



## Section News

# 2005–06 Section Leaders

**Chair:**

Kevin L. Shepherd, Baltimore, MD

**Chair-Elect:**

Christine L. Albright, Chicago, IL

**Vice-Chair, Real Property Division:**

Kathleen M. Martin, Minneapolis, MN

**Vice-Chair, Probate & Trust Division:**

Steve R. Akers, Dallas, TX

**Finance & Corporate Sponsorship Officer:**

Roger D. Winston, Silver Spring, MD

**Secretary:**

Tina Hestrom Portuondo, Miami, FL

**Section Delegates to the ABA House of Delegates:**

Neal J. Fink, Atlanta, GA

Leopold Z. Sher, New Orleans, LA

David K. Y. Tang, Seattle, WA

**Section Representative to the ABA Board of Governors:**

Raymond J. Werner, Chicago, IL

**Immediate Past Chair:**

Edward F. Koren, Tampa, FL

**Real Property Division Council**

**Members:**

Nancy J. Appleby, Washington, DC  
Kenneth L. Samuelson, Washington, DC  
Susan G. Talley, New Orleans, LA  
David A. Thomas, Provo, UT  
Sidney G. Saltz, Chicago, IL  
Andrew F. Palmieri, Alexandria, VA  
Michael D. Goler, Cleveland, OH  
Barry B. Nekritz, Chicago, IL  
Michael J. Glazerman, Boston, MA  
Martin P. Miner, Washington, DC  
Roseleen Parker Rick, Richmond, VA  
Elwood F. Cahill Jr., New Orleans, LA

**Probate & Trust Division Council**

**Members:**

Jo Ann Engelhardt, Palm Beach, FL  
Barbara A. Sloan, New York, NY  
William P. LaPiana, New York, NY  
Gideon Rothschild, New York, NY  
David J. Dietrich, Billings, MT  
Bernard V. Kearse, Atlanta, GA  
Linda Hirschson, New York, NY  
John W. Porter, Houston, TX  
Marc S. Bekerman, Mineola, NY  
Thomas M. Featherston Jr., Waco, TX  
Alan F. Rothschild Jr., Columbus, GA  
Linda S. Whitton, Valparaiso, IN

**Assistant Secretary**

**Real Property Division:**

Victoria deLisle, New Orleans, LA

**Assistant Secretary**

**Probate & Trust Division:**

Terrence M. Franklin, Los Angeles, CA

## Welcome to Our New Fellows!

The Section of Real Property, Probate and Trust Law welcomes our new class of young lawyer fellows. They are Anta Cisse-Green of New York, New York, Elizabeth Lindsey-Ochoa of Aurora, Colorado, Julie Panero of Wilmington, Delaware, and Christopher Walker of Jackson, Mississippi. Each appointment is for a period of two years. The Section has designed the program to encourage minority participation in the Section by designating two of the fellowships for minorities. Funds have been allocated by the Section to cover expenses for the fellows to attend meetings of the Section during their fellowships.

Each fellow has been assigned to Section committees and will have a mentor to work with during the years as a fellow. Section leaders are charged with involving fellows in the substantive work of the committees, and the mentors will work to maximize the opportunities for participation and professional development on the part of their fellows. Each fellow will also work with his or her mentor to produce a significant written work for the Section magazine or journal.

Four fellows are selected each year. To be considered for selection, a candidate should have practiced in the probate or real property area for at least one year and be an active member of the YLD with demonstrated leadership initiative. Candidates may also be active members of the division who have aged out within the last three years.

For more information about the fellows program or nominations for next year's fellows class, please contact Steve Gorin at (314) 552-6151 or [sgorin@thompsoncoburn.com](mailto:sgorin@thompsoncoburn.com) or contact the Assistant Director for Technology, Marketing and Communications, Rob King, at (312) 988-5540 or [kingr@staff.abanet.org](mailto:kingr@staff.abanet.org). Or visit the Section web site at [www.abanet.org/rppt](http://www.abanet.org/rppt). ■

## Preventing the Loss of Property

The Property Preservation Task Force (PPTF) has been actively involved the last several years to identify the character, scope, and possible solutions to the loss of tenancy-in-common property throughout the United States including, without limitation, the southeastern United States. The PPTF has teleconferenced four times since November 2004, has met with Undersecretary Dorr of the USDA, and has communicated with the Joint Editorial Board of the National Council of Commissioners on Uniform State Laws. The general focus of the PPTF has been to identify the character, scope, and possible solutions to the loss of tenancy-in-common property. The key elements of the PPTF's focus at this time are

- to develop a coherent analysis of the nature of the problem to propose solutions for submission to the Joint Editorial Board of the NCCUSL,
- to prepare a symposium at the Fall Leadership Conference in early November 2005 in Colorado Springs,
- to become involved with the USDA to develop a method to allow a co-tenant to purchase with Rural Development loan proceeds, the remaining co-tenants' interests, and
- to coordinate with local bar associations for education of and delivery to members of the public who are vulnerable to tenancy-in-common land loss. ■

### Section Nominations Committee

Pursuant to Section Bylaw § 6.1(f), following are the names of the Section 2005-06 Nominations Committee and the Section officer and council positions to be elected at the 2006 Section Annual Meeting. Any Section member wishing to suggest a nomination should send it to one of the Nominations Committee members listed below.

#### Nominations Committee

Chair: **Philip J. Bagley III**, Troutman Sanders LLP, P.O. Box 1122, Richmond, VA 23219-3531, [phil.bagley@troutmansanders.com](mailto:phil.bagley@troutmansanders.com).

