Winter 2015

the SideBar

The Exit Planner

By Joseph G. Milizio, Esq.

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Professionals, entrepreneurs, manufacturers, retailers, those in technology fields, the arts, real estate and construction, along with other commercial enterprise owners, are often too busy to plan for the future of their businesses should they wish to retire, become disabled or die. Rather than looking at the comfort and security of their families in the future, they focus on today. Often, they are faced with unnerving questions about the future of the business if they are no longer at the helm: Who will operate it? How will the owner or the owner's spouse continue to receive enough income to support his or her lifestyle? How will their children be treated fairly?

The worst case scenario for a business and its owner is to do nothing and rely on the assumption that family members will inherit equal portions of the business. This often occurs when a will provides for all assets of the decedent to be distributed "in equal shares." This is a recipe for disaster. Disagreements among family members with respect to the operation of the business are certain. What was once a business that supported one family may now be expected to support multiple families. The easier way, one that still upholds the notion of fairness to all children, is to separate assets into classes and make sure that family members receive shares in classes which are appropriate to them.

If a business owner has a child who is involved in the business, that child should ultimately become the owner of the business. Other children can receive other assets. If, as is often the case, the business is the owner's most substantial asset, there may not be other assets sufficient to ensure that all children are treated fairly. In that situation, the child who ultimately receives the business must pay for it, or at least pay for the part that does not represent his or her fair share. The portion of the business that the child is obligated to purchase can be paid through life insurance, cash, a promissory note or a combination of these payment methods. Children who are not involved in the business receive their share. The specifics of the transactions are set forth in a buy/sell agreement, which must be signed well in advance of exit by the parent. The buy/sell agreement will ensure continuity and will provide everyone with the knowledge that the business will continue for the benefit of the child involved and that the remaining family members also will be provided for.

Vishnick McGovern Milizio's Exit Planning Practice Group can provide you with the time and resources needed to accomplish an economically feasible plan…and one that works best for you and those who succeed you in the business. There are many options available when creating an exit plan and many considerations that are unique to each business owner. We look forward to working with you on this critical component of every successful company.

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table of Contents

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Gee, where did I put my will?

By Bernard F. McGovern, Esq.

When a client executes a will in our office, only one original will is signed. As the will is the property of the client, the client is always asked if he or she would like to keep possession of it, or if they would like our office to retain the will for safekeeping.

If the client elects to take the original will, we always caution him or her to keep it in a secure location, and to advise the executor named in the will as to the its location. We do so, since there have been occasions when the testator's (a person who dies leaving a will) original will had been in his or her possession, and was not able to be located after the testator's death.

The testator's relatives or friends will then inquire as to why we cannot just probate the copy of the will we have, since they are certain that those provisions remained the wishes of the decedent. Unfortunately, we tell them that if the original will cannot be found, and it had been in the decedent's possession, there arises a presumption that the testator revoked the will, which may or may not have been the case.

There are certain times when a lost or destroyed will may be admitted to probate. In order to do so, the statute permitting this requires that three things are to be shown:

Bernard F. McGovern, Esq.

1. That the testator executed the will with the required formalities;

2. That all of the will's terms and provisions be clearly proven; and

3. That it be proven that the testator did not revoke the will.

Normally, the first two requirements can be met if the attorney who drafted the will retained a copy, and assisted in the will's execution. The last element to be proven can be difficult if the decedent had possession of the will and it is missing at his or her death, since there is the presumption that the testator destroyed it, with the intent of revoking the will.

We have had "lost wills" admitted to probate, once when it was proven that the will was among other documents that were stolen from the decedent's office, and on another matter, when the will was

– Continued on Page 3

Ability-to-Repay rule affects mortgage lending

By Brian Lovell, Esq.

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Prior to 2008, mortgage lenders were liberal in their lending practices, resulting in many residential home buyers carrying mortgages they were unable to pay. In response to the high rate of delinquencies and foreclosures, the federal government created a new set of guidelines, known as the Ability-to-Repay rule, requiring lenders to make a reasonable, good faith determination that the borrower will be able to pay the loan, according to its terms, using the following criteria:

1. Verifiable current or reasonably expected income;

2. Current employment status;

3. Monthly payment for the loan and related expenses, such as property taxes and homeowners' insurance;

4. Other debt;

5. Credit history;

6. Debt to income ratio cannot exceed 43% allowing for borrowers to have funds remaining for necessities. (The ratio for adjustable rate mortgages is determined using the highest possible interest rate).

NOTE: The new rule applies to refinances, but refinances are exempt if the lender remains the same, the monthly payment is being lowered and the borrower's prepayment history has been favorable.

