

## **Fundamentals of Will Drafting in Mississippi**

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A will is a written instrument executed with the formalities required by law, whereby a person makes a disposition of his property, such disposition to take effect after his death. Black's Law Dictionary, Fifth Ed. It is the expression of what the testator wants to happen to this property after he dies. The authority to execute such an instrument in Mississippi is largely a creature of statute, which can be found in Title 91, Chapter 5 of the Mississippi Code. MISS. CODE ANN. § 91-5-1; - 35. In order to be a valid testamentary instrument, certain formalities are mandatory, while others, while are merely commonly performed for good reasons, but their absence is not fatal to the document's effectiveness. The following is a cursory discussion of the mandatory requirements and many preferred practices for lawyers to follow when executing a will:

**Testamentary Intent:** The most basic requirement of any valid will is the possession of testamentary intent by the testator. While no magic language is required, it is absolutely essential that the person executing a document purporting to be a will express his intention as to the disposition of his property upon his death. In other words, his intent must be both testamentary, (i.e. in contemplation of death) and dispositive (i.e. intending to dispose of assets). Testamentary intent merely means that the writing must have been intended to be a will. Dispositive intent means that the decedent must have intended the instrument to result in the passing of title of his possessions to those whom he had identified. Accordingly, while the tried in true legalese often contained in these instruments, such as "bequeathed, give, and devise" are not mandatory, they do clearly establish an intent on the part of the testator that the document was intended to be both testamentary and dispositive, and as such are commonly found within wills. *In re George's Estate*, 45 So.2d 571 (Miss. 1950).

**Will Form:** No particular form is required by statute or common law to establish a will. However, except for the very narrow exception for nuncupative wills contained in MISS. CODE ANN. 91-5-15, all wills must be in writing. No specific type of paper, color ink, paper size, or even that nice blue background paper or thick fancy envelopes that have “Will” engraved on the front are mandated by statute or common law. Any writing can be a will if it otherwise legally qualifies, containing the requisite witness signatures and testator signature. Likewise, there is no requirement that the document itself contain formal self descriptive language such as "The Last Will and Testament of \_\_\_\_\_". While such language is helpful in establishing the testamentary and dispositive intent discussed above, and is commonly used both in Mississippi and elsewhere, such a title page or header on the front or top of the will document is not required.

**Testamentary Capacity:** In addition to having a testamentary intent, the testator must also have the mental capacity to execute a will. Testamentary capacity in Mississippi requires (1) that the testator understand and appreciate the nature of the act of executing a will, (2) know the beneficiaries of his bounty and their relation to him, and (3) that he be capable of determining how he desires to dispose of this property. *Howard v. Coward*, 51 So.2d 775, 776 (Miss. 1951); *Estate of Edwards*, 520 So.2d 1370, 1372 (Miss. 1988). In other words, the testator or must know that he is signing a will, know who his natural heirs are, and understand what he has and who will be getting it. That is the limit of testamentary capacity. Any other eccentricities or mental defects of the testator will not disqualify him from executing a valid will. Additionally, this capacity must only exist at the time the will is executed. MISS. CODE ANN. § 91-5-1; *Estate of Edwards*, 520 So. 2d 1370 (Miss. 1988). Thus, a temporary mental incapacity, such as an individual in the early stages of Alzheimer's disease, is not prohibited from executing a will during a period of lucidity. Temporary mental incapacity does not invalidate a will if capacity can be shown at the time of the will's execution.

**Age:** By statute, an individual must be at least 18 years of age or older in order to execute a will. MISS. CODE ANN. § 91-5-1. There is no maximum age limitation for the execution of wills.

**Signature:** A will must be signed by the testator, or may be signed by someone else on the testator's behalf if done in the testator 's presence. MISS. CODE ANN. § 91-5-1; *Miller v. Miller*, 96 Miss. 526, 51 So. 210 (1910). Additionally, it is not necessary that the testator guide his own pen, and it is perfectly acceptable for an individual to assist the testator by holding the pen upright if he is unable to do so himself because of his diminished physical condition. *Watson v. Pipes*, 32 Miss. 451 (1856). That having been said, the best practice is, of course, for the testator to execute his own document without any assistance of others. There is no requirement that the testator sign the will on any particular location, however, it is the best practice for the testator to execute his will at the end, preferably on or near the line provided for his signature, so that no question can be raised as to the validity of the content of subsequent pages or his capacity to understand what he was signing. The testator must sign the will in the presence of two witnesses, or must otherwise acknowledge his signature in their presence and must be in their presence while they sign as witnesses to the will.

