

# Rhode Island Bar Journal

Rhode Island Bar Association Volume 64. Number 6. May/June 2016



**Evolution of Rhode Island  
Guardianship Law**

**Valuing Home Grown Electricity**

**Estate Planning for International  
Family and Property**

**BOOK REVIEW: *Buying, Owning, and  
Selling Rhode Island Waterfront  
and Water View Property***



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### INTERNATIONAL TENNIS HALL OF FAME, NEWPORT, RI

As part of the global tennis community the International Tennis Hall of Fame, located at 194 Bellevue Avenue in Newport, Rhode Island, is committed to preserving tennis history, celebrating its champions, and educating and inspiring a worldwide audience. The Museum at the International Tennis Hall of Fame re-opened on May 20, 2015 after complete renovation. Highly interactive, completely redesigned, and now showcasing more of the collection than ever before, the new museum offers a comprehensive and intriguing narrative of tennis history in an engaging manner.

Cover Photograph by Brian McDonald

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# Addressing Our Profession's Challenges



**Melissa E. Darigan, Esq.**  
President  
Rhode Island Bar Association

**Our Bar's experience, expertise and relationships in all things touching on the practice of law and administration of justice make us uniquely suited to play an influential and impactful role in how our members adapt and whether lawyers in this state struggle or thrive.**

So I began this year as Bar President speaking of change in the legal profession and the marketplace challenges caused by increased client demands, intensifying competition and disruptive technologies. We need to work better, smarter, faster and cheaper to stay ahead, I said, and called on members to get engaged in finding solutions to our challenges.

As my term comes to an end, I look back and ask whether anything has changed, really, and have I just been crying wolf? After all, clients still call, the courts are still running, the work gets done and bills are getting paid – business goes on pretty much as usual. But does it? Could it be that we simply are refusing to acknowledge the threats? Could it be that we are reluctant to adopt changes that upset our traditional way of doing things? Could it be that we are just opting for short-term fixes versus making difficult choices that will provide benefits in the long run?

I believe most of us, even the skeptics, know, in our heart of hearts that the market for legal services has changed in significant and permanent ways. Clients are more willing than ever to look to non-traditional legal services providers for a wide range of services previously offered almost exclusively by lawyers. When they do use lawyers, good results are not enough; clients are demanding greater value, meaning greater efficiency, predictability and cost effectiveness. This is to say nothing about the growing number of clients who simply cannot afford legal assistance and the mounting strain on the court system as it struggles to do more with less.

Our profession needs to stop responding to these market changes in passive and reactive ways. My plan this year was to try to raise our collective consciousness about the need to change, elevate the level of engagement of our members, and encourage greater communication and collaboration with all our constituencies. I am happy to say we have made progress toward these goals in large and small ways. Among them, our Bar's Executive Committee met with leadership of the Rhode Island House of Representatives to discuss how

the Bar Association can be a resource to the legislature and its attorney members. We wrote to the Governor regarding the adverse effect on the administration of justice resulting from unfilled judicial vacancies, and to the Supreme Court seeking implementation of a statewide administrative order on attorney use of electronic devices in the courtroom. Mid-year reports were requested of committees and distributed among all of our leadership so that members would stay connected to the initiatives and work of the Association and identify areas for collaboration. Soon the Executive Committee will meet with the Chief Judges of all the state courts and the federal district court to discuss matters of common concern and possible solutions. And, we updated and formalized our legislative protocols with the objective of increasing the efficiency and effectiveness of our legislative program. In all of these activities, my mission has been to increase the impact the Bar Association has on matters that affect the changing practice of law.

A big success on this front is the Bar Association's report to the Supreme Court on Limited Scope Representation (LSR). Providing less than the traditional all-in legal services to clients in litigation, LSR is a growing trend developing in response to changes in the marketplace and is a way of practicing that is relatively new to Rhode Island. We harnessed the expertise of our members and created an inter-disciplinary committee to analyze other states' responses to the problems stemming from the increasing number of *pro se* litigants and to propose rules and protocols for our members to competently and safely provide limited scope assistance to clients. A comprehensive report and model forms for LSR were prepared in record time, and our Bar's Executive Committee and House of Delegates met in special sessions so the report's recommendations could be vetted and approved in time to meet the Court's submission date.

This project typifies the type of collaboration and proactive engagement we as a Bar Association need to play a role in adapting our profession to change. And, I believe, that role should be prominent. As the preeminent professional association of lawyers within the state, our Bar Association should have a greater voice in what

is happening in the legal profession. Our experience, expertise and relationships in all things touching on the practice of law and administration of justice make us uniquely suited to play an influential and impactful role in how our members adapt and whether lawyers in this state struggle or thrive.

As I said at the outset of this term, I do not easily embrace change. But I cannot deny the threats to our profession arising from the shift in client demands and expectations and the growing problems related to the public's unmet need for legal assistance. For me, knowing the legal landscape has changed is not the

challenge; it is making the choice to act. Our Bar Association can have an active and energetic leadership presence that provides value to members, improves the delivery of legal services and advances the interests of the profession. We just have to do it.

At this time of year, I am frequently asked if I'm counting down the days to the end of my term. I am, but not in the way most people think. I have loved every aspect of this job and will miss being a part of the opportunity we have to innovate and adapt to change. I hope I have served you well. I think I have. Thank you for giving me the opportunity. ♦

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## Rhode Island Bar Association Annual Meeting June 16th and 17th

The Rhode Island Bar Association Annual Meeting is on Thursday, June 16th and Friday, June 17th, 2015 at the Rhode Island Convention Center. Featuring over **40 Continuing Legal Education seminars, great keynote and workshop speakers, Bar Awards, many practice-related product and service exhibitors, and the chance to get together with your colleagues socially, the Bar's Annual Meeting, traditionally drawing over 1,500 attorneys and judges, is an event you'll want to attend and enjoy!**



## RHODE ISLAND BAR JOURNAL

### Editorial Statement

The *Rhode Island Bar Journal* is the Rhode Island Bar Association's official magazine for Rhode Island attorneys, judges and others interested in Rhode Island law. The *Bar Journal* is a paid, subscription magazine published bi-monthly, six times annually and sent to, among others, all practicing attorneys and sitting judges, in Rhode Island. This constitutes an audience of over 6,000 individuals. Covering issues of relevance and providing updates on events, programs and meetings, the *Rhode Island Bar Journal* is a magazine that is read on arrival and, most often, kept for future reference. The *Bar Journal* publishes scholarly discourses, commentary on the law and Bar activities, and articles on the administration of justice. While the *Journal* is a serious magazine, our articles are not dull or somber. We strive to publish a topical, thought-provoking magazine that addresses issues of interest to significant segments of the Bar. We aim to publish a magazine that is read, quoted and retained. The *Bar Journal* encourages the free expression of ideas by Rhode Island Bar members. The *Bar Journal* assumes no responsibility for opinions, statements and facts in signed articles, except to the extent that, by publication, the subject matter merits attention. The opinions expressed in editorials represent the views of at least two-thirds of the Editorial Board, and they are not the official view of the Rhode Island Bar Association. Letters to the Editors are welcome.

### Article Selection Criteria

- The *Rhode Island Bar Journal* gives primary preference to original articles, written expressly for first publication in the *Bar Journal*, by members of the Rhode Island Bar Association. The *Bar Journal* does not accept unsolicited articles from individuals who are not members of the Rhode Island Bar Association. Articles previously appearing in other publications are not accepted.
- All submitted articles are subject to the *Journal's* editors' approval, and they reserve the right to edit or reject any articles and article titles submitted for publication.
- Selection for publication is based on the article's relevance to our readers, determined by content and timeliness. Articles appealing to the widest range of interests are particularly appreciated. However, commentaries dealing with more specific areas of law are given equally serious consideration.
- Preferred format includes: a clearly presented statement of purpose and/or thesis in the introduction; supporting evidence or arguments in the body; and a summary conclusion.
- Citations conform to the Uniform System of Citation.
- Maximum article size is approximately 3,500 words. However, shorter articles are preferred.
- While authors may be asked to edit articles themselves, the editors reserve the right to edit pieces for legal size, presentation and grammar.
- Articles are accepted for review on a rolling basis. Meeting the criteria noted above does not guarantee publication. Articles are selected and published at the discretion of the editors.
- Submissions are preferred in a Microsoft Word format emailed as an attachment or on disc. Hard copy is acceptable, but not recommended.
- Authors are asked to include an identification of their current legal position and a photograph, (headshot) preferably in a jpg file of, at least, 350 d.p.i., with their article submission.

Direct inquiries and send articles and author's photographs for publication consideration to:  
Rhode Island Bar Journal Editor Frederick D. Massie  
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# The Evolution of Rhode Island Guardianship Law



Mark B. Heffner, Esq.  
Heffner & Associates  
Warwick

**At the same time a Rhode Islander might be opening his shiny new Mac, another Rhode Islander, classified as an “idiot, lunatic, or person of unsound mind,” could be stripped of their personal autonomy.**

With its iconic 1984 commercial, aired in the third quarter of the 1984 Super Bowl game, Apple announced the availability of the first Macintosh computer. With its graphical user interface replacing the “glowing greenish phosphor”<sup>1</sup> and “surly c:\> prompts”<sup>2</sup> of the IBM P.C. launched three years earlier, the first Mac introduced the intuitive user interface which we now take for granted.

At the same time a Rhode Islander might be opening his or her shiny new Mac, another Rhode Islander, classified as an “idiot, lunatic, or person of unsound mind,” could be stripped of their personal autonomy. Rhode Island law afforded a probate court no statutory standards to decide whether an individual would fall into one of these classifications – or others, such as “a habitual drunkard” – which might cause a probate court to appoint a guardian. Apart from required personal service, people who found themselves on the wrong end of a guardianship proceeding were afforded no clear procedural rights, including evidentiary standards or right to counsel, under Rhode Island’s guardianship statutes.

Rhode Island guardianship law in 1984 was essentially the same since 1905. And, in turn, the 1905 statutes represented only a modest modernization of Rhode Island’s colonial era guardianship laws.

It would take until 1985 – and, more fully, until 1992 – before the breakthrough of the woman throwing a hammer through glass figuratively depicted in Apple’s 1984 commercial would literally occur in Rhode Island’s guardianship laws.

Focusing on provisions of Rhode Island’s statutes pertaining to guardianship of adults highlights this evolution.<sup>3</sup> For, as the Rhode Island Supreme Court pointed out in *Trustees of House of the Angel Guardian, Boston v. Donovan*, “in this state, the probate court derives its jurisdiction wholly from the statute.”<sup>4</sup>

## The Dark Period 1742-1984

As described by the Rhode Island Supreme

Court in *Tillinghast v. Holbrook*, “[i]n 1742, the General Assembly, for the first time, legislated upon the subject of the appointment of guardians of the persons or estates of persons other than infants...”<sup>5</sup> The court noted that “[t]he title of the act indicates its general purpose” –

“An act empowering several town councils of this colony to have the care and oversight of all persons who are delirious, distracted, or *non compos mentis*, and their estates.” It enacts that “it shall be in the power of each town council in this government to take into their care all persons and their estates in each respective town, who are delirious, distracted, or *non compos mentis*, or such who, for want of discretion in managing their estates, are likely to bring themselves and their families to want in misery, and thereby render themselves and their families chargeable to the respective towns in which such person lives...”<sup>6</sup>

In the Rhode Island Public Laws, enacted by the General Assembly in 1822, the General Assembly refined the phrase “the persons or estates of persons other than infants” to empower “the courts of probate, in their respective towns... to approve of guardians chosen by minors of fourteen years of age and upward.”<sup>7</sup> It also made more succinct and specific this power, namely “to appoint guardians of idiots, and all other persons who are *non compos mentis* or lunatic, or who for want in discretion in managing their estates are likely to bring themselves and families to want and thereby render themselves and families chargeable to such town.”<sup>8</sup>

Thus, the 1822 enactment of the General Assembly replaced the terms “delirious and distracted” of its colonial era predecessor with the terms “idiot” and “lunatic.” The General Assembly, however, hit its full stride in its enactment of the 1844 Public Laws:

Whenever any idiot or lunatic, or person *non compos mentis*, or any person who for want of discretion in managing his estate, shall be likely to bring himself and family to want, and thereby to render himself and family chargeable, shall reside or have a legal settlement in any town, the court of probate of such town shall have the right to appoint a

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Since its inception under the sponsorship of Past Bar President Michael McElroy, our Bar's List Serve has grown exponentially in participating members and in a wide range of answered questions. From nuances of the Rhode Island Courts e-filing system to requests for local and out-of-state referrals, List Serve members are providing each other with timely answers. List Serve topics encompass a wide range of practice areas including consultants, traffic violations, medical marijuana, landlord/tenant, divorce, *pro hac vice*, immigration and more!

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guardian or person and estate of such person.<sup>9</sup>

It is, perhaps, not surprising an early or mid-nineteenth century General Assembly classified someone as an “idiot or lunatic or person *non compos mentis*” and used that characterization as the basis by which to subject an individual to a guardianship. However, it is surprising these same classifications (with additions such as “habitual drunkard”) persisted, with only minor phrasing changes, for the next 142 years.

