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WEALTH PRESERVATION AND TAX PLANNING ALERT

ESTATE PLANNING IN THE INFORMATION AGE

by Jerome L. Wolf, Esq.

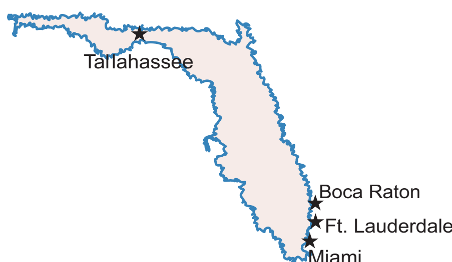
MARSHALLING THE ELECTRONIC ACCOUNTS

The Sunday Business Section of the January 2, 2005, *New York Times* contained an article ("After Writing a Will, You Still Have I's to Dot") that described a situation where a daughter was required to travel from her home to Washington, DC to her mother's house in Menlo Park, California, to help locate her mother's stock certificates and bonds. After three days of searching, they were finally found behind an antique organ in the family room. The "bad news" is that it took three days to find the documents; the "good news" is that they were findable.

However, as our lives and the lives of our parents (and even our grandparents), become inextricably entwined in the worldwide web, a new problem has evolved. The promotion and growing acceptance of on-line banking and bill paying systems, as well as on-line access to brokerage accounts and trading, means that many people no longer have stock certificates, bonds, or even "hard" copies of account statements in which their ownership interests are reported.

If in the reported case the mother could not recall her password or account access credentials, and if the daughter was never made aware of their existence, it is not inconceivable that the mother's assets could never be recovered.

Many of our clients have availed themselves of our Financial Planning Questionnaire, which can be used to assist in the organization of financial affairs and the preparation of an asset and liability statement; many others maintain their financial records within their own computerized or hard copy filing system.



In any case, however, it is important that these financial questionnaires and databases include a list of all electronic accounts and all the passwords required to gain access to information needed to manage the account owner's affairs or administer his estates. For purposes of security, this information can be deposited and custodized with the original Will, for example, to avoid unintended disclosure or access.

> *"Financial questionnaires and databases must include lists of electronic accounts and passwords to gain access to information."*

RIGHTS OF PRIVACY UNDER HIPAA

Recent amendments to HIPAA (the Health Insurance Portability and Accountability Act of 1996) were intended to ensure an individual's right to privacy with respect to his or her medical information. These new Privacy Rules describe the variety of circumstances in which an individual's medical records may be disclosed to persons other than such individual, establish safeguards to ensure healthcare providers protect the privacy of medical records, by imposing civil and criminal penalties against violators of these patient rights. Consequently, there are now established national standards to protect an individual's medical records and other personal health information and to determine when the disclosure of such information is "authorized" or must be "consented to". Thus, an authorization must be signed by an individual for the use or disclosure of his medical records when the disclosure to the third party is not related to the patient's treatment or health care operations.

This becomes an issue for those who have executed Trust documents or Durable Powers of Attorney which provide for the appointment of a successor fiduciary when the then-serving fiduciary becomes "incompetent" or "incapacitated". Often - times, the determination of "incapacity" is to be established under the terms of the document in language similar to "the evaluation of at least two physicians attending" such fiduciary.

Unfortunately, under the new HIPAA Regulations, those two physicians may not be authorized to disclose their evaluations to parties other than the fiduciary who is claimed to be incapacitated. Consequently, it may be necessary to revise or amend all estate planning-related documents under which certain circumstances change upon the determination of "incapacity" to provide the authorization now required under HIPAA.

"SPRINGING" POWERS OF ATTORNEY

Under the common law, and codified in the statutory law, a person (the "principal") can nominate another person (the "agent" or "attorney-in-fact") to act in the principal's place and on the principal's behalf. The common law, or general, power of attorney expires when the principal is no longer capable or deemed capable of extending authority to act on his behalf.

For precisely the reason that the power expired upon the principal's incapacity, the time when the need for the agency relationship is most acute Florida adopted the "durable" power of attorney, which survives or "endures" beyond the principal's incapacity and therefore can be utilized to continue the management of the principal's assets and provides an informal and inexpensive alternative to a guardianship.

Until recently, a Durable Power of Attorney became effective immediately upon its valid execution. Thus, the attorney-in-fact was legally entitled to undertake and implement financial transactions on behalf of the principal, even if the principal was of full capacity and capable of handling his own financial affairs. However, Florida has now adopted legislation recognizing a "springing" power of attorney – i.e. it only becomes operational upon a determination of the principal's incapacity. The determination of incapacity for these purposes must be made and evidenced by the affidavit of a licensed physician. A third party may rely upon the authority granted under the "springing" power of attorney only after receiving the affidavit of the attorney-in-fact acknowledging the validity of the power of attorney instrument. ■

This is an advertisement in accordance with The Florida Bar Rule 4-7.4.

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JEROME L. "JERRY" WOLF

BOARD CERTIFIED IN

WILLS, TRUSTS, & ESTATES

Mr. Wolf has practiced in the areas of Trusts and Estates since the inception of his professional career as a Financial Planner with the U.S. Trust Company of New York. Since then, Mr. Wolf has spent his entire career in private law practice in New York City and then Florida.

Mr. Wolf is a knowledgeable practitioner and has served as a speaker in the Florida Bar's Continuing Legal Education Program, as a panelist on programs sponsored by the Florida Attorney/Trust Officer Liaison Conference, and as primary draftsman of revisions to Florida's Trust law (Chapter 737, Florida Statutes). Mr. Wolf has been awarded an "AV" rating by Martindale-Hubbell, and in May, 1993 was awarded the Annual Achievement Award by the Real Property, Probate and Trust Law Section of The Florida Bar for his outstanding effort and achievement on behalf of the Bar.

Mr. Wolf's major area of legal experience includes Estates and Trust, Probate, Estate and Financial Planning. He is a Board Certified Wills, Trust and Estates Lawyer by the Board of Legal Specialization and Education of The Florida Bar.

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