

# Agricultural Law Update

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## From the AALA Executive Director

**New Update Format** This issue continues a new format that brings new functionality to the e-mail version without adversely affecting the readability of the print version. The front page will now feature a short summary of all articles. The PDF version sent by e-mail also has embedded links in the summary which, with the click of the cursor, will take the reader directly to that article inside the newsletter. The bottom of each page also has a link to take you back to the top of the issue. If you are receiving the print version and would like the e-mail version, just send me an e-mail and I’ll switch you over. [RobertA@aglaw-assn.org](mailto:RobertA@aglaw-assn.org)

The AALA board is seeking new members, including student members, for the Update Editorial Board, responsible for overseeing and writing for the *Agricultural Law Update*. Please contact Jesse Richardson, [jessj@vt.edu](mailto:jessj@vt.edu).

**2010 Membership Renewals** were out in late November please send yours in as soon as possible.

**2010 Annual Conference.** President-elect Pat Jensen is seeking topics and speaker suggestions for the 2010 Annual Agricultural Law Symposium, October 8-9, 2010 at the Hilton Hotel in Omaha, NE. Contact her at [wcolemanpjensen@aol.com](mailto:wcolemanpjensen@aol.com).

Robert P. Achenbach, AALA Executive Director

# NATIONAL ANIMAL IDENTIFICATION SYSTEM: POTENTIAL LEGAL IMPLICATIONS

by Elizabeth R. Springsteen\*

Private farmers and ranchers have been branding animals to show ownership and identification for hundreds of years. However, government-run animal identification programs are not necessarily a new concept either. State and federal programs tracing the movement of livestock involved in disease outbreaks are already in place for brucellosis in cattle, bison, and swine, tuberculosis in cattle and cervids, scrapie in sheep and goats and pseudorabies in swine. Further, some states have implemented mandatory programs, such as premises identification in Wisconsin<sup>1</sup> and premises and cattle identification in Michigan.<sup>2</sup> However, until recently there has been no nationwide framework of animal identification in place. This changed with the introduction of the National Animal Identification System, or "NAIS." The first and most important thing to remember is that NAIS, at this time, is completely and strictly voluntary. Because it is not mandatory, there are no required regulations. Instead, the NAIS program establishes a general framework for the relationship between USDA, state health officials, and private industry. In general, the plan addresses the need for fundamental information in the system: identification of premises where animals may spend time (including farms, veterinary clinics, stockyards, and meatpacking plants), identification of the animals (either on an individual or lot basis, depending on species), and a record of the animals' movement. This article will look specifically at the requirements imposed on those who participate in NAIS and consider the possible legal implications of the NAIS system.<sup>3</sup>

## NAIS Framework

The Animal Health Protection Act provides USDA with the authority to restrict the interstate movement of livestock and to carry out operations to detect, control, and eradicate animal disease.<sup>4</sup> This authority, combined with the discovery of bovine spongiform encephalopathy in December 2003, expedited efforts to establish a federal animal identification program. This program, NAIS, was developed through the collaboration of USDA, private industry, and state animal health officials, and was announced in April, 2004.

As currently outlined, the USDA encourages registration of animals including cattle and bison; poultry; swine; sheep; goats; cervids (e.g., deer and elk); equines (e.g., horses, mules, donkeys, burros); and camelids (e.g., llamas and alpacas).<sup>5</sup> When fully implemented, the NAIS can provide information on the whereabouts of an animal from its original birthplace to its death at the slaughter plant. It does not, however, include further tracing of the meat through the plant to the consumer. The ultimate goal of NAIS is to be able to trace all livestock and poultry within 48 hours of a certain event such as a disease outbreak.<sup>6</sup>

The first step in the NAIS system is called "premises identification." The purpose of premises registration is to ensure that individuals are notified quickly when a disease event might impact their area(s) or the species of animals they have.<sup>7</sup> In order to take part in this, landowners register their premises, which is "a unique and describable geographic location where activity affecting the health and/or traceability of animals may occur."<sup>8</sup> These locations include "farms, ranches, stables, other production units, markets, abattoirs (slaughter facilities), rendering facilities, ports of entry, veterinary clinics/laboratories, exhibitions, and any other location where livestock are raised, held, or boarded."<sup>9</sup> To register, the landowner must supply information including the name of the entity, contact person, address/city/state/zip, phone number, operation type, and species kept at the premises.<sup>10</sup> A unique premises identification number, or PIN, is then assigned and contact information recorded for that location. While the information above is all that is required to participate in the federal NAIS program, the state or tribe responsible for assigning PINs may also ask for additional information.<sup>11</sup> The owner of an applicable operation may register their premises without participating in the other two parts of the NAIS system.

