

The ElderLaw Report

Editors

Harry S. Margolis, Esq.
Kenneth M. Coughlin

In This Issue

Tax Bill Makes Change in DRA Annuity Provision 7

CMS Bars Spousal Protections for Certain Waiver Recipients 7

Keeping Current 8

- *In Re: Decision of Comm. of Human Ser.*
- *Poindexter v. State*
- *Armstrong v. Roberts*
- *In the Matter of the Estate of Ramirez*
- *Sherman v. DeRosa*

Practice Tips ... 10

Pet Trusts Offer Elderly Clients Peace of Mind

By Rachel Hirschfeld

Pets are important to your clients. In America, more adults have pets than children and most pet owners consider their pets as part of their families. In fact, a recent survey by the American Animal Hospital Association found that 83 percent of pet owners refer to themselves as their pet's "mom" or "dad." But what happens to pets when their "parent" becomes incapacitated or dies? The most effective way for a pet owner to ensure the continuity of care for a beloved pet in the event of the owner's incapacity or death is to establish a Pet Trust.

Since 1990, when the Uniform Probate Code §2-907 validated Pet Trusts, 38 states from New York to Alaska have passed laws that allow pet owners to set up trust funds to take care of pets after the owner has become incapacitated or dies, just as if the animals were minor children.

A Pet Trust will protect the animal companion, something that a will cannot do. If pets are only named in a will, their future is not secure. First, the will is likely to be read long after the animal has gone hungry. Second, the caretaker named in the will is only an honorary position. The caretaker may abscond with funds intended to care for the pet or leave the animal in a shelter, and the court cannot enforce the owner's instructions. It is sad but true that an elderly dog is not as cute as a puppy and is less likely to be adopted. (The New York City pound, for example, generally euthanizes elderly unadoptable animals within 72 hours.)

The court, however, *can* enforce the owner's instructions in a Pet Trust. Additionally, the Pet Trust is enforceable during the owner's lifetime and after death, while a will is enforceable only after the owner dies. This can literally mean the difference between life and death for a

pet whose owner dies or becomes incapacitated.

A pet owner's incapacity should not spell the end of this important relationship, just when the owner most needs the pet's love and companionship. It is well documented that pets can have a significant impact on a person's physical and mental health. Whether playing a game of "catch" to help a stroke patient improve muscle tone or just being a calm, familiar presence for an owner suffering from dementia or Alzheimer's disease, pets can play an important role in an incapacitated owner's medical treatment.

An elderly person who is concerned that an animal companion may outlive her or her incapacity, a Pet Trust can mean the difference between getting a pet and not getting one. If the owner's incapacity prevents the pet and owner from living together, Pet Trusts can help by including instructions that require the named caretaker to bring the pet for visits with the incapacitated owner.

Protecting your clients' animal companions is a two-step process. The first step is to protect the pets by establishing a Pet Trust. The second is to include an article in the will naming the Pet Trust, and giving specific instructions for its funding.

Who Can Establish A Pet Trust?

As noted, statutes in 37 states and the District of Columbia expressly allow the establishment of a trust with a pet as beneficiary; the majority of these statutes were enacted in the last ten years (*see* accompanying box). These statutes are significant because pets are considered property and, as such, cannot inherit. Clients in the remaining 12 states—Connecticut, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, North

Dakota, Oklahoma, Vermont, and West Virginia—are not without a solution: Pursuant to the New York Estates, Powers & Trusts law §7-6.1,¹ a grantor who is not a New York domiciliary can create a trust—including a Pet Trust—that is governed by New York law as long as the trustee or grantor resides, is incorporated in, or is authorized to do business in the state, or is a national bank with offices in the state. The caretaker and any co-trustees may be located in any state—including a state that does not have a Pet Trust statute.

Pet Trusts are not limited to dogs and cats, but may be established for all kinds of companion animals, including birds, horses, reptiles, rodents (hamsters, rabbits, gerbils, guinea pigs, ferrets, *etc.*), and even fish.

