

# SURVIVAL GUIDE

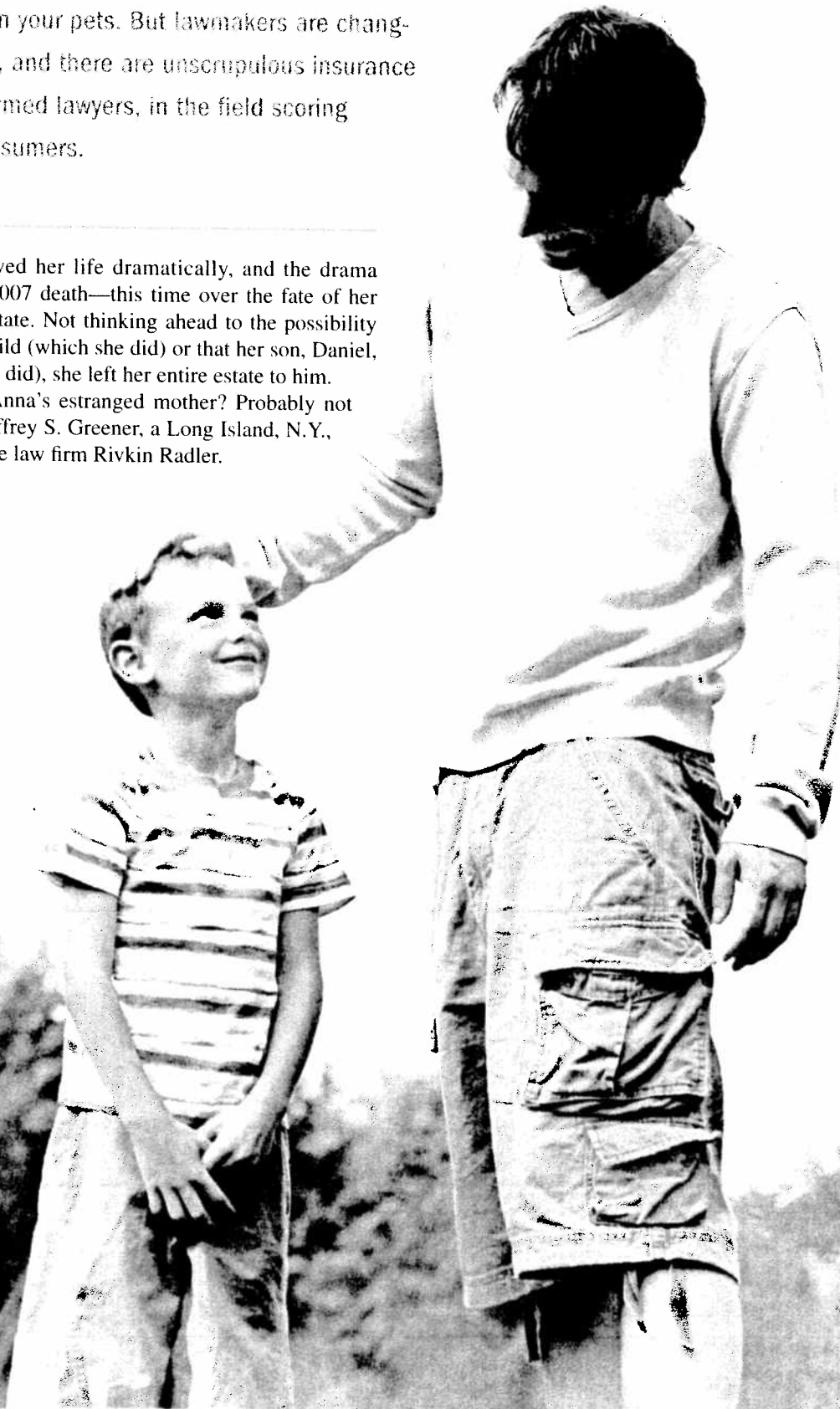
## KEYS TO SUCCESSFUL ESTATE PLANNING

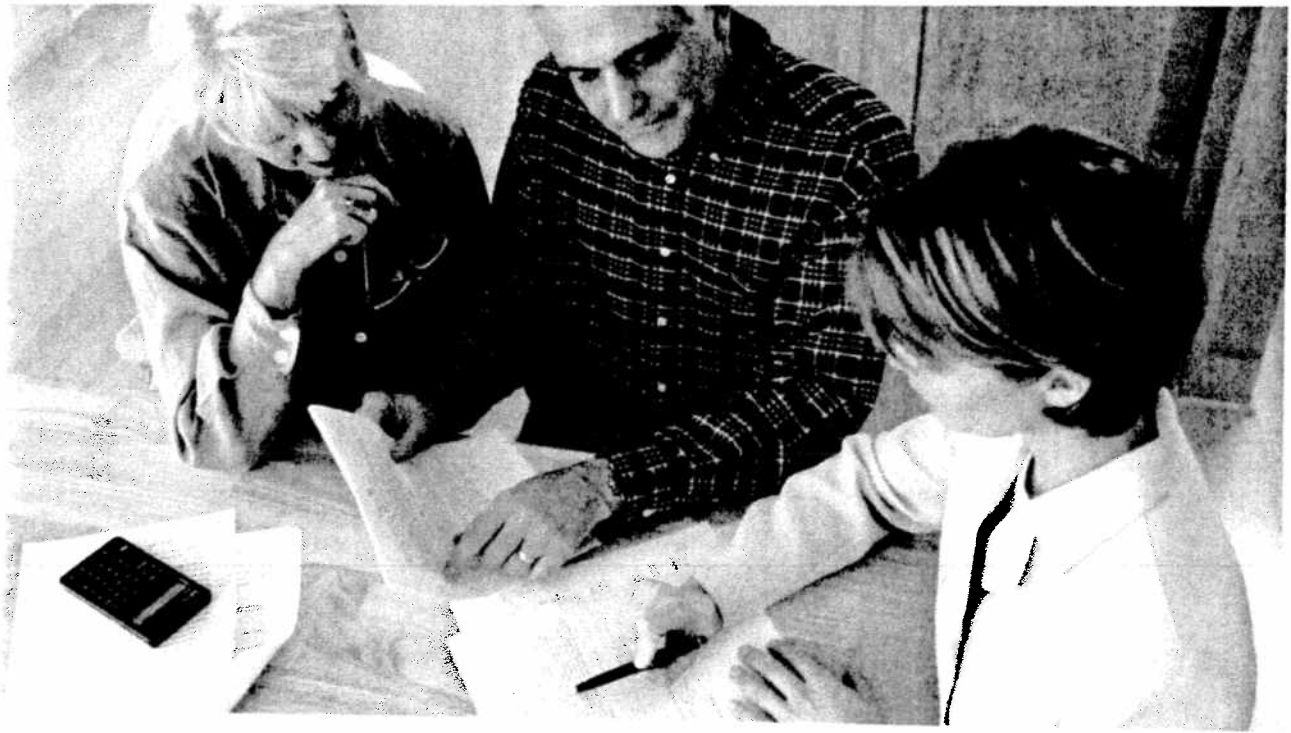
Even if you can't take it with you, careful estate planning can be a boon to your heirs—even your pets. But lawmakers are changing the rules of the game, and there are unscrupulous insurance agents, as well as uninformed lawyers, in the field scoring against unsuspecting consumers.

By Stacie Zoe Berg

**A**nna Nicole Smith lived her life dramatically, and the drama continued after her 2007 death—this time over the fate of her reported \$700,000 estate. Not thinking ahead to the possibility that she might have another child (which she did) or that her son, Daniel, might die before her (which he did), she left her entire estate to him.

“So, who would be left? Anna’s estranged mother? Probably not who she had in mind,” says Jeffrey S. Greener, a Long Island, N.Y., trusts and estates attorney at the law firm Rivkin Radler.





STOCK/EDWARD BOCK

If you haven't yet taken care of your estate, there are things you should know. And if you already addressed your estate planning and think you can rest easy, think again. Recent changes in the law might have potential effects on your estate. But you can't think about this right now, right? Of course, you also don't want to put your heirs through any unnecessary hardships, either. Granted, although you likely won't face anything similar to what happened to Smith, situations change—and so do laws. That means estate plans could be affected in terms of taxes and access by unwanted parties, not to mention family drama—though perhaps without any media spotlight.

