

**Meeting of Elder Law Section of the CBA
August 16, 2007**

Co-Chairs:	John Campbell	Denver	303-290-7497
	Nancy Germany	Denver	303-454-3711
Secretary:	Frank Slaninger	Denver	303-758-5200
Treasurer:	Marco Chayet	Denver	303-355-8500
Council Members:	Bert Myrin	Aspen	970-925-8645
	Elizabeth Tulloch	Denver	303-388-3500
	K. Gabriel Heiser	Boulder	303-447-6855
Liaison Coordinator:	John Campbell	Denver	303-290-7497
CBA Liaison:	Gretchen Eoff	Denver	303-860-1115
Representative to CBA Board of Governors	John Campbell	Denver	303-290-7497
Uniform Trust Code Committee	Eric Solem	Englewood	303-761-4900

The Executive Council Meeting of the Colorado Bar Association Elder Law Section was called to order at 8:18 A.M. Several matters were discussed, including the Judicial Review efforts of the Board of Governors, the upcoming Uniform Guardianship Jurisdiction Act, quiet status of the Disability Law Committee of the CBA, Uniform Laws, the need to do R & R with the Trust and Estate Section, and to learn from last spring's SB 150 experience.

Call to Order and call for review and approval of May 17, 2007 Minutes --- The meeting was called to order by John Campbell at 9:07 a.m.

Introductions followed, and the sign-in sheet was circulated. Those attending in person or by phone were:

David Bernhart	Michael Kirtland
Tim Bullock	W. Eric Kuhn
John Campbell	Marcie McMinimee
Billie Castle	Paul Mitchell
Marco Chayet	William Myers
Chuck Connell	Bert Myrin Jr.
Tammy Conover	Kathleen Negri
Valerie Corzine	Anne Nichting
W. Dirk Costin	Frank Slaninger
Gretchen Eoff	Carl Stevens

Aaron Evans	D. Wayne Stewart
Aaron Frishman	Melissa Sugar
Nancy Germany	Michael Valdez
M. Carl Glatstein	Dennis Valentine
K. Gabriel Heiser	Louis Wilcox
Stanley Kent	Harold Wright

The minutes from the May 17, 2007 meeting with a couple changes were approved later in the meeting. Under attendance Carl Stevens will be listed; on page 4, line 6, replace “Trust and Estate’s” with “Real Estate’s”; on page 6, in the Carl Stevens paragraph, replace “SNC” with “SNT”; the first word on page 7 is capitalized – ”Provision”; and on page 9, second line of Carl paragraph, replace “there” with “their.”

2. **Treasurer’s Report**– Marco Chayet reported our Section has a balance of \$6,457.47, with the addition of dues and subtraction of expenses this changed to \$11,101.22, with \$2,000 remaining to be paid out for Senior Law Day. The S.B. 150 phone conference bill was pre-paid ½ by Marcie McMinimee and ½ by the Trust and Estate Section; Marcie McMinimee will submit a final bill when she receives one.

3. **Old Business**

- a. Committee Reports (Chairperson of the committee may report any current matters). Our current committees are:
 - i. Civic and Community Affairs Committee: Carl Glatstein – Senior Law Day on June 2, 2007 went very well. About 550 attended, a few less than in 2006. The Senior Handbook will be available at \$5.00 to the public, will go out to state libraries, and it is also on-line where it can be downloaded by attorneys who want to give a client one or two chapters. 2008 planning has started. We are seeking more fundraising and more financial support. Sean Bell served well leading the 2007 effort.
 - ii. Guardianship Standards: Marco Chayet – things are pretty quiet.
 - iii. Guardianship Jurisdiction Act Committee: Kate Seal –On her behalf Michael Kirtland stated the act was in draft form, and Kate Seal will present it and her comments at the September 20, 2007 meeting. Carl Glatstein said the Judicial Task Force is being asked to support it in some form. It will soon be e-mailed to Elder Law members. It is on

the National Conference Committee on Uniform State Laws (NCCUSL) website.

