



LEGAL NOTES

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PUT IT IN WRITING! (PART I)

By Burt J. Blustein, J.D.

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The need to memorialize an agreement in writing can be critical. However, there seems to be a reluctance in our culture for parties to have written agreements. When we suggest to clients that they should “get it in writing,” we hear responses such as, “why, we know each other for twenty years and trust each other,” or “I don’t want my partners to think I don’t trust them.” The excuses for avoiding written agreement are endless. Even when a client agrees to enter into a written agreement, the request is often prefaced by “now, I want a simple one page agreement.” While that’s an admirable goal, once we start understanding the terms of the deal and start asking questions, it becomes obvious that one page won’t suffice.

Why is a written agreement so essential? Primarily, it removes uncertainties about what the parties intended their agreement to cover. Memories are faulty and, without a written document, it is difficult to recall the exact substance of what the parties intended to be their “meeting of the minds.” Also not to be ignored is the issue of trustworthiness. When an

endeavor contemplated by a contract goes bad, or if the parties start feuding, it is inevitable that each person’s recollection of what the parties agreed to will be different. If the writing is properly drafted and due consideration is given to the potential troublesome issues, the writing will eliminate the reliance on memory which becomes selective to suit the individual’s needs. It is not that a written agreement is perfect; indeed in forty-five years of practice I have learned that there is no such thing as a perfect, all-encompassing agreement. It is simply impossible to conceive all contingencies that would cover unknown future events.

While a written agreement may contain many provisions, there are certain fundamental elements essential to a valid agreement. One key principle is the *Statute of Frauds*. An ominous sounding phrase, the Statute of Frauds was developed in English law many centuries ago when it was recognized that certain types of commitments to be enforceable should be in writing to avoid the possibility of fraudulent claims of a substantial right in certain circumstances.

English common law evolved over the centuries and has become codified and in New York. The rules concerning agreements required to be in writing are found in Section 5-701 of the General Obligations Law. Let us look at that

section briefly. The opening statement of the statute is instructive: “[E]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by...” The statute then creates a long list of promises that must be in writing to be enforceable, including: (i) promises that will not be performed within one year; (ii) a special promise to answer for debt or default or miscarriage of another person or more commonly referred to as a guarantee or promise made in consideration of marriage; (iii) a new promise to pay a discharged bankruptcy debt; a contract to assign or assignment of a life or health or accident insurance policy; (iv) a contract to pay compensation for services

FOR YOUR INFORMATION ...

By Rita R. Rich, J.D.

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- President Obama signed a bill to extend the new homebuyer tax credit. There are income limits and other qualifications, but generally, first-time home purchasers who buy after January 1, 2009 and go into contract before May 1, 2010, with a closing before July 1, 2010, are eligible for up to an \$8000 tax credit. AND, current homeowners who buy a replacement home after November 6, 2009 could qualify (under the same contract and closing timeframe) for up to a \$6500 credit if they lived in their home for at least 5 consecutive years of the last 8 years. ALSO NOTE that if you believe you qualify for the credit, you may reduce your withholding amount on your W-4 with your employer or take the

rendered in negotiating a loan; (v) a purchase, sale, exchange, renting or leasing of any real estate or interest therein; or (vi) a business opportunity, essentially a brokerage commission agreement. Additional items on the list include esoteric and specific types of transactions that are very narrow in scope and need not be addressed in this article.

In Part II of this Article (to be published in the May 2010 Newsletter), I will discuss two frequently litigated topics involving the Statue of Frauds, guarantees and real estate transactions. Stay tuned!

reduction on your quarterly estimated tax payment.

- Governor Paterson recently signed a bill relating to foreclosure actions on home mortgage loans. In general, the bill:
 - Expands the required 90-day pre-foreclosure notice for all home loans;
 - Sets forth regulations for assistance to distressed homeowners;
 - Provides for mandatory settlement conferences between the foreclosing party and all home borrowers (no exceptions), so that there are good faith negotiations to resolve the delinquency, possibly by a loan modification;
 - Allows for the court to appoint counsel for the homeowner;
 - Protects tenants of foreclosed properties for at least 90 days, when fair market rent is being paid;
 - Requires foreclosure plaintiffs to maintain the foreclosed property (at the point of the judgment of

