The Elder Law Advocate

"Serving Florida's Elder Law Practitioners"

Inside:

- *Session 2020: An early start this year*
- *The treatment of ABLE accounts in HUD-assisted programs*
- *It is official—Florida law authorizes creation and execution of electronic wills*
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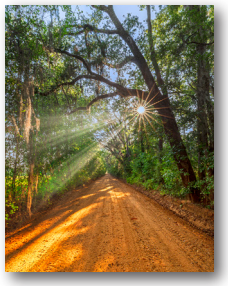

COVER ART

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Correction to spring 2019 article

The editors would like to correct an editing error in the article "PACE financing and financial exploitation of the elderly: A study of unintended consequences" by Ellen Cheek. The editorial staff inserted the word *homeowner* in the last sentence of the paragraph addressing PACE basics. The sentence should have read: The financing agreement is recorded, providing a lien of equal dignity to county taxes and assessments—a "super lien," in effect.

PACE agreements are indeed recorded, but by "the sponsoring unit of local government," not by the homeowner (*See* Section 163.08(8), Fla. Stat.). The author pointed out this is an important distinction because one of the major issues with PACE financing is that in many cases, the homeowner is unaware of the mechanics or the details of the PACE obligation until the property tax bill is received. We apologize for any confusion.

The deadline for the WINTER 2020 EDITION: November 1, 2019. Articles on any topic of interest to the practice of elder law should be submitted via email as an attachment in MS Word format to Heather B. Samuels at *hsamuels@solkoff.com* or to Genny Bernstein at *gbernstein@jonesfoster.com*, or call Leslie Reithmiller at 850/561-5625 for additional information.

Randy C. Bryan

Message from the Chair

'Coming of age' in 2019

2019 has been a year of personal milestones for me. It is the year my wife and I turned 50, the year we celebrate our 25th wedding anniversary, the year our firstborn turns 21, the year my law partner and I celebrate the 20th anniversary of our firm, and the year it becomes my privilege to serve as chair of our Elder Law Section. Each of these milestones is cause for personal reflection, looking back on the decisions we've made that bring us to where we are today, and to honor the people who have been there to help along the way.

Don't worry, I'm not going to bore you with a long recounting of my life's story to this point, but as I assume the position of chair, I am reminded of the long line of leaders who preceded me, championing causes on behalf of all of us and bringing us to where we are as a section today.

In preparing my comments for this article, I scanned through my copies of Elder Law Section newsletters I've collected over the years. Although I don't have nearly all of them, I was surprised to see I actually have a copy of Vol. I, No. 1 of our section's newsletter. Although not as financially valuable as realizing you have a copy of Superman No. 1, it still holds a place of significance and importance to me.

Many of our members, myself included, won't recall a time when the Elder Law Section didn't exist. Although to many it seems we have "always" been here, it is surprising how young our section really is. The Florida Bar's Committee on the Elderly was founded in July 1991 with 45 inaugural members. Generationally, this would mean our section is actually a millennial! One year later, led by Joseph W.N. Rugg as chair, the section boasted more than 600 members and in May 1992 published the section's first newsletter aptly titled *The Elder Law Section Newsletter*.

That inaugural newsletter proudly included the headline that elder law had finally "come of age" in Florida. The chair touted that the section's 14 newly established committees were working on "no less than 40 projects, each of which can have significant impact on senior citizens in Florida." Committee chairs were a virtual who's who of the founding matriarchs and patriarchs of elder law in Florida, to include Jerome Ira Solkoff, Charlie Robinson, Rebecca Morgan, Richard Milstein, Phil Bauman, Ray Parri, Ken Rubin, Russell Carlisle, and Charlotte Brayer.

Articles included topics we continue to see today, such as homestead, guardianship, and nursing home litigation, and also included period-relevant topics such as planning for income in excess of the income cap (remember, this was prequalified income trusts days) with a reference to a "new" case from Colorado allowing "Miller" trusts that may be helpful in Florida. The newsletter also included a roster of every member of the Elder Law Section, including future leaders Rebecca Berg, Ed Boyer, Linda Chamberlain, Michael Connors, Sheri Kerney, Len Mondschein, Julie Osterhout, Steve Quinnell, Alice Reiter, and Ira Wiesner, among others.

I wish I had the other newsletters from that inaugural year, but my next copy isn't until Vol. III, No. 2 (Winter 1995) where the headline confirms "Qualified Income (Miller) Trust Finally Implemented" and includes an article on the recent release of the Medicaid Manual on OBRA '93.

Today we are a section of more than 1,700 members, which places our section as the ninth largest among the Bar's 21 substantive sections (keeping in mind that the eight ahead of us have been around an average of 51 years!). Although many things have changed over the years, one has not—it continues to be the members who volunteer their time and talent to advocate for our clients and our practices and to mentor future leaders who are the absolute heart and soul of our section and true champions for the elderly and disabled in Florida.

We have more than 30 members who volunteered to chair one or more of our 20 substantive and administrative committees. These individuals continue to work on projects "each of which can have significant impact on senior citizens in Florida." Through

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the collaborative efforts with our partner in elder law, the Academy of Florida Elder Law Attorneys, the Joint Public Policy Task Force for the Elderly and Disabled has become a major player in Tallahassee, both administratively and legislatively. Although we may be the younger millennial sibling of the larger Bar sections, we have developed a very loud and respected voice on behalf of the clients we serve.

Although elder law may have "come of age" in 1992, I firmly believe that the Elder Law Section has "come of age" in 2019! It is my distinct privilege to stand on the shoulders of my predecessors and to serve as your chair for the next year. I am very proud of everything we have accomplished but recognize that we will face new challenges in the years to come.

The baby boomer wave is coming! There are an estimated 77 million baby boomers, with more than 10,000 turning 65 every day. As these boomers enter the long-term care continuum, it will create an inevitable strain on resources (both theirs and the government's) and will increase the importance that we remain vigilant to help our clients plan for their future needs and hold the government accountable when we see proposed cutbacks in government programs.

Although there will be inevitable challenges, we as a section have never been positioned better to face these challenges head-on. I look forward to continuing the legacy of my predecessors and encourage each and every one of our members to become more involved so your voice can be added to the collective. Together we will continue to be the champions for the elderly and disabled in Florida!

Visit the Elder Law Section on Facebook

We are happy to announce that the Elder Law Section has created a Facebook page. The page will help promote upcoming section events as well as provide valuable information related to the field of elder law.

