ESTATE PLANNING FOR THE DISABLED BENEFICIARY
Wills, Trusts, including Special Needs Trusts,
and Powers of Attorney (with a hint of Guardianship)

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Estate planning can allow people to direct how, when and to whom their property passes, both at death and (in the case of some trusts) during life. Wills and/or trusts and powers of attorney are generally the main documents that make up a person’s estate plan (other documents, such as marital property agreements, also can be part of a person’s estate plan). Parents and other relatives of people with disabilities are uniquely positioned—if their child or other relative qualifies for or is likely to qualify for means-tested public assistance, they have to be careful about how they leave assets to that person. This outline hopefully will allow the reader to begin thinking about his or her own estate plan, including specifically the planning that is needed to accommodate the person with the disability. This outline is not intended to provide legal advice.

I. What Will Happen to My Property If I Don’t Do Any Estate Planning?

A. Property may pass by operation of law. Assets are titled in different ways. Some ways allow assets to change hands automatically at death. If a person with a disability inherits an asset by operation of law, he or she is at risk of losing his or her public benefits. Some of the most common ways assets pass by operation of law include:

1. Joint Tenancy. If two or more people own property as joint tenants, the survivor(s) take title to the property at the death of the first joint tenant.

2. Survivorship Marital Property. If spouses own property as survivorship marital property, the surviving spouse takes title to the property at the death of the first spouse.

3. Beneficiary Designation (life insurance, retirement accounts, payable on death accounts). If any individual names another (or a trust) as beneficiary of an asset, the beneficiary takes the asset (or the proceeds) at the death of the insured or account holder.
B. **Property may pass under the laws of intestacy.** Dying "intestate" means dying without a valid will. Wisconsin has statutory "fallback" provisions which direct the distribution of assets that are held by an individual at death and which are not governed by law or by a will or a trust. The intestacy laws do not make any special provisions for people with disabilities. Thus, if someone with a disability inherits under these laws, he or she is at risk of losing his or her public benefits.

1. **Share for surviving spouse.** The surviving spouse receives the entire estate unless the decedent has children who are not the children of the surviving spouse.

2. **Share for children.** If the decedent is married, the decedent’s children get a share only if they are not the children of the surviving spouse. If the decedent is not married, his or her children (or grandchildren, if a child has died) share the entire estate.

3. **Share for other relatives.** If there is no surviving spouse, children or grandchildren, the decedent’s parents, siblings, nieces and nephews, grandparents and other relatives all could receive property, depending upon who is surviving.

4. **Share for state.** If a person dies with no heirs, the state school fund receives the property.

II. **Do I Need Estate Planning?** If you intend to leave assets to a person with a disability, you will need to do some estate planning, either via will or trust (or both). A will or trust (or both) also is needed if you have to plan for minor children, if you have a blended family, if you need or want to avoid estate tax, if you help support your parents, if you want to leave property to charity or if you disagree with the distribution of property under the laws of intestacy. There may also be other reasons to create a will or trust.

III. **Will Planning 101.**

A. **A will distributes the testator’s property after his or her death.** It can distribute property outright or create a trust for the benefit of a beneficiary.

B. **If the testator has minor children or children who may need a guardian, that nomination is made in the will.**
C. In Wisconsin, a will must be witnessed by two witnesses in order to be valid. The testator must be 18 years old, competent and not under undue influence at the time the will is signed. The witnesses must meet certain requirements.

IV. Trust Planning 101.

A. Trusts can be used for any lawful purpose. They are very flexible, and can be drafted to accomplish a variety of goals.

B. Trusts can be “stand-alone” or created under a will or another trust.

C. Common Elements.

1. Grantor/Settlor (the person providing the property to be held in trust).

2. Beneficiary (the person for whose benefit the trust is created).

3. Trustee (the person or entity that administers and manages the trust for the benefit of the beneficiary).

D. Living (Intervivos) Trust vs. Testamentary Trust. A living trust is one created and administered during the life of the grantor/settlor. A testamentary trust is one created at the death of the grantor/settlor under the terms of a will.

