



# LEGAL NOTES

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March 2011  
Vol. 2 – No. 3

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### *COMMERCIAL REFINANCING*

By Michael S. Blustein, J.D.

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Thinking about refinancing your commercial mortgage? Now may be a great time. While interest rates are beginning to climb, they remain at historical lows. The attorneys at Blustein, Shapiro, Rich & Barone, LLP have been assisting many of our clients in refinancing existing commercial mortgages on favorable terms. While we have worked with both the large national banks and local banks, our recent experience is that, in general, the best loan terms are being found at local lending institutions where our clients have easier access to the key decision-makers.

It is no secret that three years ago the credit markets were largely frozen. Today, however, banks are willing and able to lend, subject to the borrower's financial condition and other business factors.

To streamline the loan process, it is essential that you (or your accountant) provide income statements and tax returns for the past few years for both the company that is applying for the loan, as well as the individuals who will be asked to guarantee the loan (typically the

principals of a closely held business). Detailed information must also be provided regarding the collateral that will be used to secure the loan.

Some banks are willing to provide extremely low variable rates fixed for a five-year term. If there is a reasonable likelihood that you may sell the commercial real estate in the next few years, taking advantage of these extremely low short-term interest rates will provide immediate help for your business' cash flow, thereby freeing up money that can be used for other investment and business opportunities. For clients expecting to hold their commercial real estate over a longer term, we have seen lenders offering very competitive fixed rates for ten-year periods, with amortizations of between twenty and thirty years.

If you have any questions or wish to seek assistance, please do not hesitate to call one of our real estate attorneys.

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## ***ESTATE PLANNING IN A PERIOD OF UNCERTAINTY***

**By Austin F. DuBois, J.D.**

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If 2010 has taught us anything, it should be that no one can predict the actions (or inactions) of Congress. Nowhere is this more evident than in the wildly varied state of affairs surrounding the Federal Estate Tax over the past ten years. This article explains where the Federal Estate Tax has been, why it took the course it did, and what we can do to prevent a fickle legislature from ruining our planning goals.

Rewind to 2001. The Federal Estate Tax rate was 55% and individuals with \$1 million of assets or less were exempt. The Economic Growth and Tax Relief Reconciliation Act (“EGTRRA”), which was signed into law in June 2001, created a gradual phase-out for the Estate tax. The tradeoff for this phase-out – which was long-advocated by the Republican party – was that in 2011 the law would “sunset”, and the Estate Tax would return to its 2001 rates. In 2009, EGTRRA provided an individual exemption of \$3.5 million and a rate of 35%. In 2010, the Estate tax was set to be repealed, the culmination of the phase-out.

No one thought Congress would let full repeal take place. We know now, of course, that they did. The Federal Estate Tax had been repealed, resulting in chaotic results with many estate plans. Consider the following “Error Message” example:

A typical tax planning will or trust has language to the following effect: “I leave to my Trust created under Article II an amount equal to my then-existing federal estate tax exemption, with the remainder of my estate to go to my spouse outright.” But what does the language mean when it refers to an exemption? There needs to be a tax in order for an exemption from that tax to

exist, and in 2010 no such tax existed. Therefore, the exemption didn’t exist. It wasn’t that it existed and had a value of zero—it literally was nonsense to speak of it. In 2010 at least, many wills and trusts were literally nonsensical. It is not that wills and trusts were producing unintended, or even absurd, results; it was that they were unable to produce *any* result. Just like a calculator produces the message “Error” when you hit the wrong button and it literally *can’t* compute the sequence of buttons you pressed, many longstanding wills and trusts, if left to their own devices, would, in very real terms, simply fail to function.

In 2010, about four serious proposals were on the Congressional table regarding possible estate tax solutions. The “winner” is a version of the most conservative proposal on the table. With the Democrats in control of the White House and legislature, no one could have predicted Congress would have settled on that solution. However, contrary to all predictions, Congress, with President Obama’s acquiescence, approved a \$5 million per person exemption that includes a “portability” option for spouses.

A turbulent estate tax regime can cause a number of problems if the proper planning and maintenance is not a part of an individual’s design. The “Error message” example above is extreme, but with some political figures advocating a permanent Estate Tax repeal, it is not out of the question. And even less extreme changes can be disastrous to an ill-advised plan.

For example: most tax planning documents for married couples involve the use of two trusts: A “credit shelter trust” to take advantage of the Federal Estate Tax exemption, and a “marital trust” for the benefit of the spouse to take advantage of the “unlimited marital deduction.”

