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Legal Notes

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DOMESTIC ANIMALS, "VICIOUS PROPENSITIES" & STRICT LIABILITY

By: Rita G. Rich, J.D.
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You've probably heard that every dog is entitled to one free bite and is not considered dangerous until an attack occurs. However, that's not true in New York State. New York's case law imposes "strict liability" on owners of domestic animals (and sometimes on the landlords of animal owners) in certain instances.

Strict liability is a concept or theory that is applied to domestic animals, usually dogs, with "vicious propensities." Strict liability applies when the owner (or harborer) knows or has reason to know that the animal had such propensities at the time it caused injury, even when the dog had not yet bitten anyone.

Vicious propensities include the animal's prior acts of which the owner had notice, such as growling, snapping, or baring its teeth. Barking at people does not establish vicious propensities because some dogs naturally bark and run around when excited by visitors.

Also of importance is whether the owner chose to restrain the dog and the manner in which the dog was restrained. Confinement alone is not evidence of a vicious dog.

(continued on page 2)

New York's highest court, the Court of Appeals, has addressed this issue many times over the years. The court in Collier v. Zambito, 1 N.Y.3d 444, 807 N.E.2d 254 (2004) found that although a 12-year-old boy was bitten in the face when he was a guest at his friend's home, there were no prior incidents in which the dog ever threatened or bit anyone, and the owners had no reason to expect the dog to turn on the boy. Thus, the owners were not liable for the boy's injuries. It should be noted, however, that two of the seven judges dissented and one abstained.

Interestingly, in 2006, Collier was cited as the rule of law that applied to an action for injuries sustained by a self-employed carpenter who was working at the request of another self-employed carpenter and who was attacked by a hornless bull named Fred while making repairs to a dairy barn, Bard v. Jahnke, 6 N.Y.3d 592, 848 N.E.2d 463 (2006). Although Bard suffered severe injuries, the court held that the owner did not have knowledge of Fred's vicious propensities (Fred had never before behaved in a hostile or threatening manner) and could not be held strictly liable for Bard's injuries. The owner was not found negligent in failing to restrain Fred or to warn of Fred's presence.

In 2008, the Court of Appeals in Bernstein v. Penny Whistle Toys, Inc., 10 N.Y.3d 787, 886 N.E.2d 154, upheld the lower court's dismissal of a complaint in a dog bite personal injury action. While she was shopping at a toy store, an 8-year-old girl was bitten in the face by the owner's dog. Strict liability did not apply because there was no evidence that the dog had, or the owner knew of, any vicious propensities of the animal. Again, Collier was cited, as was Bard, but in this case, as in Collier, two justices dissented. The dissent argued that the business was operated primarily to sell toys to children and the owners, who should have overseen the safety of the premises, were negligent.

A more recent case involved a female mail carrier who was on her route. She saw a Rottweiler lying unleashed on a lawn, so she decided to return to her vehicle. On her way back, she noticed the dog about six feet behind her. She ran the short remaining distance to the car and tried to jump through the open window on the driver's side, legs first. She injured her right middle finger, which caused her to miss about six (fully paid) weeks of work. At trial, she did not recall whether the dog ever barked at her, and it was apparent that the dog did not bite or threaten or make any contact with her. In 2009, the Court of Appeals in Petrone v. Fernandez, 12 N.Y.3d 546, 910 N.3.2d 993, reversed an Appellate Division's reversal of a Queens County Supreme Court decision, upholding the Queens County Supreme Court's dismissal of the plaintiff's action against the dog's owner and the owner of the dwelling, citing Collier, Bard, and Bernstein. The court held that strict liability did not apply; negligence was not a basis for liability. Although there was a local leash law, its violation was not held to be a basis for imposing liability.

This year, the Court of Appeals in Hastings v. Sauve, 21 N.Y.3d 122, found that the Bard ruling, in which negligence did not apply to the owner for failing to restrain Fred the bull or warn visitors of him, held that strict liability was the only theory that could have been applied. In this 2013 case, Mrs. Hastings was injured when the van she was driving hit a cow on a public road.

The Court of Appeals reversed both lower courts and held that negligence may be found when a domestic animal (as defined in New York State Agriculture and Markets Laws) strays onto a roadway, depending on the facts of the case.

In summary, under present case law an injury caused by a domestic animal becomes a question of strict liability based on vicious propensities, which can result in what some may consider unjust decisions. That term also applies to on-premise farm animals such as Fred, the bull. However, when it comes to farm animals that are not properly restrained and wander onto a roadway or someone else's property and cause injury, a lawsuit may be brought under the theory of negligence.