E. Most Common Uses of Trusts.

1. Manage property for a beneficiary.

2. Distribute property at appropriate times.

3. Avoid taxes.

4. Avoid probate.

F. Most Commonly Used Trusts.

1. Trust for children. This trust manages and administers assets for the benefit of minor children.
2. Revocable living trust. This trust is created during the grantor’s life and holds and manages assets during the grantor’s life. The grantor is usually the trustee. Its main purpose is to avoid probate.

3. Family trust (also called bypass trust or credit shelter trust). The income of this trust may be paid to the surviving spouse during his or her life, but at the death of the surviving spouse, the assets in this trust generally pass automatically to the children or remain in trust for their benefit.

4. Special needs trust. This trust is created for the benefit of a person with a disability and is designed to maintain eligibility for public benefits. It can be created by individuals in the same way other trusts are created (as a testamentary or inter vivos trust, for example). There are also pooled and community trusts available to assist with management of funds for the benefit of persons with disabilities.

V. How Do You Decide, Will or Revocable Trust? You can accomplish similar planning whether you use a will or a trust. Both can distribute assets and plan for beneficiaries, including beneficiaries with disabilities. Both can accomplish estate tax planning.

A. Wills. Assets that pass via will are subject to probate court supervision. Trusts that are established under a will are not subject to ongoing probate court supervision. If a will is used, there is no need to retitle assets to a trust during life.

B. Trusts. Assets that pass via a revocable trust may have to be retitled during the life of the trust grantor/settlor, so there is more work at the outset. However, assets that pass via a revocable trust and trusts that are established under a revocable trust are not subject to probate court supervision. Thus, they offer a level of privacy to the grantor/settlor and the beneficiaries.
VI. Special Needs Trusts. Can be incorporated into a will or a revocable trust, or can be stand-alone.

A. Five common elements:

1. The SNT must be an irrevocable trust (i.e., the funds cannot be returned).

2. The funds can only be spent for the sole benefit of the Beneficiary.

3. Depending on the type of means-tested public benefits received, there may be restrictions on what expenses the SNT can pay for.

4. The funds may not be paid directly to the Beneficiary (i.e., the Beneficiary cannot receive cash).

5. The Beneficiary must be disabled as defined by the Social Security Administration.

   a. If someone is under 18, he or she must have a medically determinable physical or mental impairment which results in marked or severe functional limitations and which has lasted or is expected to last for a continuous period of at least 12 months or is expected to result in death.

   b. If someone is more than 18, he or she must have a medically determinable physical or mental impairment which results in the inability to do any substantial gainful activity and which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months.

B. Funding sources. Where the money comes from determines whether Medicaid payback applies at the end of the beneficiary’s life.

1. Self-settled trusts are those funded with the beneficiary’s own resources (such as from a personal injury settlement)—subject to Medicaid payback rules.
2. **Third-party funded trusts** are those funded with assets from another person (parent, grandparent, sibling, etc.)—not subject to Medicaid payback rules.

C. **Private special needs trusts.**

1. The parent, relative or beneficiary establishes their own special needs trust.

2. Typically prepared by an attorney.

3. Can be testamentary or living.

4. Can be stand-alone or incorporated into a will or trust.

5. Can be first-party or third-party trusts.

6. Have to appoint a trustee. When deciding who to appoint, consider whether the trustee is familiar with public assistance laws (so they do not inadvertently make a distribution that would disqualify the beneficiary from his or her benefits) and whether the trustee is up to the task of being a trustee. In addition to the accounting and other responsibilities, the Uniform Trust Code specifically requires a duty of loyalty and other requirements that the trustee act in good faith for the benefit of the beneficiary.

7. Distributions from the trust are not counted as a resource for public benefits programs as long as payments are not made directly to beneficiaries and do not pay expenses that would jeopardize eligibility for public benefits.

D. **Pooled/Community special needs trusts.** Pooled and community trusts are not private—the funds are held in a larger pooled/community trust and one trustee professionally manages the funds for all sub-account beneficiaries.