The second step in the NAIS system is "animal identification." According to the USDA NAIS User Guide, "animal identification is a recommended option for animals that are moved from one premises to a location outside that operation where the risk of exposure to disease increases (e.g., auctions, feedlots, or fairs). In addition

to being useful for protecting livestock and poultry and investigating diseases, animal identification will provide producers with an efficient, cost-effective tool for managing their animals."<sup>12</sup> Animals can be identified either individually or by group. Individual animals are identified by assigning them a unique animal identification number (AIN) that stays with an animal throughout its lifetime. The AIN is a 15-digit number beginning with 840, the numeric code for the United States.<sup>13</sup> AIN tags are available as visual tags, radio frequency identification (RFID) tags, and injectable transponders.<sup>14</sup> The AIN is linked to the premises identification number (PIN) where the animal was kept when identification was first applied. When the manufacturer of AIN tags distributes them, the specific tag numbers are correlated with the premises to which they are sent. This AIN distribution data is held in USDA's animal identification number (AIN) management system.<sup>15</sup> However, it is the person who is responsible for the care of the animal who chooses when to attach the AIN identification number on the animal. It can be attached at any time between birth and the time that the animal moves to another premises.<sup>16</sup> That tag with the unique animal identification number then stays with the animal during its entire life, and is removed only upon slaughter. Group/lot identifications, on the other hand, are more common for animals that typically move through the production chain as a group of animals of the same species. These "Group/Lot Identification Numbers," (GINs) are self-generated by the producer rather than assigned by USDA, so they are maintained at the premises by the producer in his or her management records.<sup>17</sup> Therefore, the GIN data is not part of the USDA management system.

The final component of the NAIS system is "animal tracing." According to USDA, "animal movements of interest include those that might pose a significant risk of disease transmission or, in the event of a disease detection, those that might have the greatest potential for spreading a disease."<sup>18</sup> Further, "[w]hen linked with other information, animal tracing provides timely, accurate records that show where animals have been and what other animals have come

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\* National Agricultural Law Center

into contact with them.<sup>19</sup> Information on the movement of animals is provided to state and private sector databases, where it is maintained.<sup>20</sup> These databases are owned, managed, and controlled by the private sector or the States, and will be requested, according to USDA, only when there is a risk to animal health.<sup>21</sup> The national premises identification number (PIN), the animal identification number, the date of the movement and the type of movement (move-in or move-out) are the only items of information that must be provided to participate in the animal tracing component.<sup>22</sup>

### Legal Concerns with NAIS

Recently, the USDA conducted thirteen listening sessions in different places across the country regarding the implementation of NAIS.<sup>23</sup> According to Dr. John Clifford, the Chief Veterinary Medical Officer of USDA, when he spoke to the National Institute of Animal Agriculture ID Expo, several major concerns about the program were repeatedly expressed.<sup>24</sup> First of all, there were concerns about confidentiality and who would be able to access the information provided. Secondly, people were worried about liability, and whether participation in the NAIS program would increase the liability faced by producers and others whose information was collected. To a lesser extent, a third concern, which involved First Amendment freedom of religion protections, was also raised in these listening sessions.

### Confidentiality

Typically, the information that is gathered by the government is protected from dissemination by the Privacy Act.<sup>25</sup> The Privacy Act is designed to give individuals more control over the gathering and disseminating of information about themselves, and to prohibit the unnecessary and excessive exchange of personal information that has been collected by the government.<sup>26</sup> However, even with Privacy Act protections, information collected by the government can still typically be obtained in one of two ways.

