

# *What Is Your Life Plan?*

## Futures & Estate Planning for People with Disabilities and Their Families

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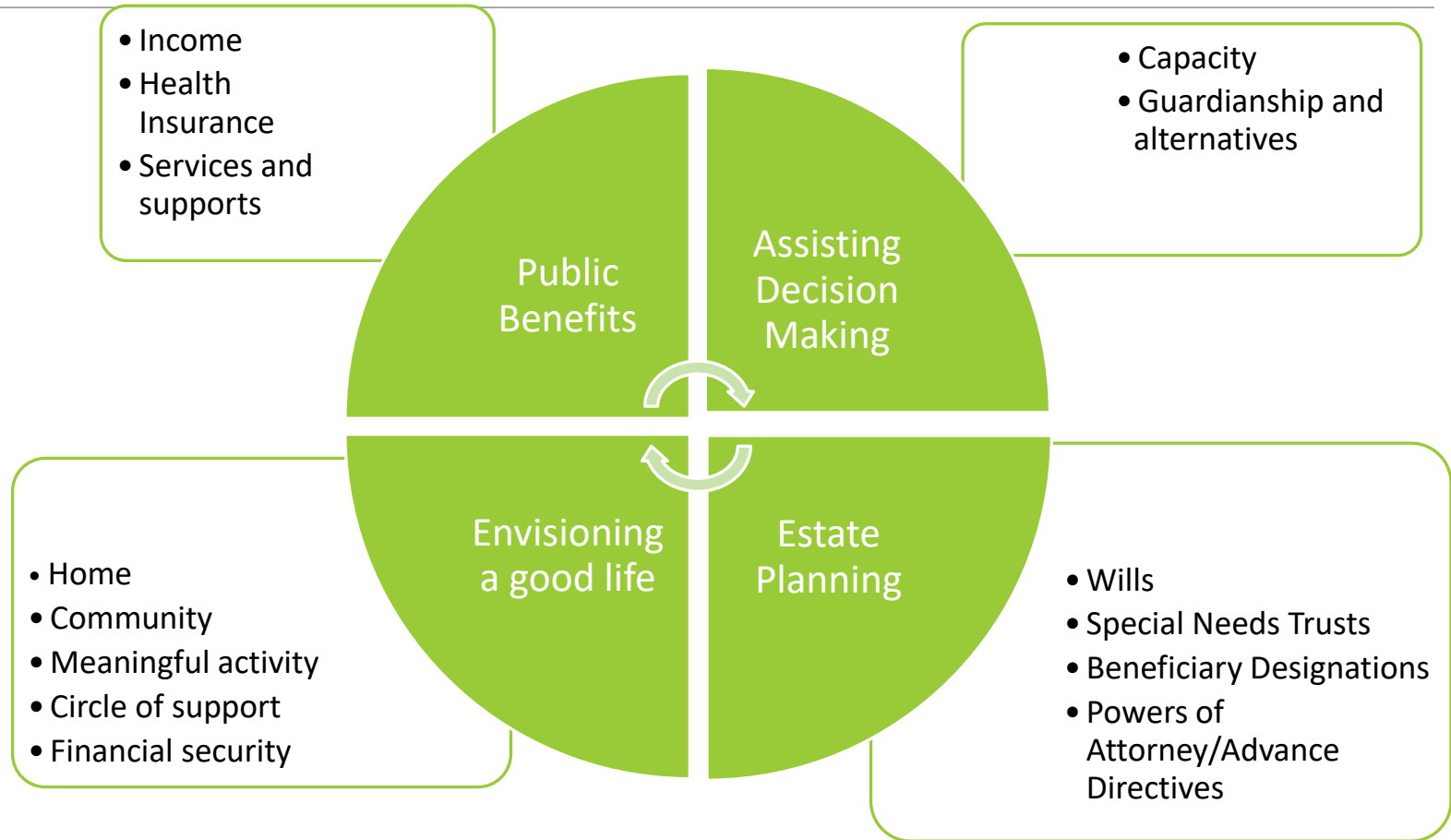
# OVERVIEW

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Legal issues in the context of futures planning:

- Estate planning and using Wills and Trusts
- Assisting in decision making – Guardianship and Alternatives

# Transition Planning and Beyond: What's Ahead for My Child/Ward and Me?



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How Best to Achieve One's Planning Goals When Faced with Limited Resources and When Many Important Public Benefits Have Strict Financial Tests?

# Estate Planning

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Estate planning involves determining what **assets** you wish **to leave** to or for others and **how**, over your **lifetime and at death**, and preparing and updating the **tools** to accomplish these goals.

Important planning considerations include:

- Providing for a **surviving spouse** and **other family members**, as well as those with **special needs**.
- **Blended** families; coordination with former spouses.
- Naming the right **fiduciaries (people in charge of the money)**.
- **Tax** planning.
- **Funding** your plan.
- Coordinating the disposition of **probate and non-probate assets**.
- Estate planning by **the person with disabilities**.