1. **The WisPACT Trust Program.** [www.wispact.org](http://www.wispact.org)

   a. Established and managed by WisPACT, Inc., a Wisconsin non-profit. The Trustee is Chemical Bank.
b. There are specific forms needed to create a “sub-account” in the appropriate trust, and attorney involvement is required at the start up phase.

c. A benefit: smaller fees for a corporate trustee. Fee schedule is on the website.

d. Distributions from the trusts are not counted as a resource for public benefits programs as long as payments are not made directly to beneficiaries and do not pay expenses that would jeopardize eligibility for public benefits.

e. There are two trusts, WisPACT Trust I and WisPACT Trust II. Trust I is used for self-settled (or beneficiary-funded) accounts and Trust II is used for third-party funded accounts.

i. WisPACT Trust I is a pooled trust. When a beneficiary dies, anything left in a sub-account may be transferred to another Trust I sub-account for another disabled family member. Otherwise, Medicaid is paid back first. If the amount is too small to pay Medicaid, amounts remaining in the sub-account at death remain in a pool for other disabled beneficiaries.

ii. WisPACT Trust II is a community trust. When a beneficiary dies, anything left may be spent on the beneficiary’s funeral, and then distributed to heirs.

f. Minimum funding around $1,000 (includes set up fees). No maximum, although if amount is high, will want to consider whether a private trust makes sense.

2. Life Navigators (formerly The ARC Milwaukee Community Trust for Persons with Disabilities). www.lifenavigators.org

a. Established and managed by Life Navigators, Inc. The Trustee is Waukesha State Bank.
b. Offers a Trust I (community trust/third party trust) and a Trust II (pooled trust/self-settled trust).

c. Minimum funding of $25,000.

3. The ARCh (Association for Rights of Citizens with handicaps) Life Needs Trust. www.waukesharach.org/lifeneeds_trust.htm

E. Former pooled special needs trust? Over the years, Movin’ Out ran the Movin’ Out Housing Trust (formerly the WISH (Wisconsin Initiatives in Sustainable Housing) Trust). It was a pooled trust and held real estate that was managed for the benefit of the person with disabilities (so that he or she had a place to live). On the death of the beneficiary, the real estate and any remaining funds were retained in the trust to develop affordable, sustainable housing for future generations of people with disabilities. Movin’ Out’s website no longer advertises its trust. www.movin-out.org Instead, it describes itself as a state-wide nonprofit housing organization whose mission is to provide affordable housing options to households that include a family member with a permanent disability. It does things such as assists households with both home ownership and affordable rental opportunities and provides specialized housing counseling to assist households to create and carry out a housing plan.

F. ABLE Account. As of June 1, 2016, the ABLE (Achieving a Better Life Experience) account became available to individuals with disabilities. An ABLE account is a tax-advantaged savings account that allows individuals to set aside funds for use toward certain disability-related expenses. The program is still very new, and Wisconsin does not yet offer ABLE accounts, although Wisconsin residents may be able to open accounts in another state (currently, Michigan, Nebraska, Ohio and Tennessee are available to residents of other states).

1. The designated beneficiary must be blind or disabled before the age of 26 (age of diagnosis is not a factor as long as the disability began before age 26).

2. The designated beneficiary is the owner of the account. If the beneficiary is a minor or incapable of managing the account, a
parent, legal guardian or agent under a power of attorney can establish the account for the beneficiary.

3. ABLE accounts work much like 529 EdVest accounts from a tax standpoint. Income earned on the account is not taxed. Although contributions are not tax deductible in many states, Wisconsin allows a subtraction from federal adjusted gross income for the amount deposited in the taxable year.

4. Total annual contributions to an ABLE account for a particular beneficiary are limited to the federal gift tax exclusion amount (currently $14,000). If more than the federal gift tax exclusion amount is deposited in any one year, the ABLE program must return the excess contributions to the contributor(s). If the excess contributions are not returned before the beneficiary's deadline to file his or her income tax return, there is an additional federal tax of 6% (on the excess) and a Wisconsin penalty of 33% of the federal tax.

5. Wisconsin's account limit over time is $330,000 (same as EdVest), however, for an individual on SSI (Supplemental Security Income) the limit is $100,000 (if a beneficiary on SSI receives more than $100,000, he or she would be suspended from eligibility for SSI, although he or she would continue to be eligible for Medicaid).

6. Withdrawals from the ABLE account can only be made for "qualified expenses," including:
   a. Education;
   b. Housing;
   c. Transportation;
   d. Employment training and support;
   e. Assistive technology;
   f. Personal support services;
   g. Health care expenses;
   h. Prevention and wellness;
   i. Financial management and administrative services;
   j. Legal fees;
   k. Expenses for oversight and monitoring;
I. Funeral and burial expenses; and
m. Other expenses approved by the Internal Revenue Service under regulations and consistent with the purposes of ABLE programs.