Congress included an exception in the Privacy Act that allows for information to be released as a result of requests made under the Freedom of Information Act, or “FOIA.”<sup>27</sup> FIOA is a federal law that gives the public the right to access federal

agency records by requesting them. FOIA applies to “agency records” maintained by agencies within the executive branch of government.<sup>28</sup> These include records that are either created or maintained by an agency and under agency control at the time the request is made.<sup>29</sup> Potential records affected would definitely include premises identification information, as that information is kept in a federal database, but could arguably include other NAIS information as well. However, in writing the FOIA, Congress included some exemptions, which allow the government to withhold certain information. One exemption allows information to be withheld if a statute explicitly forbids its disclosure.<sup>30</sup> When NAIS was created, no such statute existed to protect the provided information. However, as part of the 2008 Farm Bill, 7 U.S.C. §8791 was passed. It forbids “any officer or employee of the Department of Agriculture” from disclosing “information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself.”<sup>31</sup>

So far, this statutory provision has been tested once. A journalist submitted a FOIA request asking for information contained in the National Premises Information Repository (“NPIR”), including “all records of registered premises contained in the NPIR, including the name of the entity, name of contact person, address, telephone number, alternate telephone number, and type of operation run on the premises.”<sup>32</sup> USDA denied the request, and when the reporter took it to court, the judge sided with the USDA, holding that the statute forbade disclosure of the information and that the request was properly denied.<sup>33</sup> So, at this time, it appears that 7 U.S.C. §8791 protects against the disclosure of information submitted as part of the NAIS program.

However, the caveat to this protection is that, currently, very little animal identification information is maintained at the national level that would be protected by the FOIA. Instead, it is stored by and maintained in individual state databases. While all fifty states have enacted freedom of information acts of their own, the level to which identification information is

protected depends entirely on the parameters of the state statutes and whether other state laws have been passed limiting disclosure of animal identification information.<sup>34</sup>

The second method through which governmental information may potentially be released is through a court’s subpoena power. Private parties in the course of litigation can request a subpoena from the judge, ordering the release of certain information relevant to a case. Information that is exempted under FOIA is not automatically immune from subpoena.<sup>35</sup> Instead, it may be obtained through discovery if the party’s need for information exceeds the government’s need for confidentiality.<sup>36</sup> As a result, the court has the responsibility of balancing the interests of the two parties and deciding whether the information should be released. No cases have considered whether NAIS information may be released through the use of a subpoena.

The final concern in confidentiality and privacy does not involve the government at all, but is nonetheless important. In a situation where information is created and held by a private party, FOIA does not apply. However, if a federal law were to require that information be kept with a private company, it is a gray area whether that information would be considered agency or private information. No court has considered the issue yet. Even if it is determined to be private party information, however, privacy issues should be considered involving the private contract between the provider and maintainer of information, and how much the contracts allow or restrict the sharing of information.

### Liability

According to USDA, NAIS “will not expose producers to unwarranted or additional liability.”<sup>37</sup> This is an accurate statement. Producers have always been responsible for the animals they sell, and that will not change. However, NAIS helps identify individuals who have been part of the chain of custody for particular animals. This identification increases the accountability for individuals who until now have been anonymous. This makes it easier to determine who mismanaged

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the animal, which can lead to increased liability exposure for that person or entity. It is important to note that the degree to which the NAIS increases exposure may be limited, given that NAIS does not trace the meat through the processor to the consumer. If, however, liability can be imposed, it would more than likely be through one of three theories of liability- warranty theory, strict liability or negligence.

Under the warranty theory, individuals are held responsible under an “implied warranty of merchantability,” a law adopted in most states as part of their commercial code, which is a set of laws regulating sales. The implied warranty of merchantability states that goods sold by a merchant are fit for the ordinary purposes for which they were sold. This probably is not the most likely theory of liability for producers, for two reasons. First, courts have been reluctant to consider livestock producers to be “merchants.” Since only merchants can give warranties, if the producers are not considered merchants, they cannot be held responsible under this theory. The second reason is that many states in which animal agriculture is a major part of the economy limit livestock producers’ exposure under a warranty theory of liability.<sup>38</sup> These statutes, which vary widely within the states in which they have been passed, provide protection for either specific individuals or prohibit implied warranties from attaching to livestock generally.

Under the theory of strict liability, an individual who has introduced a defective product that is unreasonably dangerous into the stream of commerce may be held liable. However, this may not be a likely way to hold producers or veterinarians responsible, as courts have been reluctant to consider animals to be “products.”<sup>39</sup> This reluctance eliminates the possibility of strict liability as an option for imposing liability. However, if this changes, strict liability might become more of an issue.<sup>40</sup>

The most likely theory under which liability would attach to either producers or veterinarians is negligence, the failure to exercise reasonable care. Examples of negligence that might be caught as a result might include the administration of illegal drugs, failure to follow withdrawal times, or selling sick or diseased livestock. For

negligent producers, the NAIS information may help pinpoint the responsible parties and impose liability as a result of their negligence.