Part of the section's mission is to "cultivate and promote professionalism, expertise, and knowledge in the practice of law regarding issues affecting the elderly and persons with special needs…" We see this Facebook page as a way of helping to promote information needed by our members.

We need your help. Please take a few moments and "Like" the section's page. You can search on Facebook for "Elder Law Section of The Florida Bar" or visit *facebook.com/FloridaBarElderLawSection/*.

If you have any suggestions or would like to help with this social media campaign, please contact:

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Capitol Update

by Brian Jogerst

Session 2020: An early start this year

The 2020 Legislative Session will begin in January, meaning that House and Senate committees scheduled their meetings to begin in early September. The Elder Law Section is actively working on its legislative agenda for 2020. First, here is a brief follow-up on an important bill that passed during the 2019 Session:

Electronic notaries/electronic wills

As noted in previous updates, the House and Senate adopted House Bill 409 dealing with electronic notaries and electronic wills. During the 2017 and 2018 sessions, elder law opposed the bills due to the lack of protection for exploited and vulnerable adults. Prior to the 2019 Session, working closely with Senator Jeff Brandes (R-St. Petersburg), Representative Danny Perez (R-Miami), and the proponents of the bill, the following issues were resolved:

- Clerks of court must be added as qualified custodians of electronic wills.
- Production of a complete, uninterrupted, and unedited video and if the video cannot be produced, the burden of proving the documents shifts to the proponent of the document.
- Removing super powers from remotely witnessed durable powers of attorney.
- Vulnerable adults are not eligible to execute powers of attorney or electronic wills.
- Witnesses of electronic documents must be in the United States.

In addition to the above, additional questions were successfully secured that must be asked to provide further safeguards for all individuals.

Elder law supported the bill adopted by the Legislature and encouraged Governor DeSantis to sign it, which he did on June 7, 2019 [Chapter 2019-71].

We remain grateful to both Senator Brandes and Representative Perez for working closely with us.

2020 legislative issues

The Elder Law Section's legislative and substantive committees are actively reviewing legislative proposals. The following is a brief overview of issues under discussion. A more detailed report will be provided in the winter edition of *The Elder Law Advocate*.

Florida Guardianship & Protective Proceedings Uniform Jurisdiction Act. Florida is one of only four states that have NOT adopted a version of the Uniform Adult Guardianship Jurisdiction Act. Last session, Senator Joe Gruters (R-Sarasota) and Representative Wyman Duggan (R-Jacksonville) filed a tailored version of the Uniform Act legislation. This issue may return for the 2020 Session. Florida is widely recognized as a leader in adopting laws to prevent exploitation and to protect Florida's vulnerable adults, yet those protections are eroded when they cross the state line.

Financial exploitation/exploiter disinheritance statute. Building on exploitation legislation adopted during the 2018 Legislative Session, the Elder Law Section is crafting legislation to prohibit an heir from receiving an inheritance if he or she commits exploitation of the decedent. The following scenario has played out for too long in our state: Vulnerable adults are exploited and their money is stolen, but the exploiters receive an inheritance after their bad action. We continue to review potential legislative language to provide adequate safeguards for vulnerable and exploited adults.

Financial exploitation injunction/glitch bill. As many recall, elder law worked closely with Senator Kathleen Passidomo (R-Naples) and Representative Colleen Burton (R-Lakeland) during the 2018 Session to adopt legislation creating a 15-day injunction to freeze accounts and assets to prevent money from being stolen and diverted. While we were pleased the bill passed during the first session and was signed into law, the new law limits the filing of an injunction *only if the exploited person consents*. Bill language is being drafted to permit a person with a power of attorney to file the injunction also.

Vulnerable adults/security dealers. For the past two sessions, legislation was filed—and not adopted by the Legislature—designed to give security dealers the ability to place a temporary hold on transactions if they suspect exploitation. While elder law supports the overall goal to protect vulnerable investors/adults, concerns have remained about safe harbor provisions in the bill that elder law believes gives unwarranted protections to "rogue dealers" who

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inappropriately prevent the transfer of funds to a new dealer. Elder law is again actively working with the proponents of the bill for the upcoming session to find an acceptable resolution.

Surviving successors/small accounts. Also for the past two sessions, legislation was filed—but not adopted—to permit a decedent's survivors to access funds in the decedent's account up to $10,000 per institution. Under the terms of the bills, no dispersal could happen for up to two years; however, elder law was concerned that the provisions of the bill apply to people who pass away *with or without a will*, which could ignore someone's desire for disposal of their assets. Elder law will also be actively working with potential sponsors and proponents on this legislation for the 2020 Session.

Medicaid retroactive eligibility. Prior to the 2018 Legislative Session, Medicaid recipients had three months to submit their applications and supporting documentation to secure Medicaid eligibility and benefits. During the 2018 Legislative Session, the Legislature reduced Medicaid retroactive eligibility. Initially the discussion centered on reducing the time from 90 days to 30 days, but the final budget agreement reduced retroactive eligibility from 90 days to the beginning of the month of application. Federal CMS approved Florida's change for one fiscal year, and the Legislature extended the policy during the 2019 Session for one additional year—with a study to be conducted with provider groups before the next session. As such, this issue will be considered again during the upcoming session.

Legislative Committee

With the ever-expanding legislative agenda, the Elder Law Section has increased the number of legislative co-chairs from two to three.

The Legislative Committee meets *every other* Friday prior to session and then *every* Friday during session. If you want to participate on a substantive committee and also review/comment on the bills that are filed, please contact the co-chairs of the ELS Legislative Committee:

Shannon Miller
shannon@millerelderlawfirm.com

Debra Slater
dslater@slater-small.com

Travis Finchum
travis@specialneedslawyers.com

Finally, we have enjoyed success on legislative issues by working with legislators and providing feedback to them, as well as by testifying at committee hearings. We are grateful for the grass roots support we have received and for the difference it makes when working with legislators.

You can also help by working with your local legislators and being a local resource to them. If you do not know your legislator, we remain willing to help facilitate an introduction with the legislator and his or her staff.

