

# The Estate Analyst®

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## Elder Law Topics, 2006

*Medicaid Planning, Reverse Mortgages, Will Execution, Pet Trusts*

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Elder Law has developed into a niche specialty over the past 20 years. Experts attribute this development, in large part, to the general trend toward legal specialization. However, the rise in Elder Law occurred simultaneously with other changes that factor in as well.

The demographic bulge known as the baby boom is aging with boomers reaching the age when decisions are made about elderly parents.

Those elderly parents have longer life expectancies.

Advances in medicine resulting in new diagnostic tools and treatment methods mean that a brief stay in a modern hospital can be phenomenally expensive.

The cost of long-term nursing care can rapidly exhaust one's life savings.

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□ An increasing proportion of the population relies heavily on Social Security and Medicaid programs that anticipate future shortfalls and which are increasingly regulated and restricted.

Collectively, these factors have fueled the demand for specialized Elder Law planning to the point where the niche of Elder Law is already starting to evolve into sub-niches of Medicaid planning, age discrimination, elder abuse, etc.

Volumes are being written on the various technical issues of Elder Law, but let us focus our discussion here on several selected questions of current interest in the areas of Medicaid planning, reverse mortgages, will execution for those incapable of signing their name, and an area that has been transformed over the past decade—pet trusts.

## *Questions & Answers*

**Q: My father's house, the last of his assets, was placed in my name three years ago. Will he now qualify for Medicaid?**

A: Under the new laws, when someone applies for government coverage of long-term care, Medicaid will take into account substantial gifts of assets the applicant has made within five years. Thus, planning farther ahead is essential. These new provisions were included in the Deficit Reduction Act signed by President Bush on February 8, 2006.

If the applicant is eligible for Medicaid in part because of those gifts, before Medicaid will pay any benefits, that person must contribute an amount equal to those gifts toward their nursing home care. Clients already covered by Medicaid or who applied for coverage before Feb. 8, 2006 are not affected by the new laws.

**NOTE:** The new Medicaid rules also require that annuities held by the applicant must be modified to name the government as the sole beneficiary when the applicant dies.

**Q: What are the consequences of applying for Medicaid if someone is actually ineligible?**

A: The applicant will have to pay, up front, amounts transferred during the five-year look-back period. Periods of ineligibility apply as well.

*Note:* Two states have imposed an additional penalty for applying when ineligible in such circumstances. Courts have invalidated one such statute; Federal statutes generally preempt State

statutes in areas such as Medicaid, and here the Federal statute has established periods of ineligibility as the only penalty for early application. However, there is good reason to remain wary of new state requirements in this area.

**Q: In light of these changes, when is the right time to transfer assets out of a parent's estate?**

A: Going from a look-back period of three years to a five-year period is more than just a 66% increase. It is a quantum leap to a new level of thinking. An individual who is starting to show signs of needing help and who starts moving assets can often hold on to the status quo for a while and make do...so three years is an achievable goal. In contrast, five years is too long a period to have any confidence in the outcome.

**Q: How will current Medicaid legislation affect state laws on estate recovery?**

A: The way in which Medicaid is recovered from an estate already varies from one state to another. There is a trend toward stricter enforcement of estate recovery and differing policies on estate recovery will be implemented in different states.<sup>1</sup>

**Q: Will Medicare cover a hospital visit or a longer period of convalescence?**

A: Medicare-A is a federal hospital insurance program that is made available to those who are over 65 or disabled. There is no separate premium; the program is funded through payroll taxes. This program covers up to 100 days of "skilled" care (as opposed to "custodial" care) in hospitals or longer term care facilities per illness event. There is an optional plan, Medicare-B, which covers physician fees and other expenses. Other rules apply.

Starting January 1, 2006, individuals who qualify for Medicare will be able to purchase prescription drug coverage insurance from private companies. *Note:* If beneficiaries decide not to enroll in a drug plan when they are first eligible, they may pay a penalty if they choose to join later.

Because Medicare has strict limitations and does not cover everything, many people purchase "medigap" insurance to supplement Medicare.