#### Conclusion

The law surrounding the NAIS is just beginning to develop. Although the program is not currently mandatory on the federal level, it may become so eventually. Regardless, the federal government’s approach to the precise data requirements and maintenance of information will certainly affect all participants of the livestock industry. Further, as the system is developed, participants must be mindful of the law concerning the confidentiality of the information and the liability of those involved in the raising and processing of livestock.

#### ENDNOTES

<sup>1</sup> For more information on the mandatory Wisconsin program, visit <http://www.wiwd.org/>.

<sup>2</sup> For more information on the mandatory Michigan program, visit [http://www.michigan.gov/mda/0,1607,7-125-48096\\_48149---,00.html](http://www.michigan.gov/mda/0,1607,7-125-48096_48149---,00.html).

<sup>3</sup> This article is based on the author’s presentation to the National Institute of Animal Agriculture’s ID Expo on August 26, 2009. For a copy of the materials used in that presentation or to listen to an audio recording, please see <http://www.animalagriculture.org/Solutions/ID%20INFO%20EXPO/2009/Proceedings.html#GSII>.

<sup>4</sup> 7 U.S.C. §§ 8301- 8317.

<sup>5</sup> United States Department of Agriculture, *National Animal Identification System (NAIS)—A User Guide and Additional Information Resources* (2007), page 3; available at <http://animalid.aphis.usda.gov/nais/naislibrary/documents/guidelines/NAIS-UserGuide.pdf>.

<sup>6</sup> NAIS User Guide at 34.

<sup>7</sup> NAIS User Guide at 14.

<sup>8</sup> *Id.*

<sup>9</sup> NAIS User Guide at 15.

<sup>10</sup> NAIS User Guide at 17.

<sup>11</sup> NAIS User Guide at 5.

<sup>12</sup> *Id.*

<sup>13</sup> NAIS User Guide at 22.

<sup>14</sup> United States Department of Agriculture, *Frequently Asked Questions: Animal Identification*, available at: <http://animalid.aphis.usda.gov/nais/naislibrary/factsheets.shtml>.

<sup>15</sup> NAIS User Guide at 27.

<sup>16</sup> *Id.*

<sup>17</sup> NAIS User Guide at 23.

<sup>18</sup> NAIS User Guide at 5.

<sup>19</sup> *Id.*

<sup>20</sup> NAIS User Guide at 30.

<sup>21</sup> NAIS User Guide at 31-32.

<sup>22</sup> NAIS User Guide at 32.

<sup>23</sup> For transcripts of these listening sessions, see <http://animalid.aphis.usda.gov/nais/feedback.shtml>.

<sup>24</sup> An audiorecording of Dr. Clifford’s presentation is available here: <http://www.animalagriculture.org/Solutions/ID%20INFO%20EXPO/2009/Proceedings.html>

<sup>25</sup> 5 U.S.C. § 552a.

<sup>26</sup> *Id.*

<sup>27</sup> 5 U.S.C. § 552.

<sup>28</sup> 5 U.S.C. § 551.

<sup>29</sup> *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136 (1989).

<sup>30</sup> 5 U.S.C. § 552(b)(3).

<sup>31</sup> 7 U.S.C. § 8791(b)(2).

<sup>32</sup> *Zanoni v. U.S. Dep’t of Agric.*, 605 F. Supp.2d 230, 233 (D. D.C. 2009).

<sup>33</sup> *Id.*

<sup>34</sup> See Eric Pendergrass, *Varying State Approaches to Confidentiality with Premises and Animal Identification Systems*, (2007) available at [http://www.nationalaglawcenter.org/assets/articles/pendergrass\\_confidentiality.pdf](http://www.nationalaglawcenter.org/assets/articles/pendergrass_confidentiality.pdf)

<sup>35</sup> *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336 (D.C. Cir. 1984).

<sup>36</sup> See Janice Toran, *Information Disclosure in Civil Actions: The Freedom of Information Act and the Federal Discovery Rules*, 49 Geo. Wash. L.Rev. 843, 848-54 (1981); and *Baldrige v. Shapiro*, 455 U.S. 345 (1982). See also Roberts and Pittman, *Legal Issues in Developing a National Plan for Animal Identification* (2004), available at [http://www.nationalaglawcenter.org/assets/articles/roberts\\_animalid.pdf](http://www.nationalaglawcenter.org/assets/articles/roberts_animalid.pdf).