***Brian Jogerst** is the president of BH & Associates, a Tallahassee-based governmental consulting firm under contract with the Academy of Florida Elder Law Attorneys and the Elder Law Section of The Florida Bar for lobbying and governmental relations services in the State Capitol.*

The treatment of ABLE accounts in HUD-assisted programs

by Howard S. Krooks

By now, most of us are (or should be!) familiar with ABLE accounts and the many benefits these accounts provide by protecting income and assets for purposes of determining a person's eligibility for SSI and Medicaid benefits. But what about the individual's eligibility for and continued occupancy of government housing under certain federal means-tested programs administered by the U.S. Department of Housing and Urban Development (HUD)? The Achieving Better Life Experience Act[1] of 2014 provides that an individual's funds held in an ABLE account, as well as contributions to and distributions from ABLE accounts, are to be disregarded or excluded when determining an individual beneficiary's eligibility for HUD programs. Beyond the language of Section 103 of the ABLE Act, no further guidance was available to interpret how income and assets contributed to ABLE accounts might impact on HUD program benefits.

Until now, that is.

On April 26, 2019, the U.S. Department of Housing and Urban Development issued Notice PIH 2019-09 | Notice H-2019-06 (the Notice). The Notice lists all of the HUD-based programs to which ABLE account protections apply, such as Section 8 Housing, Public Housing, and the Housing Choice Voucher Program, to name a pertinent few.

Individuals are subject to an income test in order to become eligible for assistance under HUD programs.[2] According to the Notice, HUD counts all income from all services expected to be received by all family members, unless a specific exclusion applies. Since the ABLE Act creates a federally mandated exclusion for ABLE accounts as applicable to HUD programs, not only are all assets in the ABLE account excluded from the individual's household assets, but any actual or imputed interest will not be counted as income. In addition, distributions from an ABLE account are not considered income. Applicants for and recipients of HUD-based program benefits must be aware, however, that all wage income received is considered income even if the wages are deposited into an ABLE account.

One exception to the "rule of wages vs. income rule" discussed above is that pre-tax employee contributions to an ABLE account that are not deducted from wages are excluded as income.

If any third party (i.e., someone other than the ABLE account beneficiary) makes a contribution *directly to an ABLE account*, it will not be counted as income to the ABLE account beneficiary.

If a third party gives a one-time or recurring gift to the designated beneficiary of an ABLE account (not deposited directly to the ABLE account), such funds will count as income for HUD purposes. However, if the third party directly deposits those funds into the individual's ABLE account, it will not count as income.

Finally, the Notice states that rollovers from existing ABLE accounts to the individual's ABLE account are not counted as income to the individual.

Howard S. Krooks, JD, CELA, CAP*, is an elder law and special needs planning attorney practicing in New York and Florida. He is a past president of the National Academy of Elder Law Attorneys, a past chair of the New York State Bar Association Elder Law Section, and is secretary of The Florida Bar Elder Law Section.*

Endnotes

1 Public Law No: 113-295 (12/19/2014).

2 For specific information regarding income limits by state, visit https://www.huduser.gov/portal/datasets/il.html (accessed August 7, 2019).

It is official – Florida law authorizes creation and execution of electronic wills

by Horacio Sosa

After several years of deliberation and with the participation and input of the Elder Law Section, the Florida Legislature passed House Bill 409, which authorizes electronic legal documents, including the creation and execution of electronic wills. The bill, signed into law on June 7, 2019, by Governor DeSantis, will be effective on January 1, 2020.

What are electronic wills?

Under the new law, an electronic will is an instrument, including a codicil, executed with an electronic signature by a person, which disposes of the person's property on or after his or her death and includes an instrument that merely appoints a personal representative or guardian or revokes or revises another will. *See* Fla. Stat. Sec. 732.521(4) (2020). *Electronic signature* is defined as "an electronic mark visibly manifested in a record as a signature and executed or adopted by a person with the intent to sign the record." *See* Fla. Stat. Sec. 732.521(3) (2020).

How is an electronic will signed?

Like traditional wills, an electronic will must bear the signature of the testator. An electronic signature, defined above, satisfies this requirement. As for the requirement that individuals sign the electronic will in the presence of one another, this requirement may be satisfied by the witnesses being present and electronically signing by means of audio-video communication technology. *See* Fla. Stat. Sec. 732.522(2) (2020); however:

(a) The individuals must be supervised by a notary public;

(b) The individuals must be authenticated and signing as part of an online notarization session;

(c) The witness must hear the signer make a statement acknowledging that the signer has signed the electronic record; and

(d) The signing and witnessing of the will complies with the requirement of Fla. Stat. Sec. 117.285, which elaborates in detail the process of supervision by a notary public of the witnessing and signing of an electronic will. According to Fla. Stat. Sec. 117.285(d) (2020), the act of witnessing an electronic signature through the witness's presence by audio-video communication is valid only if, during the audio-video communication, the principal provides verbal answers to all of the following questions, each of which must be asked by the online notary public in substantially the following form:

1. Are you currently married?
2. Please state the names of anyone who assisted you in accessing this video conference today.
3. Please state the names of anyone who assisted you in preparing the documents you are signing today.
4. Where are you currently located?
5. Who is in the room with you?

Audio-video technology is defined as "technology in compliance with applicable law which enables real-time, two-way communication using electronic means in which participants are able to see, hear, and communicate with one another." *See* Fla. Stat. Sec. 117.201(2) (2020). To protect vulnerable adults from undue influence and exploitation, the new law prohibits the witnessing of the execution of an electronic will of a testator who is a vulnerable adult by audio-video communication technology. *See* Fla. Stat. Sec. 117.285(5)(g) (2020).

Self-proving electronic wills

Just as for traditional wills, electronic wills may be self-proved. *See* Fla. Stat. Sec. 732.523 (2020). An electronic will is self-proved if:

1. The acknowledgment of the electronic will by the testator and the affidavits of the witnesses are made in the same manner as self-proving a traditional will in accordance with Fla. Stat. Sec. 732.503 and are part of the electronic record containing the electronic will, or are attached to, or are logically associated with, the electronic will;
2. The electronic will designates a qualified custodian;
3. The electronic record that contains the electronic will is held in the custody of a qualified custodian at all times before being offered to the court for probate; and
4. The qualified custodian who has custody of the electronic will at the time of the testator's death certifies under oath that, to the best knowledge of the qualified custodian, the electronic record that contains the electronic will was at all times before being offered to the court in the custody of a qualified custodian and that the electronic will has not been altered in any way since the date of its execution.

What is a qualified custodian?

A qualified custodian is the person or entity that holds electronic records containing the electronic wills. *See* Fla. Stat. Sec. 732.524 (2020).

