

## CORPORATE

# The Company's Directors are Deadlocked – What Happens Now?

By Gisella Rivera

It is common practice to advise clients to set up a board of directors with an odd number of members to prevent director deadlock. However, such advice may not be followed in closely held companies, particularly in closely held companies whose ownership interests are held 50/50. In these cases, a director deadlock is a real possibility.

The recent decision by the Delaware Court of Chancery in *Kleinberg v Aharon*, C.A. No. 12719-VCL (Del. Ch. Feb. 13, 2017) provides a well-reasoned road-map for attorneys advising clients on how and when a court may appoint a custodian in times of director deadlock.

Under Section 226(a)(2) of the Delaware General Corporation Law, a stockholder has the right to petition the court to appoint a custodian in times of director deadlock if:

“the business of the corporation is suffering or is threatened with irreparable injury because the directors are so divided respecting the management of the affairs of the corporation that the required vote for action by the board of directors cannot be obtained and the stockholders are unable to terminate this division”

The Court in *Kleinberg* was asked to

appoint a custodian for Applied Cleantech Inc., a Delaware company (“Applied”). Applied was founded by Refael Aharon, who had invented a sewage processing technology extracting cellulose from sewage. Aharon registered patents for this innovative technology, developed a prototype, solicited investors and tried to commercialize the technology. The major investors in Applied, other than Aharon, included Saturn Partners, a Boston venture capital firm (“Saturn”), who invested \$2.5 million, and Daniel Kleinberg and Tomer Herzog, who, together, invested approximately another \$2.5 million. Applied’s stockholders entered into a voting agreement giving Aharon the right to appoint three of the six members of Applied’s board of directors, and Saturn, Kleinberg and Herzog, each with the right to appoint one director. Kleinberg and Herzog appointed themselves as directors and Saturn appointed Ed Lafferty, one of its partners, as director. Aharon, however, appointed himself and Baruch Dill as directors, leaving the sixth director seat vacant.

From 2007 to 2015, Aharon, on be-



Gisella Rivera

half of Applied, entered into discussions with various potential partners, none of which led to long term contracts. By the end of 2015, Applied had run out of money. With no new sources of financing, all employees except Aharon were terminated. Kleinberg and Herzog, dissatisfied with Aharon’s management of Applied, sought to bring an experienced CEO to replace Aharon.

The rift within Applied’s board of directors widened during negotiations for a proposed joint venture (the “Bioform Deal”) with Canadian Sewage Mining Corporation (“CSMC”). The Bioform Deal contemplated Applied licensing its technology to a new entity (“Bioform”) who would then manufacture the sewage processing machines. Applied would own 10 percent of Bioform and would receive royalties when the machines were sold and distributed by CSMC. The negotiations for the Bioform Deal were handled by Aharon and Lafferty. A non-binding memorandum of understanding between Applied and CSMC was put before Applied’s board and was approved by Aharon, Dill and Lafferty. Herzog

was not present at the board meeting and Kleinberg abstained. However, the deal fell apart during negotiations over the final documents when Aharon became suspicious of and hostile to both Lafferty and CSMC, accusing Lafferty, amongst others, of “trying to usurp his office” and asserting that CSMC “was not living up to its obligations.” Aharon, unilaterally and without board approval, sent CSMC a letter terminating the Bioform Deal, a copy of which was sent to Lafferty.

Upon receiving his copy of the Bioform Deal termination letter, Lafferty asked Aharon to convene an emergency board meeting. While resisting Lafferty’s efforts to call for a board meeting, Aharon appointed Boaz Cohen, his brother-in-law, as his third designated director to create a “3:3 tie vote.”

The court, in deciding the instant case, reiterated the three conditions that must be met before it may exercise its authority to appoint a custodian, namely: “the directors must be deadlocked,” there must exist “a threat of irreparable harm” because of the deadlock, and the stockholders are unable to break the deadlock.