In addition to “want of discretion in managing his estate,” in 1872, the General Assembly expanded the list of potential guardianship candidates to include, “any person who from excess drinking, gaming, idleness, or debauchery of any kind” might “render himself or his family chargeable.”<sup>10</sup>

By what standards was an individual purported to be an idiot or lunatic, or person *non compos mentis*? The statute contains no definition of any of these three terms. A modern Rhode Island case notes that “[t]he 1623 James I act used the term ‘*non compos mentis*’ – literally ‘not master of one’s mind’ – in describing what has evolved into the term ‘unsound mind’ used in § 9-1-19.”<sup>11</sup> As it did in the statute of limitations provisions of R.I. Gen. Laws 1956 § 9-1-19, cited by the **Roe v. Gelineau** court, the General Assembly replaced the term *non compos mentis* in the guardianship statutes with the phrase “person of unsound mind.”<sup>12</sup>

Rhode Island’s Supreme Court decisions are equally unhelpful regarding the statute’s other terms. “The terms ‘lunatic, idiot or person of unsound mind,’ used in the statute in their natural and ordinary use, indicate a condition of mental disability and incapacity.”<sup>13</sup> Looking outside of Rhode Island law for insight to the meaning of the terms idiot and lunatic,

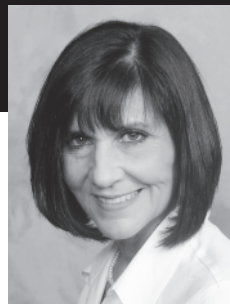
English common law distinguished between two types of individuals who suffer from mental incapacity: the idiot and the lunatic. Crudely put, the lunatic was someone who once possessed a sound mind and somehow lost it; the idiot never had one.<sup>14</sup>

The Rhode Island Court Practices Act of 1905 introduced a new concept in a section entitled *Conservators of the Property of Aged Persons*, which provided that “[i]f a person by reason of advanced age or mental weakness is unable to properly care for his property the probate

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court of the town in which he resides, upon his petition or the petition of one or more of his relatives or friends, may appoint a conservator of his property.”<sup>15</sup>

Enacting this section, the General Assembly introduced, at the beginning of the twentieth century, two concepts not previously existing in 18th or 19th century Rhode Island statutes. The first is a proceeding in which the court would supervise the “charge and management of the property” of an individual based solely on “advanced age or mental weakness.”<sup>16</sup> Secondly, unlike the guardianship proceedings, such a conservatorship proceeding could be initiated upon the petition of the individual.<sup>17</sup>

The rights – or more accurately the lack thereof – provided to the subjects of guardianship petitions in 18th and 19th century Rhode Island is best exemplified by statutory and case law pertaining to notice. In its 1857 Revised Statutes, the General Assembly mandated that “every court of probate shall, before proceeding, give notice to all parties, known to be interested” in particular proposed actions by the probate court, including guardianship proceedings.<sup>18</sup> Like Monty Hall giving game show contestants a choice of doors number 1, 2 or 3, the legislature provided that such notice “may be given in either of the following modes, at the discretion of the court,” such modes being by: a) citation personally served or “by leaving an attested copy thereof at the last and usual place of abode;” b) newspaper advertisement; or c) posting in the clerk’s office or “at the place at which the court usually meets, and in one other public place within the town.”<sup>19</sup>

In *Angell v. Angell*, the notice to the prospective ward “was by publication only.”<sup>20</sup> The Probate Court of the Town of North Providence appointed a guardian for Vashti Angell, despite the lack of personal service on Ms. Angell. Counsel for Ms. Angell contended that the statute itself “is unconstitutional because under it a person may be deprived of his liberty and property without due process of law by being put under guardianship without actual notice.”<sup>21</sup> The *Angell* court was unmoved by Ms. Angell’s argument.

Undoubtedly a personal notice to the intended ward would be better and more consonant with the usual course of judicial procedure than notice by publication only... but nevertheless our conclusion is that the appointment

## Sidebar With the Superior Court Program Draws Large Audience



From l to r: Moderator David J. Oliveira, Hon. Daniel A. Procaccini, and Hon. Jeffrey A. Lanphear.

The Bar’s “A Sidebar With the Superior Court” CLE Program drew about 60 attendees, with an additional 25 tuning in via live webcast. This special program brought together members of the judiciary, with attendees learning what the judges look for in their courtrooms, the differences between and among the Motion and Formal/Special Calendars, and the judges’ views on top notch courtroom presentations and presenting demonstrative evidence. The judges shared their thoughts on e-filing and the changes in the courtroom process the Bar should expect. For those who missed it, the program is available On Demand, by visiting the Bar’s website, [ribar.com](http://ribar.com), clicking on Continuing Legal Education, and Online CLE Seminars.

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of the appellant was valid notwithstanding the want of personal notice to the appellee notice having been given as authorized by the statute.<sup>22</sup>

The Court Practices Act of 1905 changed this by specifically requiring that “[n]o person shall be appointed guardian of the person of another, unless notice of the application for such appointment has been served upon the intended ward in person at least fourteen days prior to any action on said application....”<sup>23</sup>

### First Light 1985-1988

In 1985, the General Assembly altered the grounds by which a probate court could appoint a guardian. Gone were the grounds based on an individual’s purported status as an idiot, lunatic, or person of unsound mind. Gone also was the ability of a probate court to appoint a guardian based on categories of purported behavior (e.g., excess drinking, gaming, idleness or debauchery). Also eliminated was a potential guardianship based on “want of discretion in managing his estate” which might lead to the individual or his family being public charges.

Inserted in place was a functional standard. Specifically, probate courts could now appoint guardians for an individual “who is unable to manage his or her estate and is unable to provide for his or her personal help and safety as a result of mental/or physical disability....”<sup>24</sup> Specifically, such “mental or physical disability as determined by the court on the basis of oral or written evidence under oath from a qualified physician....”<sup>25</sup>

In 1987, the General Assembly further modified the statute enabling probate courts to appoint conservators.<sup>26</sup> The changes, though seemingly superficial, were actually substantive. Previously, an individual seeking the appointment of a conservator was required to be of “advanced age” or have a “mental disability.” The 1987 legislation eliminated the adjective mental before disability, as well as the requirement of advanced age to initiate a conservatorship.<sup>27</sup> Accordingly, an individual could seek the appointment of a conservator based on his or her own disability alone.<sup>28</sup>

While the General Assembly was providing some light on the horizon by these revisions to the guardianship statutes, nationally, the dawn was beginning to break. The catalyst was a series of articles appearing in 1987 produced by the

# SOCIAL SECURITY DISABILITY MEDICAL MALPRACTICE



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Associated Press (AP) resulting from a national study of state guardianship proceedings.<sup>29</sup> The AP's report, *Guardians of the Elderly: An Ailing System*, highlighted both procedural and substantive problems in state court guardianship proceedings.<sup>30</sup>

The AP report sparked the National Guardianship Symposium in July, 1988 at the Johnson Foundation's Wingspread Conference Center.<sup>31</sup> Wingspread produced 31 recommendations "intended to better safeguard the rights of adult disabled wards and proposed wards [and]... to provide for the ward's needs by maximizing individual autonomy."<sup>32</sup>

### The Dawn 1990-1996

Rhode Island's guardianship laws were transformed by the General Assembly's enactment of R.I. Pub. Laws 1992 ch. 493 (1992 Act) mandating the use of a seventeen page "Functional Assessment Tool" (FAT), in place of the potentially one-paragraph physician's letter, as the basis for a probate court's determination of an individual's guardianship status.<sup>33</sup> Gone was the potential that someone could be made the subject of a guardianship proceeding based merely on his alleged status as an idiot, lunatic, person of unsound mind, habitual drunkard, or some other purported classification. Instead, the individual's functional abilities and "capacity to make decisions" would be determinative.<sup>34</sup>

The 1992 Act also mandated procedural protections for a respondent including: enhanced notice requirements;<sup>35</sup> the ability to compel the attendance of and to confront and cross-examine witnesses;<sup>36</sup> and a "clear and convincing" evidentiary standard in determining whether a guardian should be appointed.<sup>37</sup> The 1992 Act also required the appointment of a *guardian ad litem*, who would have both an investigatory and reporting function, in every petition for the appointment of a guardian.<sup>38</sup>

In 1994, the General Assembly replaced the seventeen-page FAT with a six-page Decision-Making Assessment Tool (DMAT).<sup>39</sup> In addition to its virtue of relative brevity, the DMAT focused on the extent to which an individual possesses decision-making capacity.<sup>40</sup>

By mandating the use of a DMAT and by substantially enhancing the procedural

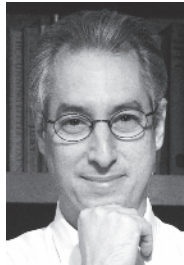
*continued on page 38*

## Your Bar's 2016 Annual Meeting Highlights

### Thursday, June 16th, Keynote Session

### *Justice at Dachau: The Trials of an American Prosecutor*

Lawmakers, religionists, and historians continue to struggle with the legal, moral, and behavioral issues raised at Dachau. The late chief prosecutor, Colonel William Denson, is viewed by some as a hero of universal human rights who established critical precedents for today's international war trials. Joshua M. Greene speaks about the Dachau war crimes trials conducted by the U.S. Third Army from November 1945 to August 1948. The proceedings, overshadowed by Nuremberg, involved some of Hitler's most notorious henchmen: nearly 1,600 men and women responsible for atrocities inside the concentration camps. Mr. Greene's presentation includes PowerPoint visuals and a narrative of the legal challenges that confronted the chief prosecutor.



**Joshua M. Greene**, has an unusual history. In 1982, he returned to the United States after living for 13 years in Hindu monasteries in India and Europe. He completed his graduate degrees at Hofstra University in New York where he was appointed Adjunct Professor of Religious Studies, and went on to author numerous books on the Holocaust period. His many documentary films on war crimes trials and eyewitness testimony are seen on PBS, and he has been a featured speaker at the Pentagon, the New York Public Library's

Distinguished Authors series, and at universities and law schools nationwide. His most recent film, *Memory After Belsen*, explores tensions surrounding Holocaust education and is distributed by Discovery Education.

Please see your **2016 Rhode Island Bar Association Annual Meeting Brochure** for more information about the Meeting's over 40 great, CLE-credited seminars, social events and other interesting and informative activities and to access your registration form, or go to the Bar's website: **ribar.com** to download a Brochure pdf and an interactive registration form. **Please note, to save \$25, you must register before June 10, 2016.**

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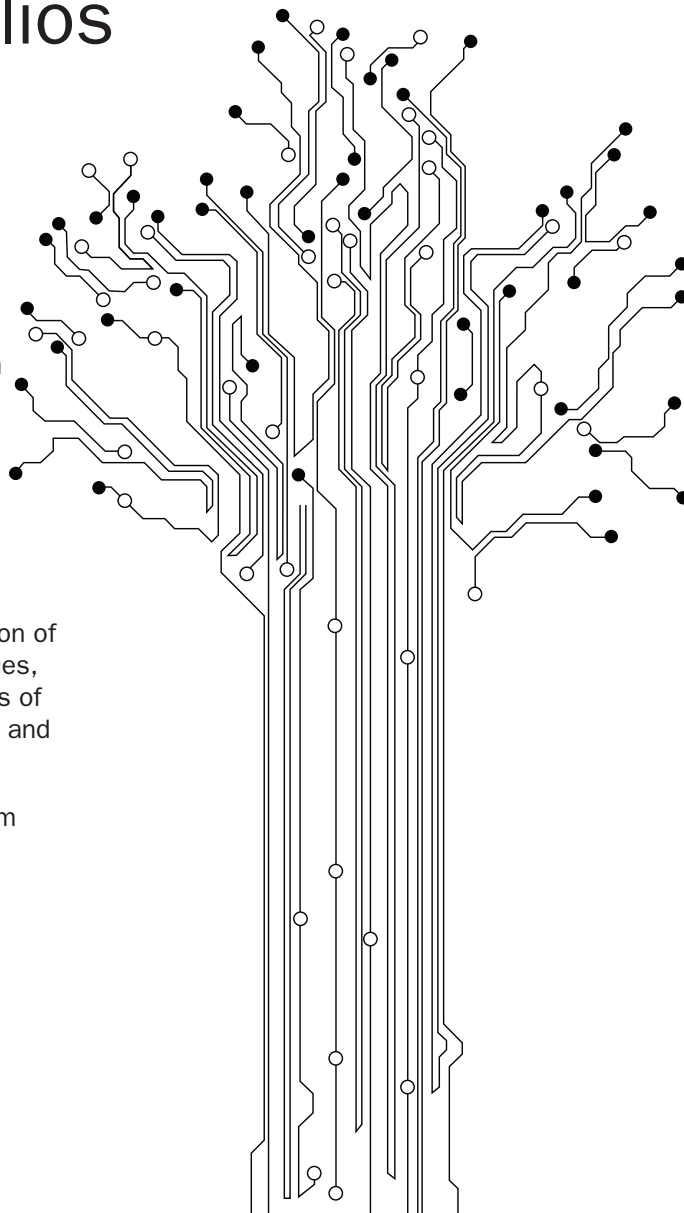
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# Lunch with Legends: Trailblazers, Trendsetters and Treasures of the Rhode Island Bar



Matthew R. Plain, Esq.  
Barton Gilman LLP, Providence



Stephen Adams, Esq.

John M. Roney was born in Washington, D.C. in 1939. The son of a justice department attorney, Mr. Roney grew up in D.C., and attended St. John's Military Academy. Upon graduating from St. John's, he attended Providence College, which his father, a Rhode Island native, also attended. He graduated from college in 1962, and then went to work for the *Providence Journal* as a staff reporter. After a brief stint at the *Journal*, John returned to D.C. to attend law school at Catholic University. During law school he worked as a Capitol policeman. After graduating, he served a one-year federal appointment at the Library of Congress' American Law Division. Thereafter, he joined D.C. Legal Services where he practiced as a neighborhood lawyer for the indigent, an experience that opened his eyes to using the law for the betterment of people. After roughly two years at D.C. Legal Services, John was recruited to join Rhode Island Legal Services (RILS) as a staff attorney, taking on the Providence Police in the **Coalition of Black Leadership v. Doorley**, a civil rights action alleging black citizens had been subjected to a pattern and practice of improper and illegal police conduct. After four years at RILS, John and fellow RILS attorney Cary Coen, joined The Law Offices of Max Winograd, practicing commercial litigation. Following this, in the late 1970s, John opened his own practice on Wickenden Street with another RILS alumna, Robert Mann where they practiced civil rights and criminal law. Soon thereafter, Lynette Labinger joined their firm and Bob Mann left. John and Lynette have maintained their practice, Roney & Labinger, since 1983. We had the opportunity to speak with this longstanding veteran of the Bar. Edited excerpts from our conversation follow.