These documents typically fund one of those trusts first, using a formula defined by the Estate Tax exemption amount, or with a monetary amount which takes the exemption amount into consideration. The remainder of the assets then passes to the remaining trust. To achieve the highest degree of tax efficiency, the credit shelter trust would be funded first. But, if the laws change to increase the exemption amount, this could result in more going to the trust than you intended. This puts your spouse in danger of getting either much less than needed, or potentially nothing at all.

To avoid the above result, you might devise a fixed sum to your spouse, with remainder to go into the credit shelter trust. However, if the exemption changes, you could end up having given your spouse an incorrect amount, and paying significantly more tax than necessary.

Other factors aside from unpredictable legislation can have similar bearing, such as a stock market crash or unforeseen expenses. Anything that drastically affects your asset values can cause your estate plan to falter.

The majority of these issues can be resolved simply by keeping on top of your plan. Laws change, asset values change, and on a less technical note, your life situation changes. Your estate plan should reflect those changes.

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***DIGNITY FOR ALL STUDENTS ACT:  
EDUCATION LAW §2810***

**By Carol C. Pierce, J.D.**

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Given the dramatic increase of bullying among young children and teens, and especially in light of the tragic rise of teen suicides as a result of bullying, New York is seeking preventative measures to help combat bullying in public schools. On September 8, 2010, Governor

David Patterson signed into law the Dignity for All Students Act under Education Law §2801, which is designed to help ensure that educators and school administrators have the proper tools and resources in place to fight bullies and protect victims that are targeted by those bullies.

New York is in the foreground of this new legislation, as only eleven other states around the country have passed similar statutes; including California, Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, Vermont, Washington and Wisconsin.

Effective July 1, 2012, The Dignity for All Students Act permits school suspensions for any violations of the anti-discrimination and anti-harassment provisions of the New Article 2 of the Education Law. Article 2 was promulgated to protect public school students from discrimination and harassment by other students and/or school employees on school grounds and functions on the basis of “actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex...” Under the act, harassment is defined as “the creation of a hostile environment by conduct or by verbal threats, intimidation or abuse that has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities or benefits, or mental, emotional or physical well-being...” on the basis of the aforementioned grounds.

The State Education Commissioner is empowered with developing model policies, providing grants to school districts, promoting regulations and establishing a uniform incident reporting mechanism that protects victims from retaliation. Furthermore, the Commissioner will also provide guidance to school districts on developing effective responses to bullying, including but not limited to intervention and education.

However, each school will be responsible for creating their own guidelines for training and prevention as well as responding to complaints of discrimination and/or harassment. All schools must adopt and enforce a Code of Conduct, governing the conduct of students, teachers, other school personnel and visitors. A summary of the Code of Conduct must be provided to students and parents and/or guardians at the beginning of each school year. School personnel must also be provided with a copy of the Code of Conduct and copies must be made readily available for review. The Code of Conduct will also set forth disciplinary and/or referral actions for any violation under the Code of Conduct, including but not limited to: referral to counseling; teacher removal with formal hearing; suspension from class or activities; out of school suspension; transfer to alternative setting and/or transfer to law enforcement. Additionally, the Code of Conduct will be required to be reviewed annually and updated if necessary, especially in light of the continuing advancements in new forms of technology that are ever changing. It will address internet and electronic device safety issues, such as cyberbullying and sexting. However, the biggest challenge facing school administrators regarding cyberbullying and sexting is how to effectively and legally handle incidents that occur off campus, but that affect the educational

process and/or endangers the health or safety of any of the students. Given that cyberbullying and sexting may involve matters of free speech and expression, which are guaranteed by certain constitutional rights, school districts may be limited on what they can and cannot restrict in their Code of Conduct regarding these matters. Undoubtedly, as this new legislation is put into effect, it is anticipated that many lawsuits will be filed in courts around the State addressing these issues.

Additionally, all incidents of bullying will be reported to the New York State Education Department on an annual basis so that the State can evaluate each individual school's performance. Individual schools will also be required to incorporate curricula on diversity and sensitivity into lessons on civility and citizenship in addition to incorporating age-appropriate, plain language versions of the statute to appear in student codes of conduct. Although the law does not come into effect until July 1, 2012, schools are required to implement the necessary rules and regulations in advance of that date.

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## EDUCATIONAL WORKSHOPS

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

**Elder Law and Long-Term Care Planning -- March 15, 2011 (4:00 p.m. to 6:00 p.m.P**

**Estate Plans That Work™ -- March 29, 2011 (3:00 p.m. to 6:00 p.m.)**

**To register for a workshop, call Donna at 291-0011 x.242, or register online at [www.mid-hudsonlaw.com](http://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.**

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