There is no telling how long these rules will be in effect. New York's case law can change at any time, especially since there was dissent in two of the above-cited cases.

NEW YORK'S HOME IMPROVEMENT LAW & YOU

By: Marcello A. Cirigliano, J.D.
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The question **"Should we renovate?"** is a common one among current and prospective homeowners, from couples who want to update the home in which they raised their children to people walking through a house for the very first time. Answering it can be stressful and time-consuming, as can the renovation process.

In considering the above question, anyone should consider how much the project is going to cost and the crucial question of **"Who can we trust to do the work?"**

Some recommendations for those considering home improvements:

- Meet with multiple contractors to get different opinions on how to complete the project, as well as a range of cost estimates.
- Do not enter into a non-written agreement or one that does not detail project costs.
- Verify that the written contract provided by the contractor is in compliance with the Home Improvement Law.

In 1988, the New York State Legislature added Article 36-A to the General Business Law. This statute amended the General Business Law and the Lien Law in relation to the home improvement contractor, which is defined as a person who undertakes, offers to undertake, or agrees to perform any home improvement for a fee of more than $1,500, except for a person who has an ownership interest in the property. The law was designed to protect homeowners from unscrupulous dealings by home improvement contractors. However, most homeowners and contractors are not aware that such a law exists, and are ignorant of the strict guidelines set forth therein.

Under the statute, all home improvement contracts are required to be in writing and include the following:

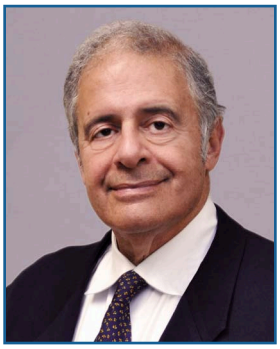
1. The name and address of the contractor and homeowner.
2. An approximate start and completion date of the project.
3. A detailed description of the work to be performed, materials to be used, and cost to the homeowner.
4. The following notice:

   Any contractor, subcontractor, or materialman who provides home improvement goods or services pursuant to your home improvement contract and who is not paid may have a valid legal claim against your property known as a mechanic's lien. Any mechanic's lien filed against your property may be discharged. Payment of the agreed-upon price under the home improvement contract prior to filing of a mechanic's lien may invalidate such lien. The owner may contact an attorney to determine his rights to discharge a mechanic's lien.
5. An explanation of where the homeowner's money is going to be during the project. Three options include:
   a) An escrow account set up by and released to the contractor as the work is performed.
   b) A bond posted by the contractor.
   c) A contract of indemnity.
6. A detailed schedule of payments, if more than one payment is to be made to the contractor during the course of the work.
7. A notice informing the homeowner that they have until midnight of the third business day to cancel the contract.

In 2011 the New York State Attorney General began a statewide investigation of contractors' compliance with the Home Improvement Law. Hundreds of contractor violations were discovered, but most were due to ignorance of the law, not deceitful practices. The home improvement contractors found to be in violation of the statute have been required to pay nominal fines and show proof that they have amended their contracts to conform to the Home Improvement Law.

For more information on New York State's Home Improvement Law, visit www.dec.ny.gov/lands/5341.html.

SELF-DIRECTED BENEFICIARY TRUSTS: CONTROL AND FLEXIBILITY WITH ESTATE TAX REDUCTION AND ASSET PROTECTION OPPORTUNITIES



By: Charles A. Judelson, J.D., LL.M.
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When a suggestion is made to consider including a trust in an estate plan to receive a gift for a beneficiary, the initial reaction is often that a trust is not necessary because the beneficiary is capable of handling his or her assets and a trust structure will add unnecessary restrictions on the beneficiary and complexities and expense to the estate plan. This article explains that including a "Self-Directed Beneficiary Trust" in an estate plan can achieve potential estate tax savings and asset protection for the assets passing to the beneficiaries while allowing the beneficiary to retain very broad flexibility and control over the trust assets. This article provides an explanation and illustration of these potential tax savings for a married couple. This article is very complicated and the illustration at the end of this article should be reviewed while reading the article. A Self-Directed Beneficiary Trust can also be very effective in situations where there is not a spouse and you desire to provide estate tax reduction and asset protection opportunities for other beneficiaries.