**Witnesses:** A will, other than a holographic will executed pursuant to MISS. CODE ANN. § 91-5-1, must be witnessed by at least two credible witnesses. The process of having a will witnessed is called "attestation". Two witnesses are required, however more are permitted. MISS. CODE ANN. § 91-5-1. If a will is likely to be probated in another state, a some consideration should be given to the use of three witnesses, as some jurisdictions require three for probate in their state. All witnesses must be "credible". The credibility of witnesses merely means that they would be allowed to testify in court. Accordingly, a minor child is not disqualified from being a witness, if the child was otherwise qualified to testify in court. *Collis v. Walker*, 272 Mass. 46, 172 N.E. 228 (1930); Weems, *Wills and Administration of Estates in Mississippi*, (2d ed.), § 4-10. Similarly, a person

convicted of perjury or subordination of perjury, regardless of age, cannot be a credible witness, because they are disqualified from court testimony. Miss. R. Evid. 601; MISS. CODE ANN. § 13-1-11. An attorney may be an attesting witness to a will. *Wilburn v. Williams*, 193 Miss. 831, 11 So. 2d 306 (1942). The witnesses must either observe the testator execute the will, or observe his acknowledgment of his signature to them while they, in his presence, witness the will. The testator must "publish" the will to the witnesses. This act of "publication" is merely a statement by the testator, or his agent, that the document signed is the will of the testator. Publication may be either expressed or implied. *Warren v. Sidney's Estate*, 184 So. 805 (Miss. 1939); *Matter of the State of McKellar*, 380 So.2d 1273 (Miss. 1980). Publication does not require disclosure of the contents of the will to the witnesses in attendance, merely the fact that the document is his will. In addition to "publishing" the will to the witnesses, the testator, or someone on his behalf, must likewise "ask" the witnesses to attest the will. *Greene v. Pearson*, 110 So. 862 (Miss. 1927). A witness is not disqualified merely because he will inherit under the will. Rather, the gift to such a witness is void to the extent that it exceeds what the witness would have taken had the decedent died intestate. MISS. CODE ANN. 91-5-9. The remaining transfers under the will are not affected. That having been said, the preferred practice would always be to have persons other than those receiving property under the will to serve as witnesses to its execution, in order to avoid issues of bias and credibility. While attestation of the will is mandatory, an "attestation clause" within the will is not. The only statutory requirement is that the witnesses actually signed the will. However, a common and recommended practice in will drafting is to insert a clause reciting the fact that the will has been published to the witnesses, that they have been requested to sign the will, and that they are doing so in the presence of each other and the testator. Such a clause, if read allowed by the attorney as a matter of practice at the will signing ceremony, will ensure that the formalities of will execution are actually met every time. Additionally, execution of such a clause by the witnesses will better ensure that the witnesses will stand behind the content of the clause in the event of a will challenge at a later date. Such a reading further adds to the ceremonial nature of the will execution and

conveys a sense of seriousness over the proceeding which may further enhance the witness's memory if questions later arise about the execution or the testator's capacity. At a minimum, such a clause will provide a mechanism for refreshing the recollection of the witness to the will should court testimony ever become necessary. There is no requirement that the witnesses sign or initialed each page of a will. However, this is also a common practice among many lawyers and will ensure that no pages of the will are later substituted.

**Affidavit:** There is no statutory requirement that witnesses to a will execute an affidavit in order to form a valid will. However, such an affidavit can be offered in lieu of live testimony when it becomes necessary to probate the will. MISS CODE ANN. 91-7-9. As such, it is a very good practice to obtain such an affidavit at the time of will execution. This eliminates the need to later locate a witness in order to offer the will for probate, absent a will contest. Additionally, this author can think of no good reason not to do this at the time of execution, unless, of course, a notary simply was not available.