John M. Roney

## *What made you decide to become a lawyer?*

The time I spent as a *Providence Journal* reporter convinced me I was not going to be a great observer. I wanted to be on the floor!

## *If you had to hire a lawyer, who would it be?*

If it were a criminal case, I'd hire Bob Mann. When the indictment comes, you go to Bob, because he will fight right to the United States Supreme Court if he thinks you've been wronged. For a civil case, I'd certainly hire my partner who is the best lawyer I've ever met. She and Bob Mann, how would you choose between those two?

## *Please describe a memorable experience you have had as a lawyer.*

A Rhode Island School of Design student put together an art show, "Private Parts." All the East Side was trooping up the stairs of the Bayard Fain Building on North Main Street, and the police raided it. We went right into the federal court, and we tried the case based on the First Amendment. In one exhibit, there was a photograph of a rabbit trying to fornicate with a chicken. I had the student on the stand and he was one of those people who are born for a witness chair. The City Solicitor was cross-examining the student, holding up the photograph and he demanded, "What is this?" The student looked at it and paused for a moment. He said, "Well, I'll tell you what I see. I see a rabbit, and it looks like he's trying to fornicate with a chicken. Now, whether a rabbit can fornicate with a chicken or not, I can't say, but that's it." The courtroom just broke up, even Judge Pettine was laughing. I still have that picture.

## *To what do you attribute your success as a lawyer?*

I'm a fast learner, and I'm relatively quick on my feet. And part of my genius has always been partnering with great lawyers.

## *Who was your most formidable opponent?*

I've been up against some good ones. Joe Kelly and Brad Gorham were always extraordinarily well prepared, and they were gentlemen. I never felt they took advantage of the fact that I was younger and less experienced. Both became friends. Joe Kelly recommended me for a position on the Rhode Island Supreme Court, which was one of the great honors of my life.

## *Would you do it all over again?*

Oh, yes. Thank God, I did. Remember that was late '60s. Anybody that didn't go into the Legal Services was nuts.

## *What advice would you give to somebody who is just getting out of law school?*

Find a mentor. You can't learn this profession by doing it without good guidance. I would not be half the lawyer I am today without the wise counsel of experienced practitioners.



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We are proud to announce the Bar Association's administration of the Volunteer Lawyer Program (VLP) for 30 years, 1986-2016. We applaud all our members who made the commitment to strengthen the legal system by representing our neediest citizens through the VLP. Our dedicated members' exceptional contributions have resulted in thousands of our poorest citizens gaining access to the legal system. The commemorative lists below reflect the recipients of the *Pro Bono Publico* and Continuing Service Award from 1987-2015. These volunteers were selected by their peers for their outstanding commitment to providing equal access to justice for those in greatest need. Throughout this milestone anniversary year, we especially want to thank all members who have participated in the *pro bono* effort and continue to offer their legal assistance. Your decision to make a major contribution to the quality of life for those who otherwise would have gone unrepresented inspires us all.

## Continuing Service Award Recipients

1991

Frederick G. Cass  
Lise M. Iwon  
Robert H. Newman, Sr.  
Robert D. Oster

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LAURENCE & IWON

1992

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Kathy A. Baldi

1993

John W. Dineen  
Carolyn R. Barone  
George J. West

1994

Edward H. Newman  
H. Jefferson Melish  
Steven J. Prignano

1995

Joel D. Landry  
Lise M. Iwon  
F. Monroe Allen  
Patrick L. McKinney

1996

Robert D. Oster

1997

Kevin F. Dwyer  
Robert O. Tiernan

1998

David N. Bazar  
Frank S. Lombardi  
Mortimer C. Newton

1999

John N. Lemieux  
Nancy J. Oliver

2000

Charles Greenwood  
Vincent A. DiMonte

2001

Christopher M. Lefebvre

2002

Denise C. Aiken  
Sheila M. Cooley

2003

Richard A. Pacia

2004

Louis M. Pulner

2005

Joseph T. Houlihan

2006

Colleen M. Hastings

2007

Pamela R. St. John

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2008

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Kevin F. Dwyer

2009

Christine J. Engustian

2010

Jane F. Howlett

2012

Carolyn R. Barone

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1987

David N. Bazar  
Fredrick G. Cass  
Michael J. Farley  
James P. Flynn  
Corinne M. Grande  
Gregory S. Inman  
DeWitte T. Kersh  
Matthew L. Lewiss  
Robert D. Oster  
Thomas H. Quinn, Jr.  
Tedford B. Radway

1988

Carolyn R. Barone  
Peter T. Bouchard  
John J. Flanagan  
Paul A. Fontaine  
Paul M. Giacobbe  
William J. Grande, Sr.  
Charles Greenwood  
Joseph T. Houlihan  
Lise M. Iwon  
H. Jefferson Melish  
Albert Skorupa, Jr.

1989

F. Monroe Allen  
Denise M. Auger  
John T. Gannon  
Joseph T. Houlihan  
Sanford M. Kirshenbaum  
Andrew Max Kohlenberg  
Joel D. Landry

1989 (continued)

George F. McDonald  
Patrick L. McKinney  
Robert H. Newman, Sr.  
Mortimer C. Newton  
Jack D. Pitts  
Robert O. Tiernan

1990

Kathy A. Baldi  
William J. Balkun  
John H. Brown  
Augustus Charos, Jr.  
John A. DeSano  
John W. Dineen  
Robert G. Driscoll  
Kevin F. Dwyer  
Judith Kapuscinski  
Kenneth J. Macksoud

1991

Jametta O. Alston  
Frank S. Lombardi  
Bruce W. McIntyre  
James P. Renaldo  
James C. Sullivan  
Craig J. Watkinson  
George J. West

1992

Lisa Cardilli  
Vera H. DiLuglio  
Christine M. Gravelle  
Edward H. Newman  
Matthew T. Oliverio  
Diane Wood Picone  
Stephen M. Prignano  
Bruce D. Todesco

1993

Lincoln D. Almond  
Patricia M. Beede  
Christine Curley  
William F. Holt  
Kenneth Kando  
Stephen S. Lyman  
John E. Martinelli  
Alicia M. Murphy  
David E. Roux  
Stephen D. Zubiago

1994

Denise C. Aiken  
David A. Borts  
Vincent A. DiMonte  
Louis W. Grande Jr.  
Alden C. Harrington  
Margaret R. Hayes-Cote  
Richard A. Pacia  
C. Scott J. Summer

1995

Alan M. Barnes  
Colleen M. Hastings  
Allen M. Kirshenbaum  
Christopher M. Lefebvre  
Nancy J. Noviello  
John F. Pellizzari  
Joseph V. Smith  
Henry M. Swan

1996

John J. Canham  
Michael J. Furtado  
Justin S. Holden  
John N. Lemieux  
Elizabeth McDonough Noonan  
Aurendina Gonsalves Veiga

1997

Daniel E. Ciora  
Sheila M. Cooley  
John A. DeSano  
Rosina L. Hunt  
Paul T. Jones, Jr.  
Valerie E. Michael  
Dawn J. Mosher  
W. Kenneth O'Donnell  
Nancy J. Oliver  
Peter J. Poulos  
William P. Tocco, III

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1998

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Laurie A. Meier  
Robert R. Nocera  
Louis M. Pulner  
Pamela B. Quigley  
Timothy J. Robenhymmer  
Bernice Stone  
Maryann Violette

1999

Jon M. Anderson  
Mark Sales

2000

Noelle K. Clapham  
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Pamela R. St. John

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Janice W. Head  
Elliot Taubman

**2003**  
Emily J. Chamberlain  
Jane F. Howlett  
Harris K. Weiner

**2004**  
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Joanne C. D'Ambra  
Keith G. Langer  
Thomas L. Mirza

**2005**  
Dianne L. Izzo  
Walter R. Stone

**2006**  
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William P. Devereaux

**2007**  
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**2008**  
Armando E. Batastini  
Mariah L. Sugden

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**2010**  
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**2011**  
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**2012**  
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## BOOK REVIEW

# *Buying, Owning, and Selling Rhode Island Waterfront and Water View Property* by John M. Boehnert, Esq.



Christian F. Capizzo, Esq.  
Shechtman Halperin  
Savage, LLP

**With over 300 miles of coastline in Rhode Island, much of it checkered with residential and commercial properties, it is a wonder why a book like this has not already been written.**

Author John M. Boehnert takes to heart Abraham Lincoln's urging for brevity, as he shares in the introduction of *Buying, Owning, and Selling Rhode Island Waterfront and Water View Property*, that this guided the intended structure of his newest book, and he delivers on his intention. Whether an attorney, real estate agent, or simply someone interested in owning or selling coastal property, this book deftly combines Boehnert's over thirty years of experience representing buyers, owners and sellers of these unique types of properties. He educates the reader on the most nuanced elements surrounding coastal property transactions with both a credible tone and an accessible style.

As the title suggests, this book is segmented into three parts and each chapter begins with a succinct overview of what he hopes to impart to the reader. This also creates a clear expectation to utilize this book as a resource, one to refer

back to at a later time in the most pragmatic sense. His many years as a practitioner – taking the law off the page and putting it into action with his clients – shines through as he points to the relevant case law and applicable regulations and statutes which non-attorneys will appreciate and benefit from as well.

In Part I, he focuses on the elements involved in buying coastal property. Boehnert begins by giving the reader an important overview of the regulatory environment and the role that the Department of Environmental Management (DEM), Coastal Resources Management Council (CRMC), Department of Health (DOH) and others play in relation to coastal property ownership and sales in Rhode Island. Throughout the book, Boehnert exhibits his skill as an author and experienced attorney – not just someone interpreting law in a vacuum – when he provides guidance to his readers on such issues as “how negotiations can go terribly wrong” citing some of the most important cases in Rhode Island related to coastal property.<sup>1</sup>

Boehnert spends an entire chapter thoughtfully delving into the intricacies of performing due diligence inquiries and accurately identifies this

process as the most important part of purchasing coastal property. In my experience, this is an area many buyers may want to rush through or even overlook for fear the transaction will fall apart. But, as Boehnert fittingly states, “a successful due diligence inquiry can save a purchaser costly surprises as well as disasters that literally deprive the purchaser of the benefit of the bargain.”<sup>2</sup> Boehnert continues, as a buyer, “you want to know before you buy that you can do with the property what you intend” as this will play an “important part of your decision of whether or not to acquire the property.”<sup>3</sup> All too often, those who purchase coastal property are so enamored with the location (and the accompanying views) they fail to recognize and address the potential barriers and constraints on their future plans. Keeping true to Lincoln's admonition about brevity, Boehnert tackles the complexities of financing and closing the transaction by breaking down the greatest concerns lenders have when financing the purchase of coastal property: 1. Credit worthiness of the buyer; 2. Value of property; and 3. Conditions of property not reflected in the appraisal (i.e. Issues with title, environmental conditions, zoning or subdivision issues).<sup>4</sup> He also examines the complex area of Flood insurance rate increases – a subject of much debate both on a national and local level over the last five years.

Part II deals with issues encountered by those who own coastal property. He correctly advises his readers that, “Coastal property is some of the most heavily regulated property in the state of Rhode Island,”<sup>5</sup> and owners that disregard the regulatory framework – including approval by state regulatory agencies for most, if not all alterations of property – risk being the target of an enforcement action. I know, having worked on coastal environmental matters for years with the Attorney General's office and now representing coastal property owners in the private sector, becoming the target of such enforcement actions is something property owners will want to avoid because of the considerable time and expense required to resolve them. In this section, he skillfully points out three regulatory triggers that coastal property owners should not only become familiar with but also comply with,



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whether they are looking to construct an entirely new structure or a simple renovation. The first example of a regulatory trigger involves CRMC's regulatory jurisdiction over activities within the tidal waters of Rhode Island such as installing a dock, seawall or boat ramp. Although many may be aware that CRMC's jurisdiction extends three nautical miles from shore, Boehnert warns "...tidal waters are not limited to ocean or bay waters ... in fact in Rhode Island, many rivers are tidal from some distance from the coast, and perhaps not even in sight of the coast and are still subject to CRMC regulatory jurisdiction."<sup>6</sup> Identifying activities occurring within two hundred feet of the inland edge of the coastal feature is the second regulatory trigger identified by Boehnert. He clearly explains that "alterations are not only prohibited within two hundred feet of the inland of the coastal feature, they are also prohibited on the coastal feature itself."<sup>7</sup> The third and final regulatory trigger involves identifying and understanding the classification of different water types that abut coastal property so you can avoid conducting activities prohibited or restricted by CRMC.

Chapter 7 deals with the importance

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of surveys and how complicated boundary issues, such as easements at the shore and changing boundaries, can impact coastal property owner's rights. He begins Chapter 8 by cautioning his readers not to disregard the significance of coastal property taxation as an "ongoing cost of ownership."<sup>8</sup> He provides a concise overview of the taxation procedures and stresses the importance for coastal property owners to understand the nuances of this process. He concludes this chapter by providing coastal property owners with a game plan to guard against and challenge unfair or illegal tax assessments and even gives a nod to the "Taylor Swift Tax" proposed in the General Assembly in 2015.<sup>9</sup>

Part III, the shortest section of the book, deals primarily with an owner's preparation in the marketing and sale of coastal property. The key take away with in this section is that the owner should "understand what prospective purchasers will consider in evaluating property and to not only anticipate those issues but address them as well."<sup>10</sup> Boehnert further denotes key areas for consideration and review including title searches, surveys, pricing, engaging a realtor and disclosures. Finally, in Chapter 10, he touches on the actual sales transaction and the importance of engaging an attorney early in the process to identify and navigate issues that may arise with the offer, purchase and sale, contingencies, etc.