VII. How Do You Decide, Private or Pooled/Community Special Needs Trust/ABLE Account? Many considerations: personal preference/family dynamics; fees; trustee (or lack of trustee); familiarity with public assistance, etc. Each family has to decide what is right for them.

VIII. Powers of Attorney.

A. Definitions.

1. A power of attorney is a document by which one person (the “principal”) authorizes another person (the “agent”) to act on his or her behalf.

2. A power of attorney is “durable” if it is effective in spite of the principal’s incapacity, incompetence or disability.

3. There are powers of attorney for finances and powers of attorney for health care.


1. The power is flexible.

   a. The principal may appoint one or more agents.

   b. The authority granted may be broad or specific.

   c. The power of attorney may become effective only upon the incapacity of the principal (springing power) or may become effective upon execution.

2. The power of attorney is relatively simple and inexpensive to prepare.
3. Execution of a power of attorney is an alternative to guardianship (if the principal becomes incapacitated).

4. The power of attorney allows the principal to choose who will manage his or her financial affairs and to nominate a conservator, guardian of the estate and guardian of the person.

5. The agent is not subject to court supervision.

6. The agent can carry out the principal’s estate plan.

7. What powers can be granted?
   a. Collect money;
   b. Pay debts;
   c. Buy and sell property;
   d. Apply for insurance or retirement benefits;
   e. File tax returns; and
   f. Sue or defend.

8. The agent cannot execute a will, vote, take oaths, take marriage vows or perform personal service contracts on behalf of the principal.

9. A conservator or guardian may revoke or amend the power.

10. The agent is not subject to court supervision.

11. There are certain requirements for executing a valid general durable power of attorney so attorney involvement is recommended.


1. Differs from a general durable power of attorney in that it is limited to health care decisions and it is not effective unless the principal is incapacitated.
2. Differs from a “living will” because a living will only applies if the principal has a terminal condition or is in a persistent vegetative state and only authorizes the withholding or withdrawal of life-sustaining procedures and feeding tubes. Unlike a power of attorney for health care, a living will does not authorize any other health care decisions.

3. The principal must be at least eighteen (18) years old and of sound mind.

4. The power of attorney must be signed and dated in the presence of two witnesses. The witnesses must meet certain requirements.

5. The document must contain a special notice or a lawyer’s certificate.

6. The agent can make health care decisions (with certain limitations). For example, if specifically authorized, the agent can admit the principal to a nursing home or community-based residential facility. In addition, if authorized, the agent can consent to the withholding or withdrawal of feeding tubes. The agent also can request, review or consent to the disclosure of medical records.

7. This power of attorney allows an individual to make his or her own decisions about health care.

8. It can help avoid disputes between family members or between family members and health care providers.

9. It may allow an individual to avoid guardianship and protective placement (if the principal becomes incapacitated).

VII. Guardianship.

A. What is Guardianship?

1. Guardianship is a legal relationship between a guardian (court-appointed) and a ward (the subject of guardianship).

2. The guardian can make both financial and personal (such as health care) decisions for the ward if the guardian is granted the power to make such decisions.
3. Guardianship can help protect a person against exploitation or abuse.

B. Types of Guardianships.

1. Guardianship of the Estate. The guardian is appointed to make financial decisions on behalf of the ward.

2. Guardianship of the Person. The guardian is appointed to make the ward’s personal care decisions.

3. Guardianship of the Person and the Estate. The guardian is appointed to make both financial and personal care decisions on behalf of the ward. A ward can have one guardian making all these decisions or can have one guardian for financial decisions and one guardian for personal care decisions.

C. Standards for Guardianship.

1. Minor and Spendthrift Guardianships.
   a. The court may appoint a guardian of the person or the estate or both for a minor.
   b. The court may appoint a guardian of the estate for a person over the age of 18 and a spendthrift. A spendthrift is a person who, because of the use of alcohol or other drugs or because of gambling or other wasteful course of conduct, is unable to manage effectively his or her financial affairs or is likely to affect the health, life or property of himself, herself or others so as to endanger his or her support and the support of his or her dependents, if any, or expose the public to responsibility for his or her support.