**Date:** There is no requirement that a will be dated. However, the prudent practice would be to always date wills. Such a practice may be determinative of the validity of such a will in the event that multiple wills surface after the decedent's death. Additionally, testamentary capacity may later come into question, in which event the date of the will can play a significant role in determining the testator's capacity at the time the will was executed. Likewise, the date of execution may become important in placing certain provisions of the will into context, or assist in construction of the meaning of some of the will terms.

**Incorporation by reference:** A will may validly incorporate an external document by reference only if (1) the external document existed at the time of will execution, (2) is satisfactorily identified in the will, and (3) if the language of the will expresses a clear intent to incorporate the external document. Otherwise, references within a will to an

external document are not binding. That having been said, it is common for some lawyers to place in wills a provision for a non-binding memorandum for the allocation of certain assets of nominal real value (but often having significant sentimental value) among a list of heirs. Such clauses are not binding, unless the list existed prior to the execution of the will, but the executor, who is given broad authority under such wills to make distributions of actual property within his discretion, will generally abide by the terms of such an external memorandum. That having been said, if such a clause is contained in a will, it should be clearly communicated that the clause is not binding but merely suggestive, and any transfers of items of significant value should be handled within the will itself or a codicil thereto. Given this rule regarding incorporation by reference, lawyers should take care when executing a pour-over will in connection with a revocable inter vivos trust to ensure that the trust is executed before the pour over will. Otherwise, the pour over will may be held to be invalid, as referencing a document which was not in existence at the time of execution.

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The foregoing items identify the minimum requirements for execution of a will (other than a holographic or nuncupative will) in Mississippi, as well as many preferred practices related to such execution. The remainder of this paper will discuss additional issues and practices within the overall context related to will drafting, execution, and other testamentary representation.

**Joint Wills.** Mississippi recognizes the validity of joint wills, as long as all of the mandatory requirements of will execution are followed. However, a joint will must be binding and intended to take effect upon the death of each of its testators, and not merely the second to die. Otherwise, such a joint will will be invalid as to both testators. This author knows of no good reason to rely on joint wills, except perhaps in situations in which the parties desire the will to be irrevocable upon the first to die. Even then, such results can be achieved through reciprocal wills and an agreement, without the necessity

of a joint will. Joint wills are not automatically irrevocable upon the first to die, in the absence of specific language either within the joint will, or a separately executed contract providing for such. Otherwise, even a joint will may be altered or revoked by the survivor.

**Codicils.** Codicils are merely changes or amendments to a will. In order to be valid, they must be executed exactly like a will, following the same requirements such as testamentary capacity, two witnesses, and execution by the testator. A codicil serves to republish the original will as to its unchanged terms, and as such can result in the correction of any defects or errors in the execution of the original will. *Hogan v. Sellers*, 151 So.2d 411 (Miss. 1963).

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## **Elder Client Practice Pointers**

### *Will Execution Procedures*

Given the importance of the foregoing requirements for execution of a will, a prudent practitioner should have in place standards and practices to ensure the proper execution of wills in his office. The best practice is to have a standard method of performing all will executions, and to do them the same way, every time. Such a practice and standardized policy ensures that will formalities are followed and statutory compliance is achieved. Additionally, in the event of a will contest, such practices will give the inevitable attorney-witness much credibility when he is able to testify as to the exact process that was followed during the execution procedure. The witness can be certain of his testimony because that is the way that every will executed in his office is executed, without deviation. Some such policies and procedures to consider all are:

- mandate that all witnesses and the testator remain in the room, with the door closed, until all documents are fully executed;
- read the attestation clause prior to the witnesses executing the will;
- review all of the dispositive provisions of the will with the client immediately prior to execution of the will;

- if there is any question as to the testator's understanding of the testamentary impact of the will, ask the testator to recite to you what he understands will happen to his property under the will when he dies;
- have the signatures of the testator and witnesses notarized at the will execution.

### *Client Intake Procedures*

The foregoing discussion of will execution is somewhat premature, like putting the proverbial cart before the horse. Before reaching the execution of the will, the will must be drafted, and before drafting, the practitioner must have some communication with the testator to determine what services they require, and determine the content of any documents to be drafted. This generally occurs during an initial client appointment or interview. However, prior to such an appointment, or perhaps during such an appointment, it is a good practice to require the client to complete a client questionnaire. The client questionnaire will enable the lawyer to gather important information from the client in order to best identify the client's needs and objectives. A will drafted using a client questionnaire will save the attorney time both during the interview process and during the drafting process, as all of the pertinent information regarding the client, his family, and his assets, will be before the attorney in a single client-drafted document. A pre-interview questionnaire will likewise likely result in more accurate and complete information being brought to the initial client conference and will require the client to think more specifically about his assets, which may result in a better estate plan for the client. Finally, a will drafted using a client questionnaire will likewise result in the disclosure of other issues which the client may or may not be aware of, such as estate tax issues, or a client's desire to avoid probate.