Elements of a Pet Trust

The elements of a Pet Trust are the same regardless of the state where the trust is established. Every Pet Trust

must, of course, name a trustee. The trustee disburses funds to the caretaker(s), who shall carry out the grantor's detailed directions concerning the pet's care and maintenance. The trust instrument may also designate a trust protector to disburse funds to the caretaker.

The more specific the instructions, the smoother the transition for both the caretaker and the animal companion. The Pet Trust should include specific instructions about all aspects of the pet's care, from the brand of food the pet prefers, to the park where the pet likes to be walked, to the grantor's preferred veterinarian and groomer. A client with more than one pet can direct that the pets must live together.

It is not necessary to execute a new trust instrument each time a new animal joins the family. The trust may cover all animals that the grantor owns at the time of incapacity or death. However, if an animal requires special care, it is wise to designate the animal by name and description.

All Pet Trusts must name a caretaker, and it is important that the caretaker be willing and able to care for the client's pet(s) the same way the owner would. For example, the caretaker should be comfortable with the client's animals. It is also absolutely imperative to name a substitute caretaker or a caretaker not-for-profit, no-kill shelter or sanctuary organization. Some not-for-profit organizations have perpetual care programs that provide an animal, for a nominal sum, with life care. A variety of such programs exist at the North Shore Animal League, Animal Haven, and The American Society for the Prevention of Cruelty to Animals (ASPCA). It is recommended that clients include a not-for-profit, no-kill organization as a caretaker to assist in finding a caretaker when all named caretakers have failed.

Although it is not technically necessary to fund the Pet Trust during life, the named caretaker(s) may not be as willing to undertake their responsibilities if funds have not been set aside for the pet's care. It is possible to fund a Pet Trust with a portion or all of the proceeds of a life insurance policy, retirement funds, or any other property. Because Pet Trusts will play an important role if the owner becomes incapacitated, it is recommended that the trust be capable of being funded during the grantor's lifetime, as well as upon the grantor's death. How much to fund a trust depends on the animal's special needs, but a dog or cat will likely require between \$200 and \$2,000 a year.

Another key element in establishing a Pet Trust is the appointment of a trust protector. The trust protector has the power to enforce the trust and to ensure that the trust funds are being spent for the benefit of the pet(s). The trust protector has the power to remove the trustee or caretaker in the event that the trust protector at his or her discretion determines that the caretaker is not caring for the pets as directed in the Pet Trust or if the trustee ceases to administer the trust for

The ElderLaw Report

EDITORS

Harry S. Margolis
Kenneth M. Coughlin

Publisher

Harry S. Margolis
Kenneth M. Coughlin

Editorial Director

Harry S. Margolis
Kenneth M. Coughlin

Production

Harry S. Margolis
Kenneth M. Coughlin

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought—*From a Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers.*

© 2007 by Harry S. Margolis

The ElderLaw Report (ISSN 1047-7055) is published monthly, except bimonthly July/August, by Aspen Publishers, 76 Ninth Avenue, New York, NY 10011.

One year subscription costs \$234.

To subscribe, call 1-800-638-8437. For customer service, call 1-800-234-1660. Send address changes to **The ElderLaw Report**, Aspen Publishers, 7201 McKinney Circle, Frederick, MD 21704. All rights reserved. This material may not be used, published, broadcast, rewritten, copied, redistributed or used to create any derivative works without prior written permission from the publisher. Printed in U.S.A.

Permission requests: For information on how to obtain permission to reproduce content, please go to the Aspen Publishers website at www.aspenpublishers.com/permissions. **Purchasing reprints:** For customized article reprints, please contact *FosteReprints* at 866-879-9144 or go to the *FosteReprints* website at www.fostereprints.com.