Vice-Chair: **Edward F. Koren**, Holland & Knight LLP, 100 N. Tampa Street, Suite 4100, Tampa, FL 33602-2644, [ed.koren@hkllaw.com](mailto:ed.koren@hkllaw.com).

Members: **Dennis M. Horn**, Holland & Knight, LLP, 2099 Pennsylvania Avenue N.W., Suite 100, Washington, DC 20006-6801, [dennis.horn@hkllaw.com](mailto:dennis.horn@hkllaw.com); **David J. Dietrich**, Dietrich & Associates, P.O. Box 7054, Billings, MT 59103-7054, [dietrichlaw@mcn.net](mailto:dietrichlaw@mcn.net); **Edward T. Brading**, Herndon Coleman Brading & McKee, 104 E. Main Street, Johnson City, TN 37604-5735, [ebrading@lawyerfirm.com](mailto:ebrading@lawyerfirm.com).

#### Positions to Be Elected, August 2006

Office	Incumbent	Eligible for Renomination?
Officers		
Chair-Elect	Christine L. Albright	No, automatic ascension to Section Chair
RP Vice-Chair	Kathleen M. Martin	Eligible to become Chair-Elect
PT Vice-Chair	Steve R. Akers	Yes
Finance & Corporate Sponsorship Officer	Roger D. Winston	Yes
Secretary	Tina Hestrom Portuondo	Yes
Section Delegate	Neal J. Fink	Yes
Council Members		
Real Property	Nancy J. Appleby	Yes
	Kenneth L. Samuelson	No
	Susan G. Talley	No
	David A. Thomas	Yes
Probate and Trust		
	Jo Ann Engelhardt	Yes
	Barbara A. Sloan	Yes
	William P. LaPiana	Yes
	Gideon Rothschild	Yes

## USA PATRIOT Act and Gatekeeper Initiative

Concerns have arisen that legislation or regulations intended to curtail money laundering or the financing of terrorism may, among other things, impinge on important ethical rules governing our practices, such as the attorney-client privilege and duty of client confidentiality.

RPPT Section Chair Kevin Shepherd and *RPPT Bulletin* Editor Mark Mehlman are heading a task force appointed by the Executive Committee to attempt to communicate to the U.S. Department of Treasury the strongly held views of the Section and, if possible, to engage in an ongoing dialogue with Treasury regarding the potential impact on lawyers of any proposed legislation or regulations. Task Force members also include Section members Michael Goler, Neil Kessler, Timothy Powers, Shannon Skinner, and Susan Talley.

Kevin and Mark have met several times with senior Treasury staff members in Washington, D.C., to address issues of concern relating to the USA PATRIOT Act and the Gatekeeper Initiative.

Kevin reports that the meetings and discussions have been extremely productive, that Treasury appears sensitive to the concerns raised by the Section and other groups in attendance, and that Treasury seems favorably inclined to work with the Section and these groups in an effort to develop an approach to the issues that will not undermine any of the essential ethical underpinnings of our practices. ■

## Letters to the Editor

### A Loophole You Could Drive a Truck Through

Michael Whitty's article in the May/June 2005 issue of *Probate & Property* argues that the IRS is applying the wrong estate tax inclusion formula to a *Walton*-type GRAT and that a fixed-term interest should be treated differently from a lifetime interest. This is clearly not the law and should not be the law. Code § 2036 includes in the grantor's estate any trust in which the grantor retains an income interest for any period which does not in fact end before the grantor's death. If the grantor retains an annuity which is high enough that it must by definition include all of the income, that trust must also be includable. If, for example, the Code § 7520 rate assumes a 6% income return, then if I retain an annuity of 6% I will be receiving more than the amount of the income and if I die at any time during the trust, whether it is a term trust or a life trust, the trust should be includable in my estate. If I create a term income interest for, say, 15 years and I die the day before the trust term ends, Code § 2036 will include the entire trust in my estate. The rule can't be different if, instead, I retain an annuity as great as or greater than the income would be. Whitty argues for a loophole you could drive a truck through.

Lawrence P. Katzenstein  
Thompson Coburn  
St. Louis, Missouri



Professor Katzenstein was kind enough to correspond with me before writing to *Probate & Property* to critique my article "Repercussions of *Walton*" in the May/June 2005 issue. We had to agree to disagree on the extent to which Code § 2036 causes inclusion of a GRAT in the grantor's estate when death occurs during the annuity term. My position can be summarized as follows:

- Code § 2036(a) causes inclusion of principal only "to the extent" principal is subject to the grantor's retained "right to the income."
- In a pure GRAT, the grantor retains no express right to the income, but instead retains an annuity payment right—which is not the same thing.
- A pure GRAT is not simply a GRIT that has been modified to fix the payment. There are significant qualitative differences in the trustee's ability to amortize principal and the grantor's inability, in a pure GRAT, to cause the generation of income or the allocation of income to the payment when principal is available.
- Any implied income right contained in an annuity payment right is limited to that amount of income necessary to satisfy the payment right when principal is insufficient.
- The only principal necessary to generate that amount of income is the Annuity NPV, which is already included under Code § 2033.

I am developing an article for submission to *Real Property, Probate and Trust Journal* to further develop my analysis and to explain how it is supported by statutory and legislative history, relevant cases, and actual practice involving GRATs. In the meantime, I would suggest that planners avoid creating GRATs with the grantor as trustee or with a direction to pay the annuity from income first.

Michael D. Whitty  
Winston & Strawn LLP  
Chicago, Illinois