Qualifications to serve as a qualified custodian

According to Fla. Stat. Sec. 732.524 (1) and (2) (2020), to serve as a qualified custodian of an electronic will, a person or entity must:

(a) Be domiciled or incorporated in Florida;

(b) Regularly employ a secure system and store in such secure system electronic records containing:
1. Electronic wills;

2. Records attached to or logically associated with electronic wills; and

3. Acknowledgments of the electronic wills by testators, affidavits of the witnesses, and the records which pertain to the online notarization; and

(c) Furnish for any court hearing involving an electronic will that is currently or was previously stored by the qualified custodian any information requested by the court pertaining to the qualified custodian's qualifications, policies, and practices related to the creation, sending, communication, receipt, maintenance, storage, and production of electronic wills.

Duties of the qualified custodian

A qualified custodian must provide a paper copy of an electronic will and the electronic record containing the electronic will to the testator immediately upon request. For the first request, the testator may not be charged a fee for being provided with these documents. Fla. Stat. Sec. 732.524(8) (2020).

A qualified custodian may not terminate or suspend access to, or downloads of, the electronic will by the testator, provided that a qualified custodian may charge a fee for providing such access and downloads. Fla. Stat. Sec. 732.524 (10) (2020).

Upon receiving information that the testator is dead, a qualified custodian must deposit the electronic will with the court. Fla. Stat. Sec. 732.524 (11) (2020).

A qualified custodian must at all times keep information provided by the testator confidential and may not disclose such information to any third party. Fla. Stat. Sec. 732.524 (12) (2020).

Who can have access to electronic wills?

Pursuant to Fla. Stat. Sec. 732.524 (2)(c) (2020), the qualified custodian of an electronic will shall provide access to or information concerning the electronic will, or the electronic record containing the electronic will, only:

(a) To the testator;

(b) To persons authorized by the testator in the electronic will or in written instructions signed by the testator with the formalities required for the execution of a will in this state;

(c) After the death of the testator, to the testator's nominated personal representative; or

(d) At any time, as directed by a court of competent jurisdiction.

Termination of the duties of a qualified custodian – Fla. Stat. Sec. 732.524(4) (2020)

A qualified custodian who at any time maintains custody of the electronic will may elect to cease serving as a qualified custodian by:

(a) Delivering the electronic will or the electronic record containing the electronic will to the testator, if then living, or, after the death of the testator, by filing the will with the court; and

(b) If the outgoing qualified custodian intends to designate a successor qualified custodian, by doing the following:

1. Providing written notice to the testator of the name, address, and qualifications of the proposed successor qualified custodian. The testator must provide written consent before the electronic record, including the electronic will, is delivered to a successor qualified custodian;

2. Delivering the electronic record containing the electronic will to the successor qualified custodian; and

3. Delivering to the successor qualified custodian an affidavit of the outgoing qualified custodian stating that:

a. The outgoing qualified custodian is eligible to act as a qualified custodian in this state;

b. The outgoing qualified custodian is the qualified custodian designated by the testator in the electronic will or appointed to act in such capacity under this paragraph;

c. The electronic will has at all times been in the custody of one or more qualified custodians in compliance with this section since the time the electronic record was created, and identifying such qualified custodians; and

d. To the best of the outgoing qualified custodian's knowledge, the electronic will has not been altered since the time it was created.

For purposes of making this affidavit, the outgoing qualified custodian may rely conclusively on any affidavits delivered by a predecessor qualified custodian in connection with its designation or appointment as qualified custodian; however, all such affidavits must be delivered to the successor qualified custodian.

As per Fla. Stat. Sec. 732.524(5) (2020), the testator also may terminate the qualified custodian. Upon the request of the testator, which is made in writing signed with the formalities required for the execution of a will in this state, a qualified custodian who at any time maintains custody of the electronic record of the testator's electronic will must cease serving in such capacity and must deliver to a successor qualified custodian designated in writing by the testator the electronic record containing the electronic will and the affidavit.

Liability of qualified custodians

The qualified custodian shall be liable for any damages caused by the negligent loss or destruction of the electronic record, including the electronic will, while it is in the possession of the qualified custodian. A qualified custodian may not limit liability for such damages. Fla. Stat. Sec. 732.524(9) (2020).

A qualified custodian shall, in accordance with Fla. Stat. Sec. 732.525(1) (2020).

(a) Post and maintain a blanket surety bond of at least $250,000 to secure the faithful performance of all duties and obligations required under this part. The terms of the bond must cover the acts or

continued, next page

omissions of the qualified custodian and each agent or employee of the qualified custodian; or

(b) Maintain a liability insurance policy that covers any losses sustained by any person who stores electronic records with a qualified custodian and their estates, beneficiaries, successors, and heirs which are caused by errors or omissions by the qualified custodian and each agent or employee of the qualified custodian. The policy must cover losses of at least $250,000 in the aggregate.

Receivership of qualified custodians – Fla. Stat. Sec. 732.525(2) (2020)

The attorney general may petition a court of competent jurisdiction for the appointment of a receiver to manage the electronic records of a qualified custodian for proper delivery and safekeeping if any of the following conditions exist:

(a) The qualified custodian is ceasing operation;

(b) The qualified custodian intends to close the facility and adequate arrangements have not been made for proper delivery of the electronic records in accordance with this part;

(c) The attorney general determines that conditions exist which present a danger that electronic records will be lost or misappropriated; or

(d) The qualified custodian fails to maintain and post a surety bond or maintain insurance as required in this section.

Probating electronic wills

According to Fla. Stat. Sec. 732.526 (2020), an electronic will that is filed electronically with the clerk of the court through the Florida Courts E-Filing Portal is deemed to have been deposited with the clerk as an original of the electronic will. A paper copy of an electronic will which is certified by a notary public to be a true and correct copy of the electronic will may be offered for and admitted to probate and shall constitute an original of the electronic will.

Destruction of electronic wills – Fla. Stat. Sec. 732.524(3) (2020)

The qualified custodian of the electronic record of an electronic will may elect to destroy such record, at any time after the earlier of the fifth anniversary of the conclusion of the administration of the estate of the testator or 20 years after the death of the testator.

Durable powers of attorney

In addition to authorizing electronic wills, House Bill 409 also made amendments to the Florida Power of Attorney Act. One of the main amendments imposes new conditions on the authority that requires separate signed enumeration or "super powers."