www.aspenpublishers.com

State Pet Trust Statutes

State	Citation	Year Enacted	Summary
Alabama	Alabama Code §19-3B-408	2007	Trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.
Alaska	Alaska Stat. §13.12.907	1996	Trust terminates after 21 years or when a living animal is not covered by the trust.
Arizona	Ariz. Rev. Stat. §14-2907	1995	Trust is valid for up to 21 years, whether or not the terms of the trust contemplate a longer duration. The trust terminates when no living animal is covered by the trust.
Arkansas	Ark. Code Ann. §28-73-408	2005	Trust terminates upon the death of the animal or upon the death of the last surviving animal.
California	Cal. Prob Code. §15212	1991	Trust's duration is for the life of the animal (domestic animal or pet), whether or not the terms of the trust contemplates a longer duration.
Colorado	Colo. Rev. Stat. §15-11-901	1995	Trust terminates after 21 years or when a living animal is not covered by the trust, whether or not the terms of the trust contemplates a longer duration.
District of Columbia	D.C. Code. Ann. §19-1304.08	2003	Trust terminates upon the death of the animal or upon the death of the last surviving animal.
Florida	Fla. Stat. Ch. 737.116	2002	Trust terminates upon the death of the animal or upon the death of the last surviving animal.
Hawaii	Haw. Rev. Stat. §560:7-501	2005	Trust terminates when no living animal is covered by the trust.
Idaho	Idaho Code §15-7-601	2005	This trust may be created for any purpose, charitable or noncharitable, under the terms of a trust agreement or will. A purpose trust does not need a beneficiary. This Idaho statute represents Idaho's relevant pet trust law. The law, while not termed a pet trust, provides that a person may create a "purpose trust." This trust does not require a beneficiary and may instead just name a person to enforce the trust.
Illinois	Ill. Comp. Stat. 760 ILCS 5/15.2	2005	A trust for the care of one or more designated domestic or pet animals is valid. The trust terminates when no living animal is covered by the trust. The trust is exempt from the operation of the common law rule against perpetuities.
Indiana	Ind. Code §30-4-2-18	2005	Trust terminates upon the death of the animal or upon the death of the last surviving animal.
Iowa	Iowa Code §633.2105	2000	Trust is valid up to 21 years, whether or not the terms of the trust contemplate a longer duration. The trust terminates when no living animal is covered by the trust.
Kansas	Kan. Stat. Ann. §58a-408	2003	Trust terminates upon the death of the animal or last surviving animal.
Maine	Me. Rev. Stat. Ann. Tit. 18-B, 408	1995	Trust terminates upon the death of the animal or last surviving animal.
Michigan	Mich. Comp. Laws §700.2722	2000	Trust is valid for up to 21 years, whether or not the terms of the trust contemplate a longer duration. The trust terminates when no living animal is covered by the trust.
Missouri	Mo. Ann. Stat. §456.4-408	2004	Trust terminates upon the death of the animal or upon the death of the last surviving animal.
Montana	Mont. Code Ann. §72-2-1017	1993	Trust is valid for up to 21 years, whether or not the terms of the trust contemplate a longer duration. The trust terminates when no living animal is covered by the trust.

