BSR&B

FEBRUARY 2016 | VOL. 8 – NO. 2

Legal Notes

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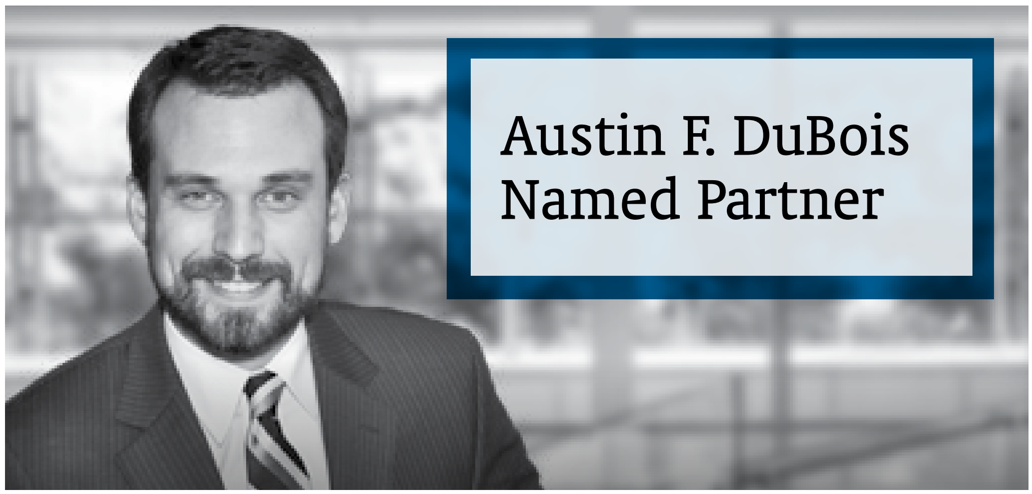

Austin F. DuBois Named Partner

Blustein, Shapiro, Rich & Barone, LLP is proud to announce that attorney Austin F. DuBois has recently been named partner of the firm.

DuBois, who joined Blustein, Shapiro, Rich & Barone, LLP in 2011, focuses his practice on estate planning, elder law, asset protection, business formation and structuring, business succession planning, and general business representation. DuBois is chairman of the Board of Directors of the Inspire Foundation, vice chairman of the City of Newburgh Industrial Development Agency, and chairman of the Government and Politics Session Committee of Leadership Orange, of which he is an alumnus and Hall of Fame inductee. He also serves on the Board of Directors for both the Orange County Partnership for Economic Development and Pattern for Progress.

"Austin has not only played a significant role in the growth and success of our Wealth Preservation department since he joined us, but he has also invested his time and talent in a variety of community-based organizations focused on making our region stronger," said BSR&B Managing Partner Michael Blustein. "He has consistently demonstrated the ambition, drive, and expertise that we know will ensure this firm's future success."

DuBois is a graduate of SUNY Fredonia and Rutgers-Camden Law School, and has a Masters in Tax Law from the Temple University Beasley School of Law. He has twice been included on the Upstate New York Super Lawyers Rising Stars list in the field of elder law. He is also Lodge Counsel for the Mid-Hudson Fraternal Order of Police and Special Counsel for Orange County Shields.

Congratulations, Austin!

Don't be Short-Sighted When Making Home Improvements

By Jeanine Garritano Wadeson, J.D.
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Typically making significant improvements to a home will result in an increase in both the value of a property and, in turn, the tax burden associated with that property.

To avoid the potential increase in property taxes, homeowners will often have work done on their home without obtaining the necessary Building Permit and Certificate of Occupancy or Compliance from their local municipal building department.

While this "under-the-radar" maneuver may avoid an increase in property taxes, the real stumbling block appears when a home-owner decides to sell that same property.

Generally speaking, once an offer is made and accepted for the sale of a home, everyone is focused on the closing. Delays in that process can be considered catastrophic.

Imagine the dismay a buyer may experience upon learning that the finished basement in her soon-to-be new home was not legally constructed. The solution to the problem is for the property owner to file an after-the-fact building permit with the local building department. Once the permit application is filed and the fee is paid, the Building Inspector will usually make a site visit to inspect the work before he or she will issue a final Certificate.

But what if the work was completed decades earlier? Let's say you remodeled your basement, and you did all the right things. You hired a reputable, licensed contractor to do all work, and the contractor did everything according to the requirements of the Building Code. Still, there are two potential problems here.

1. The Building Department has no way of knowing that the electrical work behind your beautiful walls is up to code. The Building Inspector will now need access to that electrical work to see what was done. That leads us to our second issue.