**Oldies But Goodies.** The primary goal of estate planning, obviously, is to leave the most you can to the people you want to have it, at the least cost. Giving away as much as possible of your assets before you die, which shields them from probate court and estate taxes, is a big part of this. Another part is ensuring adequate care for yourself later in life.

When it comes to charting your future, you have to consider nursing-home care, particularly the costs, which can be tens of thousands of dollars a year and stretch into the six figures in some areas. If you want to avoid spending nearly everything you have on such care, you have a few choices. One is to purchase long-term-care insurance, which can be expensive. Another is to qualify for Medicaid coverage.

"The federal government and most state governments seem to be continually tinkering with the [Medicaid] eligibility requirements and restrictions," says John McDonald, an estate-planning attorney at Stites and Harbison's in Nashville, Tenn.

Changes to Medicaid are important, because

Medicare, the federal health-insurance program for people 65 years and older, does not cover nursing-home care beyond an initial 100-day period. This means you must foot the bill afterward—and drain your estate—or give away your money and qualify for Medicaid, the state-federal program that provides health care to the poor (including senior citizens who are technically "poor" from spending down or diverting their assets and who are in need of nursing-home care). All benefit recipients must qualify financially.

Deirdre R. Wheatley-Liss, a certified elder law attorney at Fein, Such, Kahn & Shepard in Parsippany, N.J., calls the changes in elder care and Medicaid in the past few years "huge." She particularly points to the Deficit Reduction Act of 2005, which was signed into law by President Bush in February 2006. Now, for example, if you gave away a significant amount of money within the past 5 years and you needed long-term nursing-home care, the state won't pay for it immediately or, potentially, for years, depending on the amount you gave away.

"It truly puts people in a horrible situation," she says.

The Deficit Reduction Act made two important changes when it comes to giving away money and qualifying for Medicaid. First, the *look-back period*—the amount of time the government can go back to see whether you gave money as a gift and how much—increased to 5 years from 3. Second, the look-back period begins when you actually need nursing-home care. (The exact amount of wealth that disqualifies a person for Medicaid varies by state, but typically it's only a few thousand dollars.) Under the old law, the clock began ticking when the gift was made.

The look-back period was established, because the government didn't want you to have \$100,000 one day,

give it all to your children the next day, and turn around and qualify for Medicaid benefits the day after that, says elder law and estate-planning attorney Ronald C. Morton, who practices in Clinton, Miss.

The key number in all of this is the *transfer penalty*. This is calculated by taking the amount of money you gave away and dividing it by the average monthly rate of nursing-home care in your state (the state's *divisor*). The transfer penalty is the amount of time you'll have to pay for your care before Medicaid kicks in. To see how this works, let's say you gave your daughter \$20,000. If nursing-home care costs, say, \$6,000 a month in your state, your transfer penalty would be 3.3, which means you would have to pay for 3.3 months of care before getting any Medicaid benefit.

Because of the Deficit Reduction Act, the 3.3-month penalty period starts at the point you need the care. Let's say you needed care at the beginning of September. You and your heirs would have to pay for it up until mid-December, regardless of when you gave the gift in the past 5 years. Before, if you gave the gift, say, a year ago, Medicaid would take over immediately, because the transfer-penalty period would've lapsed already.

Taking the gift back would reverse the penalty. Of course, you have to hope those to whom you gave gifts don't spend the money and are willing to give it back, Morton says. That's why it's important to keep some control over the assets, he says, and we agree: Unless your children would swim shark-infested waters for you and are financially responsible, you really can't bank on them tucking away the gift in a safe, inflation-protected investment, and you certainly can't get your money back if you donated it to charity. But even if you got the money back, although you'd have cash to pay for the nursing-home care, you'd have missed the opportunity to leave those funds to your heirs or charity. It's better to hang on to it using an estate-planning strategy, such as purchase of a life estate or making an outright gift.

Not surprisingly, fear-based advertisements claiming that Medicaid will make you sell your home to pay for nursing-home care are everywhere. Companies that use such ads sell long-term-care insurance, annuities or reverse mortgages as "all-in-one" solutions, Wheatley-Liss notes.

"Like most misleading ads, these are partially based in truth and feed on fear and lack of knowledge," she says. As to the matter of your home, in a situation where one spouse is in a nursing home, the remaining

spouse can keep the home, she notes. (See "Plan to Succeed: Medicaid and Asset Protection," page 38.)