With over 300 miles of coastline in Rhode Island, much of it checkered with residential and commercial properties, it is a wonder why a book like this has not already been written. Boehnert thoughtfully lays out the uniqueness and complexities surrounding the purchase, sale and ownership of coastal property. He describes the perils and pitfalls of buying, owning and selling coastal property in the Ocean State with the intention of making all parties involved more informed and prepared, encapsulated with the foresight that comes from one who has experience in dealing with such transactions.

#### ENDNOTES

- 1 *Boehnert*, 44.
- 2 *Ibid.* 49.
- 3 *Ibid.* 91.
- 4 *Ibid.* 79.
- 5 *Ibid.* 88.
- 6 *Ibid.* 92.
- 7 *Ibid.* 93.
- 8 *Ibid.* 120.
- 9 *Ibid.* 127-128.
- 10 *Ibid.* 131. ❖

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A new, landmark study conducted by the Hazelden – Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs reveals substantial and widespread levels of problem drinking, depression, anxiety and unhealthy stress in the U.S. legal profession.

The comprehensive study of more than 12,000 lawyers found that 21 percent of licensed, employed attorneys qualify as problem drinkers, 28 percent struggle with some level of depression and 19 percent demonstrate symptoms of anxiety. The study found that younger attorneys in the first 10 years of practice exhibit the highest incidence of these problems.

The study compared attorneys with other professionals, including doctors, and determined that lawyers experience alcohol use disorders and mental health distress at a far higher rate than other professional populations.

The study also found that the most common barrier blocking

attorneys from seeking help was the fear of others finding out. The study also determined that lawyers who previously had addiction problems fared better utilizing treatment tailored to the legal profession than those who attended programs not tailored to the legal profession.

Fortunately, your Rhode Island Bar Association's Lawyers Helping Lawyers Committee provides strictly confidential free assistance via a variety of means. You may contact Committee members whose names and telephone numbers are included in the Committee's notice on page 30 of this *Bar Journal* and also on the Bar's website at [ribar.com](http://ribar.com) at **Do You Need Confidential Help?** under the **Quick Links** section on the left side of the Home page and/or, as a free membership service, you may contact the professional counselors at the Bar's health and wellness partner Coastline EAP, by telephone: **1-800-445-1195**.

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# Valuing Home Grown Electricity



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**The argument that customer-generated electricity burdens our electric supply is based on a traditional utility ratemaking system biased toward large, capital-intensive projects and utility-owned infrastructure.**

Rhode Island is finally going to accurately value locally-produced renewable energy. The old view was that renewable energy would only increase our already high electric rates. Our new state energy plan shows that relying on conventional generating sources is a money-pit – the least secure and most expensive course for our energy future.<sup>1</sup> Not surprisingly, companies heavily invested in the old model are scared. National Grid recently proposed a new charge: an access fee on renewable energy. Overwhelming opposition to that backward-looking approach led to withdrawal of the proposed charge. Rhode Island can and must now move toward setting a more precise value on a more secure and affordable energy future.

National Grid's access fee was proposed in a rate review proceeding the General Assembly mandated as part of its adoption of the Renewable Energy Growth program.<sup>2</sup> The idea is sound. As home-grown renewables flourish, we must avoid the mistakes made with traditional energy sources and fully study all the costs and benefits of these new sources. National Grid tried to impose the access fee in earlier drafts of the legislation, without the benefit of careful cost and benefit analysis. Legislators did the right thing, and called for a rate review proceeding in which the Public Utilities Commission studies the value of local renewables and adjusts rates accordingly.

It is not surprising that when the rate review proceeding started, National Grid resubmitted its access fee for local renewables to use the distribution system; but it surprisingly lacked supporting analysis.<sup>3</sup> Analysis is critical because local renewables likely provide a net benefit to the entire grid and all customers, even when some costs of integration also arise. A thorough evaluation of net value is essential. That is why many parties took issue with National Grid's proposal to charge for costs it could not demonstrate and ignore benefits it refused to measure.

The access fee proposal did not follow basic ratemaking principles. Under those standards, the utility must demonstrate and fairly allocate

its costs, net of benefits. Only then can costs be recovered through fair and efficient rate design. Effective rate design sends a price signal encouraging customers to change behavior that causes the costs. National Grid's proposal just presumed that any time a renewable energy system makes more electricity than needed at that moment, National Grid has a cost caused by the generator who made the extra electricity. That presumption overlooked the fact that the company sells such excess electricity to neighboring customers at full price. While focused on justifying costs, National Grid refused to consider or measure any benefits that come from generating closer to the point of consumption.

The refusal to account for the benefits of local renewables flew in the face of Rhode Island law.<sup>4</sup> A line of research going back more than two decades substantiates the benefit of siting generation within the distribution system.<sup>5</sup> The value of renewables is in the market and operational costs avoided and benefits received. Proper evaluation embraces a full range of avoided costs including savings over the entire life of the generation system. A grid operator must objectively and quantitatively analyze the energy, capacity, transmission, distribution, line loss reduction, operating risk, environmental, and other known and measurable costs that are avoided. National Grid's fee proposal did not assess such values. Intervenors asked the Commission to require the utility to do so because, over the long-term, local renewables can and will defer and/or avoid future fixed cost investments.

The argument that customer-generated electricity burdens our electric supply is based on a traditional utility ratemaking system biased toward large, capital-intensive projects and utility-owned infrastructure. Under old system thinking, utilities have strong financial incentives to oppose distributed customer-owned generation, even though such advocacy does not serve the public interest. Today, we are in the midst of a transformative new energy economy. In the old energy economy,

...both the technology of the original electricity system and its ownership were large and



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centralized. Vertically-integrated utility companies owned everything, from the power plant to the meter outside a home or business. In an era when cost-effective power generation came from coal or nuclear – with massive economies of scale – centralized ownership was the key to raising the capital for power generation. Utilities were rewarded with public monopolies and guaranteed rates of return to attract low-cost capital and drive down costs...<sup>6</sup>

But, “[t]he new technologies of power generation no longer require the same scale or centralization of ownership.”<sup>7</sup> Utility sector transformation promises great benefits for customers, and for utilities that adapt to the change. Utilities are entitled to a reasonable opportunity to recover prudently invested capital and a reasonable return on those investments. As distributed energy resources become increasingly cost-effective and market penetrations increase, utilities must accept the reality that customers will seek to manage their own energy generation and use and reduce their energy bills. Increased reliance on local, clean energy resources like wind and solar benefits customers including those who do not invest in these options.

The opposition to National Grid's proposed tax on customer-owned generation was based on a lack of the factual and analytical foundation needed to justify it. Days before the scheduled hearing on its proposed charge, National Grid withdrew its rate proposal. The Commission ultimately ordered a more open, collaborative, and transparent stakeholder process to establish, modify and update avoided cost values and rates. Rhode Island is now poised to get the real value of our home-grown renewables.

#### ENDNOTES

<sup>1</sup> *Rhode Island State Energy Plan*, p. 3. <http://www.energy.ri.gov/energyplan/>.

<sup>2</sup> R.I. GEN. LAWS § 39-26.6-24; PUC Docket #4568 (<http://www.ripuc.org/eventsactions/docket/4568page.html>).

<sup>3</sup> *Zschokke & Lloyd Testimony*, July 31, 2015 (“*Company Testimony*”), at pp 59-60.

<sup>4</sup> R.I. GEN. LAWS in § 39-26.6-24(b).

<sup>5</sup> *Direct Testimony of Karl Rabago*, p. 20 ([http://www.ripuc.org/eventsactions/docket/4568-WED-Rabago\(11-23-15\).pdf](http://www.ripuc.org/eventsactions/docket/4568-WED-Rabago(11-23-15).pdf)); citing <http://www.environmentamerica.org/reports/amclshining-rewards>).

<sup>6</sup> *Id.* at p. 6.

<sup>7</sup> *Id.* at p. 7. ❖

# Estate Planning for International Family and Property



Eric D. Correira, Esq.  
Correira & Correira LLP  
Providence

**When conducting estate planning for a Rhode Island resident with international connections, an attorney needs to recognize the interplay between United States and Rhode Island tax law, as well as that of any foreign country involved.**

Rhode Island's roots span the world. Beginning with the first English settlers, waves of immigrants have shaped and defined the Ocean State. Today, in large part as a result of that history of immigration, many Rhode Island residents now have family members living, or assets situated, abroad. When conducting estate planning for a Rhode Island resident with international connections, an attorney needs to recognize the interplay between United States and Rhode Island tax law, as well as that of any foreign country involved. Otherwise, the client (or his or her estate) could be subjected to unnecessary taxation in one or more jurisdictions.

What follows is a review of four of the more common international estate planning scenarios a Rhode Island attorney may face! The first scenario concerns a multinational married couple wanting to update their estate plan to minimize United States and Rhode Island estate taxes. The second scenario involves a United States citizen seeking guidance regarding the best ownership structure for his foreign real estate. The third scenario consists of a United States citizen wishing to make tax-efficient gifts of United States property to family members residing in another country. The fourth scenario involves a United States citizen trying to determine whether a charitable bequest to a foreign non-profit organization qualifies for federal and Rhode Island estate tax charitable deductions.

## ***Scenario 1: Estate Tax Planning for a Multinational Couple Living in the United States***

Elizabeth Mott, originally from England, is now a fully-naturalized United States citizen living in Portsmouth. However, her husband, Edward, while a resident of the United States, is a citizen of the United Kingdom. The couple has a taxable estate for both federal and Rhode Island estate tax purposes and would like to minimize their exposure to estate taxes. They want a review of their existing estate plan, prepared by another attorney, which includes a rev-

ocable trust with standard marital and credit-shelter provisions, often referred to as an A-B Revocable Trust.

## **Overview of the A-B Revocable Trust**

Elizabeth and Edward's existing trust is a typical A-B Revocable Trust used in Rhode Island. The A-B Revocable Trust is an estate planning arrangement designed to give individuals full use of the family's economic wealth, while minimizing, to the greatest extent possible, the total amount of federal and state estate tax payable at the death of both spouses.

The A-B Revocable Trust contains a series of steps, and ultimately results in the creation of multiple sub-trusts. First, a married couple, known as the grantors, create a revocable trust or, in the alternative, separate revocable trusts or testamentary trusts. Once created, the grantors transfer their assets into the trust (for real estate it is by deed, for financial assets it is by change of ownership and/or change of beneficiary forms). While both grantors are living, assets may be freely transferred into and out of the trust, the trust can be amended or revoked, and any income from trust assets is taxed directly to the grantors.

The trust is structured so that, upon the death of the first grantor, the trust's assets are divided in accordance with a formula into two or more separate sub-trusts. The first trust – the A trust or marital trust – benefits the surviving spouse while he or she is living, and the second trust – the B trust or credit-shelter trust – is for the primary benefit of the surviving spouse, but also other named beneficiaries. The assets are distributed between these two trusts by first funding the B trust with an amount equal to the lifetime estate and gift tax exemption, which is currently \$5.45 million on the federal level, and \$1.5 million for Rhode Island, and then placing any remaining assets into the A trust.<sup>2</sup>

The separation of assets into sub-trusts allows for the full use of both the lifetime estate and gift tax exemption and the marital deduction at the death of the first spouse. The lifetime estate and gift tax exemption removes the B trust assets from the predeceasing spouse's taxable

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estate, while the unlimited marital deduction eliminates an estate tax on the A trust (which, to qualify for the marital deduction, must be for the sole benefit of the surviving spouse during his or her lifetime, amongst other requirements). If the sub-trusts are properly funded and administered, at the death of the surviving spouse, the assets in the B trust (including any appreciation) will be outside of the surviving spouse's taxable estate. In contrast, the A trust's assets will still be taxed, but the total taxable amount will first be reduced by the surviving spouse's own lifetime estate and gift tax exemption, resulting in either a complete elimination, or significant reduction of, the overall estate tax burden.

### **QDOT Provision for Non-United States Citizen Spouse**

The A-B Revocable Trust utilizes both the lifetime estate and gift tax exemption and the unlimited marital deduction. However, while the marital deduction is available for transfers, either outright or through a trust, to a spouse who is a United States citizen, it is not available for transfers made to a non-citizen spouse unless additional planning is implemented.<sup>3</sup>

The marital deduction can be used for a non-citizen spouse if the recipient of assets is not the non-citizen spouse, but instead a qualified domestic trust (QDOT).<sup>4</sup> In addition to meeting the normal A trust requirements, including being for the sole benefit of the surviving spouse and requiring mandatory distributions of income to the surviving spouse, a QDOT also places somewhat greater restrictions upon the surviving spouse's ability to access trust assets, and those requirements are summarized as follows:

- At least one trustee must be an individual United States citizen or a domestic corporation;
- No distributions of principal can be made unless the trustee may withhold from the distribution the estate tax due;
- An election to treat the trust as a QDOT must be made on the estate tax return; and
- All other specific requirements set forth in the applicable regulations must be met.<sup>5</sup>

While the use of a QDOT prevents estate taxation immediately at the death of the predeceasing spouse, estate taxes



will still be imposed on the QDOT as distributions are made to the surviving spouse, or upon the remaining value of the QDOT at the time of the surviving spouse's death, which is similar to the A trust discussed above. That allocation of estate tax is calculated using the value of the predeceasing spouse's taxable estate and applicable rate.<sup>6</sup> In addition, any income generated by QDOT assets and distributed directly to the surviving spouse will not be subject to an estate tax, but will still be taxed as income to the surviving spouse when the income is received.<sup>7</sup>

#### **Whether to Include a Qualified Domestic Trust**

Clearly, under this set of circumstances, Elizabeth and Edward's estate plan needs to be revised. By failing to consider Edward's status as a non-United States citizen, the prior attorney established an estate plan that may not avoid estate taxes. To remedy this issue, the existing A-B Revocable Trust needs to be amended, restated or replaced to properly incorporate QDOT provisions. If the couple takes this step, and Elizabeth passes away before Edward, there will not be an immediate federal and state estate tax applied to Elizabeth's taxable estate.

