

**Washington State Bar Association
LEGISLATIVE COMMITTEE
Meeting Minutes_SEPTEMBER 26, 2011**

<p><u>Members Present</u> J. Patrick Aylward Richard L. Bartholomew, Chair Watson Blair John Cary Kathleen K. Coghlan Fred Corbit Marilyn Endriss Paul Fjelstad Claudia Gowan Ryan Harkins Ken Henrikson Taud Hume Ray Kahler Martha Patricia Lantz Don Law Dean Little D. Roger Reed Mark F. Rising Kyle D. Sciuchetti Suchi Sharma Klaus Otto Snyder Brian Sommer Catherine Szurek Sara Watkins</p>	<p><u>Members not in attendance</u> Pete Karademos Matt Le Master Merrilee MacLean Sean O'Donnell Amit Ranade Geoffrey G. Revelle Connie Taylor Carrie Valladares Connie Wan</p> <p><u>Additional Individuals Present</u> Michele G. Radosevich, WSBA President-elect Ben Porter, WSBA Taxation Section Al Falk, WSBA Real Property, Probate & Trust Section Luke Thomas, WSBA Real Property, Probate & Trust Section Corey Denevan, WSBA Elder Law Section Jackson Maynard, Senate Republican Caucus Kelly Pfundheller, House Non-partisan Staff, Judiciary Committee Kathryn Leathers, WSBA Legislative Liaison Diane Froslic, WSBA Legislative Assistant</p>
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The meeting was called to order at 1:00 p.m. by Rick Bartholomew, Chair, at the WSBA Seattle office. A quorum was present.

Introductions were made by all those present. WSBA President-elect Michelle Radosevich was in attendance, and she thanked the Committee members for their service. Chair Bartholomew thanked Diane Froslic for her excellent staff support.

Kathryn Leathers presented an overview regarding the role of the WSBA Legislative Committee and provided a recap of the 2011 legislative session as it relates to the 10 WSBA proposals. Ms. Leathers reported that the Legislature passed 7 ½ of the 10 WSBA bills. She noted that the 2 bills proposed by the Legal Assistance to Military Personnel Section did not pass even though they had full bi-partisan support in both chambers. She explained that the Senate just ran out of time to pass these bills, but they are still “alive” and she will work to get them passed

in 2012. Ms. Leathers noted that the proposal regarding the Uniform Parentage Act (UPA) and surrogacy only partially passed – the UPA provisions passed but the surrogacy provisions were removed.

Ms. Leathers further reported that the Governor has announced that a special session will likely convene on November 28, 2011, to address additional revenue shortfalls, and that the regular 60-day session begins January 9. It was noted that a special session could conclude in 1 day, but can last up to 30 days.

LEGISLATIVE PROPOSALS CONSIDERED

1. Estate Tax: Relating to Washington Estate Tax Apportionment, Z-0592.1/11 Ben Porter, WSBA Taxation Section

Mr. Porter explained the proposal to the Committee, which exonerates certain small gifts passing under a will (or revocable trust or by right of survivorship) from apportionment of estate taxes. When asked if any groups do or would oppose this proposal, Mr. Porter stated that the only possible opposition would be the Bar's Real Property, Probate & Trust (RPPT) Section – however, the Tax Section had already vetted this proposal with RPPT and they support it.

It was noted that the Estate & Gift Tax Committee of the Tax Section did not unanimously support this proposal. Mr. Porter acknowledged that the Committee's support was not unanimous.

Mr. Porter was asked about the impact on interstate situations involving states that do not have a similar law. Mr. Porter responded that the law of the state in which the estate tax return is being prepared would apply. He further noted that Washington would not be the first state to adopt this law, and that this statute was modeled after an Alabama law.

Committee members asked several additional questions, including questions about the limitations of the proposal; whether this affects a gift by separate instrument provision of a will to dispose of tangible personal property; and whether this was a tax avoidance loophole. Mr. Porter addressed each question and explained that this was not a tax avoidance loophole.

Pat Aylward moved to recommend that the BOG sponsor the proposal, and Roger Reed seconded. The motion passed 22-0, with 1 abstention.

2. **Concerning the transfer of real property by deed taking effect at the grantor's death – Enacting the Uniform Transfer of Real Property On Death Act, Z0616.1/11, Al Falk, WSBA Real Property, Probate & Trust Section**

Mr. Falk introduced the proposal, which allows an individual to record a deed to transfer real property effective at the owner's death, and informed the members that he learned about the desire to make this change from a legislator. He explained that he then learned that the Uniform Law Commission (ULC) was in the process of drafting a Uniform Act, and, after reviewing the Act the RPPT Section determined that they supported the ULC's approach to this policy change.

Mr. Falk reported that 13 other states have already passed this proposal, and then discussed some of the problems that occur when parents gift or deed property to children during their lifetimes.

Committee members asked several questions, including the following: whether this TOD deed was "too loose" and might make it easier to commit abuse/fraud; whether a TOD deed is difficult to revoke; whether a later will can change a TOD deed; whether this could create issues when people forget what they may have done before; whether the proposal has a fiscal impact; whether a TOD deed could transfer this outright and would it be a problem for possible beneficiaries; whether the language needed to be modified to address the vesting (and not just transfer) of property, see RCW 11.04.250; whether limits could be placed on such a transfer; who would pay the taxes on the property; and the effect this would have on community property.