**To Live or Die in 2010.** A different federal law meant to shield heirs from heavy estate taxes has caused concern as it nears expiration. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) gradually has raised the threshold on when estate taxes take effect. The current exemption is \$2 million, which means that you can leave \$2 million to your heirs tax-free. Next year, that amount rises to \$3.5 million, and in 2010 there is no estate tax. Bonanza from there on out, right? Well, no. In 2011, the EGTRRA expires, and the estate-tax exemption reverts back to \$1 million.

Attorneys voiced concerns to CD that unless the estate-tax repeal were made permanent, unbelievably, some people might choose to die in 2010 to preserve their children's inheritances, or, in a more sinister scenario, that some children might opt to "pull the plug" on wealthy parents or even push Mom off a cliff before the law runs out and estate taxes return in 2011.

"Money does funny things to people," explains Jeffrey L. Condon, attorney and co-author of "Beyond the Grave: The Right Way and the Wrong Way of Leaving Money to Your Children (and Others)" and author of "The Living Trust Advisor: Everything You Need to Know About Living Trusts." The incentive of saving possibly hundreds of thousands of dollars in estate taxes might affect the way people behave when it comes to inheritances, he told *Consumers Digest*.

You might think the EGTRRA affects only the wealthy. Not so. Even if you have an es-





## Throwing a Bone to Pets

**A**ccording to American Pet Products Manufacturers Association, 63 percent of U.S. households own a pet, and in 2007, pet owners spent \$41.2 billion on their animals. That devotion has prompted increasing interest in pet trusts, as owners seek to ensure that their furry, feathery and scaly friends are taken care of after their deaths.

In some states, pet trusts are considered honorary and therefore not enforceable by law. But a growing number of states enacted statutory pet trusts. States that have enacted the Uniform Trust Code (UTC) also have enforceable pet trusts, notes John McDonald, an estate-planning attorney in Nashville, Tenn. The UTC stipulates that funds might be set aside in a trust for up to 21 years to care for a pet, he says.

Another option is a traditional legal trust in which you transfer your pet and funds for caretaking into the trust as property and name a caretaker as beneficiary.

Evan H. Farr, an elder-law attorney and estate adviser in Fairfax, Va., notes that if you create a *living trust*, it takes effect immediately upon your death. By contrast, a *testamentary trust*, one formed as a part of your will, might result in a lapse in the care you want for your pet until a court declares it valid. It also cannot protect your pet if you become unable to care for it, as a living trust typically can.

It's best to name an alternate caretaker (or caretakers) in case your first choice isn't interested or isn't available when the time comes, Farr says. In addition, consider naming a sanctuary or no-kill shelter as your last choice to ensure your pet's survival.

S. Craig Stone II, a Las Vegas estate-planning attorney, warns that care must be taken in drafting a pet trust to avoid any manipulation or misinterpretation (intentional or otherwise) by the pet's caretaker or trustee, or family members. There have been cases where a caretaker has killed the pet to get the money or has unnecessarily extended an ill pet's life, because he/she benefited only during the pet's life, he says.

tate valued at less than \$1 million, you could be affected.

"[T]he catch that no one ever talks about is that the end of the federal estate tax, whether temporarily in 2010 or permanently through a change in law, also means the end of a *step up in basis* on death," Wheatley-Liss says. A step up in basis means that if you bought, say, a stock at \$10 and it's now \$100, your heirs don't have to pay capital gains taxes on the \$90-per-share gain.

But with the elimination of the estate tax in 2010 (and potentially beyond, depending on Congress), your heirs will have to pay capital gains tax on some or all of the appreciation. What's more, if the stock was bought long ago, and there's no record of the original price (or *basis*), the price will be assumed to be zero dollars, meaning your heirs will be taxed on the entire value of the current price of the stock.

To protect your heirs from having to pay capital gains taxes on the full price of stocks you purchased long ago, consider transferring your stock portfolio to a brokerage account, Wheatley-Liss says. That way, you won't have to worry about your children finding documentation of what you paid to purchase the shares. Your heirs will have the paperwork they'll need to prove the basis after your death, she says.