<sup>37</sup> United States Department of Agriculture, *Questions and Answers on the National Animal Identification System*, available at [http://www.aphis.usda.gov/publications/animal\\_health/content/printable\\_version/faq\\_ah aids.pdf](http://www.aphis.usda.gov/publications/animal_health/content/printable_version/faq_ah aids.pdf).

<sup>38</sup> See also Pendergrass, *Approaching Liability with Animal Identification*, available at [http://www.nationalaglawcenter.org/assets/articles/pendergrass\\_liability.pdf](http://www.nationalaglawcenter.org/assets/articles/pendergrass_liability.pdf).

<sup>39</sup> *Latham v. Wal-Mart Stores, Inc.* 818 S.W.2d 673 (1991), *Anderson v Farmers Hybrid Cos.*, 87 Ill App 3d 493 (1980), *Kaplan v C Lazy U Ranch*, 615 F Supp 234 (D. Co. 1985) (applying Colorado law).

<sup>40</sup> *Worrell v Sachs* 41 Conn Supp 179 (1989), *Sease v Taylor’s Pets, Inc.* 74 Or App 110 (1985).

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# OHIO VOTERS APPROVE LIVESTOCK CARE STANDARDS BOARD: NOW WHAT?

by Peggy Kirk Hall\* & Leah F. Finney\*\*

On November 3, 2009, Ohio voters approved Issue 2, a constitutional amendment that creates a Livestock Care Standards Board with authority to develop standards for farm animal care in Ohio.<sup>1</sup> The Ohio General Assembly placed Issue 2 on the ballot after passing a joint legislative resolution at the urging of Ohio agricultural organizations. The measure is a direct attempt to preempt efforts by the Humane Society of the United States (HSUS), which met with Ohio farm leaders last spring to discuss its intent to propose laws that would prohibit certain livestock management practices in Ohio. Rather than negotiating with HSUS, Ohio's agricultural interests worked through the Ohio legislature to create an alternative approach to livestock care.

The approach was approved by Ohio's voters as Issue 2, which amended Ohio's Constitution to establish a thirteen member, bi-partisan Livestock Care Standard Board made up of Ohio residents.<sup>2</sup> The board may not have more than seven members of the same political party at any time and is to be chaired by Ohio's director of agriculture.<sup>3</sup> The governor will have authority to appoint ten members of the board, which will include:

- a member representing family farmers;
- a food safety expert;
- two members representing Ohio agricultural organizations;
- a licensed veterinarian;
- the state veterinarian from the Ohio Department of Agriculture;
- the dean of an agriculture department of an Ohio college or university;
- two members of the public who represent Ohio consumers;
- a member representing a county humane society, recognized under state law.<sup>4</sup>

The speaker of the house and the president of the senate will also each appoint a family farmer to the board.<sup>5</sup>

The new constitutional amendment delineates specific factors the board must consider in creating standards governing the care and well-being of livestock and poultry. These factors include "agricultural best management practices for care and well-being, bio-security, disease prevention,

animal morbidity and mortality data, food safety practices, and the protection of local, affordable food supplies for consumers."<sup>6</sup> Board members may consider other factors in addition to those specifically stated.<sup>7</sup> Standards will be subject to the General Assembly and enforced by the state department of agriculture.<sup>8</sup> The amendment gave enacting authority to the Ohio General Assembly and took effect immediately upon adoption by a majority of Ohio voters on election day.<sup>9</sup>

## Opposition to Issue 2

Many expected HSUS to organize an extensive public campaign against Issue 2. HSUS leaders made a few appearances and statements voicing their opposition, but did not wage a full battle. Stronger opposition came from within Ohio and reflected an ever-present division within the state's agricultural community. Farm organizations such as the Ohio Farmers Union, Ohio Ecological Food and Farm Association and Innovative Farmers of Ohio publicly opposed the issue.<sup>10</sup> Joining them were local, state and national environmental, food and consumer groups.<sup>11</sup> Opposition arguments included unwanted regulations, increases in farm and food costs, preserving the sanctity of the constitution, and preventing a power grab by "big agribusiness."<sup>12</sup> Despite the opposition, 64% of the voters approved Issue 2.<sup>13</sup>

## Implementing Issue 2

Issue 2 subjects the Livestock Care Standards Board to the authority of the Ohio General Assembly, and grants the legislature authority to facilitate the amendment's implementation. Board terms, conditions of board service, and the standards development process may be addressed in the legislation. The director of the Ohio Department of Agriculture, who will chair the board, hopes to see implementing legislation by the first of the year. A more realistic time frame may be early spring.