# What's a Will?

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A Will is **legal document**, executed according to state law, which instructs how an individual's **probate estate** is to be managed and distributed after death and appoints the people or entities who will carry out these instructions.

# What's a Trust?

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A Trust is a **legal entity** created by a grantor for the benefit of one or more beneficiaries under the laws of the state and a valid trust **document** which appoints a Trustee to manage and administer the trust assets.

There are many types of trusts; what type and what characteristics suit your planning will depend on many factors.



# What is Probate?

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- Probate is a **court process** that **validates a Will**, and guides the **collection of the assets** of the deceased, the **payment of debts** and **taxes**, and proper **distribution** of assets to heirs.
- **Not all assets pass through probate** – only those in your own name, without joint owners or beneficiary designations, or those in a trust.
- **Non-probate assets** pass according to **title** (e.g., to other joint owners), the beneficiary designation, or the dispositive terms of the trust.
- **Your Will only controls what goes through probate.**
- Coordination of probate and non-probate assets is essential to achieve the desired estate planning outcome.

# What Happens if I die Without a Will?

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- Your **probate estate** will be **distributed according to state law** of intestacy based on familial relationship – spouse, children, parents, more remote relatives.
- **Non-probate assets** distributed according to title or beneficiary designations.
- **Inheritance received outright** by a child with disabilities will be **fully countable for many benefits, like SSI and Medicaid.**

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Many variables in trusts.

Focus first on the purpose.

Then choosing your variations.

# Special Needs Trusts

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- Special needs trusts provide a way to **set aside and manage assets** (e.g, income, investments, real property, insurance proceeds).
- For the benefit of an **individual with disabilities**.
- To **exclude trust assets from being counted** towards eligibility for means-tested benefits and allow use of these assets for the **beneficiary's quality of life**.

# Variables in creating your Trust

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- May be funded with the assets belonging to the person with disabilities (“**first party trust**”) or someone else’s (“**third party trust**”).
- May be created or funded **during lifetime** (“inter vivos”) or **at death** (“testamentary”).
- May be **revocable** or **irrevocable**.
- Which type of trust is right for you will depend on the facts and circumstances; e.g. ability to fund trust now or in the future, tax consequences.

# Revocable and Irrevocable Trusts

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## **Revocable** Living Trust

- The grantor can revoke or otherwise **change** the trust and **retain control** of trust assets.
- **Avoids probate.**
- Provides a way to manage assets in event of incapacity.

## **Irrevocable** Trust

- The grantor **cannot change** the trust.
- May have tax implications for the grantor.
- May have consequences for grantor's eligibility for Medical Assistance in five years after funding of trust.

# Examples of Special Needs Trusts

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Parents include a special needs trust under a Last Will and Testament (“**testamentary trust**”).

Grandparents set up a trust now into which they and others may transfer funds during their lifetime or by the terms of their Wills; the trust cannot be changed later (“**irrevocable *inter vivos* trust**”).

Parents create a trust that can be changed over time to respond to evolving abilities/circumstances of the beneficiary and plan to fund the trust with life insurance policy (“**revocable living trust**”).

Individual over 18 and on SSI receives an inheritance and puts it into a first party funded SNT that meets SSI and Medicaid rules (“**first party special needs trust**”).

# Thoughts on Selecting the Trustee

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In search of :

- Job's patience
- Martha Stewart's organizational skills
- Abe Lincoln's honesty
- Warren Buffet's investment savvy
- Ralph Nader's advocacy
- George Burns' longevity

How to involve family and friends who care

Single Trustee – Co-Trustee – Corporate – Non-profit

Who can choose or change the Trustee

Costs and services over time



# Trust Protector

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Advocate for Beneficiary

Limited but powerful authorities, e.g.:

- Remove the trustee
- Review accountings
- Amend trust to correct mistakes, respond to changes in tax/benefits laws.

Another set of eyes on the Trustee.

Built into the trust document.

May be a good role for family members who don't want to be the trustee.

# Estate Planning is a Process

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Developing **goals** for oneself and loved ones.

Determining the **proper tools** and documents to achieve these goals.

Developing a **plan** for funding, coordinating among all one's assets.

Staying attuned to **changes** in the environment.

**Revisiting** the plan periodically to make adjustments.

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# Assisting in decision making

# Common goals for parents/families of adults with intellectual disabilities

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- **Legal role** allowing assistance with complex decision making, and access to information.
- Support for child's **autonomy and independence**.
- **Protection** from manipulation, undue influence, giving money away.
- **Remaining involved** in adult child's important life decisions.

# Capacity

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Capacity - **circumstance specific**; the individual must be able to understand and communicate what choices s/he is making, the alternatives to and the consequences of the choices.

Physician's **certificate of capacity** helpful to protect the integrity of the decisions.

# Continuum of options to aid decision making

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Less capable

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More capable



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If the individual is capable of making **voluntary**, **independent** and **knowing** decisions about whom to select to assist in decision making,

then Powers of Attorney and Advance Medical Directives are an option.