Although some estate planners believe Congress will repeal the estate tax to appease wealthy taxpayers (who also fund their campaigns), the outcome is uncertain, and no change is likely this year. In the meantime, you would be well-advised to incorporate flexibility into your estate planning.

One example of flexibility: Alan Cohn, an estate-planning attorney in Fort Lauderdale, Fla., uses *disclaimer trusts*. A disclaimer trust allows the surviving spouse to place specified assets from his/her recently deceased spouse into the trust by "disclaiming ownership." The surviving spouse can access the trust, and the funds would be exempt from estate taxes upon the surviving spouse's death.

**Just Trust Us.** As you might have guessed, trusts have become a large part of any estate-planning strategy, because they can shield assets from the public or creditors. However, different laws in different states can affect your trust if you move from one state to another.

In response, more states are adapting laws when it comes to trusts. Many are doing it through what is called the Uniform Trust Code (UTC), a compilation of proposed laws drafted by a group of legal experts. According to National Conference of Commissioners on Uniform State Laws, 20 states and the District of Columbia have adopted the UTC or a modified version of it: Alabama, Arizona, Arkansas, Florida, Kansas, Maine, Missouri, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Virginia and Wyoming have it, while Connecticut, Massachusetts and Oklahoma introduced or

plan to introduce bills this year. The UTC is meant to keep the rules across states the same and provides rules where state law is not otherwise comprehensive.

But under the UTC, if the terms of a trust don't specify whether the trust is *revocable* (meaning it can be changed or cancelled by the person who set up the trust) or *irrevocable* (meaning it can't be changed or cancelled), it would be deemed revocable, explains Elena Marty-Nelson, professor of law at Nova Southeastern University in Florida.

The idea of take-backs might be appealing. You retain control of your assets, which is good if you want to keep an unruly child in line, because you can then change the terms of the trust. The problem is that if the trust doesn't specifically state that it's irrevocable, it leaves the door open to creditors, according to Marty-Nelson. And that's where things get messy among the states that have enacted the UTC, because in reality, the laws aren't completely uniform from state to state.

Under Florida's UTC, for example, if you set up a *support trust*, which is one that can be used to pay tuition, housing or food, or a *discretionary trust*, which gives you leeway about how the money will be doled out, a beneficiary's creditors cannot touch the trust funds, even if your beneficiary owes child support or alimony. But other states allow access to that "cookie jar." There are, however, an increasing number of states that are modifying the UTC to allow for *self-settled trusts*. These trusts protect

assets from creditors, but only if the trust was solely for the purpose of avoiding creditor words, the trust has to be set up well in advance.

If you're a doctor or other professional with exposure to potential lawsuits and creditors, by holding his/her hands out now, a self-settled be a useful tool to protect your assets. They're not necessary otherwise.

Keep in mind that asset protection trust is relatively new, which means it hasn't had "a kicking" by the courts" to gauge its effectiveness of smoothing out problems between states. WI warns. For example, "the Full Faith and Credit the U.S. Constitution provides that each state and enforce the laws of another state," she notes. New Jersey creditor sues a New Jersey resident self-settled asset-protection trust in Delaware creditor wins, it is arguable that the Full Faith Clause would demand that Delaware allow the have access to the trust.

"How courts will resolve this issue is unknown point," she says.

Other ways you can protect assets without a invest in your retirement plan, place your name of the spouse who's not involved in you and purchase life insurance. In some states, life is protected as an asset, Wheatley-Liss points o

## To protect your heirs

*from paying capital gains taxes on the full price of stocks you purchased long ago, consider transferring your stock portfolio to a brokerage account. That way, you won't have to worry about your children finding documentation of what you paid to purchase the shares.*



## Plan to Succeed: Medicaid and Asset Protection



If you plan to live a long time, inevitably nursing-home care might enter into the equation. Because of its high expense—in some cases, more than \$100,000 per year—nursing-home care requires a lot of money or a lot of planning if you want Medicaid, the state-federal health-care program for the poor, to pay for it. Asset protection in this case is particularly important for two reasons. First, if you're married, you'll want to ensure your spouse can continue to live at home with the same standard of living as before. Second, Medicaid doesn't pay for everything. Money set aside can pay for extras, such as a private room.