#### **Scenario 2: Incorporating Canadian Real Estate into a United States Estate Plan**

Louis Goulet moved to Rhode Island from Quebec as a child. He spent his entire life working in the textile industry, and is now retired in the village of Manville, located in Lincoln. Louis owns a vacation home in Quebec, where he still has relatives. He wants to know whether he should continue to hold that property in his own name, or instead convey it to his existing revocable trust to avoid probate in Canada.

#### **Overview of the Canadian Income Tax System**

To answer Louis's question, a general understanding of the Canadian income tax rules is needed. The Canadian income tax system applies to Canadian residents on all income, but only to non-residents of Canada to the extent of income earned in Canada. In addition, Canada does not have an estate or gift tax, but does tax some gifts and inheritances through its income tax system.<sup>8</sup> In Canada, unlike in

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the United States, a capital gains tax is applied to a gift or bequest of property that has appreciated in value, including a transfer to a revocable trust. If such a gift or bequest is made, the donor is treated as having taxable gain equal to the difference between the property's basis and the property's fair market value.<sup>9</sup>

### Tax Consequences of Transferring Canadian Property to United States Trust

Given the Canadian tax rules, if Louis transfers his Canadian real estate to his United States revocable trust during his lifetime, unlike in the United States, that transfer will be treated under Canadian tax law as a taxable event. If a transfer is made, Louis will immediately be required to pay a capital gains tax in Canada on the difference between the property's current value and its basis. Worth noting, is that the amount of any Canadian tax paid by Louis may be able to be used as a credit against his United States income tax liability in the year of the transfer.<sup>10</sup>

### Tax Consequences of Continuing to Hold Canadian Property Outright

Alternatively, if Louis continues to own the property until the time of his death, his estate will have to pay a similar capital gains tax in Canada on the difference between the property's date of death value and its basis. However, if Louis is married and his spouse is still living and receives the property through his will, because of the provisions of a treaty between the two countries, the amount of Canadian income tax may be deferred until after her death, even if she is a United States citizen or resident. In addition, and through the same treaty, any Canadian income tax incurred by either spouse's estate may be used as a credit against the United States estate tax liability.<sup>11</sup>

### Whether to Transfer Canadian Property to a United States Trust

Every circumstance is different, and a number of factors must be considered when advising Louis. If Louis's basis in the property is less than its current fair market value, the transfer of the Canadian real estate into Louis's revocable trust will result in immediate taxation in Canada, similar to if Louis sold the property to a third party. On the other hand, if he were to pass away with the property still in his

own name, the real estate will be a probate asset. Louis will need to decide whether the desire to avoid a potential probate in Canada outweighs the expense of an immediate Canadian tax, taking into consideration the amount of any taxes that will be incurred and whether he intends to keep the property until the time of his death.

**Scenario 3: Gifting United States Assets to Portuguese Family Members**

Antonio Coelho came to Rhode Island from Cape Verde as a child. He is a sea merchant, and lives in Providence's Fox Point neighborhood. Antonio has several nieces and nephews who now live in Portugal, and he would like to know the tax ramifications of making gifts to those family members, either outright, in his last will and testament, or through a trust.

**Tax Consequences of Outright Gifts of Property or Will Bequest to Portuguese Beneficiaries**

Whether additional taxes will be incurred because of the gift-making option selected by Antonio is determined not only by United States tax law, but also the law of Portugal. Portugal does not have an estate or gift tax. Also, under Portugal's Individual Income Tax Code, as is also the case in the United States, gifts and inheritances are not included in a recipient's income. Additionally, under the Portuguese tax system, residents are taxed on all of their Portuguese and worldwide income, while non-residents are taxed only to the extent of Portuguese source income.<sup>12</sup> Therefore, applying the Portuguese tax rules, an outright gift or will bequest made by a United States citizen of United States property to Portuguese residents is not subject to additional Portuguese taxation.

**Tax Consequences of United States Trust to Portuguese Beneficiaries**

While frequently used in the United States and other common law nations, trusts are not part of most civil law legal systems. Modern European civil law derives heavily from the Napoleonic Code, which specifically rejected the concept of trusts. Hundreds of years since the Code was enacted, Portugal, one such civil law country, still does not have a mechanism for recognizing

*continued on page 42*

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<b>Creditors/Debtors</b>						
Collections Practice in RI	13-04	\$35				
Avoiding Foreclosure/Loan Modifications	10-14	\$28				
<b>Family Law</b>						
Equitable Distribution in Divorce	14-03	\$35				
QDRO Practice in RI from A-Z	09-13	\$40				
<b>Law Practice Management</b>						
Billing Clients	13-02	\$25				
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Detach Here

# RI Bar Association Continuing Legal Education Seminars

Register online at the Bar's website [www.ribar.com](http://www.ribar.com) and click on CONTINUING LEGAL EDUCATION on the left side menu or telephone 401-421-5740. All dates and times are subject to change.

- May 3**  
*Tuesday*  
**A Consumer Bankruptcy Bootcamp with the Experts**  
Session 1: Before You File  
RI Law Center, Cranston  
4:00 p.m. – 7:00 p.m.  
2.5 credits + 0.5 ethics  
*Networking dinner starts at 7:00 p.m.*
- May 5**  
*Thursday*  
**Food for Thought**  
**Charitable Giving 101**  
RI Law Center, Cranston  
12:45 p.m. – 1:45 p.m., 1.0 credit
- May 10**  
*Tuesday*  
**Food for Thought**  
**Charitable Giving 101**  
Phil's Main Street Grille, Wakefield  
12:45 p.m. – 1:45 p.m., 1.0 credit
- May 11**  
*Wednesday*  
**Civil Law Practice in RI**  
**The Basics of Discovery**  
RI Law Center, Cranston  
2:00 p.m. – 4:00 p.m., 1.5 credits + .5 ethics
- May 12**  
*Thursday*  
**A Consumer Bankruptcy Bootcamp with the Experts**  
Session 2: Issues After Filing  
RI Law Center, Cranston  
4:00 p.m. – 7:00 p.m.  
2.5 credits + 0.5 ethics  
*Networking dinner starts at 7:00 p.m.*
- May 19**  
*Thursday*  
**Food for Thought**  
**Top Ethics Complaints and How to Avoid Them**  
RI Law Center, Cranston  
12:45 p.m. – 1:45 p.m., 1.0 ethics credit  
*Also available as a LIVE WEBCAST*
- May 24**  
*Tuesday*  
**Current Developments in Medicare and Medicaid for Long-Term Care**  
RI Law Center, Cranston  
2:00 p.m. – 4:00 p.m., 2.0 credits  
*Also available as a LIVE WEBCAST*
- May 26**  
*Thursday*  
**Food for Thought**  
**Special Education**  
RI Law Center, Cranston  
12:45 p.m. – 1:45 p.m., 1.0 credit

- June 1**  
*Wednesday*  
**Food for Thought**  
**Special Education**  
Holiday Inn Express, Middletown  
12:45 p.m. – 1:45 p.m., 1.0 ethics
- June 2**  
*Thursday*  
**Food for Thought**  
**Records Retention**  
RI Law Center, Cranston  
12:45 p.m. – 1:45 p.m., 1.0 credit  
*Also available as a LIVE WEBCAST*

Times and dates subject to change.  
For updated information go to [ribar.com](http://ribar.com)

**NOTE: You must register on-line for live webcasts.**

The Rhode Island Law Center is now located at  
41 Sharpe Drive in Cranston, Rhode Island.  
Continuing Legal Education Telephone: 401-421-5740.

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## Rhode Island Bar Association Annual Meeting

*Thursday, June 16<sup>th</sup> and Friday, June 17<sup>th</sup>*

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Providence, Rhode Island

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Attorney CLE credits for 2015-2016  
must be reported by June 30, 2016  
Requirements are 10 CLE credits  
including 2 ethics credits

**Registering before June 10<sup>th</sup> saves \$25!**

Please see your 2016 Rhode Island Bar Association Annual Meeting Brochure to access details and your registration form, or go to the Bar's website: [ribar.com](http://ribar.com) to download a Brochure pdf and an interactive registration form.

**Reminder:** Bar members may complete three credits through participation in online, on demand CLE seminars. To register for an online seminar, go to the Bar's website: [ribar.com](http://ribar.com) and click on CONTINUING LEGAL EDUCATION on the left side menu.

# SOLACE

## Helping Bar Members in Times of Need

SOLACE, an acronym for Support of Lawyers, All Concern Encouraged, is a new Rhode Island Bar Association program allowing Bar members to reach out, in a meaningful and compassionate way, to their colleagues. SOLACE communications are through voluntary participation in an email-based network through which Bar members may ask for help, or volunteer to assist others, with medical or other matters.

Issues addressed through SOLACE may range from a need for information about, and assistance with, major medical problems, to recovery from an office fire and from the need for temporary professional space, to help for an out-of-state family member.

The program is quite simple, but the effects are significant. Bar members notify the Bar Association when they need help, or learn of another Bar member with a need, or if they have something to share or donate. Requests for, or offers of, help are screened and then directed through the SOLACE volunteer

email network where members may then respond. On a related note, members using SOLACE may request, and be assured of, anonymity for any requests for, or offers of, help.

To sign-up for SOLACE, please go to the Bar's website at [www.ribar.com](http://www.ribar.com), login to the **Members Only** section, scroll down the menu, click on the **SOLACE Program Sign-Up**, and follow the prompts. Signing up includes your name and email address on the Bar's SOLACE network. As our network grows, there will be increased opportunities to help and be helped by your colleagues. And, the SOLACE email list also keeps you informed of what Rhode Island Bar Association members are doing for each other in times of need. These communications provide a reminder that if you have a need, help is only an email away. If you need help, or know another Bar member who does, please contact Executive Director Helen McDonald at [hmcDonald@ribar.com](mailto:hmcDonald@ribar.com) or 401.421.5740.

## Do you or your family need help with any personal challenges? We provide free, confidential assistance to Bar members and their families.

Confidential and free help, information, assessment and referral for personal challenges are available **now** for Rhode Island Bar Association members and their families. This no-cost assistance is available through the Bar's contract with **Coastline Employee Assistance Program (EAP)** and through the members of the Bar Association's Lawyers Helping Lawyers (LHL) Committee. To discuss your concerns, or those you may have about a colleague, you may contact a LHL member, or go directly to professionals at Coastline EAP who provide confidential consultation for a wide range of personal concerns including but not limited to: balancing work and family, depression, anxiety, domestic violence, childcare, eldercare, grief, career satisfaction, alcohol and substance abuse, and problem gambling.

When contacting Coastline EAP, please identify yourself as a Rhode Island Bar Association member or family member. A Coastline EAP Consultant will briefly discuss your concerns to determine if your situation needs immediate attention. If not, initial appointments are made within 24 to 48 hours at a location convenient to you. Or, visit our website at [www.coastlineeap.com](http://www.coastlineeap.com) (company name login is "RIBAR"). Please contact Coastline EAP by telephone: 401-732-9444 or toll-free: 1-800-445-1195.

*Lawyers Helping Lawyers Committee members choose this volunteer assignment because they understand the issues and want to help you find answers and appropriate courses of action. Committee members listen to your concerns, share their experiences, offer advice and support, and keep all information completely confidential.*

**Please contact us for strictly confidential, free, peer and professional assistance with any personal challenges.**

Brian Aday, Esq.	831-3150
Neville J. Bedford, Esq.	348-6723
David M. Campanella, Esq.	273-0200
Susan Leach DeBlasio	274-7200
Sonja L. Deyoe, Esq.	864-3244
Christy B. Durant, Esq.	272-5300
Brian D. Fogarty, Esq.	821-9945
Nicholas Trott Long, Esq. (Chairperson)	351-5070
Genevieve M. Martin, Esq.	274-4400
Joseph R. Miller, Esq.	454-5000
Henry S. Monti, Esq.	467-2300
Roger C. Ross, Esq.	723-1122
Adrienne G. Southgate, Esq.	301-7823
Judith G. Hoffman, LICSW, CEAP, Coastline EAP	732-9444 or 800-445-1195

**Lawyers Helping Lawyers Committee Members Protect Your Privacy**

# The Birthplace of California

## American Bar Association Delegate Report – Mid-Year Meeting 2016

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**Robert D. Oster, Esq.**  
ABA Delegate and Past  
Rhode Island Bar Association  
President

The American Bar Association House of Delegates met in San Diego, California in February 2016. The *USS Midway* aircraft carrier was docked near our hotel. Although I did not have time to visit the museum on board, it was awesome to see a floating city from the dock.

The Delegates met for one day, and I participated in several committee meetings beforehand. I am a member of the Standing Committee on Constitution and Bylaws. While this may sound fairly uneventful, in fact, we are busy with governance issues pertaining to lawyer representation from the various states. The Solo and Small Practice Division was also interesting, and many lawyers can easily identify with its focus. The New England Bar Association always meets for a caucus before these meetings, and Rhode Island was well represented.