**Q: Should I put my mother's house in my name?**

A: In the context of Medicaid planning, the answer would depend on the ability to comply with a five-year look-back provision. But there are many other

considerations as well. What is the respective wealth of the mother and the daughter? What transfer tax consequences would apply to the mother's estate? What capital gains tax would apply if the daughter sells the house in the future; would the daughter be better off inheriting the house with a stepped-up basis? What liabilities may attach to the daughter's assets?

**Q: What is a reverse mortgage?**

A: A reverse mortgage is a rising debt loan through which a homeowner-borrower receives advances secured by home equity. Various products exist. Under a one typical program, eligibility involves a borrower who is at least 62 years old and who owns or occupies the mortgaged home as a primary residence.

Reverse mortgages can provide funds for older homeowners to maintain a home, pay for daily living expenses, travel, etc. Note, however, that all reverse mortgages are not alike. The products are complex and expensive, and potential borrowers should be counseled on costs, options, alternatives and legal consequences.<sup>2</sup>

**Q: My husband can no longer sign his name but it is very important for him to have a will executed right away. If he signs with an "X," would the will be valid?**

A: Sometimes yes, sometimes no. The testator's location when the will is executed is the key. Generally, a will executed in State A must comply with the rules of State A to be valid.

There are actually several different execution techniques that apply when a testator cannot sign his or her name.

Signing with a "mark" or an "X" is specifically provided for by certain state statutes or by state case law precedents.

In some states, the testator can be assisted in making his mark. This is the "guided signature."

A proxy signature, sometimes performed by a notary, is where a person other than the testator signs the testator's name at the testator's direction.

The common denominator of these three approaches is the intent of the testator. The witnesses to the will may be called upon to testify whether the testator intended his "X" or other mark to represent his signature, or whether the testator instructed a third party to assist him and guide his hand in signing the will, or whether the testator instructed a third party or notary to sign the will on his or her behalf.

In a state where the latter approach is required by statute, an example of a correct approach is to have the testator's attorney sign the will, in the presence of the testator and witnesses. *Example:* "John Smith, by Ira Lawyer, at testator's request."

Regardless of which approach is taken, the attorney or other persons executing the will should be aware of the scrutiny that will come to bear on the will during the probate process.

During the publication or reading of the will aloud in front of the testator and the witnesses, the attorney should have the testator frequently verify that he understands and agrees with each of the major terms of the will and specifically authorizes the attorney to sign for him or to assist him in making his mark.

For example, consider the approach of the Uniform International Will Act resulting from a Washington Convention in 1973. Article 5 provides:

"2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall make note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf."

**Q. What can be done ahead of time to reinforce the validity of a will where a known challenge to the will is anticipated?**

A. If it appears likely that the will would be contested, additional precautions should be taken to rebut allegations of undue influence or lack of testamentary capacity.

In general, a will that is executed in State A, in conformance with requirements for will execution in State A, will be accepted as a valid will in State B. The problem with relying on that general rule is that as soon as a will is challenged and any kind of suspicion is cast on the will, any court probating the will in either state will be looking at the will with greater scrutiny and may hold a hearing and take testimony from witnesses. Precautionary measures include:

- Use of a will-execution checklist. This can help the attorney/draftsman verify to a probate court that the will was executed in the customary manner.
- Adding more than the required number of witnesses.
- Making certain that the witnesses are young, healthy, credible, and have no financial interest or bias.

- Videotaping the proceedings may be useful. Even if ultimately not admissible, the potential use of such evidence may be useful as leverage.
- If there are prior wills that follow the same testamentary disposition of assets, securing those documents may be relevant.

**Q: Can my dear pet dachshund, “Lucky,” inherit my estate?**

A: Not exactly. A pet is not an “heir” in a technical sense. Pets can’t own property; pets are considered property themselves. Traditionally, gifts to pets were simply unenforceable. But several practical approaches can be taken. The informal approach is to bequeath the pet to a friend or relative who has a household in which the pet would be welcomed and cared for. A bequest of funds to that same household would be intended to compensate, at least in part, for anticipated expenses for food and veterinarian care. However, such bequests and instructions on the specific care of a pet are largely precatory requests, i.e., they are unenforceable.