Pursuant to Fla. Stat. Sec. 709.2202 (2020), a power of attorney executed by a principal domiciled in Florida at the time of execution, that is witnessed remotely by a witness who is not in the physical presence of the principal, is not effective to grant the super powers. In addition, the new law prohibits the witnessing of the execution of a power of attorney of a principal who is a vulnerable adult by audio-video communication technology. *See* Fla. Stat. Sec. 117.285(5)(g) (2020).

Conclusion

This article outlines the main changes to the creation and execution of wills and powers of attorney imposed by House Bill 409. House Bill 409 contains many other provisions of which the practitioner must be familiar. For example, *online notarization* was added, which deals with all aspects of electronic notarization, including certificates to be used by a notary when performing electronic notarizations, electronic journals, electronic signatures, and electronic seals, as well as validation of identification, remote online notarization service providers, online notarization procedures, and other new concepts. In addition, a new provision was added to the Florida Evidence Code. Electronic records of qualified custodians are not hearsay. Finally, important changes were introduced to the statutes governing real estate conveyances.

Effective counseling and advocacy will require that elder law practitioners become familiar not only with the laws relating to electronic wills but also with the new online notarization laws and the other areas affected by House Bill 409. Thus, it is recommended that the practitioner read the bill in its entirety, which can be found in Chapter 2019-71 of the Laws of Florida.

Horacio Sosa, Esq.*, is a shareholder of Horacio Sosa PA in Davie, Florida, focusing his practice on estate planning, elder law, special needs planning, guardianship, and estate administration. He is a co-chair of the Estate Planning & Advance Directives, Probate Committee of the Elder Law Section and is a Florida Bar board certified specialist in elder law.*

Elder exploitation and equity indexed annuities, a tangled web!

by Matthew Thibaut and Nathan Flah

Many clients receive solicitations to attend "risk free retirement" seminars promoting the "benefits" of various annuity and insurance contracts. These types of promotions are commonplace in Florida. Recently, it seems as if indexed universal life insurance policies and equity indexed annuities have become extremely popular on the free-lunch circuit. An equity indexed annuity is an annuity that tracks an index (most commonly the S&P 500). The products have a "floor" and a "cap." The floor (typically 0%) acts as a stop loss, eliminating market losses below the floor. In exchange for not participating in losses, the product's cap ranges between 4% and 6% and allows the issuing company to keep any gains above that percentage. Floors are guaranteed; caps are not.

Also commonplace in Florida are the unfortunate stories of opportunistic brokers, primarily motivated by high commissions, leaving elderly clients in dire straits. Many financial services professionals and elder law lawyers hoped that recent changes to Florida Statutes, along with heightened industry attention to elder financial abuse and exploitation, would have changed the landscape. It hasn't been the case.

While the heightened focus and attention is a welcomed change, many victims of elder exploitation claims find that they are contractually obligated to arbitrate their cases with the Financial Industry Regulatory Authority (FINRA). Since March 2009 (the end of the financial crisis), there have been approximately 200 FINRA arbitration cases alleging some form of elder exploitation or abuse, and there have been only 19 specific findings of elder exploitation (eight cases in Florida and 11 in California).[1] It is foreseeable that these statistics will change as the public, investors, the industry, as well as arbitrators, judges, and juries address elder exploitation issues with an aging population, particularly in Florida.

Not all cases involving improper sales of annuity and insurance policies go to arbitration, however. Many cases must be brought in other arbitrable forums (including JAMS or AAA) as well as in state and federal court. For example, claims involving equity indexed annuities oftentimes must be filed in court. Many attorneys forego equity indexed annuity cases because the claim amount compared to the time and costs involved in pursuing such a claim, particularly in court, translates to an unattractive ratio. Stated differently, the opportunity cost is too high. In the past, many attorneys were not familiar enough with the products, and it left them advancing costs for high-priced experts who were learning as they went.

Equity indexed annuities are typically sold by effective salespeople who pitch only the positive aspects of the products, often showing the client having a guaranteed floor and a cap. Should the market go negative, clients' losses will never fall through the floor in exchange for limiting their gains on the upside via a "cap." All of this appears reasonable (and comforting) at a superficial level. The issuing company will keep all returns above the cap in exchange for the company absorbing all losses below the floor. Contingent on the issuing cap, this strategy may appear well-suited for most potential clients; because of this, there seems (again, on the surface) to be very little potential for an impactful claim.

Typically, upon further review of equity indexed products, the cap rate is guaranteed only for the first year. This material fact is not always properly disclosed to potential clients, and may support an elder exploitation claim. The advisor is usually correct in telling the client the annuity has a cap guarantee of "X%"; however, the advisor, either intentionally or due to lack of adequate training, omits material facts when failing to disclose that the cap rate guarantee expires after Year #1 along with surrender charges extending well beyond Year #1.[2] Terms like *cap rate minimums* are stated in every equity indexed contract, per regulations, and defense attorneys naturally revert to the contracts and sales literature in support of their defense. The reality, however, is that most customers rely upon the verbal representations from the cunning financial services professionals selling them the product, oftentimes quickly glossing over the paperwork to obtain the client's signature.

The difference between what the client currently has in the equity indexed annuity and what the client would have if the cap remained at the guaranteed level often opens up issues in these cases in a way that shifts the so-called opportunity costs in a more favorable manner for the client. In addition to this, finding the difference between what clients currently have in the annuity and what they would have if they simply invested in an exchange traded fund (ETF) of the index tied to the annuity may also increase the potential claim.

Damages associated with these types of cases can consist of the fees charged to access the annuity, the

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Elder exploitation ...
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net return between what the client would have made simply by purchasing the ETF and what was earned in the annuity, and what the client would have earned if the guaranteed cap for Year #1 remained for all years. Depending on the facts of a particular case, a thorough review should also be undertaken to determine whether an elder exploitation claim exists under Fla. Stat. § 825.103.[3] By thoroughly and accurately analyzing these cases, the opportunity cost of pursuing a claim may very well make sense. There are no free lunches …

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Nathan Flah *is principal with the fully independent insurance and planning firm of Flah & Company where he works as an advocate to bridge the growing disconnect he sees developing between American financial institutions and clients. He leverages his past experience in corporate America's largest life insurance company as its senior product designer and then its youngest, top rated regional vice president to dissect existing and to construct new plans (financial, insurance, and long-term care) that are sustainable and successful, and provide solutions for the betterment of clients.*

Endnotes

1 *See* www.finra.org/arbitration-and-mediation/arbitration-awards-online

2 Cap rates usually have a guaranteed minimum amount of 3%, and the issuing company has the contractual right to drop the rate to the minimum after Year #1.