The debate centered on a Resolution to adopt the *Model Regulatory Objectives for the Provision of Legal Services*. The importance of this reflects the fact that lawyers are becoming marginalized by form preparers, online legal advisors, and other non-traditional legal service providers. More importantly, Legal Zoom, AVVO, Rocket Lawyer, and hundreds of other profit-making companies are not subject to the same professional rules as lawyers, nor are they accountable as attorneys. The public is not well served by this phenomenon. While *pro-se* appearances by many parties burden the system, these alternatives seem antithetical to our legal system, as well as to our clients and the public at large. In my own practice, I am acutely aware of examples of legal services rendition by unqualified individuals and companies.

As a member of the Rhode Island Supreme Court Unauthorized Practice of Law Committee, I am privileged to receive a unique perspective in this area. In our own state, we have corporate entities such as those noted above. Additionally, there are many non-licensed advisors. In Washington, legal assistants and form preparers are being licensed by the State, and other states are studying ways to provide non-traditional legal services. Pressing at the edges is the overflow of *pro-se* litigants and seekers of low- and no-cost legal services. Ultimately, the various Supreme Courts of the states, including ours,

will need to adopt laws for protection of the public.

Currently, the ABA is of little relevance to half of our profession. This is unacceptable and must be remedied. I will continue to forward my perspective on the Main Street Lawyer the ABA needs to capture.

I have witnessed a number of historic firsts during my tenure as your representative: the first African American ABA President, the first Hispanic officer in the ABA, the first African American woman President of the ABA, and now Mary Smith has been nominated for the Board, the first Native American officer of the ABA. This is a momentous change from the days when the ABA was an all-white male bastion, primarily as a reaction to the Supreme Court decision of *Munn vs. Illinois*, 94 U.S. 113 (1877). The next President of the ABA will no doubt be another first in the ABA.

Over the last thirty five years, my involvement with the Rhode Island Bar Association has transformed my professional and personal life. I encourage you to become more involved in both the Rhode Island Bar Association and the American Bar Association, as participation in both benefits your practice and the profession at large. Please feel free to contact me, as I welcome your comments, and I am honored to serve as your ABA delegate. ♦

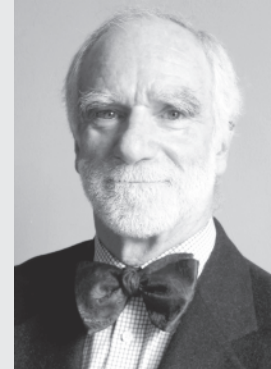
## Employment Law Seminar Focuses on HR Violations



From l to r: Speakers Chip Muller, Esq., Ali Khorsand, Esq. and Nancy Sheinberg, Esq.

The March 15th lunchtime CLE program, *Employment Law Risk Reduction for Companies: How Plaintiffs' Counsel Can Spot HR Violations*, gave attendees a practical and helpful overview of the most important areas of liability facing companies on a regular basis. The speakers provided the audience with clear checklists for Human Resources practices, audits and compliance efforts, and also concrete solutions for problems attorneys and their clients could encounter. This seminar is now available On Demand on the Bar's website, [ribar.com](http://ribar.com), by clicking Continuing Legal Education on the Home page, and Online CLE Seminars.

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## HONOR ROLL

# Volunteers Serving Rhode Islanders' Legal Needs

The Rhode Island Bar Association applauds the following attorneys for their outstanding *pro bono* service through the Bar's Volunteer Lawyer Program, Elderly Pro Bono Program, and the US Armed Forces Legal Services Project during February and March 2016.

### FEBRUARY 2016

#### Volunteer Lawyer Program

James P. Creighton, Esq., *Johnston*  
Michael A. Castner, Esq., *Jamestown*  
R. Andrew Pelletier, Esq., *Pelletier Law Group*  
Andrew H. Berg, Esq., *Sammartino & Berg*  
Kristy J. Garside, Esq., *The Law Office of Howe & Garside, Ltd.*  
Richard Howell James, Esq., *James Law*  
Lori J. Norris, Esq., *Law Office of Lori J. Norris*  
Doris A. Lavallee, Esq., *Lavallee Law Associates*  
John A. Beretta, Esq., *Law Office of John A. Beretta*  
Arthur D. Parise, Esq., *Warwick*  
Neville J. Bedford, Esq., *Providence*  
Tiffinay Antoch Emery, Esq., *Law Offices of Tiffinay Antoch Emery*  
Matthew R. Reilly, Esq., *Law Office of George Bauerle*  
Ronald LaRocca, Esq., *Pierce Atwood LLP*  
Daniel Stone, Esq., *Rumford*  
Christine J. Engustian, Esq., *Law Offices of Christine J. Engustian, Esq.*  
John S. Simonian, Esq., *Providence*  
Denise Acevedo Perez, Esq., *The Law Office of Denise Acevedo Perez*  
Barbara A. Barrow, Esq., *Moore, Virgadamo & Lynch, Ltd.*

#### Elderly Pro Bono Program

Richard Jessup, Jr., Esq., *Law Office of Richard Jessup, Jr., Esq.*  
Timothy J. Robenhymer, Esq., *Warwick*  
George A. Comolli, Esq., *Law Office of George A. Comolli*  
Susan D. Vani, Esq., *Providence*  
Steve Conti, Esq., *North Providence*  
John Boyajian, Esq., *Providence*  
Charles T. Knowles, Esq., *Wickford*  
Vincent J. Montecalvo, Esq., *Law Offices of Vincent J. Montecalvo*  
Joseph M. Proietta, Esq., *Providence*  
Arthur D. Parise, Esq., *Warwick*  
Richard Howell James, Esq., *James Law*  
H. Jefferson Melish, Esq., *Law Office of H. Jefferson Melish*  
Armando E. Batastini, Esq., *Nixon Peabody, LLP*  
Christopher D. Healey, Esq., *Wakefield*  
James P. Creighton, Esq., *Johnston*  
Michael A. Castner, Esq., *Jamestown*  
H. Reed Cospers, Esq., *Providence*  
Michael A. Devane, Esq., *Devane & Devane Law Offices*

For information and to join a Bar *pro bono* program, please contact the Bar's Public Services Director Susan Fontaine at: [sfontaine@ribar.com](mailto:sfontaine@ribar.com) or 401-421-7758. For your convenience, Public Services program applications may be accessed on the Bar's website at [ribar.com](http://ribar.com) and completed online.

### MARCH 2016

#### Volunteer Lawyer Program

Lise M. Iwon, Esq., *Laurence & Iwon*  
Michael A. Castner, Esq., *Jamestown*  
James L. O'Neill, Esq., *Law Office of James L. O'Neill*  
Matthew R. Reilly, Esq., *Law Office of George Bauerle*  
Richard Jessup, Jr., Esq., *Law Office of Richard Jessup, Jr., Esq.*  
Philip M. Sloan, Esq., *Sloan Law Office*  
Jennifer A. Minuto, Esq., *Law Offices of Jennifer A. Minuto*  
Barbara A. Barrow, Esq., *Moore, Virgadamo & Lynch, Ltd.*  
H. Jefferson Melish, Esq., *Law Office of H. Jefferson Melish*  
Samantha Clarke, Esq., *Pannone, Lopes, Devereaux & West, LLC*  
John T. Sheehan III, Esq., *Senerchia & Sheehan, P.C.*  
Susan L. Cardones, Esq., *East Greenwich*  
Shawn M. Masterson, Esq., *Shapiro Dorry Masterson LLC*  
Heath LaPointe, Esq., *Foster*  
Jennifer LeBlanc, Esq., *Hodosh, Lyon & Hammer, Ltd.*  
Denise Acevedo Perez, Esq., *The Law Office of Denise Acevedo Perez*  
Josh M. Solberg, Esq., *North Scituate*  
Amy S. Hebb, Esq., *Pawtucket*  
Bruce K. Waidler, Esq., *West Kingstown*  
James P. Creighton, Esq., *Johnston*  
Lois Iannone, Esq., *Cranston*  
Richard Howell James, Esq., *James Law*  
William J. Balkun, Esq., *Law Office of William J. Balkun*  
Eileen C. O'Shaughnessy, Esq., *Marinosci Law Group, P.C.*  
Amy E. Veri, Esq., *Providence*

#### Elderly Pro Bono Program

Robert A. Arabian, Esq., *Arabian Law Offices*  
Frank J. Manni, Esq., *Johnston*

#### US Armed Forces Legal Services Project

Kathleen G. Di Muro, Esq., *Law Office of Kathleen G. Di Muro*  
Richard Howell James, Esq., *James Law*  
Angelo A. Mosca III, Esq., *Law Office of Angelo Mosca III*  
Shelley G. Prebenda, Esq., *Law Office of Shelley G. Prebenda*  
Priscilla Facha DiMaio, Esq., *Providence*  
Regina Schwarzenberg, Esq., *Newport*

The Bar also thanks the following volunteers for their valuable participation in Senior Center events during February and March of 2016.

#### Legal Clinic

Denneese C. Seale, Esq., *Woonsocket*  
Brian G. Goldstein, Esq., *Law Offices of Brian G. Goldstein*  
Michelle D. Baker, Esq., *Michelle D. Baker, Ltd.*

#### Ask A Lawyer

Brian D. Fogarty, Esq., *Law Office of Devane, Fogarty & Ribezzo*

## AUDETTE, CORDEIRO & VIOLETTE, P.C.

Attorneys-at-Law

Is pleased to announce that  
**MEAGHAN A. OLEJARZ**  
&  
**COURTNEY R. TUTALO**

have joined our firm

Robert P. Audette	Leonard M. Cordeiro*
Mary Ann Violette*	Aimee E. Audette*
Meaghan A. Olejarz*	Courtney R. Tutalo*

*\*Also Member of Massachusetts Bar*

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The R.I. Supreme Court licenses all lawyers in the general practice of law.  
The court does not license or certify any lawyer as an expert or specialist in any particular field of practice.

## Lawyers on the Move

Jonathan P. Cardosi, Esq. joined  
Duffy & Sweeney at 1800 Financial  
Plaza in Providence, RI 02903.  
jcardosi@duffysweeney.com  
401-455-0700

Ronald R. Gendron, Esq. is now  
Assistant United States Attorney in  
the **United States Attorney's Office  
District of Rhode Island**, 50  
Kennedy Plaza, 8th Floor,  
Providence, RI 02903.  
ronald.gendron@usdoj.gov  
401-709-5036

Meaghan A. Olejarz, Esq. joined  
Audette, Cordeiro & Violette, 35  
Highland Avenue, East Providence,  
RI 02914.  
molejarz@acvlawfirm.com  
401-490-0220

Jill E. Sugarman, Esq., has joined  
Scott & Handwerger, LLP, 690  
Warren Ave., East Providence,  
RI 02914.  
(401) 654-6770  
jsugarman@riestatelaw.com

Courtney R. Tutalo, Esq. joined  
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# Title Standards and Practices Committee

## Proposed Practice Form 13

### Open for Bar Member Review and Comment

The Rhode Island Bar Association's Title Standards and Practices Committee, chaired by Michael B. Mellion, Esq., voted unanimously to submit the following Proposed Practice Form 13 to the Rhode Island Bar Association's Executive Committee for its consideration. Bar members are invited to comment on these proposed changes, no later than **June 1, 2016**, by contacting Rhode Island Bar Association Executive Director Helen Desmond McDonald by postal mail: 41 Sharpe Drive, Cranston, RI 02920 or email: hmcDonald@ribar.com.

#### Explanation of Proposed Practice Form 13

It is common to find that a mortgage has been foreclosed twice, with no explanation included in the second Foreclosure Deed as to the reason why a re-foreclosure was necessary. The recording of this Practice Form, or one substantially similar, will provide an explanation on the record as to why the mortgagee initiated a second foreclosure. This will assist those reviewing the title to determine the validity of the foreclosure.

#### Proposed Practice Form 13

#### AFFIDAVIT OF INVALID FORECLOSURE / VOID FORECLOSURE DEED

MORTGAGOR: \_\_\_\_\_ (the "Mortgagor")

PROPERTY ADDRESS: \_\_\_\_\_ (the  
"Mortgaged Property")

The undersigned, first being duly sworn under oath, hereby makes Affidavit and says as follows:

1. [The undersigned, an attorney licensed to practice law in the State of Rhode Island, represented the Mortgage Holder in connection with the Foreclosure Sale] [The undersigned is an officer or agent of the Mortgage Holder], and has personal knowledge of the facts set forth below acquired in the normal course of business.
2. \_\_\_\_\_ (the "Mortgage Holder"), is the holder of a mortgage from Mortgagor to \_\_\_\_\_ dated \_\_\_\_\_ and recorded in Book \_\_\_\_\_ at Page \_\_\_\_\_ of the land evidence records of the City/Town of \_\_\_\_\_ (the "Mortgage") encumbering the Mortgaged Property.

4. The Mortgage Holder initiated a foreclosure of the Mortgage.
5. The foreclosure sale occurred on \_\_\_\_\_ (the "Foreclosure Sale"), and a foreclosure deed resulting from the sale was recorded in the \_\_\_\_\_ land evidence records in Book \_\_\_\_\_ at Page \_\_\_\_\_ (the "Foreclosure Deed").
6. After the recording of the Foreclosure Deed, it was determined that the Foreclosure Sale was invalid because \_\_\_\_\_.
7. The purpose of this affidavit is to provide record notice that:
  - a) The Foreclosure Sale was invalid;
  - b) The Foreclosure Deed is void, and
  - c) The Mortgage remains in full force and effect, and is a valid and enforceable lien on the Mortgaged Property.