State	Citation	Year Enacted	Summary
Nebraska	Neb. Rev. Stat. §30-3834	2005	Trust terminates upon the death of the animal or last surviving animal.
Nevada	Nev. Rev. Stat. Ann. §163.0075	2001	Trust terminates upon the death of all animals covered by the terms of the trust.
New Hampshire	N.H. Rev. Stat. Ann. §564-B:4-408	2004	Trust terminates upon the death of the animal or last surviving animal.
New Jersey	N.J. Stat. Ann. §3B:11-38	2001	Trust terminates when no living animal is covered by the trust, or at the end of 21 years, whichever occurs earlier.
New Mexico	N.M. Stat. Ann. §45-2-907	1995	Trust is valid for up to 21 years, whether or not the terms of the trust contemplate a longer duration. The trust terminates when no living animal is covered by the trust.
New York	N.Y. Est. Powers Trusts Law §7-8.1	1996	Trust terminates when no living animal is covered by the trust, or at the end of 21 years, whichever occurs first.
North Carolina	N.C. Gen. Stat. §36A-147	1995	Trust terminates at the death of the animal or last surviving animal.
Ohio	Tex. Prop. Code §112.037	2007	Trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates on the death of the animal or, if the trust is created to provide for the care of more than one animal alive during the settlor's lifetime, on the death of the last surviving animal.
Oregon	Or. Rev. Stat. §128.308	2001	If the trust instrument makes no provisions for termination of the trust, the trust terminates when no living animal is covered by the trust or when all trust assets are exhausted, whichever occurs first.
Pennsylvania	Uniform Trust Act §7738. Trust for care of animal—UTC 408	2006	Trust terminates upon the death of the last surviving animal.
Rhode Island	R.I. Statutes §4-23-1	2005	Trust terminates upon the death of the last surviving animal.
South Carolina	S.C. Code Ann. §62-7-408	2005	Trust terminates upon the death of the last surviving animal.
South Dakota	Signed by Governor	2006	Trust may not be enforced for more than 21 years. The trust terminates upon the death of the animal or upon the death of the last surviving animal.
Tennessee	Tenn. Code Ann. §35-15-408	2004	Trust may not be enforced for more than 21 years. The trust terminates upon the death of the animal or upon the death of the last surviving animal.
Texas	Texas Prop. Code Ann. §112.037	2005	Trust terminates upon the death of the animal or upon the death of the last surviving animal.
Utah	Utah Code Ann. §75-2-1001	1998	Trust is valid for up to 21 years, whether or not the terms of the trust contemplate a longer duration. The trust terminates when no living animal is covered by the trust.
Virginia	Virginia Code §55-544.08	2006	Trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.
Washington	Wash. Rev. Code §11.118.005-.110	2001	Unless otherwise provided in the trust instrument or in the statute, the trust terminates when no animal designated as a beneficiary of the trust remains living.
Wisconsin	Wis. Stat. §701.11	1969	If the transferee refuses or neglects to apply the property to the designated purpose within a reasonable time and the transferor has not manifested an intention to make a beneficial gift to the transferee, a resulting trust arises in favor of the transferor's estate and the court is authorized to order the transferee to retransfer the property.

State	Citation	Year Enacted	Summary
Wyoming	Wyo. Stat. Ann. §4-10-409	2003	Trust terminates upon the death of the animal or upon the death of the last surviving animal.
Proposed Legislation Maryland	based on UTC §408		Has passed Senate.
Proposed Federal Legislation	H.R. 1796	2001	To amend the Internal Revenue Code to treat charitable remainder pets trusts in a similar manner as charitable remainder annuity trusts and charitable remainder unitrusts. H.R. 1796 is often referred to as the Morgan Bill after Rep. Earl Blumenauer's pet collie.

Source: Pets.ColoradoSprings.com

TAX BILL MAKES CHANGE IN DRA ANNUITY PROVISION

The recently enacted Tax Relief and Health Care Act of 2006, H.R. 6111, includes several “technical corrections” to the Medicaid provisions of the Deficit Reduction Act of 2005 (DRA), including one to the annuity rules in the DRA’s transfer-of-asset provisions.

The DRA requires that Medicaid long-term care applicants name the state as the remainder beneficiary of annuities in which they have an interest, in an amount equal to what the enrollees receive in coverage from the state, 42 USC §1396p(c)(1)(F)(i). The DRA provided that state remainder rights were equal to the amount paid on behalf of an “annuitant”; the Tax Relief bill replaced this with “institutionalized individual.”

Thus, if the wife of a nursing home resident purchases an annuity, under current law she must name the state as the remainderman for her own potential benefits. Under the change, she may have to name the state as the remainderman for her husband’s care instead.

Following is the pertinent provision changing the annuity rules:

(b) Clarifying Treatment of Certain Annuities (Section 6012)—

(1) IN GENERAL—Section 1917(c)(1)(F)(i) of the Social Security Act (42 U.S.C. 1396p(c)(1)(F)(i)), as added by section 6012(b) of the Deficit Reduction Act of 2005, is amended by striking ‘annuitant’ and inserting ‘institutionalized individual’.

(2) EFFECTIVE DATE—The amendment made by paragraph (1) shall be effective as if included in the enactment of section 6012 of the Deficit Reduction Act of 2005.

The entire bill can be found at <http://thomas.loc.gov> Type “h.r. 6111” in the “Search Bill Text” box. The final version is the “Engrossed Amendment as Agreed to by the House.” The Medicaid provisions are located at Section 1, Division B, Title IV.

the benefit of the pet(s) or otherwise violates his or her fiduciary duties.