3 Fla. Stat. § 825.103 has a prevailing party attorneys' fee provision. Respondents in the FINRA context are keenly aware that FINRA arbitration panels rarely award claimant damages based on an elder exploitation theory, and thus generally do not attribute a high degree of litigation risk when facing such claims, a trend that may shift in the claimant's favor in the future.

SECTION NEWS

Mark your calendar!

UPCOMING EVENTS

2019 Elder Law Section Annual Retreat
October 3-5, 2019
The Meritage Resort & Spa
Napa Valley, California

2020 Elder Law Essentials
January 16, 2020
Loews Portofino Bay Hotel
Orlando

2020 Elder Law Annual Update & Hot Topics
January 17-18, 2020
Loews Portofino Bay Hotel
Orlando

UPCOMING ELDER LAW EXECUTIVE COUNCIL MEETINGS

Friday, October 4, 2019
The Meritage Resort & Spa
Napa Valley, California

Thursday, January 16, 2020
Loews Portofino Bay Hotel
Orlando

SECTION NEWS

Elder Law Section installs new officers and celebrates members' achievements during the Annual Florida Bar Convention

The Elder Law Section held its annual executive council/membership meeting and awards presentation on June 28 in conjunction with the 2019 Annual Florida Bar Convention in Boca Raton. The ELS was well represented by its members who made presentations during the convention, and we thank them for their hard work and contributions. We also heard from Governor Ron DeSantis, guest speaker at the annual Judicial Luncheon that honors Florida's judiciary.

The ELS Executive Council honors outgoing Chair Jason Waddell with a standing ovation.

Governor Ron DeSantis speaks to Florida Bar members during the Judicial Luncheon at the Annual Florida Bar Convention.

Outgoing Chair Jason A. Waddell passed the gavel to Incoming Chair Randy C. Bryan, who will lead the section for the 2019-20 year. We thank Jason for his dedication, service, and leadership of our section. Congratulations to Randy and our new Executive Committee:

Randy C. Bryan, Oviedo
Chair

Steven E. Hitchcock, Clearwater
Chair-Elect

Carolyn Landon, West Palm Beach
Vice Chair, Administrative

Victoria E. Heuler, Tallahassee
Vice Chair, Substantive

Howard S. Krooks, Boca Raton
Treasurer

William A. Johnson, Melbourne
Secretary

Jason A. Waddell, Pensacola
Immediate Past Chair

Outgoing Chair Jason Waddell passes the gavel to incoming Chair Randy Bryan.

ELS presents annual awards

Recognizing deserving members for their service and contribution to the elder law profession is a favorite tradition of the Elder Law Section.

Congratulations to the 2019 award recipients:

Charlotte Brayer Public Service Award: Shannon Miller* for her strong advocacy efforts over the past year. Whether volunteering her time to speak with news outlets (of which there were many), in Tallahassee before the Legislature, or in the courtroom, Shannon's efforts stood out as a role model to her peers of the work our section seeks to accomplish for the elderly and persons with special needs.

ELS Member of the Year: Travis Finchum for his work as liaison between the Elder Law and the Real Property, Probate, and Trust Law sections, with special recognition of his legislative advocacy on the e-will and e-notary bills.

Lifetime Achievement Award: Sam Boone for his many years of support, dedication, mentorship, and wisdom provided to the Elder Law Section. This is a recognition well deserved as Sam's dedication and devotion to the section are exemplary.

Legislator of the Year: Representative Wyman Duggan* for his tireless support and dedication during the 2019 Legislative Session working with the Elder Law Section on the uniform guardianship legislation to protect Florida's vulnerable adults.

Outstanding Service Awards were presented to

- Deb Slater and Victoria Heuler for their work putting together legislation "on the fly" concerning the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.
- Danielle Faller for coordinating the Veterans Administration CLE, working through logistics and planning as a brand new co-chair of the CLE Committee.
- John Clardy and Heidi M. Brown for their work as co-chairs of the Medicaid Committee, especially with regard to the fight in the Legislature and beyond against retroactive Medicaid.

*Unable to attend the awards presentation

Victoria Heuler and Deb Slater pose with their Outstanding Service Awards.

Jason Waddell presents Sam Boone with the Lifetime Achievement Award.

Jason Waddell (at right) presents Medicaid Committee Co-Chairs Heidi Brown and John Clardy with the Outstanding Service Award.

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ELS presents annual awards

Jason Waddell presents Travis Finchum with the Member of the Year Award.

Carolyn Landon, Collett Small, and Alison Hickman are all smiles during The Florida Bar Membership Luncheon.

Collett Small introduces section member Eneami Bestman, who will represent the section as a member of The Florida Bar Leadership program.

Shannon Miller, recipient of the 2019 Charlotte Brayer Public Service Award

Representative Wyman Duggan, ELS Legislator of the Year

Jason Waddell presents Danielle Faller with the Outstanding Service Award.

SECTION NEWS

Committees keep you current on practice issues

Contact the committee chairs to join one (or more) today!

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PRACTICE MANAGEMENT

Best practice tips for law firm mobile security

Part 2: ADA compliance and your law firm's website

by Audrey Ehrhardt

ADA compliance in business websites throughout Florida, and across the nation, is becoming not only more relevant but a necessity as we see increasing litigation against businesses over their websites. Website accessibility lawsuits center on the fact that all, or a portion of, the business website or app is inaccessible to the disabled. We are watching as the filing of website accessibility lawsuits rises dramatically. While in 2017 we saw these types of lawsuits increase by only 17%, in 2018 we saw them increase by 181% (Hudgins, 2019) (Behnken, 2019).

At their core, these lawsuits focus on the fact that the websites were not coded in such a way to ensure that they would be able to work with assistive tech. This means that these business websites and apps are, essentially, in all or in part not accessible to disabled persons. Although it may appear at first to be an unusual question, ask yourself: Could someone who cannot see or hear interact with your website?

Most of us understand and have taken the steps we need to take in order to ensure our physical location is ADA friendly, but what about our law firm's website? From parking spaces and clear, wide entryways to employee training on relay communication and braille documents, our law practices are friendly to disabled persons. ADA compliance in web-centric technology is, in many ways, the next step in ensuring disabled persons have the same rights as nondisabled persons. Critics claim, however, that these actions result in "'legal extortion,' now targeting small business owners who feel they are 'sitting ducks' for ADA lawsuits regarding their websites that are not accessible to some with disabilities" (Behnken, 2019).