2. Guardianships for persons deemed incompetent.
   a. A court may appoint a guardian of a person or a guardian of the estate, or both, for an individual based on a finding that the individual is incompetent. An individual found incompetent is one who is:

(1) At least 17 years and 9 months;
(2) For purposes of appointment of a guardian of the person, because of an "impairment," unable to effectively receive and evaluate information or to make or communicate decisions to such an extent that the individual is unable to meet the essential requirements for his or her physical health or safety;

(3) For purposes of appointment of a guardian of the estate, because of an "impairment," unable effectively to receive and evaluate information or to make or communicate decisions related to management of his or her property or financial affairs, to the extent that:

   (i) The individual has property that will be dissipated in whole or in part.

   (ii) The individual is unable to provide for his or her support.

   (iii) The individual is unable to prevent financial exploitation.

(4) Unable to have his or her need for assistance in decision making or communication met effectively and less restrictively through appropriate and reasonable available training, education, support services, health care, assistive devices or other means that the individual will accept.

b. A determination of incompetence specifically may not be made based on mere old age, eccentricity, poor judgment or physical disability.

c. "Impairment" is defined as a developmental disability, serious and persistent mental illness, degenerative brain disorder, or other like incapacities.

(1) A developmentally disabled person means any individual having a disability attributable to mental retardation, cerebral palsy, epilepsy, autism or other
neurological condition closely related to mental retardation or requiring treatment similar to that required for mentally retarded individuals, which has continued or can be expected to continue indefinitely, substantially impairs the individual from adequately providing for his or her own care or custody and constitutes a substantial handicap to the afflicted individual. The term does not include a person with degenerative brain disorder.

(2) Serious and persistent mental illness means a mental illness that is severe in degree and persistent in duration, that causes a substantially diminished level of functioning in the primary aspects of daily living and an inability to cope with the ordinary demands of life, that may lead to an inability to maintain stable adjustment and independent functioning without long-term treatment and support and that may be of lifelong duration. Serious and persistent mental illness includes schizophrenia as well as a wide spectrum of psychotic and other severely disabling psychiatric diagnostic categories, but does not include degenerative brain disorder or alcohol or other drug dependence.

(3) Degenerative brain disorder means the loss or dysfunction of an individual’s brain cells to the extent that he or she is substantially impaired in his or her ability to provide adequately for his or her own care or custody or to manage adequately his or her property or financial affairs.

(4) Other like incapacities means those conditions incurred at any age that are the result of accident, organic brain damage, mental or physical disability, or continued consumption or absorption of substances, and that produce a condition that substantially impairs an individual from providing for his or her care or custody.
The court must consider a variety of information to determine whether an individual is incompetent, including:

1. The guardian ad litem’s report.

2. The medical or psychological report.

3. Whether the proposed ward has engaged in any advance planning for financial and health care decision making.

4. Whether other reliable resources are available to provide for the individual’s personal needs or property management, and whether appointment of a guardian is the least restrictive means to provide for the individual’s need for a substitute decision-maker.

5. The individual’s preferences, desires and values with regard to personal needs or property management.

6. The nature and extent of the individual’s care and treatment needs and property and financial affairs.

7. Whether the individual’s situation places him or her at risk of abuse, exploitation, neglect or violation of rights.

8. Whether the individual can adequately understand and appreciate the nature and consequences of his or her impairment.

9. The individual’s management of the activities of daily living.

10. The individual’s understanding and appreciation of the nature and consequences of any inability he or she may have with regard to personal needs or property management.
(11) The extent of the demands placed on the individual by his or her personal needs and by the nature and extent of his or her property and financial affairs.

(12) Any physical illness of the individual and the prognosis of the individual.

(13) Any mental disability, alcoholism, or other drug dependence of the individual and the prognosis of the same.

(14) Any medication with which the individual is being treated and the medication's effect on the individual's behavior, cognition and judgment.

(15) Whether the effect on the individual's evaluative capacity is likely to be temporary or long term, and whether the effect may be ameliorated by appropriate treatment.

(16) Other relevant evidence.