The Pet Trust should be drafted to provide that no person may act in more than one capacity at a time. The Pet Trust should also require the trustee to provide yearly accountings to the trust protector, and keep books or records showing all transactions relating to the trust fund held by the trustee under the Pet Trust agreement.

Pet Trusts are not without drawbacks. Animals can not complain to a probate judge if their trustee is short-changing them on food or accommodations. Also, a dishonest trustee could fraudulently extend the life of the trust to continue receiving a trustee stipend.

Pet laws do take into account one key fact of modern life: Surviving adult children may be reluctant to carry out a parent’s final wishes. If your client is not certain that her children halfway across the country would be willing or able to care for the pet, peace of mind may be obtained by setting up a Pet Trust.

Conclusion

For some, a pet is not only family but a best friend. The owner knows his pet’s personality, likes, dislikes, and particularities, and wants the transition to a new owner to be smooth in the event that the owner is unable to care for his animal companion. Your clients want to ensure that their pets, who have given them love and loyalty, will be continually cared for. Pet Trusts are the way to accomplish this.

Some Pet Trusts are complicated, others are modest. Some are established to meet the needs of one healthy pet, while others come with detailed instructions for the care of multiple pets or pets with health issues.

The elements of every Pet Trust are the same: A trustee to manage the funds; a caretaker to take physical care of the client’s animal companion or companions; a non-profit back-up to take the pet or pets if the caretakers of the client’s choice are not able;

CMS BARS SPOUSAL PROTECTIONS FOR CERTAIN WAIVER RECIPIENTS

States may not extend Medicaid spousal protections to the spouses of “medically needy” individuals who qualify for home and community based care services (HCBS), the Centers for Medicare & Medicaid Services (CMS) has said in a letter to New York advocates.

Some Medicaid recipients receive long-term care coverage through a state HCBS waiver program. According to 42 USC §1396r-5(h)(1), states may include HCBS enrollees in their definition of “institutionalized” individuals so that the enrollees’ spouses can receive the spousal impoverishment protections of 42 USC §1396r-5.

As reported by the National Senior Citizens Law Center in its Dec. 1, 2006, *Washington Weekly*, New York submitted to CMS an HCBS waiver application in 2005 for its “Nursing Home Transition and Diversion” program, which, among other provisions, extended spousal impoverishment protections to the community spouses of waiver enrollees. In November 2005 CMS told the state that the waiver would not be

approved if the state intended to extend these protections to HCBS enrollees qualifying as “medically needy” (Medicaid applicants who must spend down to eligibility through their medical costs).

Bruce Darling of the Center for Disability Rights wrote to the agency disagreeing with its stand and attaching a legal analysis by four New York attorneys. The analysis stressed the states’ unlimited and exclusive authority under 42 USC §1396r-5(h)(1) to decide whether to extend spousal impoverishment protections to the spouses of HCBS enrollees.

CMS replied that medically needy waiver recipients should not qualify for the spousal protections because “it is possible to construct scenarios under which an individual who meets spend down liability in the community would not meet that liability if in an institution.” According to CMS, Medicaid law does not permit this “degree of uncertainty. Rather, the statute requires that an individual actually meet the requirements for eligibility in an institution in order to be eligible . . . ”

and detailed instructions on how to care for the pet or pets.

Rachel Hirschfeld, an attorney who concentrates in Pet Trusts, was appointed to New York State Bar Association’s Special Committee on Animals and the Law as well as the New York City Bar Association’s Committee for Legal Issues Pertaining to Animals. She is the creator of The Hirschfeld Pet TrustJ (www.pettrustlawyer.com), the catalyst for which was Ms. Hirschfeld’s beloved dog, Soupbone.

Notes

1. New York Estates Powers and Trusts Law §7-6.1, reads:

(a) A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose or in the trust instrument, or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee. Such trust shall terminate when no living animal is covered by the trust, or at the end of twenty-one years, whichever occurs earlier.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of a covered animal.

(c) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such direction in the trust instrument, the property shall pass to the estate of the grantor.

(d) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (c) of this section.

(e) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the transferor and the purposes of this section.

