Rick Bartholomew, Chair; Peter Karademos; Merrilee MacLean; Mark Matthew Miller; Cynthia Morgan; Jon Ostlund; Mark Rising.

**Also present:** John Reed and Mike Hutchings, WSBA Business Law Section; Rob Nettleton, WSBA Elder Law Section; Steve Larsen; Kathryn Leathers; Diane Froslic.

Meeting called to order at 1:06 p.m. by Sean O'Donnell. Rick Bartholomew is out of town.

Sean introduced Kathryn Leathers, she is an attorney and is the staff person for the committee as well as the lobbyist for the WSBA. Introductions around the table.

**1. Guardianship, implementing recommendations from the WSBA Elder Law's Guardianship Task Force, Z-0138.1.**

Rob Nettleton is speaking for the Task Force and will explain proposal. Nettleton is chair of the Section. This proposal is the result of committee work on the Office of Guardianship and concern about how the system operates. Questions about guardianships can't be answered because there is no data. There are probably about 16,000 active guardianship cases. Legislators had a lot of anecdotal stories, but it was hard to accurately respond due to no data. The Task Force was formed to address this. They tried to choose a cross section of practitioners. They started with a state wide questionnaire. Practice varied widely from county and county. Certified professional guardians are regulated, but that leaves about 12,000 cases, not regulated. The Task Force Report has a number of suggestions, the Task Force tried to be budget aware. They think Spokane County has best system with paid overseers, but there are not funds to do this in all counties.

1. System at present is inconsistent, different time frames for final reports, 60 or 90 days. They recommend 90 days, 30 not enough to do proper report.
2. Having a court hearing on reports should be mandatory, instead of permissive as now.
3. When the Court appoints a guardian it should set a hearing to review inventory, now the court can also have hearing on personal guardians, to review their care.
4. After every hearing, set a date for new hearing.

5. Have “expiring letters of guardianship” to be sure guardian makes a report. Concept of letters was borrowed from testamentary law. Court can then review report, deny or approve or renew letters.
6. This would create statewide, uniform system (now about half counties do something, but we don’t know what).
7. These changes would have a negative budget effect, but, due to effect of guardianship depriving person of civil rights, legislation is so important, cost isn’t primary thing.

W. Blair is concerned about the Task Force provisions because it places oversight duties on the courts, he says the state should be doing this, not turn duties over to the courts, this takes away independence of judiciary. Judiciary is only place to get a hearing and yet the recommendations also make the courts the administrator. He thinks this came because legislators asked King County commissioner to do it because legislature didn’t have funding.

He asks how a guardian resigns, just with expiring letters of guardianship?

Nettleton says it appears many reports aren’t filed, the letters will get guardian back into court, he disagrees about administrative point, He says establishing guardianship can be contested, so there is opportunity for hearing. The guardians are officers of court, the person who is guarded should always get notice. It’s difficult to balance interests.

J. Cary joins W. Blair’s objection, he thinks there should be a state agency. There is no way for the judge to judge a report in an uncontested case.

F. Corbit says in bankruptcy court, the debtor is required to file reports, but the judge doesn’t lose his independence. He wonders if the Task Force report is unanimous, because he respects members of task force.

D. Little also agrees with Watson, but thinks filing reports is better than nothing.

Nettleton says if you get reports, then you can go for more, spoke to state agency for professional guardians, they said you need more training to analyze reports.

Task force also allows judges to appoint guardian ad litem. Spokane system provides a professional to analyze reports and house visit to check up. Task Force knows we need more, but can’t get it through legislature.

S. O’Donnell asks if there is a cost analysis. Kathryn asked State office for fiscal note, their system is being overhauled and can’t do it until late October. So they are contacting counties and ask them for cost estimates, but no response yet.

Nettleton has met and will meet with Superior Judges Association, they indicated they would support it. Biggest counties (with most guardianships) are doing something (16 out of 33 counties) but no consistency.

C. Wan asks who can get into the court record and check what’s happened. Nettleton says “any interested person,” even care facility can do it. But unless the reports are filed and family notices, there is nothing to review. If court screws up they have judicial immunity. State doesn’t have liability either, unless professional guardian is appointed. Professional guardians have a bond and E and O insurance.