SELF-DIRECTED BENEFICIARY TRUST

A "Self-Directed Beneficiary Trust" is structured to give the beneficiary control over the trust assets while allowing the beneficiary to be entitled to the estate tax savings opportunities and asset protection against creditors. This control is accomplished by giving the beneficiary the following powers: (1) to appoint an "Independent Trustee" who has the broad discretion to distribute the income and/or principal of the trust for the benefit of the beneficiary and possibly his or her family, (2) to remove the Independent Trustee, with or without cause and (3) to replace the Independent Trustee with a different Independent Trustee. Basically, the Independent Trustee can be any person other than a family member as defined under the Internal Revenue Code.

A Self-Directed Beneficiary Trust can be a very useful technique in designing an effective estate plan to accomplish your specific desires. The provisions of the trust can take into consideration the specific abilities and circumstances of your beneficiaries. The trust document is usually detailed and lengthy and sections of the trust instrument are sometimes interrelated. The provisions of the trust can describe the extent of the control and flexibility you wish to give a beneficiary. This can range from giving the beneficiary nearly complete and absolute unrestricted discretionary powers to more restrictive powers intended to provide some protections and limitations to safeguard the trust assets for the beneficiary and possibly the children of the beneficiary. While you are living the provisions of the Self-Directed Beneficiary Trust should be periodically reviewed to determine whether the terms continue to be suitable given any changes to your family situation, the existing needs of the beneficiaries and any changes in the applicable law concerning estate tax planning and asset protection opportunities.

ESTATE TAX SAVINGS POTENTIAL

There are two basic concepts in calculating the estate tax. First, there is an unlimited Marital Deduction which eliminates any estate tax on assets passing to the surviving spouse. Second, there is an Estate Tax Exemption Equivalent which is technically in the form of a credit against the estate tax. The Federal Estate Tax Exemption Equivalent amount is $5,000,000 indexed for inflation. In 2013, this exemption equivalent is $5,250,000. The New York State Estate Tax Exemption Equivalent is only $1,000,000 and is not indexed for inflation.

The estate tax savings potential is created by using all or part of the estate Tax Exemption Equivalent in the estate of the first spouse to die; instead of having all the assets pass outright to the surviving spouse. If all the assets passed outright to the surviving spouse, the Estate Tax Exemption Equivalent of the first spouse would be wasted in the estate of the first spouse to die for New York state estate tax purposes and could be partially or wholly wasted for Federal estate tax purposes.

In order to use all or part of the exemption equivalent, the estate of the first spouse to die is divided into a Marital Share and a Non-Marital Share. The Marital Share qualifies for the estate tax marital deduction in the estate of the first spouse to die and is includible in the gross estate of the surviving spouse. The Non-Marital Share is designed not to qualify for the estate tax marital deduction in the estate of the first spouse to die. However, the advantage is that the assets in the Non-Marital Share will not be includible in the gross estate of the surviving spouse.

The illustration in this article shows that in a gross estate of $5,000,000 there can be very substantial potential New York State estate tax savings by using a Non-Marital Share. The

NEW YORK STATE ESTATE TAX EXPOSURE
POTENTIAL ESTATE TAX SAVINGS USING A NON-MARITAL SHARE

		1 0 Non-Marital	2 1,000,000 Non-Marital	3 2,500,000 Non-Marital
1	**DEATH OF FIRST SPOUSE**			
A	Gross Estate	5,000,000	5,000,000	5,000,000
B	Less: Marital Deduction	5,000,000	4,000,000	2,500,000
C	Taxable Estate	**0**	**1,000,000**	**2,500,000**
D	**NYS Estate Tax**	**0**	**0**	**138,800**
2	**DEATH OF SECOND SPOUSE**			
A	Gross Estate [Marital Deduction From Line 1C]	5,000,000	4,000,000	2,500,000
B	Less: Marital Deduction	**0**	**0**	0
C	Taxable Estate	**5,000,000**	**4,000,000**	**2,500,000**
D	**NYS Estate Tax**	**391,600**	**280,400**	**138,800**
3	**SUMMARY ANALYSIS**			
A	Death of First Spouse	0	0	138,800
B	Death of Second Spouse	391,600	280,400	138,800
C	**Total**	**391,600**	**280,400**	**277,600**
D	**Non-Marital Share**			
E	None - Column 1	391,600	391,600	391,600
F	NYS Exemption Equivalent -$1,000,000 - Column 2		280,400	
G	Equal Division of Assets - $2,500,000 - Column 3			277,600
H	**Potential New York State Estate Tax Savings**		**111,200**	**114,000**

savings result from using the NYS exemption equivalent and the lower estate tax rates applicable to assets in the initial estate tax brackets.