In determining whether a deadlock  
(Continued on page 27)

## REAL ESTATE

# Estate Tax Lien Releases Incident to Real Estate Transactions

By Andrew Lieb

When selling real estate with an executor’s / administrator’s deed or as heirs at law, incident to the death of the owner, seller’s counsel must address both federal and state estate tax liens that automatically attach to real property on the date of death. Importantly, these liens attach and are effective without recorded notice.

The federal estate tax lien is a product of Internal Revenue Code (IRC) §6324(a), which states, in pertinent part, as follows: “[u]nless the estate tax imposed by chapter 11 is sooner paid in full, or becomes unenforceable by reason of lapse of time, it shall be a lien upon the gross estate of the decedent for 10 years from the date of death.”

The state estate tax lien is a product of

Tax Law (TL) §982(a), which states, in pertinent part, as follows: “[u]nless the tax imposed by this article is sooner paid in full, it shall be a lien upon all property includible in the New York gross estate of the decedent for 15 years from the date of death of the decedent.”

With respect to obtaining a release of these liens, there is both an official and an unofficial option.

The official option for the federal estate tax lien release is set forth at IRC §6325(c), which provides in pertinent part as follows: “the Secretary may issue a certificate of discharge of any or all of the property subject to any lien imposed by section 6324 if the Secretary finds that the liability secured by



Andrew Lieb

such lien has been fully satisfied or provided for.” To obtain a certificate of discharge, counsel should prepare and submit Form 4422, “Application for Certificate Discharging Property Subject to Estate Tax Lien,” to the Internal Revenue Service (IRS).

It is noted, that the form advises, at its “Instructions for Completing” section, that the application should be submitted “at least 45 days before the transaction date.” Before completing Form 4422, counsel should read the Department of the Treasury’s April 5, 2017 “Memorandum for Director Specialty Collection, Offers, Liens & Advisory Director Specialty Examination Estate & Gift Tax,” which provides guidance for the IRS to “Process all Requests for Discharge of the Estate Tax Lien.” Upon receipt of the certificate of discharge, which is provided as Form 792, “there is no provision for recording a release,” and pursuant to the Internal Revenue Manual at Part 5, Chapter 5, Section 8, sellers are only “instructed to provide documentation to potential purchasers of the decedent’s property.” Nonetheless, it is advisable to file the certificate

of discharge to avoid confusion and unnecessary closing delays.

The official option for the state estate tax lien release is set forth at TL §982(c), which provides, in pertinent part, as follows: “the commissioner may issue a certificate of discharge of any or all of the property subject to the lien imposed by this section if he or she finds that the liability secured by such lien has been fully satisfied or provided for, upon application for such discharge.” To obtain a certificate of discharge, counsel should prepare and submit Form ET-117 — “Release of lien of Estate Tax” — to the New York State Department of Taxation and Finance (DTF). Additionally, counsel must prepare and submit one of three additional forms as appropriate, to obtain the certificate of discharge, including “Form ET-30, Application for Release(s) of Estate Tax Lien, Form ET-706, New York Estate Tax Return ... or Form ET-85, New York State Estate Tax Certification.” To determine which of these three additional forms to utilize, counsel should read the DTF’s “Release of Estate Tax Lien Procedures,” which offers clear guidance as to which of the three  
(Continued on page 23)

*The Suffolk Lawyer wishes to thank Elder Law Special Section editor Jennifer Cona for contributing her time, effort and expertise to our June issue.*



## Among Us (Continued from page 7)

imals, People And Clients/Organizations.”

The Suffolk County Bar Association recognized **Steve Godsberg** with an award for his 50 years in the practice of law, and **Mara N. Harvey** with an award for her service as co-chair of the SCBA Education Law Committee at its Annual Meeting on May 1.

**Kim Ciesinski**, collaborative divorce attorney and partner at Schwartz & Ciesinski, presented an interactive program to a group of Long Island social workers and clinical psychologists. Often considered first responders for people going through a divorce, Ms. Ciesinski enlightened the group about the benefits of collaborative divorce; how to determine who is an appropriate candidate; and the unique team approach.