# Financial Power of Attorney

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- The single most **cost effective tool** for asset management.
- Document which permits someone else to attend to your property and financial affairs **during your lifetime.**
- Helps **avoid** the cost and intrusion of legal **guardianship.**
- Needed for both parents and adult child with disabilities, if capable.



# Advance Medical Directives

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- **Name** health care decision makers (Agents) to act in the event you become incapacitated and to give specific instructions about the care one does and does not want to receive.
- **Instructions** about **end of life decisions**.
- Many names for these documents,
  - Appointment of Health Care Agents or Medical Power of Attorney names decision makers.
  - Living Will contains end of life instructions.
- Helps **avoid** the cost and intrusion of legal **guardianship**.

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If the individual **is not capable of** making voluntary, independent and knowing decisions about whom to select to assist in decision making,

then we have **many alternatives for assisting in decision making**, short of guardianship, for financial and medical decisions.

# Alternatives for financial management

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- **Representative Payee** for Social Security, VA benefits, other federal benefits.
- **Joint title** on bank accounts.
- **Uniform Transfer to Minors** (until 21).
- **ABLE** Accounts (with some limitations.)
- Court order under Specific Transaction **Without Appointment of Guardian** statute.
- **Trusts.**
- *One or more of these options may take care of all of the individual's financial circumstances.*

# Alternatives for financial management

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May be effective for years; little or no cost; may have reporting requirements.

These arrangements operate under a set of circumstances (“**status quo**”); when something changes, another option may be needed.

- New assets received that are in individual’s name alone like inheritance, insurance, or lottery winnings.
- The person managing the alternative may die or become incapable.

# Alternatives for medical matters

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In Maryland, ***by statute***:

Certain people may legally act as surrogate health care decision makers for a person

- who has been certified to be incapable of making an informed decision and
- who has not appointed a health care agent, or the agent is unavailable.

# Surrogate Decision makers

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In priority order:

- (i)** A guardian for the patient, if one has been appointed;
- (ii)** The patient's spouse or domestic partner;
- (iii)** An adult child of the patient;
- (iv)** A parent of the patient;
- (v)** An adult brother or sister of the patient; or

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**(vi)** A friend or other relative of the patient who meets the requirements of paragraph (3) of this subsection.

**(3)** A friend or other relative may make decisions about health care for a patient under paragraph (2) of this subsection if the person:

- **(i)** Is a competent individual; and
- **(ii)** Presents an affidavit to the attending physician stating:
  - **1.** That the person is a relative or close friend of the patient; and
  - **2.** Specific facts and circumstances demonstrating that the person has maintained regular contact with the patient sufficient to be familiar with the patient's activities, health, and personal beliefs.

Md. Code Ann., Health-Gen. §5-605(a)(2)

# Consent

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An individual may consent to someone to be present during medical appointments, or to obtain information, and this can be retained on file in the providers' offices.

Not as encompassing as an appointment of agent under Advance Directives, or a surrogate decision maker, but may smooth the way in some situations.

*Meeting with medical staff in advance of 18<sup>th</sup> birthday to plan for future decision making can be very helpful.*



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If the individual **is not capable** of making voluntary, independent and knowing decisions about whom to select to assist in decision making,

**And we do not have less restrictive alternatives to** assist in decision making, then guardianship of person or property may be appropriate.

# Guardianship of Person

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- Court finds the individual **lacks the capacity to make or communicate decisions** about his or her person, e.g., health care, food, clothing, shelter.
- Requires **high standard of proof**.
- **No less restrictive alternative** available.
- Guardian generally has the same rights over Ward as a parent over a minor child.
- Life sustaining issues need court approval.

# Guardianship of Property

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- **Court finds person incapacitated** due to mental or physical disability, and
  - Has **assets or benefits which require management**, and
  - **Cannot manage** assets or benefits because of disability, and
  - **No less restrictive alternative** available
- Guardianship takes away the rights of the Ward (the person who is found incapable) to make his or her own decisions regarding property.

# Guardianship Process

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- **Filings** in Circuit Court.
- Medical/professional **certificates**.
- Appointment of **Counsel** for alleged disabled.
- **Hearing**.
- **Training** required.
- Ongoing **relationship** with Court for lifetime of Ward.
- **Public** record.

# *Please note:*

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This presentation is not intended as legal advice. Every situation is unique. Please consult with your family's legal counsel to develop the plan that best meets your and your loved one's needs.

# Resources, Law & Regulations

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“Program Operations Manual System” used by Social Security field and regional office staff.

Contains definitions, rules and procedures for all steps in Social Security eligibility and application process.

Access via [www.ssa.gov](http://www.ssa.gov)

Special Needs Alliance [www.specialneedsalliance.org](http://www.specialneedsalliance.org)

NAELA National Academy of Elder Law Attorneys [www.naela.org](http://www.naela.org)

Md. Developmental Disabilities Council [www.md-council.org](http://www.md-council.org)