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Memo

Date: April 27, 2009 "

To: Article 9 Joint Review Committee and Observers

From: Mark Clark

Regarding: Comments on "Priority" Draft for Individual Debtor Names dated April 13, 2009

I resort to this written comment because nerve damage makes participation in a conference call (or any type of oral consultation) less than satisfactory. I have not tried to redraft. I give the substance of my recommendations followed by a discussion. I think this priority or hierarchy approach will work; my recommendations are intended to improve it.

Recommendation: I recommend that the application of proposed 9-503(a)(4)(D) be restricted to passports that are issued by countries that use the Latin alphabet as the principal expression of their official language, and represent cultures that commonly put the family name last and the individual name first.

Discussion: The prevailing practice in the Chinese culture is to put one's family name first and one's individual name last. A common practice when someone brought up in that culture moves to North America is to adopt a western "first" (individual) name, and put it first; use a person's Chinese individual name as a "middle" name; and put a person's family name last. This sort of reverses the original order but introduces a middle name. (The Chinese culture, itself, has no concept of a middle name. That fact has obvious implications for proposed 9-503(a)(4)E.) This quiet accommodation of western expectations is, however, by no means universal.

When mainland China issues a passport, it does so in ideograph characters, providing a Latin alphabet transliteration (according to a system of "*pin yin*"). Both the ideographic and *pin yin* representation of the individual's name are "backwards;" that is, the family name is first and the individual name is last. Moreover, there are several systems of *pin yin* in use and they change over time. Most of us are old enough to remember that Peking became Beijing, yet the name of the city, itself, did not change in Chinese. Taiwan has not used the same system of *pin yin* as does mainland China. Taiwan is, however, now transitioning to the mainland system. The mainland system is known by a Chinese name that

can be translated “Mandarin”; the Taiwanese system is known by a Chinese name that can be translated “Standard.” The decision of which system of *pin yin* to use is not simply a linguistic matter: it can be a political statement, too. One of the persons I consulted in connection with this comment pointed out that Taiwan did not decide to adopt the system in use by the mainland government until Taiwan had elected a pro-mainland president. Thus, to insist on the Latin alphabet depiction of a name on a passport issued by either mainland China or Taiwan will probably result in a combination of letters that the individual has never used and a name that no one who met the individual after he settled in North America would recognize. One of the persons to whom I spoke in connection with preparing this comment observed that westerners find the situation so baffling that the English-language media commentators provided some unintended humor during the Olympics last year.

I suppose that similar observations could be built around Arabic, Russian or even Greek or any language that does not principally use the Latin alphabet. (I know as a personal matter that there is more than one way to come out of Greek into the Latin alphabet. I have a granddaughter born in a country that uses a Romance language. Her middle name is “Sofia,” not “Sophia.”)

I sense the law of unintended consequences lurking here. I suggest it is best to sidestep it.

Recommendation: Proposed 9-503(a)(4)(E) and 503(h) should contain the word “formal”; both should accommodate change in a manner similar to the concept that is set out in proposed 9-507(d), omitting reliance on a subsequent document; and both should indicate that they reject they reported cases and are to be interpreted in a manner consistent with the Anglo-American law of names. (The later point may best be best addressed in the Official Comments.)

Discussion: Until proposed 9-503(h), the “priority” approach is essentially a system for an orderly passing of the buck. And it will work. The vast majority of practical cases will find their way into and out of the system before ever getting to 9-503(h). Yet there will be a tiny residuum that finds its way into 9-503(h). Here, the buck cannot be passed. The UCC should at least be consistent with the background law. Most of the reported cases involved “nicknames.” They should have been easy cases but they are full of dicta that, from the point of view of Anglo-American name law, can only be characterized as ignorant foolishness. Yet, some may continue to take them seriously.

I have avoided use of the term “nickname” because one generation’s nickname is the next generation’s formal name. To my generation, Terry, Harry and the many derivatives of Elizabeth (Betty, Beth, Betsey, Liza, Lisa) are all nicknames; to my daughter’s generation, these are formal names. (One of the comments about Harry Truman was that he didn’t even have a proper name.) So, whatever you think a nickname is, I suggest that there is a consensus to avoid them.

The Anglo-American law of names is summarized at pages 570 and 571 in *Richards v. Mason*, 54 Mass. App. Ct. 568 (2002), *review denied*, 437 Mass. 1105 (2002), and applied in *Secretary of the Commonwealth v. City Clerk of Lowell*, 373 Mass. 178 (1977). This is

not, however, just a women's issue. I know a man who changed his last name when he married a woman, and I know a man who changed his last name when he married another man.

Nor is this an issue that effects only the obscure. I could find citations that would seem to mandate filings for William J. Blyth III, Wilhelm Geyer, Hiram U. Grant and Wolfgang T. Mozart. You (and everyone else in the English-speaking world) might more easily identify these men as Bill Clinton, Richard Wagner, Ulysses S. Grant and Wolfgang Amadeus Mozart. Clinton's and Wagner's stories could be characterized as poignant. Grant's story sounds like it came right out of the script of a Paul Harvey "Rest of the Story."

Mozart's story illustrates the issues that may arise even within the Latin-alphabet-based world. Mozart was baptized with Theophilus as a middle name. It is a Greek-based name that means something like "beloved of God." During his life, Mozart did not use Theophilus or T. He often used A., but in his mind it may have stood for the French equivalent. It was only after Mozart's death that biographers made the Latin equivalent the standard. The practice of translating names among European languages has died out but only recently. My great grandfather's Prussian birth documents show him to have been Henrik. But everyone who knew him in North America (including his children) thought he was Henry.

It is true that the Anglo-American law of names is very informal and flexible. It may change under the influence of the War on Terror. I doubt, however, that Article 9 will change it.

Recommendation: Delete present 9-506(c) or get rid altogether of the concept of "not seriously misleading."

Discussion: The idea of "not seriously misleading" is an analog concept. There is no place for it in a digital (binary) world. It is a fundamental conflict. All of the recording offices have adopted a digital recording and search system. It is true that with enough sophistication and expense, a digital system can be made to perform in a way that seems to humans as if it were analog. Any music CD and the Google search engine are testimony to that. On the other hand, sophistication and expense are not concepts that come readily to mind when thinking about recording offices.

Unless it is thought about ahead of time and programmed in, in a digital world whyte is as discrepant from white as is black. As long as recording office systems have the last word, the concept of "not seriously misleading" is a cruel hoax.