Rachel Hirschfeld, Esq.
1-877-7-PET-TRUST (1-877-773-7778)
rhirschfeldaol.com
www.pettrustlawyer.com

KEEPING CURRENT

Minn. Appeals Court Says Trust Is for Support and Available

In Re: Decision of Comm. of Human Ser. (Minn. Ct. App., No. A06-559, Dec. 19, 2006). A Minnesota appeals court finds that a testamentary trust established by a husband is a support trust for his wife’s benefit and is an available asset for Medicaid eligibility purposes.

Ronald Flygare died on December 17, 1993, and pursuant to his will his estate was divided into a marital share and a family share. The marital share passed immediately to his wife, Lillian Flygare, while the family share was held in trust to provide for her continued support and maintenance. The trust contained a provision that limited the trustee’s ability to make payments to Mrs. Flygare should she become eligible for government assistance benefits.

When Mrs. Flygare applied for Medicaid in 2004, her application was denied on the grounds that the trust assets were available to her. A district court subsequently ruled that the trust provision limiting payments if Mrs. Flygare was eligible for public assistance violated a state statute stating that such provisions are against public policy. Mrs. Flygare appealed, conceding that the trust violated the statute but asserting that with the provision removed the trust remained unavailable because it is a discretionary trust, not a support trust.

The Minnesota Court of Appeals affirms, ruling that the trust was designed to provide for Mrs. Flygare's continuing support and is therefore available to her. The court notes that Mrs. Flygare had the right to sue the trust for support and maintenance, and that the trustee's discretion was limited and he had no discretion with regard to making payments to meet Mrs. Flygare's basic needs.

For the full text of this decision, go to: <http://www.lawlibrary.state.mn.us/archive/ctappub/0612/opa060559-1219.htm>

State May Require Spouses to Share Income Post-Eligibility

Poindexter v. State (Ill. App. Ct., 4th, No. 4-05-0709, Dec. 12, 2006). An Illinois appeals court rules that a state law making a community spouse's income available to an institutionalized spouse post-Medicaid eligibility is not prohibited by the Medicare Catastrophic Coverage Act of 1988 (MCCA).

Illinois asks community spouses to support their institutionalized spouses in the amount that the community spouse's income exceeds the minimum monthly maintenance needs allowance established by the Medicare Catastrophic Coverage Act of 1988 (MCCA) (42 USC §1396r-5(d)(3) (2000)). Robert N. Poindexter is one of nine community spouses who challenged this practice, arguing that MCCA prevents it. The trial court found that federal law preempted state law, ruling that under MCCA a state is not allowed to seek spousal support from a community spouse's income after the institutionalized spouse has been declared eligible for Medicaid, and that MCCA does not distinguish between eligibility and post-eligibility support. The state appealed.

The Appellate Court of Illinois, Fourth District, reverses, ruling that MCCA does not preempt state law in this case. The court holds that MCCA's apparent prohibition against making a community spouse's income available to the institutionalized spouse—"no income of the community spouse shall be deemed available to the institutionalized community spouse" 42 USC §1396r-5(b)(1)—relates only to determinations of eligibility. Moreover, the court writes that in enacting MCCA, "Congress has not expressly sought to preempt state law, nor does Congress express a desire for

national uniformity in applying the provisions of the MCCA." A dissent maintains that the majority is misinterpreting MCCA and making policy.

To download the full text of this decision in PDF format, go to: <http://elderlawanswers.com/resources/Poindexter%20v.%20Illinois.pdf>

Law Firm Charged With Elder Abuse in Trust Case

Sturgeon v. King (Cal. Ct. App., No. B191816, Dec. 11, 2006). A California appeals court rules that a law firm must answer to a jury on the question of whether the firm was complicit in the looting of a trust, constituting abuse of an elder or dependent adult. *Unpublished*.

Warren and June Sturgeon created a trust in which they were co-trustees. The trust provided that Jess E. Sturgeon and Steven A. Sturgeon, two of their children, would serve, in sequence, as successor trustees in the event either parent was unable to serve. Mrs. Sturgeon died in 1999 and Mr. Sturgeon was later declared incompetent and died in March 2005.