Several definitional issues face the legislature as it begins the implementation phase. Most basic is the meaning of "well-being"—the board's purpose is to establish standards governing the "care and *well-being* of livestock and poultry." Ohio law does not define the term, leaving us with Webster's definition—"the state of being happy, healthy

or prosperous." Will the legislature attempt to narrow the definition? The legislature may also want to address other terms such as "family farm," "family farmer," and "livestock," each of which raised controversy during the ballot campaign. At issue were whether large confinement facilities should qualify as family farms, and whether "puppy mills" fall within the definition of livestock.

To develop board conditions and terms, the legislature will likely draw upon established state boards and committees such as the State Board of Education and the Concentrated Animal Feeding Facility Advisory Committee. Board member selection will be expectedly political and controversial. The governor will use an open application process to select the board members.

The board's responsibility will be to develop standards which the Ohio Department of Agriculture (ODA) will administer and enforce. Many are anxious to see whether the board will rely upon established industry standards, look to the growing body of animal welfare audit criteria, or draw upon other state standards such as those developed by New Jersey.<sup>14</sup> The New Jersey experience, which resulted in a legal challenge before New Jersey's Supreme Court,<sup>15</sup> illustrates the tension between agency deference and reactions to customary livestock management practices, and forewarns Ohio of the difficulties yet to come.

ODA's director has already promised to follow the board's recommendations with a thorough and transparent rulemaking process, and plans to concurrently use the deliberation period to educate the public about the importance of safe and local food supplies. Whether the standards development process will diffuse opposition to the new constitutional amendment is a question whose answer may depend upon the level of collaboration and objectivity displayed throughout the process.

## Countering Issue 2

The Humane Society of the United States has already indicated its intent to counter Issue 2 with its own proposal, evident from its too-quiet reaction to Issue 2 during

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the campaign period. If HSUS follows its usual approach, it will propose a law that prohibits the tethering of veal calves and/or the use of gestation crates for hogs or battery cages for poultry. Issue 2 cannot stop HSUS from initiating a ballot proposal, as the Ohio Constitution guarantees its citizens the right of initiative for both statutory and constitutional law.<sup>16</sup> The question is whether a proposal by HSUS would dovetail with the new amendment or conflict, thereby requiring a repeal of some or all of Issue 2's constitutional language or creating the need for a legal challenge to the constitutionality of an alternative ballot measure. This scenario would have been avoided had an earlier version of the joint resolution that created Issue 2 been adopted—the Ohio Senate's version proposed granting the Livestock Care Standards Board "exclusive authority to establish standards governing the care and well-being of livestock, subject *only* to the authority of the General Assembly"<sup>17</sup> (emphasis added).

Timing will play a role in any counter to Issue 2. Conceivably, administrative rules implementing the livestock care standards

may not be in place before an initiative by HSUS or others reaches the ballot. This raises the prospect of a ballot proposal containing language or directives for the Ohio Livestock Care Standards Board. Ohio voters may not be able to discern the relationship between two separate ballot initiatives.

#### Is Ohio a Model for Other States?

Ohio's battle over Issue 2 piqued the interest of other states grappling with the farm animal welfare issue. It is too soon to know whether Issue 2's approach provides a feasible model for such states. Development of the actual standards for livestock care, legal challenges to the standards, and a possible counterattack to Issue 2 all loom in the future, and will determine the long term viability of the Ohio approach.

#### ENDNOTES

<sup>1</sup> Ohio Secretary of State, Issue 2 Ballot Language (Nov. 27, 2009), [http://sos.state.oh.us/sos/upload/ballotboard/2009/2-final\\_language.pdf](http://sos.state.oh.us/sos/upload/ballotboard/2009/2-final_language.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> Ohio Const. Art. XIV §1(A)(1),(4)

<sup>4</sup> Ohio Const. Art. XIV §1(A)(2)

<sup>5</sup> Ohio Const. Art. XIV §1(A)(3),(4). This places three total "family farmer" members on the board.

<sup>6</sup> Ohio Const. Art. XIV §1(B)

<sup>7</sup> Ohio Const. Art. XIV §1(B)

<sup>8</sup> Ohio Const. Art. XIV §1(B), (C)

<sup>9</sup> *Id.*

<sup>10</sup> See Ohio Against Constitutional Takeover (December 1, 2009), available at <http://www.ohioact.org/>.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Ohio Secretary of State, State Issue 2, Unofficial Results (December 1, 2009) available at <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2009ElectionResults/20091103issue2.aspx>.

