



# LEGAL NOTES

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### ***HANGING TOUGH IN A TROUBLED ECONOMY***

**By Michael S. Blustein, J.D.**  
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Despite the economic crisis facing the United States in 2009 (and in particular the banking meltdown and residential real estate collapse) the commercial transactional team and residential real estate department of Blustein, Shapiro, Rich & Barone, LLP continued to thrive.

The record downturn in the residential housing market and subsequent government initiatives resulted in home mortgage fixed interest rates being reduced to record low levels. The low interest rates allowed homeowners who had solid credit to refinance their homes at historically low rates. As closing counsel representing regional and national lenders in both refinances and purchase mortgages, during 2009 our firm closed on over \$100,000,000.00 in aggregate deals. It is our expectation that as the housing market stabilizes, there will be a return to normalcy in the housing market in the Orange County area. Significant credit for positioning our firm as one of the leading real estate law firms in the Hudson Valley goes to

Karen Tintner, our Director of Residential Real Estate Services.

On the commercial side, BSRB stayed busy in 2009, notwithstanding the significant reduction in commercial activity throughout the region. We represented both landlords and tenants with the leasing of existing commercial office space as well as build-to-suit new construction and even short-term large warehousing space for a national retailer that needed extra storage capacity temporarily.

While larger commercial transactions were few and far between in the Hudson Valley in 2009, we were fortunate to be involved in some of the region's most significant commercial projects. One of our larger transactions included the sale of a large commercial/industrial parcel to a national developer, who then used the proceeds via a Internal Revenue Code Section 1031 exchange to acquire new vacant commercial properties to develop. We also closed on a large construction loan and permanent financing for a new industrial complex which received benefits from the Town of Wallkill Industrial Development Agency ("IDA"). We were instrumental in assisting a retail strip mall owner whose existing financing was expiring obtain a desperately needed infusion of short-term capital to avoid going into foreclosure. Further, we represented investors who

purchased a number distressed real estate properties, including the purchase of a partially built 100+ lot subdivision from a national builder. Through the use of creative financing and land use strategies, our client expects to finish developing this previously dormant property in under eighteen months, thereby creating jobs for local contractors and tax ratables for the municipality.

As we focus on 2010, we are in the final stages of completing a deal for an out-of-state client looking to relocate to Orange County and purchase and renovate an existing large warehouse facility that would create approximately 250 new manufacturing and office jobs in the Town of Wallkill. We have worked closely with representatives of the Orange County Executive's Office, Orange County Legislature, Orange County Partnership, and Orange County IDA to level the playing

field with other competitors and help our client obtain Empire Zone Certification as a regionally significant project.

Finally, we are elated that in October 2009 we finished construction on our own new office building located at 10 Matthews Street in Goshen, New York. We expect that this new state-of-the-art law office facility will maximize our ability to serve as the "go to" law firm in the Hudson Valley and beyond. More than ever we are positioned to represent companies, lenders and individuals with all aspects of their commercial and residential real estate needs. We invite all who have not visited us at our new location to come meet with members of our team.

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## ***THE BENEFITS OF 529 PLANS***

**By Mindy Menke, J.D.**

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The cost of college tuition is sky-rocketing, and financial aid is more difficult to come by. The New York State College Tuition Saving Program, more commonly referred to as New York's 529 plan, may be an excellent way for parents and grandparents to assist their children or grandchildren in paying for college, while reducing the size of the donors' estate and the likelihood of an estate tax.

A 529 plan is an educational saving program authorized by Congress in 1996 to help families save for future college costs. Every state has one or more 529 plans in place. The plans are typically established for the benefit of a child or

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grandchild, but can also be established for nieces, nephews, or other "permitted beneficiaries" as specified in the IRS code. Once the plan is in place, contributions are made to the account. The investments in the plan grow free of federal income tax, and New York residents who use the New York 529 plan can receive a tax deduction of up to \$5,000 per year (\$10,000 for those that are married and file jointly). Previously, only the owner of the plan could contribute to their 529 account, but on May 27, 2008 Governor Patterson signed legislation that allows a non-owner to contribute to a 529 plan; however the non-owner cannot claim a New York State income tax deduction for his or her contribution.

When funding the plans, the donor can utilize their annual gift tax exclusion and contribute \$13,000 (or \$26,000 for a married couple) per beneficiary without depleting their unified credit or incurring a gift tax. 529 plans also offer a special five-year election, where an individual can contribute as much as \$65,000 to a plan (or \$130,000 for a married couple), provided that no other gifts utilizing the annual exclusion are

made to the same beneficiaries during the five-year election period. That being said, there is a limit on how much can be gifted to a 529 plan. In New York, the aggregate value of gifts made to the plan cannot exceed \$235,000.

Under the tax code, contributions to the plans are considered completed gifts. Therefore, once donor makes a contribution to the plan, those monies are no longer “owned” by the donors, but are outside their estate for estate tax purposes. However, the plan owner must give up all control over the gifted funds. The plan owner retains the authority to change the beneficiary of the plan to a “qualified family member,” who may be another child, grandchild, or other qualified family member.