Mr. Falk confirmed you can in fact fully revoke the TOD death and change it during one's lifetime, and explained that a subsequent will would ordinarily not change this transfer because the proposal establishes that only a recorded transfer or change of that transfer is enforceable and most wills are not recorded. He noted that the proposal has no fiscal impact. Wayne Blair confirmed that the executor/personal representative has the responsibility to collect and pay the estate taxes and the estate's personal representative has the power to go to the beneficiaries of the estate to collect the taxes.

It was noted that practitioners may need to order title reports on real property to make sure there are no prior transfers. Mr. Falk was asked whether this had been discussed the title companies. Mr. Falk commented that they took this to the executive committee of the WLTA group.

It was suggested that a delayed effective date could be added to the proposal in order to allow for the education of practitioners and the public.

It was moved and seconded to table this proposal to a later meeting to allow Mr. Falk to answer the Committee's questions. The motion passed unanimously.

Kathryn Leathers asked Committee members to please send questions to the WSBA Legislative Office. They will compile all questions and forward to Mr. Falk.

**3. Power of Attorney: Enacting the Washington version of the Uniform Power of Attorney Act, Z-0593.2/11,
Luke Thomas, WSBA Real Property, Probate & Trust Section
Corey Denevan, WSBA Elder Law Section.**

Luke Thomas presented background regarding the process the joint taskforce of the RPPT and Elder Law Sections went through in drafting this proposal. He noted that the taskforce started with the Uniform Act and made several changes to it. In general, the task force concluded that the Uniform Power of Attorney Act, as modified, would be good for Washington because our laws are silent on many important issues. Mr. Thomas commented that the drafting committee was very concerned about protecting an individual's interests, especially the elderly and incapacitated persons, and providing some degree of certainty and reliability. He further noted that Rep. Moeller tasked their workgroup with adding additional protections in Washington's law to protect elderly and incapacitated persons from financial abuse occasioned by improper use of powers of attorney (POA). He acknowledged that this was a lengthy and complex proposal, and commented that he realized that he would not likely see a decision/vote by the Committee today.

Mr. Thomas noted that this proposal has also been disseminated to the Washington Superior Court Judges Association and the Professional Guardianship Association.

John Cary and Luke Thomas discussed the fact that this proposal deviates from the Uniform Act, and that it may need to be revised in order to gain the support of the ULC. Mr. Cary noted that he and Mr. Thomas will work closely together to identify areas that need to be modified to work in Washington, but that there is an advantage to retaining some level of uniformity (to take advantage of a body of case law, etc. and having comments be effective).

Mr. Thomas was asked to explain the problems that this proposal was intended to solve, and to compare the proposal to current law. He began by stating that current law does not address various elements of the execution of a POA, including what it takes to have one, who can sign one, and what should be done if someone cannot sign one.

Committee members asked several questions, including the questions related to the following: How this proposal addresses third party acceptance; whether opinion letters are practical for small estates; whether the proposal called for notarization or acknowledgement of a POA; what kind of proof of 'unable to sign' is enough or is needed; Section 114 (fiduciary duty), liability for acts of third parties and liability of the agent acting on behalf of the principal; drafting concerns related to Section 114, namely that the way the proviso is written seems inconsistent with and/or contradictory to the rest of the section; and Section 103, regarding how this could eliminate transactions that are not intended and that this Section may need to be clarified.

Other issues raised by Committee members included: A discussion about the POA being a document that people could rely on, especially in light of the fact that many people are concerned with POA abuse and the need to protect people's interests; whether this proposal was vetted through brokers and dealers; who decides what compensation is "reasonable"; Section 118 and the need to include a timeline/deadline.

Kathryn Leathers commented that the WSBA has referred this out to other stakeholders/non-WSBA entities but her office has not yet received any feedback from those stakeholders. It was noted that it would be most helpful to have a discussion about what other stakeholders have stated about this proposal, whether or not there are any other entities who are really concerned about this final product, and what the issues of greatest discussion were (even if an agreement was reached on a particular issue).

Mr. Thomas and Mr. Denevan commented that the Elder Law Section was concerned about Section 201(3) (Medicaid Planning) and the failure of the proposal to expand current law to allow more Medicaid planning. However, it was acknowledged that if more Medicaid planning was allowed, this would likely have a significant fiscal impact. They were not aware of other concerns about the proposal.

Chair Bartholomew asked that any additional questions be emailed to Kathryn Leathers and she would forward them to Mr. Thomas and Mr. Denevan. It was suggested that we asked for written comments from other stakeholders, to be provided in advance of the October meeting.

The RPPT and Elder Law Sections were thanked for all of their hard work on this proposal, but it was acknowledged that this proposal will likely need more work and the Committee needs feedback from stakeholders.

ACTION: The proposal was not voted on but the discussion will continue at the next meeting on October 21st.

The committee meeting was adjourned by Chair Bartholomew at 4:17 p.m.

NEXT MEETING:

**Friday, October 21, 2011 – 1:00 p.m.
WSBA Seattle Office Seattle
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