Column 1 of the illustration shows the estate taxes if the surviving spouse receives outright the entire estate and no Non-Marital Share is created. The result is that there is no estate tax due at the time of the death of the first spouse; but at the time of the death of the surviving spouse the NYS estate tax would be $391,600.

Column 2 shows the estate taxes if a Non-Marital Share of $1,000,000 is created and the balance passes to the Marital Share. The result is that there is still no estate tax due at the time of the death of the first spouse; and at the time of the death of the surviving spouse, the NYS estate tax would be $280,400. This creates a potential tax savings of $111,200 with no tax required to be paid at the time of the death of the first spouse.

Column 3 shows the estate taxes if the assets are split evenly and a Non-Marital Share of $2,500,000 is created and the balance passes to the Marital Share. The result is that there is a $138,800 estate tax due at the time of the death of the first spouse; and at the time of the death of the surviving spouse, the NYS estate tax would be $138,800. The result is a potential tax savings of $114,000: however a New York estate tax of $138,800 is required to be paid at the time of the death of the first spouse.

The Summary Analysis section in the illustration at Line 3H – Column 2 shows that the potential New York State estate tax savings if a $1,000,000 Non-Marital Share is created could be $111,200. Line 3H – Column 3 of the Summary Analysis shows that the potential New York State estate tax savings if a $2,500,000 Non-Marital Share is created could be $114,000. The potential savings under Column 3 ($114,000) in comparison to the potential savings under Column 2 ($111,000)

(continued on page 6)

is minimal in this illustration and a substantial portion of the New York state estate tax would be required to be paid at the time of the death of the first spouse. It may be noted that there could be factual circumstances, such as in a very substantial estate with an elderly surviving spouse, that it may be advantageous to prepay some of the New York estate tax on the death of the first spouse in order to reduce the future federal and state estate tax exposure on the death of the surviving spouse.

The revocable trust or will of the first spouse to die can give the surviving spouse, or even another person, the ability to determine after the death of the first spouse the amount to pass to the Non-Marital Share. Therefore, the amount of the estate tax to be paid at the time of the death of the first spouse, if any, is a decision that can be decided after the death of the first spouse.

TECHNIQUES TO HOLD THE MARITAL AND NON-MARITAL SHARES

As previously mentioned, the estate tax savings is accomplished by dividing the estate of the first spouse to die into the "Marital Share" and the "Non-Marital Share." If desired, the estate plan can be structured so that both shares are held solely for the benefit of the surviving spouse during the lifetime of the surviving spouse.

The Marital Share can be held for the benefit of the surviving spouse in any of the following structures: (1) outright to the surviving spouse, (2) in a Qualified Terminable Interest Trust ("Q-Tip Trust") for the benefit of the spouse during the lifetime of the surviving spouse and then for the benefit of other persons as determined under the will or revocable trust of the first spouse to die, (3) in a general power of appointment trust for the benefit of the surviving spouse during the lifetime of the surviving spouse and then for the benefit of such persons as determined under the revocable trust or will of the surviving spouse and (4) in a "Clayton" Q-Tip Trust under which a third person has the right to determine whether the Q-Tip Trust for the benefit of the surviving spouse will be implemented or the Q-Tip Trust will not be implemented and the assets will pass to the Non-Marital Share.

The Non-Marital Share can be held in any of the following structures: (1) trust for the sole benefit of the surviving spouse while the surviving spouse is living and distributed for the benefit of others after the death of the first spouse, (2) trust for the benefit of the surviving spouse and others while the surviving spouse is living and then for the benefit of others after the death of the surviving spouse and (3) outright or in trust for other beneficiaries.

It is important to note that these techniques must be included in the revocable trust or will of the first spouse to die. These techniques cannot be used if the surviving spouse merely receives the assets outright and then attempts to create a trust. Any trust created by the surviving spouse with their individually owned assets is considered to be a "Self-Settled Trust" and the assets in such a trust (1) will be included in the estate of the surviving spouse at the time of the death of the surviving spouse and (2) the trust assets will not be entitled to receive asset protection against any creditor claims against the surviving spouse.

The Self-Directed Beneficiary Trust and the techniques to hold the Non-Marital Share in an estate plan for a married couple may only be practical and suitable when there are substantial assets or in special circumstances. There are advantages and disadvantages with each technique which should be considered. Should you desire to discuss whether a Self-Directed Beneficiary Trust may be suitable for you, do not hesitate to contact the firm.

