

MINUTES
DSBA ESTATES AND TRUSTS SECTION
NOVEMBER 2, 2004

In accordance with notice duly given, a meeting of the Estates and Trusts Section of the Delaware State Bar Association was held at the offices of Morris Nichols Arsht & Tunnell, 17th Floor, 1201 North Market Street, Wilmington, Delaware, 19801, on Tuesday, November 2, 2004 commencing at 3:30 p.m.

In attendance were: Todd A. Flubacher, Gregory J. Weinig, Joseph E. Bell, Jr. (by invitation), David J. Ferry, Jr., Richard J.A. Popper, Mary B. Hickok, Richard W. Nenko, Dorothy K. Scarlett, Joanna Reiver, Thomas P. Sweeney, Peter J. Gordon, Michael M. Gordon, Michael R. Stein, Kalimah Z. White, M. Joseph L. Melican, Patricia E. Hall, Richard G. Bacon, Anthony J. Testa, Jr., Miguel D. Pena, Neal J. Howard, Michael A. Friedberg, Jeffrey C. Wolken, Thomas R. Pulsifer, Amy C. Hudson, Mary M. Culley, Bruce W. Tigani, Janice R. Tigani, Beverly J. Wik, and Edward R. McNamara (by telephone).

Todd A. Flubacher, Chair, called the meeting to order.

1. Minutes. The minutes of the October 5, 2004 meeting were unanimously approved.

Delaware Estate Tax. Observing that there will be no Delaware Estate Tax for decedents dying on or after January 1, 2005 and the uncertainty surrounding the Federal Estate Tax after 2010, Richard Popper advised that the Tax Section has drafted legislation to address three specific issues to avoid having to repeal the Delaware Estate Tax law in its entirety. The three provisions of the draft legislation would: (i) amend the filing requirement such that no filing would be required at any time when the federal estate tax credit for state estate taxes does not exist; (ii) provide that at any time when the credit does not exist, no inchoate lien arises; and (iii) provide that at any time the credit does not exist, it would not be required to file the corresponding affidavit (that no Delaware Estate Tax Return is required). Mr. Popper, on behalf of the Tax Section, has sent the draft legislation both to the Division of Revenue and to Todd Flubacher, Chair of the Estate and Trust Section. Copies of the draft legislation will be forwarded to Section members with next month's agenda. Mr. Popper invited members of the Section to provide him with comments on the draft legislation.

A question was raised concerning whether the entire Delaware Estate Tax statute should be deleted from the Delaware Code, but a consensus was reached that this may not be advisable because if the Federal estate tax is reinstated after repeal, the entire Delaware estate tax law would have to be re-enacted.

Legislation and Rule Committees.

Uniform Principal and Income Act – Report of Committee. Richard Bacon reported that the committee expects to be able to distribute draft legislation to the Section shortly.

Section 529 Plans – Report of Committee. No report.

LLC/LP Statutes – Report of Committee. Peter Gordon reported that the Alternative Entities Subcommittee of the Corporation Law Section embraced the concepts behind the draft legislation regarding charging orders and judgments over interests in limited liability companies and limited partnerships. That subcommittee's review of the draft legislation continues.

Chancery Court Rules 117 and 132 – Report of Committee. No report.

Trust Act 2005 – Report of Committee. No report.

Total Return Trust Statute – Report of Committee. No report.

Delaware Elective Share Statute – Report of Committee. David Ferry reported that Master Glasscock will ask the members of the Court whether there are any other issues the committee should target. Master Glasscock also indicated willingness to attend the next Committee meeting, which is anticipated to be held in December.

Estate Administration Committee – Report of Committee. No report.

DSBA Technology Committee – Report of Committee. Anthony Testa reported that DSBA ListServes will be extended to the various Sections, and possibly to Committees as well. The Tax Section may be one of the earliest Sections to receive a test run of this service.

Advanced Health Care Directive Statute – Report of Committee. Mary Culley reported that the Committee met, and observed inconsistencies between the statutes and the statutory form. The Committee is considering whether technical amendments may be needed. If so, draft legislation may be presented to the Section in December. Discussion followed concerning how the "four week" rule under the statutory form (regarding the length of time for which an individual must be permanently unconscious before artificial means being used to sustain the individual's life may be withheld) has played out in practice. The consensus was that the statutes are working and

that no substantive changes should be made.

By-Laws – Report of Committee. No report.

Old Business.

a. Unauthorized Practice of Law. Todd Flubacher reported that no other persons have joined this standing Committee. This topic will appear on future agendas only as warranted.

New Business.

Recent Developments.

Delaware Estate Tax. (See above.)

12 Del.C. §§ 260 through 270. David Ferry reported that a new statute, regarding the disposition of a decedent's bodily remains, became effective on July 30, 2004. Among its other provisions, this Act (codified as 12 Del.C. §§ 260 through 270) sets forth the following priority for determining what person(s) are entitled to make decisions concerning the disposition of a decedent's bodily remains: (i) the decedent, via a written declaration, the form for which the statute also prescribes; (ii) the appointed personal representative or nominee; (iii) the spouse, if not legally separated from the decedent; followed by certain blood relatives and others in various order of priority. Apparently the funeral directors supported the bill. It was sponsored by numerous legislators.

Mr. Ferry also reported that the Court of Chancery has already confronted the statute in a T.R.O. hearing. The Chancellor held that papers evidencing the decedent's purchase of a burial plot two years before his death did not constitute a written declaration sufficient to meet the statutory requirements.

Several concerns were raised about the statute. First, the statute trumps centuries-old common law to the effect that the spouse, or otherwise various blood relatives, are entitled to make these decisions. An appointed or nominated personal representative has never had this power. The power of a personal representative to make these decisions could cause problems, particularly if the personal representative is an accountant, a bank or some other non-family member. Second, the statute does not exempt wills that were signed before the statute went into effect, meaning that many testators may have unwittingly bestowed the power to make these decisions upon their personal representatives.

To address these and other possible problems with the statutes, a Committee was formed. David Ferry, Edward McNamara, and Richard Bacon joined the Committee.

Because these statutes were enacted into Title 12 without any member of the Section knowing in advance, it was also agreed that the Vice Chair of the Section should henceforth monitor all legislation on an ongoing basis to determine whether any bills might affect Title 12 or other subjects of interest to the Section.

Other New Business.

Sales of Real Property by Guardians of Minors. In light of the recent requirement that petitions to sell real property by guardians of minors must include two appraisals, Richard Popper asked whether the Court of Chancery was requiring that it approve the appraisers before the appraisals are performed, or whether the appraisers could simply be selected by the guardian and the appraisals attached to the petition without prior Court approval. The consensus was that the latter approach is sufficient.

There being no further business, the meeting was adjourned at 4:10 p.m.

Respectfully submitted,

Gregory J. Weinig, Secretary