- foreclosure and sale, rather than the later transfer date), and if there is a tenant, the property must be maintained in a safe and habitable condition; and
- Prohibits upfront fees to brokers who assist distressed homeowners.
- For most towns in New York, Grievance Day to contest your 2010 town assessment is the fourth Tuesday in May, but you may want to contact your assessor to confirm the exact date and time for a grievance (in Minisink, for instance, Grievance Day is the third Tuesday in May) and to make an appointment to informally discuss your assessment before you file a grievance. Be prepared to support your request for a reduction based on an excessive, unequal, unlawful or misclassified assessment. You may venture online for comparable properties that may have lower assessments. It is an Orange County website: www.co.orange.ny.us. Go to “Property Tax Information,” click “Enter,” then “I Agree,” and then “Continue.” Type in your Section, Block, and Lot numbers, click “Search,” then your property, then “Comparables” on the left side of the screen, and lastly “Run Query” at the bottom of the screen. OR, you can spend some time at Town Hall going through the assessor’s tax cards. Take your tax bill with you. If after you meet with your assessor (or even if you don’t have a meeting), you disagree with the assessment, take a look at the booklet, “What to Do if You Disagree With Your Assessment.” It can be found at www.orps.state.ny.us, where you click “Forms, Publications and Procedures” at the top of the page, then “Publications” on the left, then “Alphabetical List...” and “W” (for “What”) to get to a printable version of this 2010 New York State publication.
 - Every attorney in the State of New York must maintain an IOLA account in a New York banking institution. IOLA stands for “interest on lawyer account” and is set up for funds the attorney receives as a fiduciary which are nominal in amount and will not be held for a long period of time. The account bears interest at standard rates, subject to the bank’s standard charges or fees. The banking institution transmits the net earned interest at least quarterly to the IOLA fund, which is governed by a Board of Trustees, providing millions of dollars annually in the form of grants to non-profit, tax exempt entities to fund civil (not criminal) legal assistance to low income New Yorkers, such as the elderly or disabled.
 - Under NY Vehicle and Traffic Law Article 48-B, every ATV in New York must be registered with the Department of Motor Vehicles (DMV), with very few exceptions. However, if you buy an ATV from a person who is not a NYS registered ATV dealer, then you must register the ATV with the DMV, and of course, pay the applicable sales tax. Liability insurance on the ATV is required (with coverage of at least \$10,000 property damage; \$25,000/\$50,000 personal injury; and \$50,000/\$100,000 death) if it is operated anywhere in New York State except on your own property. When riding an ATV as the operator or passenger, it is recommended that you wear a face shield or goggles, protective clothes and footwear, but it is mandatory that you wear a USDOT-approved helmet. An operator does not need a driver’s license, but if under the age of 16, there are special restrictions concerning supervision.

ESTATE PLANNING TECHNIQUES THAT BENEFIT THE ENVIRONMENT

By James Yastion, J.D.

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With the long-term rise in oil prices and the widespread scientific belief that human conduct is contributing to climate change, people have become overnight converts to an ever growing array of new “green” lifestyle alternatives from the glamorous to the mundane -- everything from hybrid vehicles to straw bale homes to non-bleached bathroom tissue.

Among the dizzying variety of “green” living options, people often overlook the estate planning and asset management techniques that can provide a tangible and potentially *more* significant means to benefit the environment. During these difficult financial times, it is important to recognize that these techniques can confer significant financial and tax benefits while maintaining needed flexibility, both during life and upon death. Some of these techniques are not exclusively for purposes of estate planning, but when combined they all contribute to a comprehensive estate and asset plan for the environmentally minded.

One planning technique that can benefit our environment is the **conservation easement**. A conservation easement is a legal agreement between a landowner and a land trust or municipality that permanently limits uses of the land in order to protect its conservation values.

A working farm overlooking the Shawangunk Ridge is a potential setting for a conservation easement. The farmer may want to ensure that his land will always be used for farming and that the scenic views of the Ridge will be preserved and enjoyed by the community for generations to come. If he wishes to sell the property, a mere promise from the buyer that he

or she will keep the farm intact will not be enforceable in a court of law. A conservation easement, however, will “run with the land,” and will restrict development in perpetuity. Thus, if the farmer’s estate were to sell the land upon his death, all subsequent owners would be bound by the restrictions contained in the conservation easement.