Date: \_\_\_\_\_

STATE OF \_\_\_\_\_

COUNTY OF \_\_\_\_\_

Subscribed and sworn to before me in

\_\_\_\_\_ in said County this \_\_\_\_\_ date of  
\_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

Printed name: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

# In Memoriam

---

## **Ronald J. Creamer, Esq.**

Ronald J. Creamer, 63, of South Kingstown, passed away on February 6, 2016. He was the beloved husband of Janice Very Creamer and son of the late Francis J. and Margaret Poggioli Creamer. He was an attorney with the Law Offices of Ronald J. Resmini for 24 years, and a practicing attorney since 1988. He graduated from LaSalle Academy and earned degrees from The University of Rhode Island and The New England School of Law. Besides his wife, he is survived by his children, Eric Creamer, of Richmond and Scott Creamer of Sanford, FL. Ronald J. Creamer was a consummate professional. He gave credibility to the term civility, which is so often used as the benchmark of relationships between attorneys. He was always an advocate for his clients, but never acerbic.

## **Kathy DeSisto, Esq.**

Kathy Desisto, 58, of Portsmouth, passed away on March 3, 2016. She was the daughter of the late James and Patricia Brant Philbin. She leaves behind her husband of 33 years, Marc, her two children, Tony and Allie, and her loving sister, Susan. Kathy played varsity basketball and tennis, at her alma mater, Boston College. Serving as a lifeguard in her youth, fostered a life-long love of the water. She swam Narragansett Bay eighteen times, in the annual Swim the Bay event. She volunteered her time for many youth sports, including the Pop Warner program, serving as vice-president and coaching the cheerleading squads. She spent years as a model, appearing in numerous print and television ads. She simultaneously attended law school, where she met her husband Marc, and has had a long career as the managing partner at their law firm, DeSisto Law. She was fiercely loyal to her husband, children, grandchildren, and will forever be missed by her family and many friends.

## **David William Dugan, Esq.**

David William Dugan, 56, of Saunderson, passed away on March 28th, 2016. Born in Providence, on August 10th, 1959, he was the son of the late William G. Dugan Jr. and Barbara M. Palmer Dugan. He was a graduate of La Salle Academy, Providence College, and Suffolk University School of Law where he was the executive director of the *Transnational Law Review*. David's legal career in Rhode Island spanned 31 years in both the public and private sector serving for the last 18 years as senior legal counsel for the State of Rhode Island Office of Child Support Enforcement. He was an exceptionally kind and loving man with a generous spirit that he shared with all lucky enough to have crossed his path. He leaves behind his wife of 24 years, Barbara E. Grady, Esq., and two children, Ryan and Emily, who were the loves of his life. David also leaves behind his sister, Karen Spina and her husband Kevin, of Smithfield RI; his brother Richard Dugan and his wife Ann of North Providence.

## **Joseph E. Gallucci Sr., Esq.**

Joseph E. Gallucci Sr., 88, of Warwick passed away on March 4, 2016. He was the beloved husband of the late Lenora "Lee" A. Santangini Gallucci. Born in Providence, Joseph was a son of the late Dominic and Angela Regine Gallucci. He was a graduate of Mt. Pleasant High School, Providence College, and Suffolk University Law School. Joseph was an Attorney at Law for 55 years until retiring and was also a Bail Commissioner for Kent County for 30 years. Joseph was an avid boater and fisherman and a member of the East Greenwich Yacht Club. He was a US Army Veteran of WWII. Joseph is survived by two daughters: Cara Gallucci Muir and her husband Jeffrey and Lisa Gallucci and her husband Richard Moschetti; and two siblings: Robert Gallucci and his wife Marcia of Jamestown and Judy Bitting and her husband Chuck of Wickford.

## **Robert J. Healey Jr., Esq.**

Robert J. Healey Jr., 58, of 75 Sowams Road, Barrington, passed away on March 20, 2016. He was the son of Robert J. and Mary J. Martinelli Healey of Warren. He was a graduate of Warren High School, Rhode Island College, Boston University, Northeastern University, and New England School of Law. He studied International Trade and Japanese Law in Tokyo. He began his educational career as a teacher at the private Trillium School in Jacksonville, Oregon and later as a substitute teacher in Boston and Warren Public schools and Northeastern University. He was a past member and Chairman of the Warren School Committee. He founded the Rhode Island Cool Moose Party and ran for the positions of Governor and also Lt. Governor as that Party's candidate. He most recently ran for Governor as the Moderate Party's candidate. He was a practicing attorney, often providing *pro bono* and low cost legal representation. He was the Secretary of the Bristol County Bar Association for more than 20 years. Known to many and close friend to few, he remained an avid cigar smoking, crossword puzzle fan, who cared little about his personal appearance or his personal trappings. Bob had no children and is survived by his longtime companion Claire.

## **Louis V. Jackvony, Jr., Esq.**

Louis V. Jackvony, Jr., 94, of North Providence passed away on February 12, 2016. He was the beloved husband of Marilyn A. Gizzarelli Jackvony. Born in Providence, he was the son of the late former Attorney General of Rhode Island Louis V. Jackvony, Sr., Esq. and Clotilde Zambarano Jackvony. Mr. Jackvony was president of Jackvony & Jackvony, Inc. He also served in The United States Army during WWII, specializing in military intelligence. He was a graduate of Moses Brown School, Brown University and received his Juris Doctorate from Boston University. Mr. Jackvony

## In Memoriam

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headed the Department of Business Regulation for the State of Rhode Island and served on the Board of Bar Examiners and the President's Council of Providence College. He was active for many years in Republican politics and a longtime member of the Aurora Civic Association, Brown University Faculty Club and Alpine Country Club. He was the loving father of Linda J. Cortelleso and her husband Armand of Exeter, Elena Jackvony-Mansolillo, J.D. and her husband Dr. Jeffrey Mansolillo of Smithfield.

### **Tiffany M. Joslyn, Esq.**

Tiffany M. Joslyn, 33, of East Bridgewater, MA and Arlington, VA passed away on March 5, 2016. Born in Brockton, MA, she was the daughter of Robert T. Joslyn and his fiancé Melody Hill of Middleboro and Patricia Cabral Anderson. Tiffany was a graduate of East Bridgewater High School, Clark University with High Honors, and George Washington Law School. She was admitted to the Bar of Massachusetts and Rhode Island in and was a member of the Somensen Institute for Political Leadership of the University of VA, Political Leaders Program. Her career included a one year Judicial Clerkship at the District of Columbia of the Court of Appeals in Washington, DC. She also was on the Research Counsel, the National Association of Criminal Defense Lawyers and most recently, the Deputy Chief Council for the US House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, Homeland Security, and Investigations. Tiffany also served in numerous volunteer public service organizations, including the AGLA and the Arlington County Human Rights Commission.

### **Thomas L. Marcaccio Jr., Esq.**

Thomas L. Marcaccio Jr., 87, of Cranston passed away on March 1, 2016. He was the beloved husband of Angela R. DePrete Marcaccio. Born in Providence, he was a son of the late

Thomas L. Marcaccio, Sr. and Delia Pontarelli Marcaccio. Mr. Marcaccio was an attorney with Marcaccio & Marcaccio Law Office, retiring in 1990 after practicing law for 40 years. He also served in The United States Army Counter Intelligence Corps during the Korean War. He was a graduate of LaSalle Academy, Xavier University and received his Juris Doctorate from Boston University School of Law. He was appointed by three governors as a Council member of the RI Public Building Authority, he was a member of the RI Judicial Nominating Commission and served as a Clerk of the Council of the Bonnet Shores Fire District. A communicant of Immaculate Conception Church, he was a member of the St. Joseph Men's Guild. He was the loving father of Claudia Ann Marcaccio of San Francisco, CA, Nancy D. Rocha and her husband Randal of Saunderstown and Lynda A. Marcaccio of San Francisco, CA.

### **Russell M. Sollitto, Esq.**

Russell M. Sollitto, 70, passed away on March 9, 2016. He was a man of many talents and a true and loyal friend to many. He was generous of spirit and a comfort and lifesaver to many. He was the son of Paul and Emma Sollitto. He graduated from Emerson College and Franklin Pierce Law School. He was a drill sergeant during the Vietnam War, a professional musician and occasional warm-up act for the Kingston Trio, a mechanic, a car salesman, an insurance salesman, and, ultimately, a lawyer. He worked as a public defender, an attorney general, a private defense attorney, and in the Office of Legislative Counsel. He is survived by: his best friend, wife and partner Lise Gescheidt, a fellow defense lawyer; his two beloved dogs, Harry and Racy; his brother and sister-in law Paul and Linda Sollitto of Wickford; and countless loyal friends.

## Rhode Island Probate Court Listing on Bar's Website

The Rhode Island Bar Association regularly updates the Rhode Island Probate Court Listing to ensure posted information is correct. The Probate Court Listing is available on the Bar's website at [ribar.com](http://ribar.com) by clicking on **FOR ATTORNEYS** on the Home page menu and then clicking on **PROBATE COURT INFORMATION** on the drop-down menu. The Listing is provided in a downloadable pdf format. Bar members may also increase the type size of the words on the Listing by using the percentage feature at the top of the page.

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## RI Guardianship Law *continued from page 9*

protections to a respondent, the General Assembly necessarily increased the adversarial nature and concomitant expense of a guardianship proceeding. But what if an individual wished to have the supervision of a probate court in the management of her financial affairs?<sup>41</sup> To accommodate such self-initiated proceedings, the 1992 Act and subsequent revisions to Chapter 15 of Title 33 left intact Section 44 allowing an individual to initiate, and a probate court to administer, a conservatorship.

In the Probate Uniformity Act of 1996 (1996 Act),<sup>42</sup> the legislature continued to refine its work begun with the 1992 Act. For example, the 1996 Act required DMAT completion by “a physician who has examined the respondent.”<sup>43</sup> This legislation also expanded the investigatory and reporting duties of the *guardian ad litem*,<sup>44</sup> as well as created a statutory form of *guardian ad litem* report.<sup>45</sup>

To ensure a forum for ongoing study and development of proposed legislation aimed at continuing the modernization of Rhode Island’s probate laws, the 1996 Act included a statutorily created commission titled “A Legislative Commission to Study the Feasibility of Modernizing Probate Law and Procedure and to Make Recommendations Therefor” (Probate Commission).<sup>46</sup>

### After the Dawn 1997-2015

The courts’ and practitioners’ assimilation of the General Assembly’s virtual re-writing of Rhode Island’s guardianship laws in the 1992 Act, begun with the 1994 and 1996 legislation, continued thereafter. Specifically, as a result of the courts’ experience, particularly in contested guardianships, the requirements for the physician completing the DMAT, revised in the 1996 Act, was again revised in 2004<sup>47</sup> and in 2007.<sup>48</sup> In 2007, the General Assembly also refined statutes pertaining to the selection of *guardians ad litem*,<sup>49</sup> and clarified their roles in guardianship proceedings.<sup>50</sup>

The Probate Commission, created by the 1996 Act, became active shortly thereafter.<sup>51</sup> For example, the 2004 and 2007 legislation referenced above was derived from Probate Commission deliberations. In 2014, the Probate Commission suggested revisions to the General Assembly’s

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proposed enactment of the Uniform Adult Guardianship and Protection Proceedings Jurisdiction Act (UAGPPJA).<sup>52</sup> The General Assembly, considering the Probate Commission's recommendations, adopted a modified version of the UAGPPJA the following year.<sup>53</sup>

The 1992 Act virtually gutted and modernized the two century-old, anachronistic substantive and procedural requirements for instituting and administering guardianships in Rhode Island. The General Assembly's continued refinements to the statute in the 1990s, 2000s and to the present, and the work of its statutory Probate Commission, is perceived, by some, as having achieved the goal of the reformers.

Another view is the lack of further substantial changes to Rhode Island's guardianship laws in the 25 years since the 1992 Act is the result of complacency. For example, since the Wingspread conference in 1988, whose recommendations inspired and informed the reforms of the 1992 Act, the National Guardianship Conference has convened again twice, in each instance producing further recommendations.<sup>54</sup> Additionally, the National Guardianship Association (NGA), which adopted the first *NGA Standards of Practice for Guardians* in 2000, produced new editions of its Standards of Practice in 2003, 2007, and in 2013.<sup>55</sup>

The legislative commission<sup>56</sup> formed by the General Assembly in 1990, which produced the initial draft of the 1992 Act, incorporated the diversity of stakeholders<sup>57</sup> required for a successful process. Reform is a challenging and arduous process requiring significant political will and energy. And, such will and energy often require a crisis atmosphere, like that sparked by the AP reports, which was also the catalyst for the Wingspread Conference. The Conference, in turn, informed the Guardianship Commission creating, and the General Assembly enacting, the 1992 Act.

Reports of serious abuse and neglect by guardians arise periodically in Rhode Island, as they do in other states. However, without a critical mass of such cases or analogue to the AP report, it is unlikely political action, which previously resulted in the 1992 Act's systemic reforms, will be mustered.

Some consider the reforms of the early 1990s, with their continual review by the Probate Commission and periodic revi-

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sions by the General Assembly, adequate. For those who believe a more systemic change is again needed, it is not.

