

LEGAL NOTES

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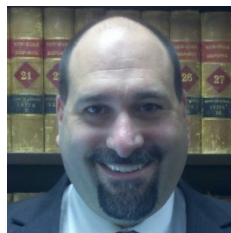
ATTORNEYS JAMIE FERRARA AND RAY RAICHE JOIN THE BSRB LITIGATION TEAM

**By Michael S. Blustein, J.D.
Managing Partner**

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Jamie T. Ferrara, Esq.



Raymond P. Raiche, Esq.

As part of our ongoing efforts to provide our clients with exceptional legal services in an array of practice areas, I am pleased to announce that within the past few months we have added two seasoned litigators to our ranks as associate attorneys. With twelve attorneys in our main office in Goshen, our experienced team is growing to meet the continued needs of our clients as we become one of the largest general practice firms in Orange County.

Following five years of service to the citizens of Orange County as an Assistant District Attorney, Jamie T. Ferrara joined the firm as an associate and is heading the firm's criminal defense department. During his stint at the D.A.'s office Jamie prosecuted many types of felonies and misdemeanors crimes, including: successfully trying a complex vehicular homicide to a guilty verdict; arson; white-collar fraud; and government theft and animal abuse.

Jamie also served in the Orange County D.A.'s narcotics unit.

In addition to his criminal law practice, Jamie will assist BSRB partner Gardiner S. "Tad" Barone and the rest of the commercial/civil litigation department in litigating complex commercial matters, contract disputes, partnership disputes, estate and probate litigation, and landlord/tenant matters.

In recent years BSRB has not had an active family law or bankruptcy practice. With the addition of Raymond P. Raiche, we are thrilled to have brought on board an experienced attorney to oversee the firm's new matrimonial, family law and bankruptcy practice. Ray will handle divorces (both contested and uncontested), child custody, support and

maintenance issues, separation agreements and post judgment modification and enforcement issues. Ray will also represent clients in United States Bankruptcy Court proceedings. Prior to joining our firm, Ray spent a number of years in private practice in the Hudson Valley, and previously served as a law clerk to a New Jersey trial judge.

If you or anyone you know needs assistance with a criminal, family law or bankruptcy matter please contact Jamie or Ray to schedule an appointment.

We are extremely fortunate to add such experienced trial attorneys with proven trial experience. We always strive to provide top-quality legal services to our clients in the Hudson Valley region as we continue our growth as one of the largest general practice firms in the region.

UNINTENTIONAL WAIVER OF DEFECTS

By Gardiner S. Barone, J.D.,
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An all too common event in construction litigation involves disputes over defective work where the defect was easily discoverable via inspection, but the owner issues payment or takes occupancy of the property without reserving its rights to have the contractor remedy the defective work. The owner can avoid this often unintended waiver by including an appropriate provision in the contract.

Typically, the owner expects the contractor to warrant or guarantee its work to be free of defects. Such a provision usually provides the contractor must remedy any defects that become apparent during a predetermined period of time.

If there is a defect and the defect is *not obvious* prior to making payment or taking occupancy of the property, then making payment and/or accepting occupancy of the property usually does not operate to waive any claim against the contractor to remedy the defect when the defect later becomes known.

On the other hand, where the defect is known to the owner and the owner makes a payment to the contractor without expressly reserving his rights to have the contractor correct the defective work, then the owner has put himself at risk of having the contractor later claim that by making the payment, without a reservation of rights, the owner waived any claim to have the contractor correct the defective work.

Where the payment is made without a reservation of rights, the owner can find himself entrapped in a seemingly endless legal battle over whether he waived his right to force the contractor to correct the work after the payment was made.

This legal morass can be avoided by incorporating appropriate language in your contract with the contractor and/or including an appropriate reservation of rights when making payment to the contractor. The need for the owner to reserve his rights is particularly important when making the final payment to the contractor, as a court will almost always view the making of the final payment without a reservation of rights as a waiver of any claim to have a contractor remedy defective work.

**NEW LAW PROVIDES INCREASED
FLEXIBILITY FOR MOVING ASSETS OUT
OF A “BAD” TRUST**

By Richard J. Shapiro, J.D.

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In 1992, New York became the first state to enact a statute that expressly permitted a trustee to move assets from one trust to another trust. These trust to trust transfers – known as “decanting” – provides flexibility that is often desired to address changing circumstances and in correcting errors that might otherwise defeat the trustmaker’s intent.

Since 1992, however, many states have enacted decanting statutes that provide trustees with far greater flexibility than has been possible under New York’s decanting statute. In response to criticism from trustees and attorneys that New York’s law was too restrictive, New York recently amended the state’s decanting statute to provide a much-needed expansion of a trustee’s decanting authority.

The statute, which was signed into law by Governor Cuomo on August 17, 2011, applies to all existing trusts as well as trusts created after enactment of the legislation. The law includes the following significant changes from the prior decanting statute:

- Previously, a trustee could move assets to a new trust *only if* the original trust document provided the trustee with the “absolute discretion” to invade trust principal. Under the amended law, however, a trustee may transfer principal to a new trust so long as the principal invasion powers in the new trust are at least equivalent to the invasion powers in the original trust. For example, many trusts permit principal invasions for the beneficiaries’ “health, education, maintenance and support” (commonly referred to as the “HEMS” standards).

Under the prior “absolute discretion” standard, a trustee had no authority to transfer assets from a trust utilizing the HEMS standards to another trust, even if the new trust provided for HEMS distributions. Under the revised law, a trustee may transfer the trust principal from one HEMS trust to another trust also following a HEMS standard.

- If in fact the existing trust provides the trustee with “absolute discretion” to make distributions to one or more trust beneficiaries to the exclusion of other trust beneficiaries, then the trustee may transfer the principal from the original trust to a new trust that may include any one or more of the beneficiaries of the original trust; the new trust need *not* include *all* the beneficiaries from the original trust. If, however, the trustee in the original trust does not have unlimited discretion as to distributions of trust principal, then the beneficiaries of the new trust must be the same as the beneficiaries of the original trust.
- Trust assets may be decanted to a new trust that has a longer term than that of the original trust, which provides expanded opportunities for multi-generational estate planning.
- The new trust can be established by the trustmaker of the original trust *or* by the trustee of the original trust.
- For a “living trust,” there is no longer a requirement to file the decanting document with the Surrogate’s Court, *unless* proceedings involving the original trust have previously been commenced with the Court.

While the new decanting rules may prove useful in an array of situations, here are two common scenarios where the new decanting rules might be especially helpful: first, with existing “Medicaid” trusts that may not conform to new

regulations implemented in New York in September 2011; and second, with old irrevocable life insurance trusts that no longer meet the family's planning objectives. If you have created an irrevocable trust that you believe no longer fulfills your intent, or if you are a beneficiary of such a trust, you may want

to consult with an estate planning attorney to determine whether the new decanting rules might prove useful in your situation.

EDUCATIONAL WORKSHOPS

Estate Plans That Work™

November 15, 2011 (6:30 p.m. to 9:30 p.m.)

Trustee Training Workshop

November 12, 2011 (9:30 a.m. to 12:00 p.m.)

All workshops are held at the BSRB Education Center, 10 Matthews St. Goshen, New York, 1st Floor

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.

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