Deirdre R. Wheatley-Liss, a certified elder-law attorney at Fein, Such, Kahn & Shepard in Parsippany, N.J., says you have options to protect assets from counting against qualifying for Medicaid, including:

- ◆ **Trading Up:** If a spouse is living in your home and the home is valued at less than \$500,000 or \$750,000, depending on the state, then the entire value of the home is a *non-countable asset* for Medicaid purposes. In other words, the value of the house is not charged against you in qualifying for Medicaid, and your spouse living at home can use

the equity in the house for whatever he/she chooses. If the same amount of money were in the bank, you wouldn't qualify for Medicaid care. Beware, however, if you are in a nursing home and the house is in both your and your spouse's name. If your spouse dies, the house will pass to you—and Medicaid payments will cease until the house is sold and the proceeds spent on the nursing-home care. Instead, you should transfer the title to your spouse. That spouse should change his/her will to provide that assets pass on his/her death to a trust that is exempt from a Medicaid spend-down to the extent allowed by state law.

- ◆ **Outright Gift:** If you have a child living at home, and the child has lived there for more than 2 years prior to your admission to a nursing home and provided care to you, you can transfer the home to the child without incurring a Medicaid *transfer penalty* (the amount of time before Medicaid benefits kick in). A disabled child qualifies without having to provide care. Just be careful: Review any public benefits criteria your disabled child is receiving to ensure transferring your house to your disabled child will not disqualify him/her from any disability benefits.

- ◆ **Gift of House Subject to Life Estate:** A common asset-protection technique is to transfer your home to your children but keep a *life estate*, which maintains your right to live in the house for your lifetime and starts the 5-year clock running on the *look-back period* (the amount of time the government can go back to see if you gave money as a gift and how much). The sooner it starts, the sooner you can qualify for Medicaid to pay for nursing-home care, should you need it. With a life estate, you have a legal right to live in the home and your children cannot force you out (compared with an outright gift of the house, which has no such protection).

- ◆ **Purchase of a Life Estate:** You can purchase a life estate in a child's home. This is accomplished by calculating the expected number of years you'll live in the home based on your age. You then purchase a percentage of the house based on the number of years you'll live there and the fair market value. This can be a huge benefit for everyone involved, because you can transfer assets without creating a transfer penalty. This leaves more money available for the family to pay for your care, and you can qualify for Medicaid after 1 year if you have no other assets.

- ◆ **Creating a Trust:** Trusts can play a role in protecting assets from Medicaid and protecting transferred assets from your children's creditors, in the event of, say, a child's divorce or a child undergoing foreclosure on his/her home. If a trust names one or more children as beneficiaries and the trust has language stating that beneficiaries' creditors cannot reach the assets, then the assets can be protected from being distributed to your children's creditors during your lifetime. For example, if you gave money to a child whose home is being foreclosed, the bank can sue your child for the money you gave him/her, but if you placed the assets in a trust, the bank can't go after the assets. If a trust doesn't allow your child to take money out of it, then creditors and Medicaid can't, either.

**Hype or Help?** One type of trust of which you should be particularly aware is the *revocable living trust*. Although these trusts once were used primarily by the wealthy, now they're pitched to those who aren't millionaires as a way to avoid probate court, which besides opening your estate to the public, also can be costly. (In some states, probate courts charge a fee based on a percentage of the entire estate.)

"People selling [revocable] living trusts often intentionally use the word *probate* to describe the process of *estate administration*," Wheatley-Liss asserts. Estate administration is the overall process of appointing the executor; gathering the assets for him/her; paying off debts, liabilities and taxes; and getting the money to the heirs. Probate is merely the act of submitting the will to the court and the executor being named by the court to act on behalf of the estate. In other words, probate is not always a term to be feared.

If you have a revocable living trust or are considering creating one, you should note that any assets not transferred into the trust will be subject to probate, says Terence Nunan, an estate-planning attorney at Rutter Hobbs & Davidoff in Los Angeles. These trusts "do not avoid income tax, protect your assets from your own creditors during your lifetime, offer any estate tax advantage over a will, or really, any tax advantages at all."