### ENDNOTES

- 1 Walter Isaacson, *STEVE JOBS* 95 (2011).
- 2 Walter Isaacson, *THE INNOVATORS* 363 (2014).
- 3 Prior to R.I. Pub. Laws 1992 ch. 493, referred to later in this article as the "1992 Act," guardianships of minors and adults were dealt with in the same statute. Section 5 of R.I. Pub. Laws 1992 ch. 493 created a new Chapter 15.1 of Title 33 dealing exclusively with guardianships of minors. R.I. Pub. Laws 1946, ch. 1711 created a new Chapter 16 of Title 33 dealing with veterans guardianships. Both of these Chapters are outside the scope of this article.
- 4 71 R.I. 407, 410, 46 A.2d 717, 718 (R.I. 1946).
- 5 7 R.I. 230, 248 (R.I. 1862).
- 6 *Id.*
- 7 R.I. PUB LAWS 1822, An act respecting Guardians, § 1.
- 8 *Id.* § 2.
- 9 R.I. PUB LAWS 1844, An act respecting Guardians, § 3.
- 10 *General Statutes of the State of Rhode Island and Providence Plantations* 1872 ch.154 § 7.
- 11 *Roe v. Gelineau*, 794 A. 2d 476, 485 (R.I. 2002) (citation omitted).
- 12 *Public Statutes of the State of Rhode Island and Providence Plantations* 1882 ch.168 § 7.
- 13 *Champlin v. Probate Court of Exeter*, 37 R.I. 349, 351, 92 A. 982, 982 (R.I. 1915).
- 14 Louise Harmon, *FAILING OFF THE VINE: LEGAL FICTIONS AND THE DOCTRINE OF SUBSTITUTED JUDGMENT*, 100 YALE L.J. 1, 16 (1990).
- 15 *The Rhode Island Court Practices Act* 1905 ch. 50 § 1077.
- 16 *Id.* § 1077.
- 17 *Id.* § 1077.
- 18 *Revised Statutes of the State of Rhode Island and Providence Plantations* 1857 ch. 152 § 3.
- 19 *Id.* § 4.
- 20 14 R.I. 541, 545 (R.I. 1884).
- 21 *Id.*
- 22 *Id.* at 546.
- 23 *The Rhode Island Court Practices Act*.
- 24 R.I. PUB LAWS 1985 ch. 156 § 1.
- 25 *Id.*
- 26 R.I. PUB LAWS 1987 ch. 122 § 1.
- 27 *Id.*
- 28 *Id.*
- 29 ROBERT FLEMING & LISA DAVIS, *ELDER LAW ANSWER BOOK 11-3* (3d Ed. Year).
- 30 THE AMERICAN BAR ASSOCIATION, *RECOMMENDATIONS OF THE NATIONAL GUARDIANSHIP SYMPOSIUM iii* ().
- 31 *Id.* at iv.
- 32 *Id.*
- 33 R.I. PUB LAWS 1992 ch. 493 § 4.
- 34 *Id.*
- 35 *Id.* § 3.
- 36 *Id.* § 4.
- 37 *Id.*
- 38 *Id.*
- 39 R.I. PUB LAWS 1994 ch. 359 § 1.
- 40 *Id.*
- 41 *But why would a person subject herself to oversight of her financial affairs by a probate court? Why not simply appoint someone to act as agent under a durable financial power of attorney? One*



reason might be that the person whom the individual has selected as her fiduciary is only willing to serve in that capacity with the imprimatur and supervision of a court, perhaps due to a contentious family circumstance. Another is that the establishment of certain special needs trusts under 42 U.S.C. § 1396(d)(4)(A) requires the involvement of a court.

42 R.I. PUB LAWS 1996 ch. 110.

40 *Id.* § 9.

40 *Id.*

40 *Id.*

40 *Id.*

40 R.I. PUB LAWS 2004 ch. 573 § 1.

40 R.I. PUB LAWS 2007 ch. 417 § 1.

40 *Id.*

50 *Id.*

51 *The author, in his capacity as a then State Representative, served as the first Chair of the Probate Commission, and subsequently, including to the writing of this article, as its Vice-Chair.*

52 H.R. 7687, 141th Gen. Assemb., Reg. Sess. (R.I. 2014); S. 2548, 141th Gen. Assemb., Reg. Sess. (R.I. 2014).

53 R.I. PUB LAWS 2015 ch. 210 § 1; ch. 241, § 1.

54 *Symposium Third National Guardianship Summit: Standards of Excellence, THIRD NATIONAL GUARDIANSHIP SUMMIT STANDARDS AND RECOMMENDATIONS, 2012 UTAH L. REV. 1191 (2012); Wingspan—The Second National Guardianship Conference, RECOMMENDATIONS, 31 STETSON L. REV. 595 (2002).*

55 THE NATIONAL GUARDIANSHIP ASSOCIATION, STANDARDS OF PRACTICE 2 (2013).

56 House Bill 90-H 7925A, "Joint Resolution Creating a Special Legislative Commission to Study the Laws on Guardianship."

57 *In addition to members of the Rhode Island House of Representatives and Rhode Island Senate, and the directors or their designees of various state agencies, the 25-member commission authorized by House Bill 90-H7925A (the "Guardianship Commission") included a diverse number of stakeholders in issues involving the elderly and disabled, including a representatives of a senior citizens' center, the National Gray Panthers Association, a mental health association, the American Association of Retired Persons, and the Rhode Island Council of Senior Citizens. Specifically mandated among the two members were to be two "physicians specializing in geriatrics." There was also to be one probate judge, the chief judge or his designee of the Family Court and two attorneys.*

#### EDITOR'S NOTE

A more detailed treatment of this subject will be published in a forthcoming article in the ROGER WILLIAMS UNIVERSITY LAW REVIEW. ❖

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## Estate Planning

*continued from page 27*

trusts.<sup>13</sup> Unlike some other civil law nations, Portugal has not ratified the Hague Convention on the Law Applicable to Trusts and on their Recognition, which sets the parameters for recognition of common law trusts by civil law nations.<sup>14</sup>

However, although Portuguese law does not include trusts, for income tax purposes, income distributed from a United States trust is still treated as income to the recipient-beneficiary under Portuguese tax law.<sup>15</sup> The characterization of any distributed income depends upon the income's classification under Portugal's Individual Income Tax Code.<sup>16</sup> Nevertheless, and similar to a gift or will bequest, distributions of principal from a trust are not be subject to Portuguese taxation.

### Whether to Make Outright Gifts, Will Bequests or Establish a Trust for Portuguese Beneficiaries

Whether Antonio makes outright gifts to his Portuguese family members, leaves bequests in his last will and testament, or establishes some form of a trust, the inclusion of Portuguese beneficiaries under any approach will not create a new tax that could otherwise be avoided. For that reason, Antonio can proceed with his estate tax planning, focusing on the United States and Rhode Island tax and probate issues presented, without having the inclusion of Portuguese beneficiaries play a significant role in his decision-making.

### Scenario 4: Making Charitable Bequests to a Foreign Non-Profit Organization

Josefina Rosario was born in the Dominican Republic, and immigrated first to New York City, then New Haven, before settling in South Providence. She and her husband, Tony, ran a successful bodega together, specializing in Dominican food and products. Now retired, Josefina is including charitable bequests in her last will and testament, and intends to leave a portion of her estate to a charity based in the Dominican Republic. Her accountant has told her that a bequest to a Dominican charity will not qualify for the estate tax charitable deduction. She is not sure her accountant is correct, and would like a determination as to whether the inclusion of the foreign charity in her estate plan will reduce her taxable estate.



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## Charitable Deduction for Income Taxes

First, to understand the reasoning of Josefina's accountant, it is worthwhile to compare the income tax charitable deduction rules with those for the estate and gift tax deduction. To qualify for the federal income tax deduction, the contribution cannot be to a foreign charity.<sup>17</sup> In addition, in Rhode Island, there is no longer a charitable deduction of any kind for income tax purposes.<sup>18</sup> As a result, a contribution to a United States entity will qualify for a federal, but not state, income tax deduction, while a contribution to a foreign entity will not generate any deduction whatsoever.

## Charitable Deduction for Estate and Gift Taxes

In contrast, the federal and state estate and gift tax rules differ from the income tax rules for charitable contributions. First, on the federal level, a charitable gift or bequest to a foreign charity can qualify for a tax deduction.<sup>19</sup> On the other hand, while Rhode Island does allow an estate tax deduction for charitable contributions, the deduction is limited to charitable contributions made to Rhode Island charities and those charities, "which if located within this state, would be exempt from taxation; provided that the state of domicile of the corporation, association, or institution allows a reciprocal exemption to any similar Rhode Island corporation, association, or institution."<sup>20</sup> Given this limiting language, it is doubtful a bequest to a foreign charity is entitled to the Rhode Island deduction, as a foreign charity is located in another country, not another state. Moreover, there is not a reciprocal income tax treaty or estate and gift tax treaty between the United States and the Dominican Republic.

## Whether to Make a Charitable Bequest to a Foreign Non-Profit Organization

It appears Josefina's accountant has confused the income tax rules with the estate and gift tax rules for charitable contributions. While a charitable contribution to a foreign entity is not allowed a federal income, state income, or state estate tax deduction, a charitable gift or bequest to a foreign entity may be entitled to a federal estate or gift tax deduction. Still, given that the current federal estate tax exemption is \$5.45 million, while the Rhode Island exemption is \$1.5

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million, Josefina's state estate tax concern is likely greater than her federal one. Therefore, if Josefina wishes to maximize her overall tax savings from charitable giving, she must refrain from naming the Dominican charity in her last will and testament, and, as one alternative, identify a United States charity, with an analogous mission.

### Conclusion

The issues arising from a client's relationship to another country through a spouse, other family members, property ownership, or charitable giving require additional planning considerations. When advising a client, an attorney must recognize the impact of United States and Rhode Island tax law, the law of the other jurisdiction involved, and any tax treaties in place. With a complete understanding of the relevant issues, an attorney will be able to assist his or her client with achieving most, if not all, of their goals, despite having to develop a plan under multiple legal systems.

### ENDNOTES

1 *The hypothetical scenarios involve fictional clients, loosely based on historical Rhode Islanders featured in the Providence Children's Museum's "Coming to Rhode Island" exhibit, an interactive, hands-on experience that introduces children to the Ocean State's immigrant history. More information available at <http://www.childrenmuseum.org/exhibits/comingRI.asp>.*

2 I.R.C. § 2010; R.I. GEN. LAWS § 44-22 (2015).

3 I.R.C. § 2056(d)(1).

4 I.R.C. § 2056(d)(2).

5 I.R.C. § 2056A(a).

6 I.R.C. § 2056A(b)(1).

7 I.R.C. § 2056A(b)(3).

8 Robert Couzin and Mark Novak, *BUSINESS OPERATIONS IN CANADA*, § IV, Part B (4th ed. 2009).

9 *Income Tax Act, 1985 S.C., ch. 1* § 69(1)(b) (Can.).

10 I.R.C. § 901.

11 *Convention with Respect to Taxes on Income and on Capital, U.S.-Canada*, art. XXIX, Sep. 26, 1980.

12 *EUROPEAN TAX HANDBOOK 2008* 645-647 (Juhani Kesti ed., 2008).

13 See e.g., Barbara R. Hauser, *ESTATE PLANNING IN AND FOR CIVIL LAW COUNTRIES*, 138 *Trusts & Estate* 45 (1999).

14 *Hague Convention on the Law Applicable to Trusts and on their Recognition*, Jul. 1, 1985.

15 I.R.C. § 652(b); I.R.C. § 662(b).

16 *Individual Income Tax Code, 2015, Categories A - H* (Port.).

17 I.R.C. § 170(c).

18 R.I. GEN. LAWS § 44-30 (2015).

19 I.R.C. § 2055; I.R.C. § 2522; *Treas. Reg.* § 20.2055-1(a).

20 R.I. GEN. LAWS § 44-22(c) (2015). ❖

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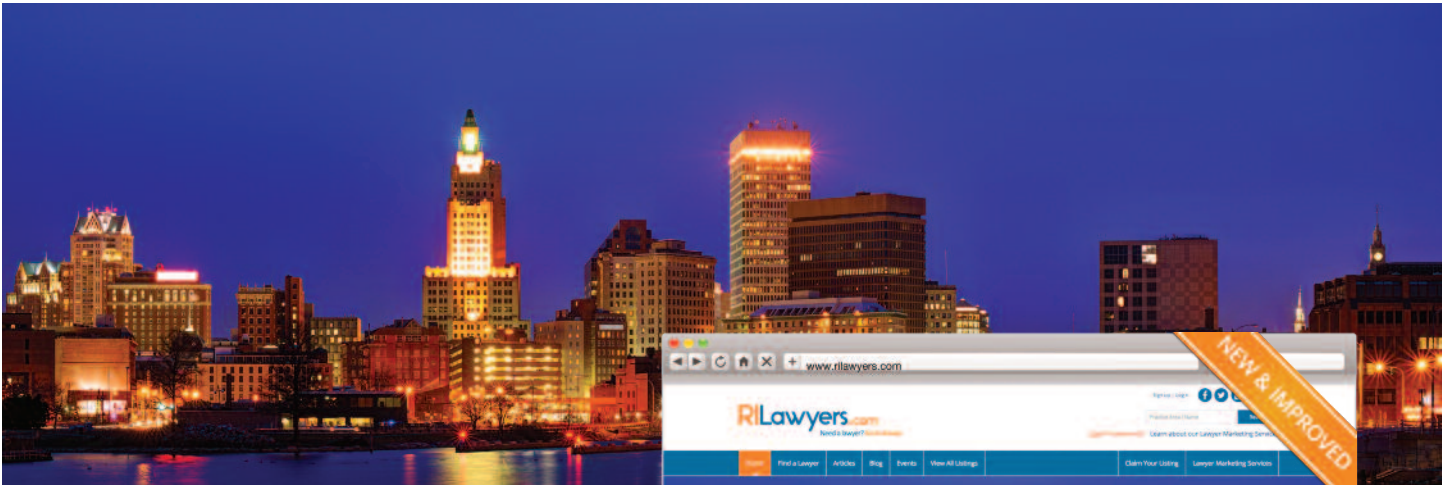
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