BLUSTEIN, SHAPIRO, RICH & BARONE, LLP
Gives Back to the Community

BSR&B supported a number of community organizations and events this summer, including:

- Community Foundation of Orange & Sullivan
- Eva Fini Rett Syndrome Research Foundation
- Warwick Lions Club Golf Outing
- John S. Burke Catholic High School Golf Outing

FIRM HIGHLIGHTS

BSR&B PARTNER GARDINER "TAD" BARONE NAMED Super Lawyer IN THE FIELD OF BUSINESS LITIGATION 2012 & 2013

BSR&B Partner Gardiner "Tad" Barone was recently named to the 2013 list of Super Lawyers in the field of business litigation for the second year in a row. No more than five percent of the lawyers in New York State are selected to receive this honor.

Barone's profile will appear in *Super Lawyers* magazine, as well as *Hudson Valley Magazine*. *Super Lawyers* magazine is published in all 50 states and Washington, D.C., reaching more than 13 million readers.

ESTATE OPTIONS FOR SAME-SEX COUPLES

The *Times Herald-Record* recently ran a column by Associate Austin DuBois in which DuBois encouraged same-sex couples to consult their professional advisors, in light of the Supreme Court's June decision on DOMA.

Some of the new financial and estate planning options and benefits that may apply to same-sex couples include:

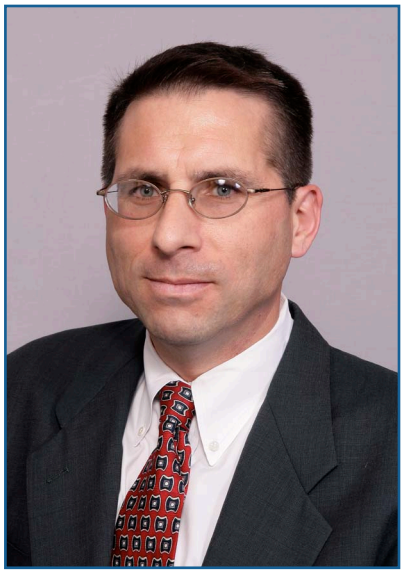
- More favorable income-tax treatment.
- Fewer restrictions on retirement accounts.
- Lower taxes on death transfers to a spouse.
- More options to protect assets from long-term care costs.

If you think you're already covered, think again; the rules are changing. Shouldn't your estate plan change, too?

BSR&B Partner Continues Trend of Successful Litigation

BSR&B Partner Gardiner "Tad" Barone has enjoyed a pair of recent successes on behalf of his clients, securing favorable outcomes while saving time and money by avoiding unnecessary arbitration and court proceedings.

- In one recent instance, a real estate broker—who had entered into an illegal commission-splitting agreement—sued for commission on the sale of a multi-million dollar property in Middletown, N.Y. Barone, on behalf of the defendants, convinced a lower court to dismiss the suit in advance of a trial; then the plaintiff (broker) appealed the decision to the U.S. District Court of New Jersey. Barone, who gained temporary admission to the New Jersey Bar to represent his client there, successfully argued to the District Court that the lower court's decision was correct. The defendants were not obligated to pay the $250,000 commission, nor were they subjected to a lengthy trial.
- In a second instance, a man and his wife were riding bicycles in Ulster County when they were struck by a motor vehicle. While the wife was unhurt, her husband sustained fractures to his tibia and fibula, which required surgery to affix a plate and screws and an extended period of rehabilitative therapy. Barone was instrumental in recovering for the injured bicyclist the full policy limits of both the motorist's and his own automobile insurance policies, all without going to arbitration or commencing a lawsuit.



FREE EDUCATIONAL WORKSHOPS:

Estate Plans That Work™

September 12, 2013
3:00 p.m. to 6:00 p.m.

October 15, 2013
3:00 p.m. to 6:00 p.m.

We'll explain little-known pitfalls and the best methods to protect your loved ones' inheritance after you're gone.

2013 Client Update Meetings

September 17, 2013 ~ 6:30 p.m.
October 16, 2013 ~ 10:00 a.m.
November 19, 2013 ~ 4:00 p.m.

Our client update meetings (which are open only to participants in our law firm's maintenance program) provide our up-to-date document language, a discussion of the latest estate planning legal news and issues, and advanced estate planning ideas.

The above workshops and meetings will be held at the
BSR&B Education Center (1st Floor)
10 Matthews Street
Goshen, New York

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