

## MINUTES

### CBA Real Estate Law Section Council

Date: September 16, 2015 (Wednesday) 3:00 p.m.

### Colorado Bar Association Offices

1900 Grant Street, 9<sup>th</sup> Floor

Denver, Colorado

#### I. Call to Order

Mr. Sweetser called the meeting to order at 3:04 p.m.

#### II. Introduction of Guests

Leia Ursery, Walter Kelly and Elaine Carleton from the CBA Trust & Estate Section, as well as Alex Pankonin, were welcomed as guests at the meeting.

#### III. Approval of Minutes

The minutes of the August 18, 2015 RESC meeting were approved with corrections.

#### IV. Financial Report

- A. Mr. Calvin reported that the Real Estate Section has \$64,049.08 in its account as of August 31, 2015.
- B. Mr. Sweetser commented that in the future, a copy of financial report that is received by the officers will be circulated to all members of the Council.

#### V. Action Items

- A. Mr. Sweetser reported that the Title Standards Committee had recommended an amendment to Title Standard 3.4.1, which had been adopted when C.R.S. 38-34-105 expressly validated conveyances to yet-to-be-formed entities only if the entities were corporations. The title standard extrapolated the legislative policy to newer types of entities formed by filings in the Secretary of State's office, but a note observed the Title Standard went beyond the express language of the statute. Now that the statute has been amended, the note needed to be updated as well. Mr. Calvin moved approval of the amendment, Ms. Arnold seconded the motion, and the motion was approved on a voice vote.
- B. Mr. Sweetser invited Leia Ursery to explain the background of the Trust & Estate Section's support for legislation to amend the determination of heirship provisions of the Probate Code. Ms. Ursery said that the need for legislation was driven by situations that arose most often in oil and gas transactions, where rural land had

been passed down, sometimes for several generations, without formal probate proceedings. Existing law does not clearly allow for probate proceedings to be initiated by persons other than creditors or family members, and while it allows probate courts to determine whether a given person is or is not an heir, does not clearly provide for determinations of the quantum of ownership of particular assets. The Probate Code also does not provide for service of process by publication. Elaine Carleton commented that her oil and gas clients do not want to spend money drilling a well unless they are sure that questions of ownership will not hold up production if the well is successful.

Mr. Sweetser asked whether the interests of persons who do not receive notice of an heirship proceeding would be affected under the proposed legislation. Ms. Ursery responded that the existing statute provides for a one-year period for collateral attacks on any order of the probate court, and that this provision would remain unchanged; thus, whether or not actual notice was received, the holder of an interest whose rights were not recognized in an order would be barred.

Walter Kelly commented that creditors are barred presumptively under existing law if they do not submit claims within four months after an estate is opened, and absolutely barred after one year, and that no heirship proceeding could be brought for one year after a decedent's death, by which time creditor interests were out of the picture. He added that secured creditors are not precluded from enforcing their liens by the four-month and one-year bar dates, and that their rights would also not be affected by the proposed new legislation.

Geoff Anderson asked how conclusive determinations of non-ownership with respect to persons who did not receive notice could be squared with the holding in *Lobato v. Taylor*. Ms. Ursery responded that existing statutes had the same effect, and a good faith effort to give notice should be sufficient. She added that Colorado law provided for a presumption of death after seven years' absence, in certain circumstances, and that this was analogous to the determination that might result from an heirship proceeding under the proposed legislation.

After the guests from the Trust & Estate Section had departed, Mr. Schupbach asked that the Council consider the draft legislation, *attached*, and decide whether the Section can live with it. Following some discussion of the extent to which creditors and other owners of non-fee interests are protected, Mr. Calvin suggested the proposed new definition of "interested person" might benefit if the words "leasehold or other similar" were deleted before "non-ownership".

- C. Mr. Sweetser mentioned the possible need for a change in Colorado statutes dealing with licensing of mortgage loan originators. Mirroring the first draft of corresponding federal regulations, the statute provides for limited exemptions for sellers of real property who carry back notes and mortgages from their buyers, but no similar exemption for intra-familial or other non-commercial loans to finance purchases from third parties. Jean Arnold commented that she understood the

federal regulations now defined “creditor” in a way that would provide an adequate exemption for most such non-business loans, and that Jean had signed up to attend a seminar featuring a talk by DORA representative on licensing of mortgage loan originators; Jean said she would ask a question about the exemption topic if the speaker didn’t otherwise cover the issue. Mr. Sweetser commented that if the problem had been addressed on the federal level, it might be timely to explore a legislative fix in Colorado. Eben Clark volunteered to look at the Colorado MLO statute and regulations, if any, and report on possible solutions.