D. Procedures for Guardianship.

1. File a petition for guardianship with the appropriate court.

   a. In most counties, the probate court handles guardianship petitions. Venue (the appropriate county) is governed by the residence of the proposed ward. There are statutory directives that govern venue for nonresidents and changes in venue.

   b. Petitions require specific information, including not only name and address but information about the proposed ward's alleged incapacity. The required forms are available through the court.

   c. Guardianship petitions must be heard within 90 days of filing. The court will set the date for hearing when the petition is filed.
2. The court will appoint a guardian ad litem, an attorney to represent the best interests of the proposed ward. The guardian ad litem will be required to prepare a report.

3. The petitioner must notify the proposed ward, guardian and interested persons of relevant proceedings.
   a. Upon filing the petition, the court orders the petitioner to serve notice on the proposed ward and guardian and to deliver notice to interested persons. Failure to provide notice as required by the statute deprives the court of jurisdiction.
   b. Service has to be completed within certain times, typically no later than 10 days before the guardianship hearing.
   c. Depending on who is included in the petition, specific persons have to receive notice.
   d. Personal service is required for some persons.

4. A physician or psychologist, or both, must examine the ward and provide a report. The physician’s report must be provided to the guardian ad litem and the attorney for the proposed ward at least 96 hours before the hearing. The guardian ad litem, the physician or the psychologist must inform the proposed ward that any statements made to the physician or psychologist may be used as a basis for a finding of incompetency and that the ward has the right to refuse to participate in any assessment. The physician or psychologist can consider information from before the petition was filed, but the court is directed to consider the recency of the report.

5. The guardianship statutes set out a list of the proposed ward’s rights, including, but not limited to, the right to advocacy counsel.

6. At the hearing, the judge or court commissioner will decide whether guardianship is appropriate. If the court awards guardianship, the court will prepare an order that will appoint a guardian and make rulings with regard to the ward as appropriate.
a. The statute requires the court to consider a variety of information when determining whether a nominated guardian is appropriate.

b. The statute also sets out the general duties of a guardian as well as duties specific to a guardian of the person and guardian of the estate.

c. The court can award payment of the petitioner’s costs and fees out of the ward’s estate, if appropriate.

d. The court must award payment of the guardian ad litem’s costs and fees out of the ward’s estate, unless the court otherwise directs or the court dismisses the guardianship petition.

e. The court order for guardianship can appoint co-guardians and standby guardians as necessary.

E. Post-Guardianship matters.

1. The guardian of an estate is required to file an inventory of the ward’s assets within 60 days of appointment.

2. All guardians are required to file yearly annual accounts with the court by April 15.

3. The court can review guardianships and modify them if necessary.

4. The court can review the conduct of the guardian and take necessary action if the guardian fails to perform his or her duties as required.

5. Subject to the court’s approval, a guardian can receive compensation for his or her services.

D. Temporary Guardianships, Conservatorships, Protective Placements and Protective Services.

1. Temporary Guardianships.
a. Temporary guardianships are appropriate if guardianship is immediately necessary but permanent guardianship cannot be awarded immediately.

b. The statutes set out methods for petitioning for and ordering temporary guardianships.

2. Conservatorships

a. Conservatorships are voluntary guardianships.

b. Any adult who believes that he or she is unable to properly manage his or her assets or income may voluntarily apply to the circuit court for appointment of a conservator of the estate.

c. The statutes set out the methods for petitioning for and ordering conservatorships.


a. A protective placement is a placement of a ward for the primary purpose of providing care and custody. Protective placement cannot be ordered unless there is an adjudication of incompetency.

b. Protective services are ordered for persons who are incompetent and present a need for services to prevent injury to themselves or others. Persons entitled to protective services may not have a primary need for care and custody.

b. A petition for guardianship may include an application for protective placement or protective services or both. When a petition for guardianship on the ground of incompetency is filed with respect to an individual who resides in a facility licensed for 16 or more beds, a petition for protective placement must also be filed.

c. A guardian may consent to an individual’s admission to a facility licensed for fewer than 16 beds. A guardian also may temporarily consent to an individual’s admission to a facility
with 16 or more beds for a period of 60 days while a petition for protective placement is filed and heard (one extension of an additional 60 days may be available in appropriate circumstances).

d. The statute requires a comprehensive evaluation with a protective placement petition.

e. Protective placement and protective services are governed by their own chapter in the statutes.