- iv. CLE and Publications Committee: Jennifer Gormley – John Campbell reported the Colorado Lawyer has given us two article slots to fill, and one of them is for September, 2007. Contact him if you have any ideas or articles lurking in your minds or files.
 - v. Advance Directives Task Force - Michael Kirtland - the task force is in place, and Jeff Clayton with State Judicial will participate in discussions about how it will work, sources of funding, what it looks like, pilot projects in urban areas and rural areas, and so forth.
 - vi. Public Guardianship – Val Corzine – copies will be e-mailed to us.
 - vii. Fiduciary Misconduct: Marcie McMinimee – drafts of an amendment to 15-12-712 and 15-12-808 have been prepared. Proposed new statutes 15-10-501 to 505 were prepared and handed out. She said 15-12-722 (failure to comply with court orders – penalty) was proposed to be deleted. She said Judge Frederic Rodgers of the 1st Judicial District said no to this and wished to rely on Rule 107. A couple examples were given. Giving of fiduciary notice was discussed. These proposals go to the Statutory Revisions Committee today. Marco Chayet suggested a reference between 15-12-501 and 15-12-723.
 - viii. Joint Tenant – Carl Stevens – the joint subcommittee needs to interact with other committees seeking to reinstitute the four unities of joint tenancy. Their main concern is the right to pass property and the right of survivorship. There is also a concern about unequal interests which are used in Medicaid planning to avoid a look-back period.
- b. Liaison Reports –
- i. Trust and Estate Council Liaison: Billie Castle – passed.
 - ii. AARP Liaison: Elizabeth Tulloch – Dennis Valentine said AARP didn't meet during the summer and will start up again in the fall.
 - iii. Department of Health Care Policy and Financing Liaison: John Campbell – a meeting with HCPF will be held August 30, 2007 to discuss policy issues and a 4-page HCPF list of CMS instructions to the states that, if persons do any of these listed transfers, you can “never” apply for Medicaid. He discussed use of the Deficit Reduction Act to start a period of time running. In one example the penalty period never begins to run because the applicant never received services from Medicaid for HCPF programs. A couple states have adopted these CMS rules. You can go into a nursing home but must beware of “waiver services.” Do these facts merit a § 1983

claim? Kathleen Negri suggested asking HCPF, what is coming down the pipe from CMF, and are we correct in our understanding?

- iv. Board of Governor's Meeting – John Campbell – Michael Valdez meets with the Legislative Policy Committee every Friday and will continue to do so. He discussed S.B. 96 dealing with theft from an “at risk” adult and mentioned the Uniform Anatomical Gift Act.
 - v. CBA Legislative Policy Committee Liaison: Michele Lawonn – passed.
- c. Audit on oversight of probate cases: Carl Glatstein said the task force took the summer off and has now joined with the Judicial Task force which has two judge co-chairs. They will look at guardians and conservators. They may encourage courts to act in protective proceedings, especially to help counties with very few other sources of assistance. They need to learn how to monitor guardians and conservators. This is required by statute but was never funded.

4. New Business and Announcements

- a. Colorado Lawyer articles – we were given two, and the first one is September, 2007.
- b. TOPICS AND SPEAKERS: Please continue to let the Co-Chairs know your ideas for possible speakers and topics. The names and email addresses for the Co-Chairs are: John Campbell (jcampbell@jjcelderlaw.com). and Nancy Susan “Susie” Germany susie@coelderlaw.net.

c. CLEs and PROGRAMS

- August 24, 2007 – Elderly Financial Exploitation in Colorado - \$30 – 7 CLE (Arapahoe County jury room – contact Cheryl Law at CBA)
- September 26, 2007 – Drafting Effective Wills and Trusts (NBI)
- October 30, 2007 - Ethics for Estate Planning Attorneys (NBI)

d. Hot Topics Discussion

- a. Chuck Connell submitted a Wall Street Journal article by Kelly Greene, “Backlash Hits Annuities Tied To Stock Market,” Wall Street Journal, Wednesday, August 8, 2007, page D1. The article discusses index based annuities which can't be withdrawn for a long time or only with a significant penalty, which are not good investments for senior citizens who often need money and can't leave it for long periods of time. He described a situation where a good letter can produce a full refund. Insurance applications are subject to suitability standards.

b. -----

The Minutes of the May 17, 2007 meeting were approved with the corrections noted above.