This rule will have a significant impact on particular groups of borrowers:

1. First time home buyers, who tend to have higher debt to income ratios;

2. Self-employed borrowers, whose income cannot be verified;

3. Retirees; and

4. Previously unemployed borrowers who have only recently regained employment.

The new rule does not apply to:

1. Balloon mortgages;

2. Negative amortization mortgages;

3. Loans with prepayment penalties;

4. Loans with bank fees and points greater than 3% of the loan amount on loans over $100,000 (excluding third party fees); and

5. Loans longer than 30 years.

A lender who is found to be in breach of the rule may be liable for damages equal to the finance charges and fees paid by the borrower, plus court costs and attorney's fees. The borrower may also have a defense in foreclosure.

If you are planning to apply for a mortgage loan, it is important to understand these rules and to choose a reputable lender. Our real estate attorneys can help you with the process.

Brian Lovell is an associate in the Real Estate and Business Law Practice Groups. He can be reached at blovell@vmmlegal.com or at 516-437-4385, ext. 124

news & Events

Partner **Joe Trotti** participated in a panel discussion for the Family Law Society of St. John's University School of Law. He covered "Adoption and the LGBT Family."

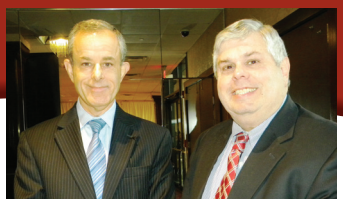
Partners **Joe Milizio**, **Joe Trotti** and **Morris Sabbagh** presented "Before 'I Do': Considerations for same-sex couples contemplating marriage" at programs hosted in VMM's New York City and Lake Success offices on October 2 and October 30, 2014, respectively. As a result of its popularity, the program will be presented again on January 15, 2015.

Pictured with Jim is Hofstra Law Columbian Lawyers Association President Steven De Sena.

Partner **Jim Burdi,** former president of the Columbian Lawyers' Association of Nassau County, spoke to members of the Hofstra Law School arm of the organization on October 29, 2014, commenting on the value of membership and networking opportunities.

Associate **Constantina Papageorgiou** participated in the Pro Bono Legal Fair on October 23, 2014, sponsored by the Nassau County Bar Association. Constantina met with several senior citizens who had concerns related to elder law, trust and estates.

Partner **Joe Milizio** participated in a program, "Ethics of Diversity: The Intersection of Competence and Professionalism," hosted by the Theodore Roosevelt Inn of Court at the Nassau County Bar Association on November 20, 2014. The program focused on the legal ethics and professionalism issues related to practicing law in a diverse world.



left to right: Andrew Kimler and Irv Miljoner

Partner **Andy Kimler** and U.S. Department of Labor District Director Irv Miljoner lent their insights through their presentation, "Wage & Hour Laws Affecting Your Client's Business" at the 2014 Long Island Tax Professionals Symposium on November 21, 2014 at the Crest Hollow Country Club in Woodbury. Andy was also elected a member of the board of directors of the Brandeis Association.

John Gordon

Associate **John Gordon's** article, "Portability Aside, Credit Shelter Trusts Retain Importance in Estate Plans," was published in September 2014 issue of The CPA Journal. In addition, John has been elected president of the Chamber of the Willistons and will begin his term on January 1, 2015.

Senior Partner **Bernie Vishnick** was elected secretary of the board of directors and executive committee member of the Holocaust Memorial & Tolerance Center of Nassau County, Inc. He will serve a two year term through August 31, 2016. He was also elected first vice president of the Brandeis Association. On June 8, 2014, Bernie and Morris Sabbagh conducted a planned giving seminar for the Holocaust Center at Hofstra University.

Avrohom Gefen
Photo credit: Bob Giglione

For the second consecutive year, partner **Andy Kimler** was named a New York Metro Area Super Lawyer for 2014 by Super Lawyers, a publication of The New York Times. Associate **Avrohom Gefen** was named a New York Metro Area Rising Star for 2014 by the same publication. Avrohom was featured in two Long Island Business News articles: "Albany revamps rules on intern harassment, pay," in August, and "When is a pay raise not a pay raise?," in September 2014.

Gee...where did I put my will?... *(Cont'd from Page 2)*

shown to have been kept in an area of the decedent's home that was flooded. On both those occasions, the court ruled that it was proven that the decedent did not "revoke" his will, and allowed each of the wills to be admitted to probate. Without such proof, a court is likely to state that the missing will was revoked. Although a court wants to carry out and fulfill the decedent's wishes, it will not do so without all of the necessary requirements being met.

There are times when the will had been left with the testator's attorney for safekeeping and the will is not able to be located after the testator's death. Under such circumstances, if it can be proven that the original will had been retained by someone other than the testator, no presumption of revocation arises. If the court is satisfied with this proof, and the other requirements of the statute are satisfied, it will admit a copy of the will to probate.

The moral of the story is this: Care should be taken to insure that a last will and testament, as with all our other important documents, is kept safeguarded and current.

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in this Issue

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