2. If the work was done in 1985, and the Building Inspector is just coming to inspect it in 2016, all work must be compliant with 2016 code requirements. This can include significant changes in the law, such as the size and placement of ingress/egress windows or electric installation methods, and can be costly and/or destructive to remedy.

How about this one: Suppose you built a shed in your backyard, but you did not obtain the necessary permit. The shed is five feet from your rear property line. Upon investigation, it is determined that your town's Zoning Code requires that all accessory buildings be located a minimum of 10 feet from any property line. Your buyer does not want the shed taken down. In fact, that shed has suddenly become the thing they love most about the home. The topography of the yard makes it impossible to move the shed.

The remedy to this problem is to seek a variance from your local Zoning Board of Appeals to allow the shed to remain where it is. Most local boards of this nature meet, at most, monthly, and you likely will be required to attend at least two meetings to allow for a work session, review of your application, public hearing, and vote. Your hope for quick closing has evaporated.

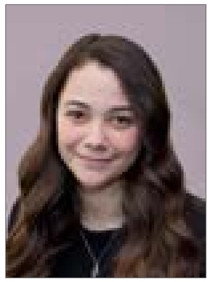
Not planning to sell your house? There are other very real and very serious consequences to consider when making the decision to proceed without required review and approvals.

1. While we may not always like to acknowledge it, Building Codes have been enacted for good reason. It is well settled that one of the primary goals of government at any level is to promote the common welfare of the citizenry. To that end, if a Building Code says that waste lines must be constructed in a certain way, or that the primary means of escape from an area must be a certain minimum square footage, it might actually behoove one to follow those guidelines.

2. Any illegally constructed living space within your dwelling is almost certainly not covered by your homeowner's insurance policy. So assume that the electrical wires in your basement – which may or may not have been properly installed – catch fire. Your property is damaged or, worse, someone is injured. Are you prepared to absorb the cost of repairing the damage and/or defending a lawsuit without the resources of your homeowner's insurance policy behind you?

To obtain, or not to obtain? To seek permission, or forgiveness? Only you can answer that question for yourself.

Choosing The Right Business Entity: Partnerships



By Megan C. Conroy, J.D.
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A limited liability company, or LLC, is frequently a business owner's best option when choosing an entity structure for a business. An LLC combines structural and tax flexibility with significant asset protection (see BSR&B: Legal Notes Vol. 7-No.5, Sept. 2015 for a brief overview of LLCs).

For some business owners, however, partnerships may be worth considering. **A partnership is an association of two or more people who carry on a business as co-owners for their mutual profit.**

There are three types of partnership structures.

1. General Partnerships

General partnerships are the easiest to create, but are rarely a good business structure. All that's needed to form this kind of partnership is for two individuals who intend to co-own a business for profit to begin operating the business. There is no state filing requirement to start a general partnership, although filing a Certificate of Assumed Name with the county in which the business operates may be necessary. Without any formal filing or agreement stating otherwise, a general partnership is presumed to be the kind of partnership created by co-owners.

In a general partnership, each partner has equal authority to manage the business. Additionally, each partner has "agency authority," or the ability to act as an agent on the partnership's behalf. This means that each partner can bind the entire partnership to a contract, business deal, or other legal obligation.

In exchange for full management control, each general partner is burdened with full personal liability to creditors of the business. **Every partner is personally responsible for all business obligations and for any wrongful acts committed by themselves or the other partners in the course of conducting business.** This puts not only the business assets at risk in the face of a lawsuit, but also each partner's personally owned assets. Because of such unlimited liability, a general partnership is almost never an appropriate business form, especially when other options such as limited partnerships, corporations, and LLCs are available.

2. Limited Partnerships

Limited partnerships differ from general partnerships in that the **"limited partners" are shielded from the personal liability inherent in general partnerships.** In a limited partnership, at least one partner serves as a general partner who has all the same rights, responsibilities, and liabilities as the partners of a general partnership. In addition to general partners, however, the partnership must have at least one limited partner. The limited partner(s) invest capital in the business and receive profit distributions, but have no control over business operations, management, or decision-making. The tradeoff is that they are relieved from any personal liability for business debts in amounts above their capital contribution to the entity. Limited partners must be careful not to cross the line between active and passive participation in the business, however. If a limited partner begins to participate in management or decision making, they can lose the protections afforded by their limited partner status and become personally liable for business debts.