While a client questionnaire is helpful and important, often these documents can be overwhelming to clients, and especially to the elderly. Accordingly, while such a pre-conference questionnaire should be sent to each appointment, clients should be encouraged to attend the appointment even if they have not completed the questionnaire. Many of the questions on the questionnaire can be quickly completed by the attorney



during an initial client interview. Often, the specifics of some questions may be frustrating to the elderly person, and may be unimportant to that individual's estate plan. For example, if it is clear that the individual has considerably less than one million dollars in assets, the exact amount contained in a series of bank CD's is unimportant to that individual's estate plan, although the title of those CD's may be very important. During the initial client interview, the attorney should seek to determine what it is that the client wishes to accomplish. This is the attorney's opportunity to tell the client what options are available to him to accomplish his desired goals. It is also an opportunity for the attorney to detect other potential issues, such as family disputes, potential conflicts of interest between family members, potential undue influence over the elderly by their children or siblings, or issues with respect to who might best serve in the capacity of estate executor or agent for a power of attorney. A client may identify one of two sons to be her agent for power-of-attorney in her client questionnaire, however through the interview process, the lawyer may determine that she reached to that decision because the selected son had been arrested on drug charges fewer times than the other son, and was therefore the more responsible of the two, when in fact neither child may be appropriate to serve as agent. Careful attention to cues, both verbal and nonverbal, from the client, often raises such issues and concerns in the elder law practice.

### *Estate Taxes*

One of the most obvious issues to be identified in the interview process is whether any estate tax issues exist. Given the current state of flux of the federal estate tax code, estate tax issues should be discussed with any client who identifies assets approaching the value of \$1 million. While the current 2004 exemption amount is \$1.5 million, and scheduled to rise for the remainder of this decade, the exemption is scheduled to return to the \$1 million mark in 2011, absent further congressional action. Accordingly, unless the client can pinpoint his anticipated date of death, some provision for estate tax reduction should probably be built into such a client's will. This may include a spousal disclaimer trust, or a formula bypass trust which is only triggered in the event of estate taxes. Examples of such clauses are contained in the appendix to this section.

### *Fear of Probate*

Likewise, clients who express a fear of the probate process should be given some explanation of the revocable inter vivos trust and the benefits and problems inherent in such a alternative. They should also be give a full explanation of the probate process. Many clients have an unsubstantiated fear of probate simply because they do not understand the process.

### *Disinheritance*

Often, a client interview will reveal that the client desires and intends to disinherit a child. Upon such a revelation, the attorney in must be acutely aware of the potential for charges of undue influence and challenges to testamentary capacity, and should govern his will execution ceremony accordingly. In Mississippi, a child is not entitled to any portion of his parent's estate. *Guion v. Guion*, 100 So.2d 351 (Miss. 1958). The presumption in Mississippi is that a parent would treat children equally. Therefore, if the testator left nothing to the children who were alive at the time of will execution, then the presumption would be that he intended to disinherit all of his children. Conversely, if he did leave property to a child who was alive but failed to mention its siblings, it is presumed that the testator inadvertently failed to provide for his other children. *Clark v. Clark*, 89 So. 4 (Miss. 1921); see also MISS. CODE ANN. § 91-5-3;-5. The best practice in the event a client desires to disinherit a child is to identify that child as an offspring elsewhere in the will, so as to eliminate the argument that the child was inadvertently omitted. A common practice by many lawyers is to leave the disinherited child a token amount, such as one dollar, however, such clauses can make closing the estate more difficult, since it is unlikely that the bitter disinherited child will actually cash the one dollar check, which may require the estate and to remain open for a prolonged period. A simple statement intentionally identifying the child and leaving them nothing accomplishes the same result without the issue of outstanding checks. Another practice to be considered under such circumstances is to re-execute the same will six months later. Then, if the disinherited child is successful in overturning the final will, the child will be faced with a second court battle to overturn the immediately preceding will executed six

months earlier, effectively doubling his cost of challenging the will, and reducing his chance of ultimate success. Such a practice will likely have a significant deterrent effect on will contests.