<sup>14</sup> N.J.S.A. §2:8 (2009).

<sup>15</sup> *New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Dept. of Agriculture*, 196 N.J. 366 (2008).

<sup>16</sup> Ohio Const. Art. II §1

<sup>17</sup> Ohio Am. Sub. S. J. R. No. 6 (2009). The Ohio House of Representatives rejected the Senate's version and removed the "exclusive authority" language from the joint resolution.

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## HOW TO REVIEW YOUR ESTATE PLAN: A STEP-BY-STEP GUIDE

by Kevin M. Alerding\*

**[Editor's note: The following is a sample letter to clients submitted which we hope may be useful to practitioners.]**

A once-a-year review can go a long way in ensuring that your estate plan is up-to-date. Many financial advisors recommend that their clients review their estate plans annually, and often assist in the review. I try to send letters to my clients each year reminding them to review their estate plans, and I typically get a couple of notes in response thanking me for the reminder, and a few requests for assistance in making changes. But the response rate is pretty low, and I often wonder how many of my clients are doing any sort of review at all.

Recently a client who had received my letter left me this voice message:

*Kevin, this is Bob. I got your letter about reviewing our estate plan. Thanks for sending it. I've got my Will and Trust and other stuff here but I don't know*

*how to review it. Would you call me and tell me what I should be looking for?*

His message hit me like a freight train. All these years I've been telling my clients to review their estate plans, and suddenly I realized that the suggestion is wholly inadequate. Most of my clients are no better equipped to review their estate plans than I am to inspect the HVAC system in my house. So I sent my client these step-by-step instructions.

It is important to understand, first and foremost, that it is your responsibility to keep your estate plan up-to-date. The lawyer has a definite role to play, but only at your invitation. I will give you some suggestions below about when your lawyer should be included in the review process.

#### Your Will and Living Trust

You should begin your review by reading those parts of your Will and Revocable Trust, if you have one, that identify the beneficiaries

who would receive your property after you have passed away. For most people this is the spouse and children, and may also include parents, other relatives, friends and charities. Be sure that you still want these beneficiaries to receive your property.

If you left any beneficiary's inheritance to him or her in a trust fund, you should review the terms of that trust to be sure that they still are appropriate. Many parents will establish trust funds for their children so that the children would receive their inheritances in staggered distributions such as at ages 25, 30 and 35. As the children get older, some parents wish to extend those distribution ages, for instance to 35, 40 and 45. On the other hand, some parents are blessed with exceptionally responsible children and decide that no trust fund is needed at all.

Next you should check the people who you have nominated to perform certain duties after you have passed away. The typical (cont. on page 7)

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positions are:

• **Personal Representative or Executor.** The Executor's job typically lasts six months to two years. He or she is responsible for submitting your Will to Court, gathering your assets, paying your debts, filing your final income tax returns, filing your inheritance and estate tax returns, and distributing your property to the people you have identified to receive it under your Will and Revocable Trust.

• **Trustee.** If in your Will or Revocable Trust you have directed any person's inheritance be held in a trust fund for him or her, then the Trustee would be responsible for holding the trust property, investing it, making distributions to the beneficiary at the times and under the circumstances as directed in the trust instrument, and keeping accurate records with respect to the trust property. This job could last anywhere from a few years to many decades and even for multiple generations, depending on the specific terms of your trust.

• **Guardian.** If you have children who are under age 18, then in your Will you probably nominated someone to serve as the guardian for those minor children. The guardian's job is to step into your shoes as a surrogate parent; to take the children into their home; to love and care for them; and to raise them. Be sure that the person you nominated as guardian still is fit for that role. For instance, if you named your parents as guardians for your children, you should consider whether they are young enough to serve effectively.

• **Power of Attorney.** Your documents likely include a general power of attorney, in which you identify a person to act as your agent to assist in handling your business and financial affairs in case you become ill, or are in an accident, or for any other reason are unable to handle those things yourself. Be sure that the person you have identified as your business agent or attorney-in-fact still is appropriate. If that person is your spouse, then you also should name an alternate attorney-in-fact in case you and your spouse are injured in the same accident.

• **Health Care Representative.**

Your documents also likely include an appointment of health care representative, in which you appoint someone to assist in making medical decisions for you if you are not able to make those decisions for yourself. Again, if you have nominated your spouse then you also should identify a successor or backup health care representative.