Limited partnerships might be a good option for business owners who would like the ability to bring in investment capital without giving up any control over business operations. Investors might be quicker to invest if they are assured that they cannot be held personally liable for the general partner's actions. Also, the general partner, unlike in a LLC, has no requirement to keep personal assets separate from business assets. This allows the general partner to move assets in and out of the entity as needed.

3. Limited Liability Partnerships

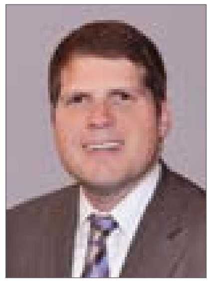
Limited liability partnerships (LLPs) are partnerships in which there are no general partners, only limited. **All of the partners retain management control over the business, as well as protection from personal liability for business obligations.** In many states, however, LLPs are reserved for professional businesses only. In New York, all partners must be professionals as defined in Title Eight of the New York State Education Law, and each partner must be authorized by law to render a professional service. LLPs are well-suited for professional groups like attorneys, accountants, and physicians because of the protection they offer from a particular kind of liability: malpractice. This is an enormous benefit and the reason an LLP is often the entity of choice for professional businesses.

Taxation of Partnerships

Partnerships are not taxed as an entity, but instead get the advantage of "pass-through" taxation in which the profits and losses pass through to the partners individually. **The partners claim those profits or losses on their own income tax returns and gains are thus taxed at a lower rate.** Each partner individually reports and pays taxes only on his or her share of the profits each year. Also, limited partners are not required to pay self-employment taxes because of the passive role they take in the management of the business.

If you are considering a partnership for your business, please keep in mind the risks associated with this type of entity. Many times an LLC can accomplish the same objective. **Talk to an experienced attorney to see what entity best suits your particular needs.**

The Benefits of Protective Trusts



By Richard J. Shapiro, J.D.
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Here's an interesting experiment to try for your next family gathering: Ask your children how they would like to receive their inheritance (assuming they're getting one).

Ask them if they'd like an "outright" distribution, or if they would prefer to receive it in a trust?

Invariably the answer will be, "I'd like it outright."

Now explain the following: "I can leave your inheritance directly to you, but if you ever get sued, get divorced, or get sick, your inheritance is placed at risk. Or, I can leave it to you in a way that you have control of and access to the inheritance, but if you get sued, get divorced, or get sick, your inheritance is protected for your use and enjoyment, as well as for future generations, against 'creditors and predators'."

Then ask the same question again: "How would you like to receive your inheritance?"

Described that way, your children will almost certainly have a different answer.

What I have described in the second scenario is what estate planners refer to as a **"lifetime protective trust."** This type of trust, which can be created under a revocable or irrevocable living trust, or under a will, affords the beneficiary with protections against so many of life's risks that they cannot readily provide for themselves. That is because when assets are left by one or more persons in trust for another person, the trust beneficiary never technically "owns" the trust assets. **Under centuries-old trust law, a trust beneficiary's creditors cannot seize assets left to the beneficiary in a trust established and funded by one or more other persons.** This arrangement is referred to as a "third-party" trust.

The creditor protection afforded to third-party trusts is called "spendthrift" protection, and is generally not available to a "first-party" trust – that is, a trust established and funded by person for that person's own benefit. So, a child inheriting assets outright cannot then go to an attorney and create a trust that will protect those assets from the child's creditors. Instead, it is incumbent upon the parents to establish by a will or one or more living trusts provisions that create the lifetime protective trusts for the children that would be funded with the parents' assets upon their death.

Most people don't consider establishing lifetime protective trusts because they assume that someone other than the beneficiary must be the trustee, thereby depriving the children of control of their inheritance. But in most jurisdictions, including New York, a child can be a trustee of his or her own lifetime protective trust, either individually, or with a co-trustee who can either be named in the document or who may be appointed (and replaced) by the child. This arrangement affords the child with control over the management, investment, and distribution of the trust assets, such that they can "squeeze out" trust assets only as needed, with the assets remaining in trust protected against creditor claims, divorcing spouses, or a spend-down otherwise required to qualify for public benefit programs.

Of course in those cases where there is a minor or disabled child, a child who has financial or addiction issues, or simply where the parent wishes to place greater controls on the disposition of trust assets, a trust administered by a third-party trustee may well be appropriate. But in a significant majority of cases, **establishing a beneficiary-controlled trust will be the appropriate planning tool to ensure that only the beneficiary and, if applicable, your other descendants will benefit from the assets you've worked hard to acquire and preserve over your lifetime.**

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