### *Special Needs Children*

The interview process should also identify why the parent desires to disinherit the child. It may be that the parent has good reason for their decision. On the other hand, it may be for a mistaken reason, such as the child's dependence on public assistance that the parent does not wish to disqualify, or a fear that the child will squander the proceeds of an inheritance. In such circumstance, the attorney can identify other options available to the parent, such as a special needs trust, which will result in meeting the needs of a special needs child without resulting in any disqualification of the child's other benefits, and can improve the child's quality of life. Similarly, the incorporation of a spendthrift trust can protect the assets of an inheritance from creditors or the unwise decisions of an irresponsible child. The client should be informed of all of their options before reaching the ultimate conclusion of disinheritance. Careful listening during the interview process by the lawyer should reveal the client's reasons for their decision and enable the lawyer to help the client make a more informed decision.

## **Common Trusts in the Elder Law Context**

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### **Trust as a Will Substitute**

As a result of heavy marketing from the insurance industry, some lawyers, some non-lawyer “estate planners,” and reports from several media outlets, many elderly clients have questions about, or believe that they want, a revocable inter vivos trust, commonly referred to as a revocable living trust, or simply a "living trust." The attorney advising elderly clients must be familiar with these instruments, and be able to intelligently discuss their advantages and disadvantages. A trust is simply a three-way relationship between the creator (the grantor), a trust manager (the trustee), and one or more beneficiaries whose needs or rights are provided for by the terms of the trust. Restatement (Second) of Trusts § 2. For most purposes, the trust is treated as a separate legal entity, separate and apart from its creator, in a similar manner that a corporation is treated as a separate legal entity from its shareholder owners. The grantor executes an agreement, the trust agreement, which defines the terms of the trust, and any property placed within the trust is thereafter managed by the trustee for the benefit of the beneficiaries, pursuant to the terms of the trust agreement.

Trusts may be revocable or irrevocable, inter vivos or testamentary, trusteeed privately or by corporate trustee, and may be formed with or without federal estate tax planning provisions. Additionally, any of the foregoing features may be combined in a single trust. In an irrevocable trust, the grantor cannot undo, or revoke the trust. Restatement (Second) of Trusts § 57. Once the grantor executes the trust agreement and the transfers assets into the trust, he loses all control over those assets, except that control provided for by the trust agreement. The grantor has no right to withdraw principal from the trust, except as expressly provided by the trust agreement. Restatement (Second) of Trusts § 330. The most common example of such irrevocable trusts are Irrevocable Life Insurance Trusts, in which life insurance policies are transferred into the trust, which can

be used to provide an inheritance to heirs or a pool of money to liquidate closely held assets upon the death of the grantor, without inclusion in the decedent's taxable estate.

In contrast to the irrevocable trust, most living trusts are formed as revocable trusts, meaning that the grantor reserves the right to make changes to the trust, or even to abolish the trust altogether, at any time during his lifetime. It is this revocable trust that is typically used as a will replacement, in an effort to avoid or minimize the perceived adverse affects of probate. The concept is simple. A trust agreement is executed by the grantor, which is a revocable trust by its terms. The grantor of the trust is also named as the trustee of the trust, and the primary beneficiary of the trust. The trust is funded by the retitling of assets into the name of the trust. Personal property is transferred to the trust by execution of a bill of sale, real estate is transferred through execution of quitclaim deeds, and accounts are transferred by changing title on the account. Because the trust is a revocable grantor trust, it is ignored for tax purposes and no separate tax identification number or tax return is required during the life of the grantor. Thereafter, the grantor of the trust manages those assets for the benefit of the primary beneficiary, usually himself. In the event of the death or incapacity of the grantor, the trust will provide for a substitute trustee, who will be charged with management of the property for the benefit of the primary beneficiary during his lifetime. Upon the death of the grantor, the substitute trustee will manage or disburse the assets of the trust, as provided within the trust, for the benefit of the substitute beneficiaries, usually other family members. In this manner, if the trust is properly funded, when the individual dies, he owns no assets. As such, there is no estate property to probate.