But Emily M. Nelson, another estate-planning attorney with Rutter Hobbs & Davidoff, says there are advantages to revocable living trusts beyond the avoidance of the probate process. For example, there's no lag time associated with a revocable living trust. The trustee "will have instant access to all assets that are a part of the trust estate, including any existing trust bank accounts," she explains. Carrying out a will delays when a beneficiary can receive his/her inheritance.

But New York elder-care attorney Jeffrey A. Asher of Pryor Cashman emphasizes that avoiding probate still depends on the transfer of assets into the revocable living trust. The signing of documents creating the trust isn't enough.

Plus, if you create a revocable living trust and don't transfer assets of the trust—your house, your car, your money—you'll still have to go through probate. For example, if you deed your house to your trust and change the title to your brokerage account to the trust, but you keep your car and checking account in your own name, a probate proceeding will need to transfer the checking account and car to your beneficiaries. "So, while you have reduced the assets subject to a probate proceeding, you have not avoided probate," Wheatley-Liss says.

**Is Online Out of Line?** Speaking of saving money, when it comes to estate planning, there has been a surge in online estate-planning services. These services typically sell forms for that allow you to set up an estate plan for a fraction of the cost of an estate planner.

A will at LegalZoom.com, for example, costs about \$70. Each step has explanations and tips, and your form is reviewed for completeness before it's mailed to you. On the one hand, these Web sites do, however, have you fill out the form online, which means you disclose some pretty private information to them. On the other hand, PublicLegalForms.com offers free forms that vary depending on the state in which you live for you to print and fill in. This is more private if you plan to have your documents reviewed by an attorney. Although costs vary significantly by case, estate planning through traditional means can cost hundreds or even thousands of dollars.

Many of the attorneys we interviewed assert, not surprisingly, that although online services are much less expensive upfront, they might cost you more in the end if you don't know your options. Further, there are variations in state law. A boilerplate form from a Web site might not be acceptable in all states, and what's required by way of signatures varies, as well.

"I have seen over and over estates where the individual created their own plan, only to have their plan thwarted because of poor drafting," Morton says. He recalls a case where the decedent intended to disinherit his daughter, but because his will was wit-

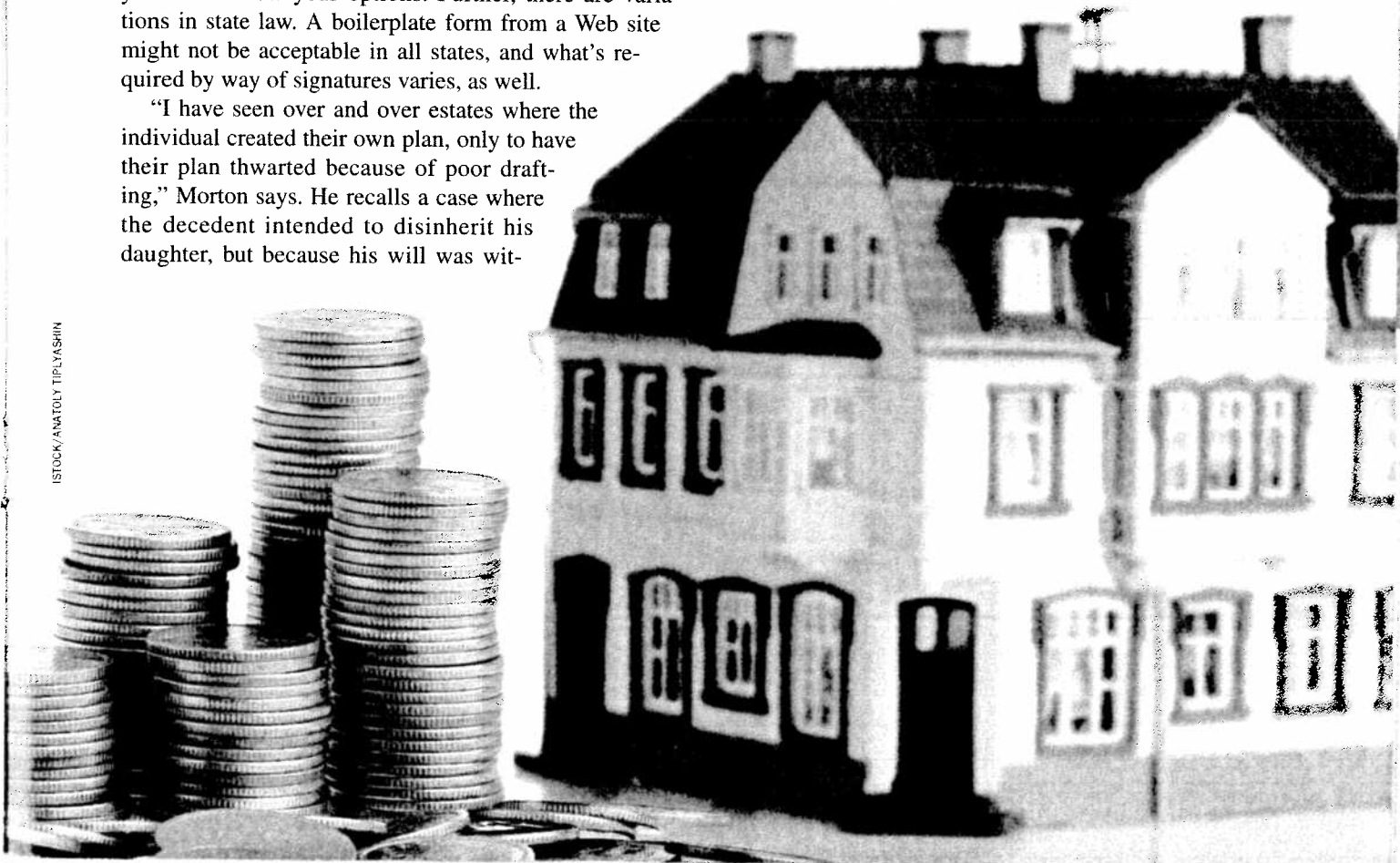
nessed by his other children, it was disallowed—and the excluded child shared equally, reversing the father's intentions.