**Alyson Mathews of Lamb & Barnosky, LLP**, was the moderator of a panel on the topic entitled “Hot Topics in Labor and Employment Law” co-sponsored by the Labor and Employment Law Section and the Committee on Continuing Legal Education of the New York State Bar Association on March 1.

**Richard K. Zuckerman of Lamb & Barnosky, LLP**, is co-editor of the recently released New York State Bar Association treatise “Lefkowitz on Public Sector Labor and Employment Law, Fourth Edition.”

**Alyson Mathews of Lamb & Barnosky, LLP**, was a program chair on Jan. 27 on the topic “Emergency Ethics - How to Recognize and React to Ethical Landmines in the Practice of Labor and Employment Law” at the New York State Bar Association’s 140th Labor and Employment Law Section’s Annual Meeting. She participated in a Strafford live webinar on the topic entitled “Forms 1094 and 1095: Complying With Mandatory ACA Healthcare Coverage Reporting Requirements of IRC 6055 and 6056” on Thursday, January 5, 2017.

**John P. Christopher**, a partner at Sahn Ward Coschignano, PLLC, served as one of the program co-chairs for the New York State Bar Association (NYSBA) Young Lawyers Section (YLS) Trial Academy, from April 5 to 9, which was held at Cornell Law School in Ithaca.

**Karen Tenenbaum and Jennifer Ann Wynne**, tax attorneys at Tenenbaum Law, P.C. in Melville, will be speaking on June 15 at the NYU Tax Controversy Forum on the topic of NYS Civil Enforcement.

## Congratulations...

To Richard and SCBA President **Patricia Meisenheimer’s** lovely granddaughter Ashley Meisenheimer on her graduation from James Madison University in Virginia. Ashley received a B.S. in Health Sciences and plans to continue her studies in the sciences as a physician assistant.

Congratulations to the winners of the Long Island Business Awards. For Judicial Excellence: Hon. **Joanna Seyberg**, U.S. District Court Judge, Eastern District New York; and Hon. **Denise F. Mollia**, Suffolk County Supreme Court Justice. For Commitment to Women in Law Leadership Award: **Linda Morrone**, Supervising Court Attorney, President of the SC Women’s Bar Association. For Outstanding Women in the Law Award: **Britt Burner, Patricia Galteri, Martha Krisel**, President, Nassau County Bar Association; **Melissa Negrin-Wiener**, former President of the SC Women’s Bar Association.

**Alan E. Weiner**, CPA, JD, LL.M. chosen as the recipient of the Baruch College Alumni Association’s 2017 *Alumni Leadership Award for Business*. This award was given to him in recognition of his years of professional accomplishment, success in business and untiring commitment, dedication and leadership in his profession and the community at large. Alan is Partner Emeritus of the international CPA firm of Baker Tilly Virchow Krause, LLP (formerly Holtz Rubenstein Reminick LLP).

Congratulations to the following for Diversity in Business Awards presented by Long Island Business News: **Bonita J. Ricks**, Special Project Coordinator to Interim Dean Hon. A. Gail Prudenti, Maurice A. Deane School of Law, Hofstra University. **Sima Ali**, of the Ali Law Group.

**Richard K. Zuckerman, Esq., of Lamb & Barnosky, LLP**, has been selected as a recipient of one of Corporate LiveWire’s 2017 Global Annual Awards: “North American Employment Lawyer of the Year.”

**Sharon N. Berlin, Esq., of Lamb & Barnosky, LLP**, has been selected by her peers for inclusion in the *Best Lawyers’* 2017 Spring Business Special Edition “Women of Influence” in the practice areas of Labor and Employment Law.

To immigration lawyer **David Sperling**, who was honored as the “Grand Champion” of the 51st annual Puerto Rican/Hispanic Parade in Brentwood on June 3. David was recognized for helping to launch the Yerbabruja Arts Center

in Central Islip and for establishing the DREAM Foundation, which provides college scholarships to immigrant students who do not qualify for government assistance.

To **Esme Warmuth**, the daughter of Prof. Kimberly Poppiti and Glenn Warmuth, who was inducted into the National Junior Honor Society at Oregon Middle School. Esme is also the granddaughter of Gregory and Paula Warmuth.