Because the trust is revocable, there is no fear of the grantor losing control over his property. If he so desires, he can withdraw any or all of the property held by the trust at any time. Additionally, because the trust is revocable, it is ignored for purposes of income taxation, property ownership, and at death, estate taxes if any. It is as if the individual still owns the property in his own name. Anything that can be accomplished within a will or a testamentary trust can also be accomplished with the inter vivos trust. It is simply a matter of proper drafting. Below is a chart comparing the advantages and

disadvantages of simple wills, wills containing testamentary trusts, and the living trust.

	Avoid Probate	Avoid Conservatorship	Estate Tax Planning	Avoid Power of Attorney	Privacy of Estate Settlement	Spendthrift and Special Needs Protections	Limitation on Creditors
Simple Will	No	No	No	No	No	No	Yes
Will with Trust	No	No	Yes	No	No	Yes	Yes
Living Trust	Yes	Yes	Yes	Yes	Yes	Yes	No

There are obvious benefits to the use of a living trust as a will substitute. The most heavily touted is probate avoidance, however, conservatorship avoidance and better financial control in the event of incapacity are also definite advantages to these instruments. While the same results of the latter two benefits can arguably be achieved through use of a carefully drafted power of attorney, the power of attorney does not preclude or prohibit appointment of the conservator. Additionally, many banks and financial institutions are reluctant to accept or recognize powers of attorney, and especially if those powers are very old or are not on the institution's approved form. If all of an individual's assets are titled in the name of trusts, there would be no estate for a conservator to manage, and a financial institution would be hard-pressed to refuse to honor the terms of the trust agreement when the asset itself is titled in the name of the trust. Probably the biggest disadvantages of using an inter vivos trust in lieu of a will are the costs of establishing the trust, inconvenience in funding the trust, and an inability to utilize the 90-day statute of limitations for notice to creditors. Trusts are typically more complicated instruments than wills, and require significantly more drafting time, and significantly more time with clients, both in the explanation of the trust document before execution, during execution of the trust document, and subsequent to execution in assisting the client in retitling the assets. As such, inter vivos trusts are generally significantly more expensive than simple wills.

Another inconvenience attributable to trusts is the necessity of funding the trust. While there is no requirement that the trust actually be funded, failure to do so will necessitate opening and probating an estate, which is generally what the trust grantor sought to avoid. As a safeguard to the grantor's failure to properly transfer all of their assets into the trust, a "pour over will" should always be executed immediately after the trust agreement. Such a will simply states that any assets owned by the decedent at the time of their death should be transferred or "poured over" into their revocable living trust. Such a will serves to safeguard against any inadvertent omission in the retitling process, however this should not be relied upon by the grantor as a funding mechanism, because that usually defeats the purpose of creating the trust to begin with, since the pour over will requires probate in order to transfer the assets into the trust. Finally, the requirement that all creditors within 90 days of first publication of notice to creditors must file their claims with the court or thereafter be barred from collection, only applies to probated estates, and not to living trusts. While this bar typically is not in issue, as most creditor claims are recognized and acknowledged by the estate and are timely paid, occasionally a disputed claim or unknown claim is forced into the open or otherwise avoided because of failure to timely notify the estate of the claim. One final benefit of the living trust which bears mentioning is privacy. While wills remain private until death of the testator, thereafter they are filed in the public record of the Chancery Court where the decedent resided, for all curiosity seekers to review. There is no such filing requirement, either at death, or upon execution, of a living trust, except for the filing of a certificate of trust pursuant to MISS. CODE ANN. § 91-9-7. While the existence of the trust must be disclosed at the time of creation, the terms of the trust may forever be kept confidential. The only public information required is (1) the name of the trust, (2) the name and address of the trustee, (3) the name and address of the grantor, (4) a legally sufficient description of all real property owned or conveyed to the trust, (5) the anticipated date of trust termination, and (6) the general powers granted to the trustee. All of the remaining terms of the trust can remain confidential to the public.