Do small law firms, or law firms that have fewer than 15 employees, fall under the ADA rules? The answer is yes. Law firms fall under ADA Title III, Public Accommodations and Commercial Facilities. Under the ADA rules, "Title III prohibits discrimination on the basis of disability in the activities of places of public accommodations (businesses that are generally open to the public and that fall into one of 12 categories listed in the ADA, such as restaurants, movie theaters, schools, day care facilities, recreation facilities, and doctors' offices) and requires newly constructed or altered places of public accommodation—as well as commercial facilities (privately owned, nonresidential facilities such as factories, warehouses, or office buildings)—to comply with the ADA Standards" (U.S. Department of Justice, Civil Rights Division).

Interestingly, as of the writing of this article, Title III has not been updated to include websites, but it may only be a matter of time. For example, from a worldwide perspective, in September of last year, Europe updated its EU Web Accessibility Directive, which made "all public sector websites and applications in EU member states implement, enforce and maintain accessibility standards or risk fines and legal penalties" (Berg, 2019).

How do you protect yourself? What standards apply? Are they different as you consider a mobile user of your website versus a desktop user? Although there is no bright line legal rule or standard we can follow right now, we have a lot of guidance to rely on as these cases continue to evolve. We also have the Web Content Accessibility Guidelines (WCAG 2.0 and 2.1), which all website providers should be factoring into the equation in the ongoing operation and support of your law firm (W3C Web Accessibility Initiative).

You need to understand, first, that ignoring this issue is not the defense you want for your law firm's website and, second, that there are many steps you can take right now on your website to ensure it is "reasonably" accessible. You can start by asking yourself or your website provider these six example questions regarding your website:

1. Is your law firm's website optimized for voice search?
2. Is your law firm's website metadata built out?
3. Is your law firm's website image coding complete?
4. Is your law firm's website optimized for screen reading software?
5. Are your telephone numbers optimized with click to call tech?
6. How are new webpages handled when they are added each week to ensure ADA compliance?

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ADA website compliance . . .
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The issue also comes home as we think about your employees. For disabled individuals who are not seeking to be plaintiffs in a case against your law firm and who are, instead, acting as any potential client would, bear in mind they may call your law firm using a relay system or a friend who is helping them make the call. On the practice management side of your law firm, are you training your front desk employees to be ready to act compassionately and efficiently for a disabled client? If not, bear in mind that it could make all the difference in a website accessibility lawsuit.

As we continue to think through this challenge in assistive tech, know that website disability compliance is not a one-time solution. Similar to anything on your law firm's website, all of your content is at risk when there is a significant update to the internet. What could be coded correctly for performance today may very well be obsolete tomorrow, or five minutes from now, when there is a change in the multibillionaire world of search engine research and development. Although we often think of these changes in terms of website performance, such as in your Google rankings, or cyber security, now we must think about them in terms of ADA compliance as well. If this article raises more questions than it answers, or if you want an ADA compliance audit on your website, do not wait to let me know!

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Call for papers – *Florida Bar Journal*

Randy C. Bryan is the contact person for publications for the Executive Council of the Elder Law Section. Please email Randy at *randy@hoytbryan.com* for information on submitting elder law articles to The Florida Bar Journal for 2019-2020.

A summary of the requirements follows:

- Articles submitted for possible publication should be MS Word documents formatted for 8½ x 11 inch paper, double-spaced with one-inch margins. Only completed articles will be considered (no outlines or abstracts).
- Citations should be consistent with the Uniform System of Citation. Endnotes must be concise and placed at the end of the article. Excessive endnotes are discouraged.
- Lead articles may not be longer than 12 pages, including endnotes.

Review is usually completed in six weeks.

Tips & Tales

by
Kara Evans

Who is your inventory attorney?

The tale: A very good friend of yours calls you in distress. Her husband, with whom you attended law school, has died. His death was unexpected, and his home office is cluttered with client files and papers. She believes that his Interest Only Trusts Accounts (IOTA) account contains quite of bit of money that was earned retainers or settlement fees and should be paid to his estate, which in turn will be paid to her. She begs desperately for your help.

The tip: The Rules Regulating The Florida Bar discuss the appointment of an inventory attorney in Rule 1-3.8 as follows:

> (a) Appointment; Grounds; Authority. Whenever an attorney is suspended, disbarred, becomes a delinquent member, abandons a practice, disappears, dies, or suffers an involuntary leave of absence due to military service, catastrophic illness, or injury, and no partner, personal representative, or other responsible party capable of conducting the attorney's affairs is known to exist, the appropriate circuit court, upon proper proof of the fact, may appoint an attorney or attorneys to inventory the files of the subject attorney … and to take such action as seems indicated to protect the interests of clients of the subject attorney.

Section (e) of this rule states that "Each member of the bar who practices law in Florida **shall** designate another member of The Florida Bar who has agreed to serve… The designated member shall not be under any obligation to serve as inventory attorney" (emphasis added).

Your friend's husband was a sole practitioner who had not designated an inventory attorney. After many inquiries to the Bar, you discover that no one else is willing to act. As a favor to your friend, you agree to act as the inventory attorney. Although The Florida Bar assists you by providing an Inventory Attorney Manual with sample forms and a checklist (found at https://www.floridabar.org/member/inv-atty/), nothing could prepare you for this particular case.

First, you investigate his home office only to find that he has kept every file on every client since he graduated law school some 30 years ago. While The Florida Bar will provide a list of open court cases, not every case is filed in court. Some transactional cases, such as creating corporations, estate planning documents, and mediating disagreements between partners or landlord tenant disputes, are among the files. The inventory attorney does not automatically become counsel to these orphan clients. The job actually entails closing out the practice by notifying clients and taking steps to return client files and funds to the appropriate parties.[1] Still, the inventory attorney is not prohibited from agreeing to such representation should a client wish to engage him or her.[2]

Once you get the files in order, you need to investigate the IOTA account. The bank cooperates by providing you all statements and records of deposits, but it will be your job to reconcile which payments came from which deposits and which funds are retainers and which belong to a client or a vendor. Since your friend has no money, you will be doing most of this work gratis.

While going through this process, you reflect on your own practice. Have you appointed an inventory attorney? Is your office in such disarray that another individual would be unable to figure out which files remain open and which are closed? Is your IOTA account in good standing, and is it easy to decipher whose funds are where? Do you keep good enough records?