**Melissa Negrin-Wiener**, elder law attorney and partner at Genser Dubow Genser & Cona (GDGC), recently received the Outstanding Woman in Law award given by Hofstra University Maurice A. Deane School of Law for 2017. She joins Jennifer Cona, GDGC managing partner, and Roseanne Beovich, GDGC senior associate, who won this award in its inaugural year in 2016.

**Laura Lane**, the Editor-in-Chief for The Suffolk Lawyer, placed in the 2017 Press Club of Long Island Media Awards in the Best Newspaper category for the newspaper, the Oyster Bay Guardian, for which she is the editor.

## Condolences...

It is with deep sympathy that we acknowledge the recent passing of Joan Hudson, mother of **Judge James C. Hudson**. Her life was the epitome of

courage, vision and deep faith and the example that she set will long continue to influence and inspire us.

The Board of Directors sends it deepest sympathy to **Eric J. Besso** and his family on the passing of his father Marty. The family asks that donations be sent to the Alzheimer Association, Broad Hollow Road, New York in memory of Martin Besso.

## New Members...

The Suffolk County Bar extends a warm welcome to its newest members: **Ronald L. Baron, Christopher M. Becker, Jessica M. Blydenburgh, Stephen A. Brown, Courtney A. Chivak, Cassandra M. Cositto, Robert M. DeStefano, Kenneth J. Falcon, Joanne Fanizza, Joseph B. Fazio, Christopher M. Gavin, Mark C. Gaylor, Joyce M. Glass, Jessica M. Greguski, Colleen Hoeffling, Gregory W. Kalmar, Rachel S. Katz, Kevin T. Kearon, Ashad Majid, Kieran L. McCarthy, Catherine P. Mendolia, Kevin M. Meyer, Susan M. Pierini, Peter B. Skelos, Gregory Spicer, Peter Tufo & Alyssa L. Zuckerman.**

The SCBA also welcomes its newest student members and wishes them success in their progress towards a career in the law: **MaryKate Brigham, John Caffrey, Alexandra Dyroff, Gabriella Leon and Jonathan Lugo.**

## Estate Tax Lien Releases (Continued from page 10)

forms to select for each possible scenario faced. It is noted that the DTF advises that the “average processing time for a completed application is three to four weeks” and another “seven to ten business days” should be allowed for mailing, at the DTF’s website. Upon receipt of the certificate of discharge, the same should be recorded with the “recording officer of the county where real property described therein is situated,” pursuant to TL §982(d).

As to the unofficial option, many title underwriters and buyer’s counsel will accept an affidavit from the seller that no estate tax is due or that the estate undertakes to pay any and all estate tax due, while not requiring the official certificate of discharge. Such an affidavit will generally satisfy title underwriters and buyer’s counsel because DTF’s Advisory Opinion, TSB-A-00(2)M, of October 11, 2000 states that “bona fide purchaser, mortgagee ... for an adequate and full consideration ... shall be divested of the lien provided in section 982.”

Nonetheless, title underwriters and buyer’s counsel must nonetheless be

mindful of the federal estate tax lien because IRC §6324(a)(2) renders a “transferee” personally liable for the federal estate tax if it “is not paid when due.” In fact, *U.S. v. Estate of Young*, 592 F.Supp.1478 (E.D. Penn. 1984) held that a purchaser “took that property subject to the government’s superior lien under § 6324.”

It is noted that a purchaser is fully protected from the federal estate tax lien when purchasing real estate that is either “non-probate property” or probate property where the “estate’s executor has been discharged from personal liability pursuant to I.R.C. § 2204.” *Id.* To avoid this exposure, however slight, title underwriters and buyer’s counsel should request a certificate of discharge as the preferable method to close title.

*Note: Andrew M. Lieb is the Managing Attorney at Lieb at Law, P.C., a law firm with offices in Center Moriches and Manhasset. Mr. Lieb is a past Co-Chair of the Real Property Committee of the Suffolk Bar Association and has been the Special Section Editor for Real Property in The Suffolk Lawyer.*