The attorney advising elderly clients should at least be aware of the living trust

and be able to make an appropriate recommendation to the client regarding its use. While not the panacea represented by many outlets, it is a viable alternative to the will and another tool in the lawyer's belt for accomplishing the client's desired goals. One final note bears mentioning concerning fees to charge in drafting such trusts. As previously mentioned, living trust drafting and funding takes considerably more effort, skill, and time than the typical will, and should be priced accordingly. Clients, however, expect and deserve to know what their charges will be prior to approving drafting of their estate planning documents. Care should be taken not to prematurely quote the price of any living trust until the entire scope of the work is fully understood by both the attorney and the client. This author has learned from past experience that quoting a fee before fully understanding what services will be required can result in too much work for inadequate compensation. Accordingly, it is recommended that the price of a living trust not be quoted until the full scope of the work is understood by all concerned parties.

### **Medicaid Qualifying Trusts**

For purposes of Medicaid qualification, a revocable trust is considered an available resource if the assets are available to the individual, either by the terms of the trust, or through the termination or revocation of the trust. Additionally, any transfers from such a revocable trust to a third-party may be subject to the 60 month look-back penalty period for computation of Medicaid disqualification. If a trust is a revocable trust, the portion of the corpus of the trust from which payment could potentially be made to the individual is considered an available resource to the individual. Additionally, if potential income from the trust could be paid to the individual, the potential income is also considered an available resource to the individual. Any income paid from the trust to the individual is considered income as well. Likewise, payments from the corpus of the trust to the individual are also considered income for Medicaid calculation purposes. Any portion of a trust or payment of income for which no disbursement or payment could be made to the person for any reason is considered a transfer for Medicaid calculation purposes, and subject to the 60 month look back for trust transfers. 42 USC §



1396p(d)(3)(a). Accordingly, an individual who creates an irrevocable trust from which he cannot receive any income or obtain disbursements of the principal for any reason can be eligible to receive Medicaid 60 months after the date the funds are placed inside the trust. Similarly, an irrevocable trust that pays income only to the individual will not be counted as a resource for Medicaid eligibility after the 60 month look back, but the income would be counted, and paid to the nursing home with Medicaid paying the balance owed.

### **Special Needs Trusts**

Current federal law also recognizes Special Needs Trusts as being exempt from available assets when qualifying for Medicaid. Trusts established with assets of a disabled individual under the age of 65 are not considered a resource, provided the trust is established for a disabled individual by a parent, grandparent, legal guardian or by a court. The trust cannot be established by the individual. The trust must provide that the state will receive all moneys left in the trust upon the death of the individual up to an amount equal to the total medical assistance paid on behalf of the individual by the state. 42 U.S.C. § 1396p(d)(4)(a). This type of trust is often referred to as a Special Needs Trust or a (d)(4)(a) Trust, named after the statutory subheading in Title 42 of the Code.

In contrast to the special needs trusts, a third-party special needs trusts can also be established which provides for supplemental assistance to a disabled individual. This type of supplemental needs trust is not required to pay reimbursement to Medicaid upon the death of the beneficiary, since the funds used to establish the trust originally belonged to a third-party who had no obligation to provide the resource to the Medicaid recipient. Additionally, this third-party special needs trust will not be a countable asset for purposes of disqualifying the beneficiary from receiving Medicaid benefits as long as the trust is drafted in such a way that the resources are not available at the discretion of the beneficiary, and cannot be used to provide services already provided by public benefits.

### **The Medicaid Income Trust**

In determining qualification for Medicaid, Mississippi is an income cap state. This means that, in addition to being sufficiently medically needy, an individual's income cannot exceed 300% of the SSI maximum benefit rate (\$1,692 per month in 2004). In such an event, that individual is ineligible for Medicaid long-term-care coverage. For individuals whose monthly income exceeds this limitation, a Medicaid Income Trust, also known as a "Miller trust", can be created, which will be excluded as a resource. This trust is merely a written agreement that the individual or someone with legal authority on his behalf agrees that all of the individual's income will go into a trust account on the individual's behalf. From the trust account, the trustee may pay the individual's personal needs allowance, any spousal dependent allowances, and any medical expenses not covered by a third-party. After eligibility has been established through a Miller trust, an institutionalized individual may be required to pay some, if not most, of his or her income to the nursing facility less any permitted deductions. After these deductions are withheld, all remaining income of the individual is classified as patient pay amount and must be paid to the nursing facility. Any money remaining in the trust must be paid to the State.