- D. Mr. Sweetser reported that Willis Carpenter had approached him with the suggestion that the Council take an active role in perpetuating POETS, an informal social organization founded by Willis, Jack Kellogg and other real estate lawyers some 495 months ago. POETS meets monthly for lunch and discussion of topics deemed relevant to experienced real estate and title lawyers. Membership in POETS is by invitation only, though certain conventions have developed as to when and to whom invitations will be extended. The force of Willis Carpenter’s personality has carried the organization and its traditions for many years, but, as Willis begins to curtail his active law practice, he would like to see POETS become less dependent on his involvement.

Mr. Sweetser noted that he was not at all sure the Council or the CBA could take over a private organization where membership was not open to all Section members, and that he also had concerns regarding potential financial risks to the organized Bar. Members of POETS pay dues several times a year that cover the cost of meals. This voluntary system works because of the extraordinary esteem in which Willis Carpenter is held, but the system might not function as well in other hands.

Ms. Hance said she did not think it would be appropriate for the Bar to get involved in a private, somewhat exclusive organization; perhaps former officers of the Section might take on some informal role. Similar comments were offered by others. Mr. Sweetser invited a motion, and Mr. Clark moved to reject the request that the Council take on any responsibility for POETS. The motion was seconded and passed on a voice vote.

## **VI. Reports**

### **A. Uniform Laws.**

Mr. Schupbach reported that another meeting of the Colorado members of the Uniform Law Commission is scheduled for 10:00 a.m. on October 20, 2015 in HCR 0112. He will distribute the agenda when it’s available. Several potential uniform acts will require discussion by more than one section of the Bar, and he will be pushing for consensus among the affected sections before October 20.

Mr. Sweetser reported that an associate was preparing a memorandum comparing the provisions of the Uniform Residential Landlord Tenant Act to existing Colorado law.

Mr. Schupbach noted that he had obtained unofficial approval to propose changes in the Uniform Substitute Decision-Making Documents Act to remove coverage of property transactions, leaving only medical care and personal care to be covered by the proposed statute.

Mr. Sweetser noted that the concern of the Real Estate Section regarding the proposed Uniform Voidable Transactions Act centered on the choice of law provision, and particularly the notion that a court outside Colorado could potentially determine the ownership of real property in Colorado. He observed that the jurisdictional issue was more important than the issue of which state's substantive law was applicable, and that the uniform act's proposed application of the law of the debtor's state might be acceptable if a foreign judgment had to be domesticated in Colorado before enforcement, so a Colorado court would take ultimate responsibility for any judicially-decreed change of ownership.

Mr. Calvin asked whether the Council should be prepared to offer specific language to address the domestication of foreign judgment procedure.

Mr. Schupbach said he did not think the Uniform Law Commissioners would consider any alternatives to the uniform language before the Legislature convenes and bills are introduced.

Mr. Schupbach reported that the Legislative Policy Committee was contemplating a meeting and reception for legislators around the October 20 date, to signal the desire of the CBA to be helpful to legislators in the upcoming session.

B. Documentary Fee/TD1000 Task Force.

Ms. Decker reported that no meeting of the task force had been held or called. She had asked the Clerk and Recorder of Douglas County and been told that the Clerks' Association was not planning to propose any legislation on this issue.

Mr. Sweetser said he understood that LTAC would want to push forward soon, and asked Mr. Schupbach to explore this with LTAC.

C. Legislative Policy Committee.

Mr. Sweetser noted that the LPC has not met over the summer, and in Mr. Toth's absence, there was nothing to report.

D. Bradford Forms Transition.

Heidi Ray reported on the acquisition of the legal form division of Bradford by Continuing Legal Education in Colorado, and distributed a document package describing the current forms in detail. The forms are available in editable Word format. CLE in Colorado does not intend to hold out the Bradford forms as “Bar Association approved” documents.

E. Statements of Authority.

Mr. Sweetser reported that the Business Law Section has been working on changes in the statutes governing statements of authority. He will speak with the Chair of the Business Law Section and LTAC to find out where each of these groups is in the process. Ms. Waggener mentioned that the statutory form should be revised to require an acknowledgment, or, perhaps, a jurat.

F. Address Confidentiality Program.

Mr. Sweetser reported that the Council’s task force had met with leadership of the ACP and other stakeholders earlier on September 16. There seemed to be consensus that an approach that limited disclosure of the identity of program participants was preferable to an approach that attempted to conceal the description of real property. Initially, it had seemed that taking title in the name of a revocable trust was a workable solution, but some issues had been identified that made this approach less appealing. At the moment, some kind of officially-sanctioned nominee approach seems most promising, but all involved are still working on basic concepts. Sam Starritt is taking the lead in working on this topic.