Jess and Steven Sturgeon sued their brother, Douglas Sturgeon, his wife Janice, and their daughter, along with Wayne T. King and the law firm of Thompson and King, for elder abuse related to the looting of hundreds of thousands of dollars in cash and real property from the trust. The complaint alleged that the firm knew that Douglas and Janice had misappropriated trust funds and was complicit in several ways, including preparing an amendment to the trust naming Douglas and Janice as co-successor trustees and actively facilitating a loan pocketed by Douglas Sturgeon and his family. The trial court entered summary judgment against Douglas and Janice for elder abuse, but the charge of elder abuse against the attorney and law firm was dismissed with prejudice. Jess and Steven Sturgeon appealed the dismissal.

The California Court of Appeals reverses, finding that the law firm's alleged actions fit the statutory definition of financial abuse of an elder person and that a jury must decide whether the firm played a role in the misappropriation of the trust funds.

To download the full text of this decision in PDF format, go to: <http://www.courtinfo.ca.gov/opinions/nonpub/B191816.PDF>

Broad POA Insufficient Authority To Designate POD Beneficiaries

Armstrong v. Roberts (Tex. Ct. App., 8th Dist., No. 08-05-00164-CV, Dec. 7, 2006). A Texas appeals court finds that although a broad power of attorney was sufficient authority to purchase certificates of deposit, it was insufficient to designate pay-on-death beneficiaries of the certificates.

Nine years prior to his death, John C. Roberts executed a broad power of attorney in favor of one of his two daughters, Mary Lou Garrison. Based on that authority, Ms. Garrison purchased three certificates of deposit and designated herself (or, in the case of one certificate, herself and another individual) as the payees on death. In 2002, the other daughter died, leaving two surviving children. Mr. Roberts died in 2003, with his property passing to his two daughters under his will. Ms. Garrison filed a declaratory judgment action to establish that while her sister's two children were entitled to a one-quarter share each of Mr. Roberts' estate, she was entitled to the proceeds of the certificates of deposit. The trial court granted the declaratory judgment and the children appealed.

The Court of Appeals of Texas reverses, ruling that the applicable probate law required Mr. Roberts himself to designate the certificates of deposit's pay-on-death beneficiaries for the designation to be effective. Ms. Garrison's designation of the beneficiaries, which coincidentally benefited her greatly, was ineffective.

For the full text of this decision, go to: <http://www.8thcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=64054>

Medicaid Recovery Not Shielded by *Ahlborn*

In the *Matter of the Estate of Ramirez* (NY Sur. Ct., No. 283-M/06, Nov. 29, 2006). In this case of first impression, a New York court finds that the Department of Social Services may use settlement proceeds stemming from a fatal car crash to recover unrelated Medicaid assistance it paid on the elderly decedent's behalf, and that limitations on recovery rights against a Medicaid recipient's tort action that the US Supreme Court outlined in *Ahlborn* do not apply.

Virginia Ramirez died in a car crash at age 87. Her heirs sought to accept a settlement for Ms. Ramirez's personal injury and wrongful death from the defendant driver's insurance carrier. The New York Department of Social Services (DSS) objected and asserted that it was entitled to recover from Ms. Ramirez's estate for Medicaid assistance it had paid on her behalf for unrelated medical care between 1995 and 2005. The administratrix of Ms. Ramirez's estate filed a motion for summary judgment, asserting that since the proposed tort action settlement did not include any recovery for medical expenses, under *Arkansas Department of Health and Human Services, et al v. Ahlborn*, 547 US ___ (2006), DSS' claim was barred by the anti-lien provision of federal Medicaid law; (see "Keeping Current," *The ElderLaw Report*, June 2006, p. 6).

The Surrogate Court of New York denies the motion for summary judgment and rules that federal estate recovery law requires DSS to seek recovery of medical

assistance paid to an individual age 55 or older. "DSS," the court writes, "would be required to assert its claim against the decedent's estate . . . regardless of whether the estate's assets arose from a personal injury recovery, a lottery, or other source." However, because DSS is limited to relief only from the personal injury settlement, not the wrongful death portion, the court directs the parties to appear to consider factual issues regarding allocation of the settlement.