R. Reed has litigated in this area, says consistent system is vital. He is OK with court supervision, because you can go to court immediately. He supports the proposal. He **moves we approve recommendation of committee for sponsorship.**

R. Harkins notes that people injured in personal injury case can get guardian, but that is a special process and by this proposal. Also issue of a minor person, concern about expense of reporting and annual hearing. This is not as much for minors, due to SPR.

J. Cary asks how uniform the process would be under proposal. Nettleton says the proposal requires two reports, their contents may differ.

Nettleton says most counties support idea; cost is the issue.

**Motion has been seconded.**

D. Little asks if this is the most efficient way to do this.

P. Karademos made a motion to sponsor the bill. It was seconded.

**D. Little moves the question, K. Coghlan second.**

B. Sommers notes that the Task Force proposals will have significant impact on the judiciary, and thinks it premature to act until we have the opinion of the Superior Court Judges Association. He is also concerned about the fiscal impact of the proposal and again thinks it is premature to sponsor the proposal until there is a fiscal impact statement.

The fiscal issue is discussed, I address it as does Kathryn, bills that cost won't proceed, but that that will dealt with later in process.

In favor: 23

Opposed: 1

Passed.

Pat Aylward describes, for the committee, the difference between the support and sponsor or a proposal.

## **2. Corporations: Proposed revisions to the Washington Business Law Section, Corporate Act Revision Committee (CARC).**

John Reed and Mike Hutchings discuss the proposed legislation.

1. Sets forth limits of shareholders' ability to pass bylaws that limits the authority of a board of directors and describes what authority can't be limited
2. Force the vote provision. Arises in merger and acquisition arena. Such a provision allows a board of directors to commit to a shareholder vote on a merger even if the board later changes its recommendation about the merger.
3. Adding statute to indemnification provisions that after something arises that might give rise to right of indemnification, that that right can't be withdrawn.
4. Uniformity, clarity, and competitiveness are goals of corporate division. WA is Uniform Act state, we want legislation to remain uniform. The new amendments are in accord with Revised Model Act new revisions.
5. Clarity, to make legislation clearer and eliminate some traps for the unwary, doesn't really change current law, but removes ambiguities or addresses a silent area like retroactive removal of indemnity rights.
6. Competitiveness, want to stay competitive vis a vis other states, so WA lawyers can recommend incorporation in WA.
7. This proposal has received no negative comments. It has received no comments at all. It was circulated to the WSBA Litigation and Corporate Sections. Also the Trial Lawyers Association and to the ABA Committee on Corporate Laws, no response.
8. Bylaw amendments - corporations are managed by their board of directors. With two exceptions, the articles of incorporation can modify the board of director management and

board of director management may be changed by unanimous resolution of shareholders. Shareholders and directors can amend bylaws. Shareholders can adopt a bylaw that states that the directors can't amend it. Bylaws can contain any subject that isn't illegal or conflict with the articles of incorporation. There is some inconsistency in this. See California case. Case dealt with issue whether bylaw adopted by shareholders that said directors have to reimburse shareholders' proxy expenses, court decided Delaware law didn't allow such a bylaw, couldn't limit board of directors substantive powers to manage corporation or limit their fiduciary powers. Delaware legislature later allowed proxy expense reimbursement.

9. Washington decided that this should be done here and that there were other possible bylaws that could be illegal. Pass a law that says what is permissible or not.
10. Current WA law allows shareholders to pass any bylaw at all, conflicts with another provision of corporate statute that say nothing can impair board of directors' right to manage corporation.
11. So proposal says board of directors has exclusive right to substantively manage corp. Shareholders can mess with processes.
12. Remaining changes conform to that concept or, in one case, supplied a missing cross reference.
13. Mike addresses Phase 2 and 3. Force the vote - continue the purpose of RCW 23B, it enables corporations to decide for themselves how to govern. Also generally slightly favors shareholders. Two reasons to address: to conform to Model Code, a corporation during merger and acquisition can agree to submit to shareholders regardless of what happens between approval and submission. Proposal says that board of directors can say they will submit to shareholders no matter what happens. Board of directors can withdraw approval even if they still submit to shareholder vote. Another reason is that Delaware court looked to their state law which specifically said it could be done. These provisions can enhance price, because it makes the deal more secure. So new Section, Chapter 23B.08 RCW.
14. Vesting of indemnification rights - when in time can rules be changed. Indemnification of Officers and Directors. It is important. In Delaware in 2008 a director left the corporation and after he left, he was sued for action while a director. While on board he had indemnity rights, but his indemnification rights were changed after he left. The court said the statute was silent on when this can happen and invited the legislature to address it. State changed the law to disallow retroactive changes of indemnification rights, unless there was a bylaw that specifically said the corporation could make such changes.
15. Proposal mirrors Delaware law.
16. Questions: J. Cary asks re procedure asks J. Reed to describe the Corporate Revision Act Committee. Reed says there are about 12 members of diverse geographic and practice area backgrounds and describes their process. Says they have no litigator (asked about a shareholder representative as litigator). Asked if Committee has input from medium size firms, John says not directly, unless on a referral to the committee.
17. It appears the SEC is not taking action regards the Delaware case.
18. This proposal is more general than the specific case.