The business meeting ended at 10:10 AM on May 17, 2007.

SPEAKERS

Our speaker today was Doni Dolfinger who spoke on "Reverse Mortgages." She is with the Reverse Mortgage Division of Universal Lending Corporation.

She gave a good power point presentation with materials, and there will be no attempt to repeat most of the remarks and materials here. A summary follows.

A reverse mortgage can be a source of money which meets financial needs and insures clients may stay in their home as long as they choose. It's a loan against the primary residence. There are no income/medical/credit requirements, no monthly payments to the lender, no prepayment penalty, and borrowers can use the money as they wish.

All homeowners must be 62 or older. Any existing mortgage must be paid off. A free counseling session is required to be sure the lender is proper. The home must meet FHA guidelines. Windsor Gardens is on the "FHA reject list." FHA loans must meet FHA guidelines. You must do necessary repairs, get an estimate, and set aside an amount 1.5 times the repair costs. Repair cost estimates must not exceed 15% of the value of the property.

Three factors determine the reverse mortgage amount: the appraised value; the age of the borrowers (tied to the age of the youngest borrower); and the current interest rate (5.78% on 08/16/2007). Samples varying by ages and values were presented.

Loan payment options include tenure or term, line of credit, lump sum (a reconfiguration of assets and income), or a combination. Options can be changed at any time for a \$20 fee.

The fees are expensive, especially if this done for a short time. It's better if done for 3-4-5 years, but one can do it to stay in the home for a short time. Estimated closing costs may be \$14,000 which can't be recovered if the home is sold soon. Other loan costs, FHA MIP charges, loan origination fees, mortgage insurance, and normal closing costs were discussed. Doni Dolfinger said her company "shows all available programs as well as reverse mortgages."

Interest calculations may vary to try to achieve the best rates to obtain the most money. There is a monthly adjustable and an annual adjustable. There is no way to foresee which interest rate will be better.

A reverse mortgage may be made for a valid and enforceable revocable living trust accompanied by an acknowledged attorney opinion letter. The lender must be notified of any later changes in the trust. An alternative is to quit claim the real property out of the trust and then do a reverse mortgage. Keep the ages of the settlors in mind.

Life estates are usually acceptable if all named parties obtain counseling and sign the closing documents. The remaindermen must also submit to it. Life estates between a parent and child are an exception to the “62 and older” rule. The life estate amount is still based on the total value of the home.

So far, there have been no problems with beneficiary deeds.

Powers of attorney have been subject to some fraud nationwide. They should be durable, and the POA must be allowed to encumber the property. There may be a conflict with the lender. A doctor letter as to competency or capacity may be required by an investor buying the reverse mortgage. Check with your lender.

There are security features. The reverse mortgage is insured by FHA, the house repays the debt, it may be used with SSI and OAP and Medicaid and other needs-based programs, and it is non recourse (guaranteed no debt left to borrower or estate).

Duties of the homeowner include: keep property taxes current, maintain homeowners’ insurance, keep property in good condition, live in the home as a primary residence, etc. The borrower(s) retain ownership. The reverse mortgage can complicate later estate planning.

Benefits include extra dollars to stay in the home by enabling borrower(s) to pay for homeowners’ insurance, in home health care, long term care insurance, and money to renovate or update the home. The money can also enable to borrower(s) to travel, spend more, make gifts, purchase other homes, and live more comfortably.

Page 16 charts “value/payment examples with monthly adjustable assumptions.” The next page portrays an example of a 75 year old person who obtained a reverse mortgage and held the property for six years and took only \$500 a month income. The net equity could be used to buy another home and obtain a reverse mortgage on it.

The final page lists reverse mortgage benefits: no monthly payments, tax-free funds, receive benefits as long as borrower (s) remain in their home, and retain home ownership. If the house sale price didn’t cover the debt at the time of sale, skip probate and let the lender proceed with foreclosure.