The above example is not fictional. Unfortunately, it is based on a real-life experience. While an inventory attorney for a member of a larger firm is unlikely to face such a challenge, many elder law attorneys are sole practitioners and may not keep great records or have an assistant who could help an inventory attorney sift through and decipher the details of a small law office. It may be time for all small office and sole practitioners to look around at their office practices and procedures, make a plan, and appoint an inventory attorney. Just in case …

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Endnotes

1. https://www-media.floridabar.org/uploads/2018/09/Inventory-Attorney-Manual.pdf
2. *Id.*

TAX TIPS

by Michael A. Lampert

Documentary stamps and transfers between spouses

Recently the Elder Law Listserv has had a series of comments regarding documentary stamps on transfers between spouses. This article briefly covers this topic as well as provides an update on current law.

Florida Statutes § 201.02 imposes a documentary stamp tax on interspousal transfers of encumbered real estate. When one spouse adds the other to a deed on encumbered real estate, this often leads to the surprise documentary stamp tax result. In that case, a tax would be imposed on one-half of the mortgage note balance.

There has long been an exception in the law for conveyances incident to divorce. Therefore, the tax result was better if the client got divorced. The Tax Section and other sections of The Florida Bar, the Florida Land Title Association, and other groups advocated for a change to the law, in what I refer to as the "Defense of Marriage Doc Stamp Act."

Last year the Legislature made the change—sort of. Fla. Stat. § 201.02(7) was added to exempt the conveyances of homestead property between spouses, even if the property is encumbered. That change, enacted July 1, 2018, was limited to transfers within one year of marriage. The reasoning for the time limit was that removing the one-year limit would cost the State too much revenue.

Good news: The Florida Legislature decided that removing the one-year limit would not cost that much in revenue after all. CS/HB 7123 removed the one-year limitation. The governor signed the bill on May 15, 2019, and it became effective July 1, 2019.

Note: This new law only applies to homestead property, not to *non*-homestead property, transferred between spouses.

Note: The law still does not apply to gift transfers of encumbered real estate to others, such as to children.

Practice tip: If a lender requires the spouse, who is being added to the deed, to sign on to the mortgage note, a surtax may apply.

Taxpayer First Act of 2019

Congress enacted the Taxpayer First Act of 2019 (TFA). This Act became effective July 1, 2019, although some provisions have a later effective date. The TFA is almost completely focused on IRS procedures and operations. It has been described as the largest change to IRS structure and procedure in 20 years.

The TFA has provisions addressing broad areas. Some of the provisions of particular interest to elder lawyers include:

- Renaming the Appeals Office to the Independent Office of Appeals under a chief of appeals. Certain other procedural changes will, it is hoped, enhance taxpayer appeal rights within the IRS.
- The secretary of the Treasury has one year from the date of enactment to submit to Congress the IRS's Customer Service strategy. This may include co-locating with other federal services, increased self-service availability, and the use of best practices such as those used in the private sector. Interestingly, the Act even addresses customer service training and materials that are to be "easily understood" by IRS customer service employees.
- Consolidation and some enhancement of innocent spouse/injured spouse provisions to address joint liability situations between spouses.

Applicability for elder lawyers: This provision clarifies and codifies the ability to argue in Tax Court cases where one spouse seeks to be relieved from joint tax liability from a spouse, particularly a former or deceased spouse. It also enhances the ability to obtain a refund of taxes paid by the "innocent spouse" but applied to the other spouse's tax liability.

- Treasury is to submit to Congress a plan to comprehensively redesign the IRS's organization. This plan is to prioritize taxpayer services and to combat cybersecurity and other threats to the IRS.
- Funds to be made available for a Volunteer Income Tax Assistance Matching Grant program.

Applicability for elder lawyers: The grants may assist lower income and underserved populations to obtain free tax preparation services.

- The IRS may also provide information to taxpayers regarding the availability of Qualified Low-Income Taxpayer Clinics.

Applicability for elder lawyers: Some clients need, but truly cannot afford, competent tax counsel.

- Change in "music on hold" to instead provide helpful information to the caller, which may include information on scam avoidance, identity theft, and similar issues.
- Regulations to be enacted to create procedures to address funds that were incorrectly not transferred to the taxpayer's financial account.

Applicability for elder lawyers: Currently payments that are incorrectly deposited to the wrong taxpayer, such as tax refunds, can be very difficult to trace and correct. It is hoped that this new law and the regulations to be enacted will make it easier to find out the status of, and cause a refund to, the client of funds that may have been improperly sent to someone other than the client. The IRS is even supposed to coordinate with financial institutions.

- Further improvement regarding cybersecurity and identity theft, and creation of an Identity Protection Personal Identification Number (IP PIN) program. The new law expands the availability of IP PINs.

Applicability for elder lawyers: It is hoped that these increased efforts will help to reduce identity theft, for which elder clients are particularly at risk. The IRS is also expected to have a single point of contact for identity theft cases.

Possible challenge: With the existing IP PIN program, it is not uncommon for taxpayers to lose or forget their IP PIN. This creates additional challenges in identifying taxpayers when they file their income tax return.

- Increased civil and criminal penalties for improper disclosure or use of information by tax return preparers.
- Online preparation and filing for 1099 forms. Unfortunately, the implementation deadline for this is Jan. 1, 2021.
- Income Verification System (IVS) enhancement. Primarily utilized in loan transactions, currently there are procedures where with the taxpayer's consent, a financial institution can verify income or other items. The new law directs the IRS to implement a fully online program (for a fee) to provide the information. The new law also restricts the use of the information received under the IVS program to the purpose for which it is requested. Before the TFA, the information requested could be used for other purposes.

Applicability for elder lawyers: The enhancement may simplify procedures for a client obtaining loans and also reduce the amount of targeted marketing that uses otherwise confidential IRS data.

- Increased ability to pay taxes by credit card directly rather than through a private gateway; however, the taxpayer still has to pay the credit card fee.
- Private debt collectors: The new law limits private debt collectors hired by the IRS from collecting from taxpayers who derive substantially all of their income from SSDI or SSI or have adjusted gross income not more than 200% of the applicable poverty level.

Applicability for elder lawyers: This should reduce the push to collect from clients who really cannot afford to pay anything, yet are bullied into paying by the private debt collector.

How is the TFA paid for? As a practical matter, the IRS is being asked to do more without an increase in its budget. By increasing the minimum failure-to-pay penalties (one of the few non-IRS procedural changes in the TFA), this Act will, by Congressional standards, be paid for.

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