• **Living Will.** Many people have living wills. This is a non-binding document that expresses your desires with respect to life prolonging procedures. You should read it to be sure that it reflects your current intentions.

**Property Not Controlled by Your Will or Revocable Trust**

It is a common mistake to believe that if your Will is in order, then your estate plan is in order. In fact, your Will is just one component of your overall estate plan. In most cases, the Will controls the disposition of some but not all of a deceased person's property. Other property, like life insurance policies, retirement plan accounts, and commercial annuities are controlled by beneficiary designations. As you review your estate plan, you should check all of those beneficiary designations to be sure that they are complete and consistent with your overall estate plan.

Jointly owned property also might not be controlled by your Will or Revocable Trust. If you and another person own a parcel of real estate together, or joint bank account or joint brokerage account, then when you die the other owner might acquire full title to the real estate or account. You should consider if that is what you intended when you acquired the property, and if not then you should ask your lawyer for help in structuring the ownership of the property in a way that would allow each owner to dispose of her or his portion of the property under her or his estate planning documents.

If you have named a transfer of death (TOD) or pay on death (POD) beneficiary on a bank account, brokerage account, or other property, then on your death that account or property would pass to the named TOD or POD beneficiary and would not be disposed of under your Will or

Revocable Trust. In some cases, this can have disruptive consequences. Most people who have a complete estate plan do not need to name TOD or POD beneficiaries. If you have POD or TOD beneficiaries, then you should confirm with your lawyer that these are properly coordinated with your overall estate plan.

If you have had a major "life change" since you signed your estate planning documents, then you should have your lawyer review your estate plan to be sure that it is still suitable. For instance, if you have been married or divorced; if you have moved to a different state; if you have acquired significant wealth or lost a good portion of your wealth; if you have sold a business or become an owner of a business, then your entire estate plan should be reviewed by your advisors.

**Taxes**

You probably know that the federal estate tax rules have been in a state of flux for several years now. As recently as 1999, the estate tax exemption amount (the amount a property that a deceased person could pass to her beneficiaries without paying any federal estate tax) was \$600,000. Since then the exemption amount has increased almost six-fold to \$3,500,000 today. If your estate planning documents include provisions intended to minimize estate taxes, and if your estate plan is more than a couple of years old, then you should consult with your lawyer to see if those tax clauses are still appropriate. On the other hand, if your estate planning documents do not include any estate tax-related provisions and your wealth has increased, then you should ask your lawyer to see if estate tax provisions should be added to your estate planning documents.

**Retirement Accounts**

If you hold a good portion of your wealth in retirement plan accounts, then it might be important to include technical provisions relating to the handling of your retirement plan accounts in your Will or Revocable Trust. In 2000 the IRS published new regulations about how benefits from retirement plan accounts are to be paid after the account owner's death. Those rules have

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## Agricultural Law Update

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## Alerding—HOW TO REVIEW YOUR ESTATE PLAN: A STEP-BY-STEP GUIDE cont. from p. 7)

been further refined over the last nine years through IRS rulings, court opinions, and good lawyering. If this issue is important to you, then you should discuss it with your estate planning lawyer.

### **Life Insurance Policies**

Life insurance is an important component of many estate plans. Life insurance proceeds often constitute a significant part of the wealth that passes to a decedent's family, so it is imperative that the manner in which the policies are owned and the way the beneficiary designations are completed are properly coordinated with your overall estate plan. The brevity of the standard beneficiary designation form sometimes lulls people into believing that naming a beneficiary is simple. But there may be gift, estate, and income tax issues to consider. And most importantly you want to be certain that your insurance proceeds will go to the right beneficiaries, at the right time, and under appropriate circumstances. Your lawyer can help you do this properly.

If you find issues that you want to discuss with your financial advisor or lawyer, you should be prepared to give her or him copies of your existing estate planning documents along with a personal financial statement that shows all of your assets, how much each is worth, and how each is owned (either in your name alone, or jointly with another person). You also should give your advisors copies of the beneficiary designations for

your life insurance policies, retirement plan accounts, and commercial annuities, or at least confirm that those are complete and what they say. In any event you should have a lawyer review your entire estate plan at least every three years.

If you have questions about estate planning, you can contact \_\_\_\_\_.

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If you are planning for a year, sow rice; if you are planning for a decade, plant trees; if you are planning for a lifetime, educate people. *Chinese proverb*