Besides the tuition assistance provided by the 529 plan funds, there are additional benefits to the beneficiary. If the plan owner is a grandparent, the assets in the plan will not negatively affect the beneficiary’s ability to obtain financial aid and do not have to be disclosed on financial aid applications. However, if the plan is owned by a parent, the assets in the plan must be reported on the federal financial aid application (FASFA).

When considering a 529 plan, many people are concerned about what happens to the assets in the plan if the beneficiary does not go to college. In such event, the plan owner has two options: they can change the beneficiary to another qualified family member who is or will be attending college, or they can take the money out of the 529. If the money is taken out of the 529 plan, any earnings on the growth will be taxable to the plan owner at his or her ordinary income tax rate, plus a ten percent penalty. As part of a comprehensive estate plan, a structured 529 gifting program is an excellent way to reduce the value of an individual’s taxable estate, while providing much needed educational support for children, grandchildren and other family members.

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## ***GOOD TRUST – BAD RESULT***

**By Richard J. Shapiro, J.D.**

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I met recently with three brothers whose mother died in 2009. Their father had died in 2002. In 2000, the brothers’ parents – let’s call them Robert and Sandy Jones -- had completed an estate plan that included a joint revocable living trust. Most of their assets – which were comprised primarily of residential and commercial property worth approximately \$1.25 million in 2000, plus a brokerage account worth about \$150,000 – were “funded” to the trust by retitling the assets in the name of the revocable trust.

One can only assume what the Jones’ planning goals were, but experience tells me that there were probably two objectives: probate avoidance and estate tax protection. In the end, neither objective was satisfied.

The first critical omission was the failure to properly apportion the assets funded into the joint trust between Mr. and Mrs. Jones. While joint revocable trusts are certainly valid in New York, to be fully effective the funded assets must be specifically allocated between the spouses. This is done by dividing the previously jointly-owned assets equally between the husband and the wife, and specifically identifying assets contributed to the trust by each spouse on schedules appended to the trust. In this particular case, the schedules that were supposed to identify each spouse’s “portion” of trust assets were left blank.

When Mr. Jones died in 2002, Mrs. Jones probably assumed that since the trust already owned all the assets, there was nothing for her to do. She probably believed that her estate planning was successfully completed, as she was able to avoid having to probate Mr. Jones’

estate since he owned no assets in his name alone. And, since the joint trust provided that upon her death, the trust assets would pass equally among the three sons as she desired, her estate planning was “done”.

Unfortunately, the absence of continued professional involvement with Mrs. Jones’ planning led to unintended consequences. Under the terms of the joint trust, upon Mr. Jones’ death “his” share of the trust assets was supposed to be funded into a “Family Trust” for Mrs. Jones’ benefit. Assuming a total estate value of \$1.4 million in 2002, approximately \$700,000 of assets – comprising one-half the interests in the real estate, plus one-half the assets in the brokerage account – should have been retitled in the name of the “Robert Jones Family Trust.” Mrs. Jones and her sons were to have been the Trustees of the Family Trust.

Between Mr. Jones’ death in 2002 and Mrs. Jones’ death in early 2009, Mrs. Jones acquired additional assets, including a vacation home in Florida. The newly acquired assets were titled in Mrs. Jones’ name alone, rather than to her “survivor’s trust” portion of the revocable trust. By the time of her death, her total estate – both the trust assets and the assets in her own name – were worth \$1.8 million.

Since Mrs. Jones owned assets in her own name, the Jones’ three sons had to commence a probate proceeding in Orange County Surrogate Court to obtain “Letters Testamentary” that

provided them with administrative control over Mrs. Jones’ investment and bank accounts, and most of the probate assets. However, because Mrs. Jones owned the Florida home in her name alone, our clients were required to retain Florida counsel to file for an “ancillary” probate proceeding in that state, at an additional expense of approximately \$3,500.

I had the sad duty of informing the Jones’ sons that, because their father’s Family Trust had not been funded at the time of his death in 2002, Mr. Jones’ estate exemption on the one-half of the trust assets that should have been allocated to the Family Trust was forfeited. Accordingly, the entire \$1.8 million of assets owned by both the trust and in Mrs. Jones’ name at the time of her death are includable in Mrs. Jones’ taxable estate. Since New York’s estate tax exemption is capped at \$1 million, the “extra” \$800,000 that would otherwise have been owned in the Family Trust is fully taxable, resulting in a New York State estate tax obligation of about **\$85,200**.

What’s the moral of the story? Simply having good estate planning documents is not enough. Your estate planning must be regularly maintained and monitored to assure that all your goals can be satisfied both during lifetime and after your death.

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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:**

### Estate Plans That Work™

March 16, 2010 – 3:00 p.m. to 6:00 p.m.

## **Protecting Your Assets from Nursing Home Costs**

March 4, 2010 – 3:30 p.m. to 5:30 p.m.

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](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.**