However, the desire to provide for a beloved companion pet after one’s death is by no means unusual. Demographic information on the number of elderly who are divorced, separated, or widowed would undoubtedly indicate a growing pool of elderly individuals who have ample assets, few heirs, and only one true companion — a pet.

Perhaps this growing need within the population has helped a modern transformation of American law. Prior to 1990, only a handful of states had statutes on point and some of those, such as Wisconsin, had only unenforceable rules.

The Uniform Probate Code (UPC) was amended to include provisions for pets in 1990. The Uniform Trust Code (UTC) followed suit in 2000. In February, 2006, South Dakota became the 34<sup>th</sup> state to adopt specific legislation addressing pet trusts.

Law Professor Gerry Beyer identifies these states and the UPC or UTC basis for each on his website at [professorbeyer.com/articles/animal\\_statutes](http://professorbeyer.com/articles/animal_statutes) along with convenient links to text of each state statute. Maryland has passed legislation and may soon become the 35<sup>th</sup> state to join this list. Legislation has also been proposed in Alabama, Connecticut, Massachusetts, Oklahoma, and West Virginia. If those states follow the trend, only 10 states will remain without specific pet trust statutes. Here are states with pet trust laws:

1. **Alaska** [based on UPC § 2-907] (1996)
2. **Arizona** [based on UPC § 2-907] (1995)
3. **Arkansas** [based on UTC § 408] (1995)
4. **California** [allowed, but unenforceable] (1991)
5. **Colorado** [based on UPC § 2-907] (1995)
6. **District of Columbia** [based on UTC § 408] (1994)
7. **Florida** (2002)
8. **Hawaii** [based on UPC § 2-907] (2005)
9. **Idaho** (2005)
10. **Illinois** [based on UPC § 2-907] (2005)
11. **Indiana** (2005)
12. **Iowa** (2000)
13. **Kansas** [based on UTC § 408] (2003)
14. **Maine** [based on UTC § 408] (2005)
15. **Michigan** [based on UPC § 2-907] (2000)
16. **Missouri** [based on UTC § 408] (2004)
17. **Montana** [based on UPC § 2-907] (1993, amended 1995)
18. **Nebraska** [based on UTC § 408] (2005)
19. **Nevada** (2001)
20. **New Hampshire** [based on UTC § 408] (2004)
21. **New Jersey** (2001)
22. **New Mexico** [based on UTC § 408] (2003)
23. **New York** (1996)
24. **North Carolina** [based on UPC § 2-907] (1995)
25. **Oregon** [new version, based on UTC § 408] (2006)
26. **Rhode Island** [UTC § 408] (2006)
27. **South Carolina** [based on UTC § 408] (2006)
28. **South Dakota** [based on UPC § 2-907] (2006)
29. **Tennessee** [based on UTC § 408] (2004)
30. **Texas** (2006)
31. **Utah** [based on UPC § 2-907] (1998, amended 2003)
32. **Virginia** [based on UTC § 408] (2006)
33. **Washington** (2001)
34. **Wisconsin** [allowed, but unenforceable] (1969)
35. **Wyoming** [based on UTC § 408] (2003)

All told, there are 30 states adding, amending or considering pet trust legislation over the past five years. So “Lucky” the dachshund has a better chance than ever of benefiting from a valid pet trust.

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## Technical References

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1. *Medicaid Estate Recovery: A 2004 Survey of State Programs and Practices* (June 2005) by the ABA Commission on Law and Aging on behalf of the AARP’s Public Policy Institute noted that the scope of estate recovery efforts is expanding and varies greatly. See, [www.abanet.org/aging/wingspan\\_final\\_0405.pdf](http://www.abanet.org/aging/wingspan_final_0405.pdf).
2. For information on reverse mortgages, see the article by Stephanie Edelstein: [www.abanet.org/aging/reverse\\_mortgage.doc](http://www.abanet.org/aging/reverse_mortgage.doc).