A one-page sheet was distributed entitled “HOME EQUITY CONVERSION MORTGAGES FOR PROPERTY HELD IN TRUST.” HUD will insure HECMs on property held in the name of an *inter vivos* trust. It listed the requirements for the living trust, for origination in the name of the living trust, and for transfer of the property into or from a trust.

The business meeting ended at 10:58 A.M.

NOTES

QUESTION: A is competent. A gives B a durable financial power of attorney (POA). B executes a Will for A. Is this Will valid?

“Law in Colorado” – this booklet is being re-published in the fall of 2007 through the CBA Association Law Education Committee. The CBA liaison contact is Carolyn Gravitt, 303-824-5323. It was published earlier in 1987 and 1994. The 1987 edition contains chapters on introduction to law, the Colorado court system, criminal law, juvenile law, torts, consumer-contract law, family law-domestic relations, housing-property law, employment law, and individual rights and liberties, with a Boulder Model Lease and checklist in the Appendix. (Secretary: I recommend we become aware of this and request that it be furnished to senior centers. Copies are sent to places that request them. Carolyn Gravitt is familiar with our Section, with Senior Law Day and our Handbook, and she coordinated our LawLine 9.

NO PRESUMPTION OF EQUAL OWNERSHIP IN JOINT ACCOUNTS BETWEEN SPOUSES – Husband and wife opened various joint accounts. Before husband’s death, wife withdrew all the funds from these accounts, terminating the joint tenancies. In *Maxfield v. Maxfield*, 856 P.2d 1056 (Utah 1993) the court held the wife must prove by clear and convincing evidence that her husband intended a gift to her when he made the deposits. The trial court’s decision that each spouse was entitled to one-half was erroneous.

ABA Real Property, Probate & Trust programs –

September 14, 2007 – Total-Return Unitrusts: Investment Issues, State Developments, and Tax Considerations

September 20, 2007 – “Understand Asset Protection Planning:” Part Two of the Essential Issues in Trust and Estate Law Series

September 20, 2007 – “Timely Payment Litigation in the Managed Care Arena: Payer and Provider Perspectives & Strategies” Health Law Section, ABA Center for CLE – Teleconferencing and Live audio Webcast

September 27, 2007 – “Medicare/Medicaid Fundamentals”, Health Law Section, ABA Center for CLE, Young Lawyers Division

October 2, 2007 – “Effective Use of Life Insurance in Estate Planning”

October 3, 2007 – “Charitable Giving part Three of the Essential Issues in Trust and Estate Law Teleconference Series” – Young Lawyers Division, Section of Real Property, Trust and Estate Law, ABA Center for CLE

ABA – “name change” – Section of “Real Property, Probate and Trust Law” has been changed to Section of “Real Property, Trust and Estate Law.”

SPLIT-INTEREST TRUST RESULTS IN DENIAL OF CHARITABLE DEDUCTION – In *Galloway v. U.S.*, 492 F.3d 219 (3d Cir. 2007) the unfortunate result of applying IRC 2055(e), meant to prevent abuse of split interest trusts by non-charitable beneficiaries, was the denial of a charitable deduction for a trust that little chance of abuse, but that failed to meet the requirements of 2055(e).

House Judiciary Committee passed amendments to patent statutes that would deny patents to tax planning methods.

There are new proposed IRS regulations that provide guidance in determining what portion of a trust is includible in a Settlor's estate under Sections 2036 and 2039. The calculation is based on the Settlor's income stream and the applicable Section 7520 rate.

The Trump Taj Mahal in Atlantic City agreed to pay \$1.2 million to settle a lawsuit by a 74-year old woman injured when her hotel room toilet broke away from the wall she was sitting on it. She weighed 320k pounds. ABA Journal News Now, September 4, 2007.

Law grad acquitted of sexual battery charges after he introduced a polygraph exam, the first time such evidence was used in an Ohio criminal trial in 30 years. ABA Journal News Now, September 5, 2007.

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