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Although he admits there are certainly good outcomes from using online forms, Robert Miller, a Santa Ana, Calif., estate-planning attorney, says that an estate planner can inform clients about more options and thus better achieve estate-planning goals.

Even attorney Brian Liu, CEO and co-founder of LegalZoom.com agrees to a point. He says, "if you're not comfortable with making your own decisions and need legal advice; or if you want to disinherit a spouse, anticipate a will contest or have other difficult estate-planning issues; or if you have over \$2 million in assets and estate taxes are a concern, then we recommend that you seek a qualified estate-planning attorney."

You are well-advised to bring any documents to an attorney for review, but attorney R. Zebulon Law of Costa Mesa, Calif., points out that it might not be a money-sav-



ing move, because the attorney must read it word for word and understand all the legal nuances, otherwise he/she could be sued if something goes wrong. He maintains that it's cheaper for clients to use forms he himself has already drafted, because he already knows those nuances. As for the legal liability of the lawyers who drafted the online forms, there might not be any: Law pointed to disclaimers posted on those Web sites.

Joel R. Beck, an estate, small-business and financial-markets attorney in Snellville, Ga., agrees that the costs of an attorney review can be as much as starting from scratch. But, he says, if all you want is to ensure your will was executed properly and meets the requirements of the state to be valid, that review is quick and could be done for free or a very small cost.

But know that you cannot tweak, say, a form for a will purchased online. Adding or deleting words or sections invalidates it, Beck says; so does a major life change—getting married, or having or adopting a child—unless the will explicitly states that the will shall remain valid in the event of each of these changes.

Wheatley-Liss has a different take on online forms. If

you have a simple estate—you are leaving everything to your spouse and then your children, or you're a single person leaving assets to your children—and have no previous relationships that might complicate matters, the forms can work adequately. Just make sure, of course you have your signature notarized and witnessed as required by your state.

And what of Anna Nicole Smith's estate? The court determined that Dannielynn, the daughter born before the death of Smith's son but after Smith drafted her will, is Smith's heir, and the daughter will inherit her estate. Time will tell whether that constitutes a happy ending. The whole mess could have been avoided with careful planning. True, these types of family situations might be uncomfortable to think about and cost money now, but in the long run it could allow you to truly rest in peace. ☐

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*Stacie Zoe Berg is an award-winning journalist and author of books "The Unofficial Guide to Managing Your Personal Finances" and "The Unofficial Guide to Investing in Mutual Funds." She writes the "Your Money" department for Consumer Digest.*

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