G. Publications/Newsletter, Website and Discussion List Committee.

Mr. Killean reported that the committee had meet a couple of weeks earlier. The next newsletter should be out around October 31. The committee is working to obtain some significant changes by the author of a proposed article for *The Colorado Lawyer* on 1031 exchanges. Other articles are in the pipeline, including one on the possibility of sales free and clear of covenants, and an update of Tom DeVine’s article on mortgage loan originators. He added that Mr. Lubinski was exploring the feasibility of pairing practicing lawyers with law students to provide research assistance for articles to be published in both names. Tyler Murray commented that the Tax Section had done that successfully last year. Mr. Lubinski added that he had spoken with the law schools and that they seemed to be on board with the concept of joint authorship with students providing research assistance for the articles.

H. Education/CLE Committee.

Mr. Mayo reported that the fall “Hot Topics” program would be presented as planned on October 16.

I. Education/Topical Lunch Committee.

Ms. Alderman reported that the fall schedule is underway. The next topical lunch will be at the Tech Center on October 1 and will provide an overview of CFPB regulations. The November lunch will cover environmental issues in real estate transactions. Subsequent topical lunches are in the planning stages.

J. Business Law Section Liaison.

Mr. Bergstrom was not present and no report was made.

K. Interprofessional Committee.

Ms. Dunn provided a written report, *attached*, regarding the August meeting. Ms. Decker added that she had attended the meeting as well, which featured, among other things, a report from the DORA supervisor of HOA registrations regarding possible changes in that program, a report of a possible move to require licensing of home inspectors, and a presentation concerning reports of fake title insurance policies purportedly covering timeshare interests in Mexico. Also, LTAC reported on its objections to the proposed consumer protection regulations circulated by the insurance commission.

L. Supreme Court Civil Rules Committee Liaison.

Mr. Calvin relayed Fred Skillern’s report that the proposed new Rule 120 is still under review by the editorial/style subcommittee. Mr. Sweetser added that Mr. Skillern had stated that he did not wish to be re-appointed to the Civil Rules Committee when his term expires later in 2015, and that the Section needed to find a good, young real estate litigator who could, over time, provide some of the perspective that Mr. Skillern had provided so ably for many years.

M. Publications/Colorado Lawyer Committee.

See Item G above; Mr. Killean’s report covered both Newsletter and Colorado Lawyer topics.

N. Community Service/Charitable Committee.

Mr. Mayo reported that the next LawLine 9 event would be September 23<sup>rd</sup>; volunteers would need to be available from 3:45 to 6:00 p.m. He is expecting Jeff

Bergstrom, Deanne Stodden, Dan Sweetser and Mr. Mayo himself. He added that in responding to questions, lawyers do not use their own names or the names of their firms.

Mr. Mayo also reported on several Habitat for Humanity programs that could use lawyer participation. Each program offers specific dates and times to participants; anyone in the Section may participate, but each program has a tight limit on the number of actual participants on any given date. Mr. Mayo distributed a sheet summarizing the programs and available dates and times, and will send out questionnaires to Council members before seeking broader participation from the Section.

O. Trust & Estate Section Liaison.

Ms. Wendell, standing in for Mr. Kirch, reported that the Trust & Estate Section had planned to create some forms of its own for real estate transactions, but had decided that Bradford forms were adequate for most purposes.

P. Colorado Housing Council.

Ms. Wendell distributed a written report, *attached*. Data presented at the last meeting indicated that Colorado is making relatively good progress in reducing unemployment, but doing less well at reducing poverty and providing affordable housing.

Q. Young Lawyers Division Liaison.

Mr. Sweetser noted that the RESC is awaiting the appointment of a new liaison by the Young Lawyers Division.

R. Cannabis Law Committee.

Ms. Dunn provided a written report, *attached*. Mr. Sweetser noted that the committee wants some substantive help from people who have actually dealt with leasing and other real property issues.

S. Tax Section Liaison.

Tyler Murray reported that the next meeting of the Tax Section would be the following week, and that as yet he had nothing to report.

T. CBA Ethics Committee Liaison.

Deanne Stodden reported that this committee will meet next week. She noted that the committee is working on several new opinions, most notably on one

concerning a lawyer's duties to a missing client, *i.e.*, a client who at some point after retaining the lawyer ceases responding to subsequent attempts by the lawyer to contact the client. She also noted that the July issue of *The Colorado Lawyer* contained an article on Revised Ethics Opinion 113 on representation of clients with disabilities.

U. Title Standards Committee.

Ms. Waggener said that she had nothing to report, apart from the amendment of Title Standard 3.4.1 discussed earlier in the meeting.

V. CBA Board of Governors Liaison.

No report; the next meeting will be in October.

W. Membership and Practice Development Committee.

Jim Killean reported that the committee has met and is reviewing the actions of the past couple of years, and is developing a plan of action to be presented at a subsequent meeting of the Council.

X. Forms Sub-Committee Liaison.

Geoff Anderson reported that the subcommittee had not met since the last RESC meeting, and therefore had nothing new to report.

Y. Eminent Domain Committee.

No report.

## VII. Adjournment

The meeting was adjourned at 4:59 p.m.



Charles D. Calvin, Secretary