J. Cary moves that Committee Recommend to the WSBA Board of Governors that we sponsor all three proposals. P. Alyward seconds.

19. Question is what is Legislature likely to raise about this. John says not much, no fiscal impact. Maybe people who represent shareholder groups think it doesn't go far enough, the

proxy issue should be specifically mentioned in statute. The CARC thought that wasn't necessary, as present proposal is actually broader and will cover more.

In favor: 24  
Opposed: 00  
Abstaining: 0

### **3. Notice of refiled proposal from 2010. Revisions to Washington Trust Code, Z-0074.1**

Karen Boxx, WSBA real Property, Probate & Trusts Law Section is not here, but is willing to come again. Kathryn Leathers addresses it. Question is whether to adopt the Uniform Law in whole or part. Decided to go for part of the Uniform Law. In 2009 this Committee approved the law as did the Board of Governors, but it was a short session and so the proposed statute didn't get anywhere. Since then there was an interim House Judiciary workshop, Boxx presented there. No negative comments after being sent out to everyone they could think of. Kathryn compared 2009 and this bill, any changes she thinks are technical, she has spreadsheet. Still three years statute of limitation. We don't need to vote again, the 2009 motion to sponsor is carried forward.

### **4. Escrow Legislation and Lawsuit Update.**

Kathryn Leathers provided update. Escrow bill, HB 2564, was passed last session and there is a subsequent lawsuit. Section 2 of bill is the problem. Subsection 2 of Section 2 seems to imply that attorneys could be subject to its regulations. The Board of Governors created a task force, chaired by Gov. Nancy Isserlis. Private attorneys wanted to bring suit on separation of powers. Superior Court Judge punted to Supreme Court for ruling. We are awaiting ruling. Kathryn says language is problematic, seems to scoop up any attorney who practices in this area. DFI didn't intend to regulate attorneys.

### **5. Legislative Elections Update.**

Kathryn addresses this. Thinks elections will be very interesting. House may get 13 or 14 new Republicans. To change majority, in Senate you need 7 new Republicans. House has 19 close races, 8 to 10 will probably change. Majority leaderships probably won't change. In Senate 8 races might change. Probably end up with 25-24, still Democratic majority. In both houses Judiciary Committee chairmanship probably won't change. Ten attorneys in House, only three in Senate. There are almost 60 initiatives, 6 or 7 on repeal of junk food taxes. An income tax initiative. Another reinstating requirement of 2/3 votes to raise taxes. She doesn't like initiatives, they are poorly drafted. Budget is a big deal for all; legislature will focus there instead of policy. Revenue forecast is very bad, \$550 million deficit. Next biennium it's \$4.5 billion. Expect six percent across board agency cuts.

### **6. Housekeeping**

She had trouble getting materials ready in time (mid-September). That has been a problem for years. Pat and I addressed this saying in years past we got things way to late. Their proposals couldn't be appropriately vetted and people couldn't come back so the process couldn't be completed in time to be presented to the legislature. Some thought about moving meeting about two weeks later.

Do we want to get materials or snail or email? Opinion both ways. Kathryn will send out email asking us about this.

Future meetings:

October 14, WSBA Seattle.

November 5, Seattle Airport Marriott Hotel. Stakeholders meet in morning and WSBA Legislative Committee members are encouraged to attend. The regular WSBA Legislative Committee meeting will begin at 1:00 following buffet luncheon.

Meeting adjourned at 3:50 p.m.