

## MINUTES

### DSBA ESTATES AND TRUSTS SECTION MEETING

February 6, 2018

In accordance with notice duly given, a meeting of the Estates and Trusts Section of the Delaware State Bar Association was held on February 6, 2018, beginning at 3:30 p.m. at the offices of Bessemer Trust Company of Delaware, N.A., 1007 N. Orange Street, Suite 1450, Wilmington, Delaware 19801.

In attendance were: Mark E. Doyle, James J. Gallagher, Todd A. Flubacher, Trisha Williams Hall, J. Zachary Haupt, Denise D. Nordheimer, Richard J. A. Popper, and Gregory J. Weinig, and associate member, Sue D. Lomas.

In attendance via conference call were: Elizabeth W. King, P. Kristen Bennett, Michael A. Friedberg, Robert A. Glen, Mary B. Hickok, Robert M. Kleiner, Steven E. Kleiner, Alexander Lyden-Horn, Deirdre O'Shea McCartney, Alex Mili, Richard W. Nenno, Harold W.T. Purnell, W. Donald Sparks, Michael R. Stein, Scott E. Swenson, Elle R. Van Dahlgren, John Legaré Williams, and Jeffrey C. Wolken, and associate members, Cynthia D. M. Brown and Janet Pilling Jolles.

Mark E. Doyle, Chair, called the meeting to order.

1. Minutes. Upon motion duly made and seconded, the minutes of the meeting of January 6, 2018 were unanimously approved.
2. Committee Reports and Activity.
  - a. Estate Administration Committee – Report of Committee. On behalf of the Committee, Mr. Mili reported that the Department of Health and Social Services has approved a template letter that can be used by attorneys to obtain a death certificate from the Office of Vital Statistics in situations in which they do not represent a family member of the decedent. A copy of the form letter was circulated to the Section immediately prior to the February 6 meeting. Mr. Popper asked about the provision of the letter that suggested an attorney would be subject to discipline if the death certificate was not safeguarded. He noted that a common use for obtaining death certificates is to forward them to a third party – for example, to a custodian of trust assets in order to document the death of a predecessor trustee. Mr. Mili responded that the discipline should only apply if the dissemination is not for a “proper purpose,” as set forth in the final paragraph of the letter. However, proper “safeguarding” may require that the disclosing attorney notify the recipient of the need to keep the death certificate confidential and protected.

Mr. Mili also discussed draft legislation proposed by the Family Law Section to amend Section 923 of Title 13. The draft legislation makes clear that an impounded birth certificate should not be shared. Because the Register of

Wills office often deals with questions regarding the identification of a decedent's children, the Family Law Section asked for our Section's input on the bill. The Section had no objection to the draft legislation but did not favor taking an official stance of support.

- b. Trust Act Committee – Report of Committee. On behalf of the Committee, Mr. Nenno reported that the Committee has prepared the draft 2018 Trust Act bill to be discussed at today's meeting. The plan is for comments and questions to be addressed in the next month so that the bill can be put up for vote at the March Section meeting. Mr. Nenno noted that Mr. Weinig will be presenting the bill to the Section, and Tom Pulsipher and Peter Gordon also played integral roles in the drafting process. Mr. Doyle encouraged the Section members to attend the March meeting to assure that a quorum is obtained, as the Section bylaws limit the ability of members to be counted as present for voting purposes when they attend the meeting by conference call if they are physically located within five miles of the meeting. A March vote would allow the bill to be moved to the Executive Committee on the schedule requested during the Section's annual report.
- c. CLE Committee – Report of Committee. On behalf of the Committee, Mr. Swenson noted that the planned spring program for the "Fiduciary Litigation Update" has been postponed, as the DSBA requested that the Section plan a Fundamentals program for the fall. The Committee is thus working on an agenda and outline for this fall program, tentatively scheduled for October 17, 2018.
- d. Notice Committee – Report of Committee. Mr. Doyle reported that Vince Thomas contacted him to report that the Committee is working on draft legislation, but it is likely that any bill will not be introduced until the 2019 General Assembly session. The Committee would like to be able to introduce some aspects of any eventual draft legislation to the full Section at the March meeting.
- e. Access to Digital Assets Committee – Report of Committee. On behalf of the Committee, Ms. Hall informed the Section that the Committee held a meeting upon learning of the possible introduction of the 2015 Uniform Fiduciary Access to Digital Assets Act during the current General Assembly session. The Committee reviewed the 2015 Act and maintains its prior position that the current Delaware law is more favorable to residents than the 2015 Act would be – it promotes access of fiduciaries to information while reasonably minimizing the use of judicial resources. The Committee's understanding is that the General Assembly may not be open to considering a draft bill of the 2015 Act with amendments, as it is feared any amendments will likely cause tech companies to oppose the resulting draft bill in its entirety. The Committee supports no change to current Delaware law at this time.