For the full text of this decision, go to: <http://elderlawanswers.com/resources/preview.asp?id=5869>

New York Medicaid Agency May Recover From Refusing Spouse

Sherman v. DeRosa (NY App. Div., 2d, No. 2005-10027, Nov. 28, 2006). A New York appellate court rules that the spouse of a Medicaid recipient who exercised her right to refuse to contribute to the cost of her late husband's nursing home care must reimburse the state for benefits paid.

When Anthony DeRosa applied for Medicaid coverage of his nursing home care, his wife, Libra, exercised her right to refuse to provide for her husband's care and thus retain resources in excess of the allowable limit. Following Mr. DeRosa's death, the Department of Social Services of Nassau County, New York, sought to recover from Mrs. DeRosa \$108,619.05 in Medicaid benefits it paid for Mr. DeRosa's care. Mrs. DeRosa refused, asserting nine affirmative defenses, including that counties are not authorized to sue individuals for repayment of Medicaid services; that there was no express or implied contract between herself and the Department; that the Department had not established her ability to pay at the time Medicaid coverage was granted; and that because the Department was denied recovery of the same amount in an earlier guardianship action, the doctrines of res judicata and equitable estoppel barred the Department from seeking relief. The Supreme Court of New York granted the Department's motion to dismiss all Ms. DeRosa's defenses, and she appealed.

The Appellate Division of the Supreme Court of New York affirms, ruling that Ms. DeRosa's defenses were "properly dismissed since DSS is authorized to bring an action to recover the cost of Medicaid benefits paid for the care of the defendant's spouse to the extent that the defendant, a responsible relative, has available resources."

Mrs. DeRosa was represented by Vincent J. Russo, a Founding Member, Fellow, and Past President of the National Academy of Elder Law Attorneys.

For the full text of this decision, go to: http://www.courts.state.ny.us/reporter/3dseries/2006/2006_08963.htm

PRACTICE TIPS

The Tax Treatment of the Sale of a Life Estate

A question was raised on an elder law forum recently about whether or not a son's sale of a life estate in his house to his mother qualified as a capital gain and, if so, how that capital gain should be calculated.

The purchase price was arrived at by multiplying the life expectancy ratio found in HCFA Transmittal 64 by the home's fair market value. The mother would live in the house for at least one year, per the requirements of the Deficit Reduction Act of 2005. But the son's tax preparer claimed that the purchase price was the equivalent of prepaid rent and that tax would be due from the son. The tax preparer professed no knowledge of how the sale could be structured as a capital gain.

A forum participant replied that she had confronted a similar situation and her accountant had cited case law from 2nd and 8th Circuits that the sale of life estate interest in property constitutes a capital asset. The accountant, however, said that the child could not

exclude the capital gain on the sale of the life estate in the residence to the parent because Sec 121(d)(8) of the Internal Revenue Code allows remainder interests to qualify for the exclusion but specifically excludes all other interests in the residence to qualify. (This conforms to the remarks of a National Academy of Elder Law Attorneys' Institute session leader, reported in last month's feature article; see "Tax Issues in the DRA's Life Estate Safe Harbor".)

But how to determine the cost basis for the life estate when the child has not relinquished residence in the home and is in fact sharing it with the parent or parents? A case, *Estate of Johnson Camden* (47 BTA 926, 1942), sets out a method for calculating the cost basis of a life estate, but in the case the taxpayer was not sharing the residence with another person. The forum participant's accountant calculated the percentage that the parent used the house, multiplied this times the tax basis of the entire residence, and then multiplied this by the parent's life estate factor using the IRS's valuation table. "It apparently worked as far as the IRS was concerned," the participant reported.

To subscribe, call 1-800-638-8437 or order online at www.aspenpublishers.com

February/9900514557

Forwarding Service Requested

Aspen Publishers
The ElderLaw Report
Distribution Center
7201 McKinney Circle
Frederick, MD 21704

Presorted
First Class
US Postage
PAID
Permit No. 4205
Southern, MD

Wolters Kluwer
Law & Business