MINUTES
DSBA ESTATES AND TRUSTS SECTION
OCTOBER 5, 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, October 5, 2004 commencing at 3:30 p.m.

In attendance were: Todd A. Flubacher, Gregory J. Weinig, William H. Lunger, Michael M. Gordon, M. Joseph L. Melican, Neal J. Howard, Anne Stallman (by invitation), Patricia E. Hall, Kalimah Z. White, Miguel D. Pena, Michael A. Friedberg, Dorothy K. Scarlett, Francis S. Babiarz, Bruce W. Tigani, F. Peter Conaty, Jr., Mary B. Hickok, Thomas P. Sweeney, Kim Gill Hankins, David J. Garrett, Richard J. A. Popper, Mary M. Culley, Jo Donoghue, Edward R. McNamara (by telephone), and Clay T. Jester (by telephone).

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

Special Appearance by Chief Disciplinary Counsel. In light of the discussion at the previous Section meeting regarding the unauthorized practice of law ("UPL"), Andrea L. Rocanelli, Chief Disciplinary Counsel addressed the Section. Ms. Rocanelli summarized the responsibilities and abilities of the Office of Disciplinary Counsel ("ODC") with respect to UPL issues. She also described what ODC has done concerning the local accounting practice discussed at the previous Section meeting. ODC is not aware of any current activities of this accounting practice that would constitute UPL.

Ms. Rocanelli expressed jurisdictional, time and priority constraints on ODC's ability to take further action against the local accounting practice in connection with UPL. Ms. Rocanelli encouraged the Section to form a standing Committee to address UPL issues, to the extent necessary, on an ongoing basis. Ms. Rocanelli excused herself from the meeting, after which time Thomas Sweeney and David Garrett agreed to co-chair a standing UPL committee in this Section. Richard Popper and Peter Conaty also joined the Committee. Other Section members interested in joining the Committee are encouraged to contact Todd Flubacher or one of the co-chairs.

Minutes. The minutes of the September 7, 2004 meeting were unanimously approved.

Legislation and Rule Committees.

Uniform Principal and Income Act – Report of Committee. No report.

Section 529 Plans – Report of Committee. Peter Gordon (via Todd Flubacher) reported that draft legislation is nearly complete, and will hopefully be finished in time for distribution with the agenda for next month's meeting.

LLC/LP Statutes – Report of Committee. Peter Gordon (via Todd Flubacher) reported that the draft legislation, regarding charging orders and judgments over interests in limited liability companies and limited partnerships, was viewed positively by the Alternative Entities Subcommittee of the Corporation Law Section.

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. William Lunger reported that he has spoken with Daniel Wolcott regarding the typographical error in the bill form of the legislation, which bill was passed by the legislature and signed into law. Mr. Wolcott advised Mr. Lunger that no progress has been made regarding attempts to correct the error informally, and that it is likely a formal amendment will be required.

Delaware Elective Share Statute – Report of Committee. No report. Gregory Weinig will ask David Ferry, the Committee chair, whether the Court has indicated that there are further issues the Court would like the committee to target.

Estate Administration Committee – Report of Committee. No report.

DSBA Technology Committee – Report of Committee. No report.

Advanced Health Care Directive Statute – Report of Committee. No report.

By-Laws – Report of Committee. Todd Flubacher reported that his preliminary comparison of Section By-Laws for conformance with DSBA By-Laws revealed no discrepancies. Todd Flubacher, John Ciccarone and William Lunger will perform a more detailed review.

Old Business.

Section Dues. Todd Flubacher reported that given the Section's roughly $2,000 surplus last year and an approximate membership of 125, the surplus amounted to about $16.00 per member. Smaller, perhaps preliminary, reductions in dues of $5.00 or $10.00 per member were considered, but the Section soon decided to leave dues as they are in light of the new standing UPL Committee's possible need of funds. Mary Hickok also observed that, as has occurred in the last two years, portions of future surpluses would be appropriately directed to the Combined Campaign for Justice. This item will be removed from future agendas, but may be revisited later.

Treas. Reg. §1.643-3/NIMCRUT. No report.

Unauthorized Practice of Law. (See Section 1, above.)

Fundamentals Seminar. Todd Flubacher reported that William Lunger will serve as co-instructor for the Case Study with Joanna Reiver. Time allocated for the basic section on wills, being handled by Beverly Wik and Michael Friedberg, will be expanded. State tax issues will now be addressed by Chuck Durante.

New Business.

Recent Developments.

Thompson/Turner decision and related issues. Thomas Sweeney observed that the Third Circuit recently decided the Thompson case, sub nom Turner on appeal. Mr. Sweeney counseled vigilance in reading the opinion. This decision and related authority provide guidance regarding family limited partnerships (and Delaware statutory trusts or limited liability companies fulfilling similar roles), with respect to such topics as the age of the entity and the degree to which personal assets can be mixed with those placed into the entity. Mr. Sweeney advised that the Third Circuit would likely issue another decision in this arena within the next year or two.

Mary Hickok recommended that Stephan Leimberg's e-newsletter of October 5, 2004 contained a very useful checklist regarding these kinds of entities. She also reported that in the ongoing Strangi case before the Fifth Circuit, the government will not settle and will proceed with the case. Thomas Sweeney further recommended the amicus briefs that ACTEC filed in both the Strangi and Kimble cases, regarding bona fide sales for valid consideration.

Other New Business.

Funding Revocable Trusts. Richard Popper asked whether other Section members were encountering stricter policies from banks, including local banks that traditionally were more lenient, concerning what documentation the banks require to re-title assets in the name of revocable trusts. In most instances, only the title, signature and fiduciary powers pages of the trust agreement used to be required. Banks now seem to require copies of the entire trust agreement. Patriot Act regulations are apparently the cause.

Asset Protection Trusts. Jo Donoghue asked whether any Section members have filed notices with the Secretary of State's office in order to provide notice to start the running of the statute of limitations with respect to asset protection trusts. Some Section members observed that while Alaska's asset protection trust statute establishes a procedure for formally filing a trust certificate upon creation of the trust, the drafters of Delaware's statute deliberately declined to do so for a variety of reasons.

Proposed GST Regulations. Bruce Tigani reported that the IRS has issued proposed generation skipping transfer ("GST") tax regulations in August, 2004. Mr. Tigani advised Section members to review these regulations because of their possible effects on qualified severances. The regulations can be read as stating that anything other than a fractional severance will not qualify for GST purposes. The regulations could be viewed as taking away the ability to use a pecuniary formula for severances.

There being no further business, the meeting was adjourned at 5:00 p.m.

Respectfully submitted,

Gregory J. Weinig, Secretary

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