- f. Publications Committee – Report of Committee. No report.
  - g. Power of Attorney/Health Care Directive Committee – Report of Committee. No report.
  - h. Trust Accountings Committee – Report of Committee. No report.
  - i. Guardianship Committee – Report of Committee. On behalf of the Committee, Mr. Purnell reported that the Committee met to discuss how Court oversight of management trusts should be handled in its draft legislation. The last Committee meeting did not have a quorum, so no firm outcome was reached, but the Committee also prefers to have another meeting to discuss this matter with the attorney members of the Guardianship Subcommittee of the Court of Chancery’s Rules Committee. It is hoped that the Committee’s draft legislation can be circulated for discussion at the Section’s March meeting.
  - j. Trust Litigation Committee – Report of Committee. No report.
  - k. Electronic Wills and Trusts Committee – Report of Committee. On behalf of the Committee, Mr. Haupt reported that the Committee has been communicating with a national group that is developing a model act for electronic wills. The current expectation is that this model act will be completed by summer 2019. Mr. Haupt is hoping to attend an upcoming national conference of this group in order to help the Committee better understand the national position on issues falling under this topic.
3. New Business -- Overview of draft Trust Act 2018. On behalf of the Trust Act Committee, Mr. Weinig walked the Section through the Committee’s draft legislation for Trust Act 2018. The draft bill sets out proposed legislative changes to Titles 10 (Courts and Judicial Procedures), 12 (Decedents’ Estates and Fiduciary Relations), 18 (Insurance Code), and 25 (Property) of the Delaware Code. The items that were discussed in some depth included the following:
- Chapter 33 of Title 12 was expanded to provide greater rights to trust advisers, protectors, and designated representatives who are serving in a fiduciary capacity. Sections 3302 and 3303 were modified to account for sustainable investment strategies. Sections 3302(c) and 3313A were modified to provide for greater limitation of liability among co-fiduciaries in situations in which full authority on a matter is held by only one co-fiduciary.
  - 12 *Del. Code* section 3313(g) was modified to make it express that a person submits to Delaware personal jurisdiction by serving or acting as an adviser of a Delaware trust.
  - Some discussion occurred regarding the modification to 12 *Del. Code* section 3341, item (5). This item provides generally that a holder of a power of

appointment in one or both trusts that are merged shall hold a power over the property of the transferee trust only as expressly provided in the merger instrument. The proposed modification states that if a holder held substantially identical powers over all of the property of each participating trust that the power is exercisable over all of the property of the transferee trust unless the merger instrument expressly provides otherwise. Mr. Flubacher asked what the intended result would be if the holder exercised the power for the property of only one of the two participating trusts prior to the merger. After discussion, Mr. Weinig stated that the Committee would review the notes and determine whether the intention was for the proposed rule to apply only to post-merger exercises of powers of appointment, if the instrument of exercise did not acknowledge the merger.

- 12 *Del. Code* section 3585(a) is the subject of a proposed amendment that would limit the time to bring actions for breach of trust following delivery of a trustee's report adequately disclosing facts constituting a claim to one year following the date of receipt of the report, rather than two years under the present law. Mr. Weinig pointed out that this change is consistent with the Uniform Trust Act. The original enactment of this statute in 2000 was intended to mirror the similar provision of the Uniform Trust Act, and at the time the Delaware legislation was introduced the Uniform Trust Act provided for a two year limitations period. A late change was made in the Uniform Trust Act to change the limitations period to one year, but this change was not captured during Delaware's adoption of the corresponding statute.

Mr. Doyle asked whether this provision would override 12 *Del. Code* section 3303 if an old trust instrument expressly adopted the two-year period set forth in the existing law. Mr. Weinig replied that perhaps item (3) should be modified to make it clear that the trust instrument can extend this limitations period by its terms, but not shorten it.

Mr. Doyle expressed the Section's appreciation to Mr. Weinig and the rest of the Trust Act Committee for all their work on the draft legislation. Section members with comments or questions are encouraged to send them to Mr. Weinig or to Mr. Doyle.

There being no further business to come before the meeting, the meeting was adjourned at 4:40 p.m. The next meeting of the Section is scheduled for Tuesday, March 6, 2018, 3:30 p.m., at the offices of Bessemer Trust Company of Delaware, N.A., 1007 N. Orange Street, Suite 1450, Wilmington, Delaware 19801.

Respectfully submitted,

James J. Gallagher, Secretary