Landowners often shy away from the conservation easement because, by its nature, it limits how the property may be used and, except in rare instances, it cannot be revoked. However, the conservation easement is a flexible device and can be crafted to permit certain specified uses and even some development in the future. The terms of the easement should be negotiated between the landowner’s attorney and the municipality or land trust receiving the easement, and it would provide for the continuation of certain uses based on the needs and goals of the landowner. There are many variables that the attorney must discuss with the landowner before he or she signs the conservation easement. The easement may permit the construction of additional structures, roads and paths. The farmer in the above example may even permit the development of a portion of the property. The landowner may wish to permit public access for hiking and scenic enjoyment.

In addition to the obvious environmental benefits of the conservation easement, there are significant tax benefits. With respect to estate taxes, the Internal Revenue Code provides that if a person dies owning land subject to a conservation easement, the owner may deduct the value of the easement from the gross estate. Additionally, if certain geographic, ownership, and other criteria are met, up to forty percent of the land value can be excluded from the gross estate with a cap of \$500,000. With a combined Federal and New York State estate tax rate of approximately fifty-five percent of the taxable estate, significant tax savings may result from the use of a conservation easement.

The conservation easement also confers income tax benefits on the landowner. The Federal government allows an income tax deduction in the year the easement is created equal to the value of the easement up to fifty percent of the landowner's adjusted gross income. The deduction can be carried over into subsequent tax years if it is not fully utilized in the year of the easement. There is an added incentive for a full time farmer or rancher who can deduct up to one hundred percent of his or her adjusted gross income. Whereas the Federal government allows a one-time income tax deduction, New York State provides an ongoing annual tax credit against income of up to \$5,000 per year. This credit survives the landowner's death and can be claimed on the estate's annual income tax returns, which is particularly useful if the real property is held in trust by the family for many years after the landowner's death.

The second estate planning technique is a testamentary **gift of money or property to a charitable organization** devoted to conservation. An individual can make the gift either in a will or trust. The will or trust would simply provide for the bequest to the organization. The gift can be a specific dollar amount, percentage of the estate, or a gift of real property. The testator could also make the bequest contingent upon another event happening such as certain beneficiaries predeceasing the grantor. Depending on the testator's wishes, the will or trust could require that all specified bequests to family members be satisfied first before the gift to the charity is made.

There are numerous benefits of including a charitable bequest in a will or trust. For one, the assets remain in the individual's control during life, so he or she can modify or revoke the bequest at any time prior to death. Additionally, there is no upper limit for such a bequest, and the entire bequest can be used as a charitable deduction against the gross estate for estate tax purposes. The deduction would reduce the tax to be paid by the estate thereby

preserve more of estate for distribution to the decedent's family and beneficiaries.

While testamentary giving is a fairly straightforward technique, the will or trust must be worded carefully to avoid unintended consequences. For example, if the will provides that a portion of the estate should pass to a particular conservation organization and the organization ceases to exist before the individual's death, the share intended for the organization would pass to the other beneficiaries under the will, a result that may not have been intended. To avoid this result, language can be included in the will or trust to provide that if the chosen organization is not in existence, the bequest would pass to another organization with a similar charitable purpose.

A third technique is the **charitable gift annuity**. Certain conservation organizations offer this option whereby an individual can transfer cash, securities or other property to the organization. The organization in turn pays out to the individual a lifetime annuity, and the principal passes to the organization after the deaths of the income beneficiaries.

The benefits of the charitable gift annuity include an immediate income tax deduction for a portion of the gift to create the annuity. Moreover, the annuity payments are treated as part ordinary and part tax-free income. If the gift is funded with appreciated property, the annuity payments are also part capital gains income, which is usually taxed at a lower rate. Finally, the individual has the satisfaction in knowing the gift was put to work for environmental or conservation purposes. One caveat: the prospective donor should be careful to ensure the organization is well capitalized, since the annuity would likely be backed only by the assets of the organization.

Whether they are labeled as glamorous, mundane, or somewhere in the middle, the estate and asset planning techniques described above allow the environmentally minded

individual to leave a lasting legacy of environmental stewardship, all while conferring significant tax and other benefits to the donor for his or her life, and often for generations to come.

EDUCATIONAL WORKSHOPS

Blustein, Shapiro, Rich & Barone, LLP offers complimentary educational workshops to our clients and friends. Here's our upcoming workshop schedule:

Estate Plans That Work™

April 19, 2010 – 3:00 p.m. to 6:00 p.m.

May 18, 2010 – 3:00 p.m. to 6:00 p.m.

Protecting Your Assets from Nursing Home Costs

April 7, 2010 – 3:30 p.m. to 5:30 p.m.

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

All workshops will be held in the BSRB Education Center at our 10 Matthews Street location.