



# ESTATE AND ADVANCE PLANNING

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# Basic Concept

- ▶ A Competent Adult Makes Decisions about Personal Care and Financial Affairs
- ▶ What Happens When They Can No Longer Do That?



# ESTATE AND ADVANCE PLAN

- ▶ An estate and advance plan provides for personal and medical care, management of financial affairs, and disposition of assets when a person can no longer do those things for themselves.

# EVERYONE HAS AN ESTATE PLAN AND PLAN FOR DISABILITY!!

These plans are set out in State Law

- ▶ Estate Administration Law (Probate)
- ▶ Adult Guardianship, aka Guardian of the Person
  - ▶ (Personal and Health Care)
- ▶ Intestate Succession (No will)
- ▶ Conservatorship, aka Guardian of Property
  - ▶ Financial Management



# What is wrong with State Law Plans?

- ▶ One size fits all . . . . except when it doesn't.
- ▶ Can be cumbersome and inflexible.
- ▶ Will likely be more expensive.
- ▶ Personal affairs are subject to court or government agency control.
- ▶ Possible loss of personal autonomy and control.
- ▶ Private matters become public.
- ▶ Asset protection may be inadequate or incomplete

# There is a better way!!

- ▶ You can make your own plan!!
  - ▶ Financial Power of Attorney
  - ▶ Advance Medical Directive and Power of Attorney for Health Care
  - ▶ Will
  - ▶ Trust
  - ▶ Standby Guardian for Minor (In some states)



# Advance Planning is a Gift You Give to Your Loved Ones!

- ▶ This gift may be more valuable than any financial inheritance you leave behind!

# Terminology

- ▶ Capacity
  - ▶ Depends on Issue or Document
  - ▶ Depends on whether court or government involvement is needed

Basic concept is whether a person is able to understand the transaction or make decisions for their own personal or financial wellbeing.

Capacity is not incompetence!!



# Terminology, con't.

- ▶ Fiduciary: A person responsible for the personal or financial affairs of another.
  - ▶ Personal Representative of a decedent's estate (Executor, Administrator)
  - ▶ Trustee
  - ▶ Agent under a Power of Attorney
  - ▶ Guardian of person
  - ▶ Conservator (guardian of property)
  - ▶ Guardian of property of minor child

# Advance Planning for Incapacity

▶ Objective:

Put in place a structure to provide for:

- personal and health care;
- management of financial affairs;
- protection of financial security of family

in the event of incapacity.



# Advance Planning for Incapacity, con't.

- ▶ Objective is met by:
  - ▶ Financial Power of Attorney
  - ▶ Advance Medical Directive and Power of Attorney for Health Care
  - ▶ Trust

# Power of Attorney: Agency

- ▶ Concept of Agency:
  - ▶ A “principal” authorizes , directs, and ratifies the actions of an appointed “agent” .
  - ▶ Agency relationship becomes effective when the principal wants it to become effective
  - ▶ Principal directs agent orally or in writing.
  - ▶ Agency can be for a specific purpose, or for many purposes, or a general grant of full authority to act for the principal.

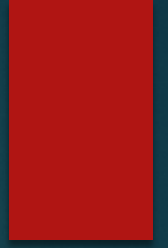


# Power of Attorney: Defined

- ▶ A power of attorney is the document by which one person – the principal – authorizes another person – the agent – to act and make binding decisions for the principal, to the extent authorized in the power of attorney.
- ▶ A “durable” power of attorney is a power of attorney that is effective even when the principal does not have the capacity to direct or ratify the actions of the agent.
- ▶ A “springing” power of attorney becomes effective if and when the principal becomes incapacitated.



# Power of Attorney: Selection of Agent



Basic Point: You are “hiring” a person for an very important job.

- Agent will have great deal of responsibility
- Agent will be expected to make important decisions
- Agent will have a much authority

The selection of the agent is a critically important decision. You should hire someone in whom you have a very high level of trust and confidence.



# Power of Attorney: Selection of Agent, con't.

- ▶ Considerations for selecting agent
  - ▶ What tasks or issues can the agent be expected to handle.
  - ▶ Will the agent have the ability, and temperament, needed for the anticipated tasks or issues.
  - ▶ Will the agent be readily available to perform the agent's duties.
  - ▶ Will the agent have, or be able to obtain, needed assistance
  - ▶ Will the agent have a conflict of interest that may inappropriately affect the agent's decision-making
  - ▶ Can the agent be bonded, if needed
  - ▶ Is there a potential for conflicts with others.



# Power of Attorney: Selection of Agent, con't.

- ▶ Who can be selected:
  - ▶ Spouse
  - ▶ Adult Child
  - ▶ Trusted Relative or Friend
  - ▶ Financial Advisor or Attorney.

The same person does not have to be the agent (or fiduciary) for all purposes; different persons can be selected for different purposes.



# Financial Power of Attorney

- ▶ Uniform Statutory Power of Attorney is used in many states.
  - ▶ General Statutory Power of Attorney:
    - ▶ Standardized Form
    - ▶ Extensive Powers Granted to Agent
    - ▶ Can Add Specific Provisions
  - ▶ Limited Statutory Power of Attorney
    - ▶ Provide for specific powers for specific purposes



# Financial Power of Attorney, con't.

## Specific Issues to Address for Complete Advance Plan

### General Concept:

Agent (or other fiduciary) is generally required to use income and assets solely for the benefit of the principal.

If agent (or other fiduciary) is to use income and assets for the benefit of a third person, agent must be granted specific authority to do so.

Third persons: spouse, children, or other dependents.



# Financial Power of Attorney, con't.

## Specific Issues to Address for Complete Advance Plan, con't.

- ▶ Consider provisions directing, or empowering, agent to handle property or asset in a specific manner.
  - ▶ Maintain real property as residence for principal and principal's family.
  - ▶ Direct agent to provide support for spouse and / or minor, or disabled adult.
  - ▶ Limit agent's authority to expend money for a specific purpose.
  - ▶ Transfer property into trust.



# Financial Power of Attorney, con't.

## Specific Issues to Address for Complete Advance Plan, con't.

- ▶ Power to Make Gifts
  - ▶ Gift defined: transfer of property to or for the benefit of another for less than full value.
  - ▶ Providing support for another person may be a gift, unless there is a legal obligation to provide support (example is a minor child).
  - ▶ Transfer of assets into a trust of which someone other than the donor is a beneficiary



# Financial Power of Attorney, con't.

## Specific Issues to Address for Complete Advance Plan, con't.

- ▶ Other Matters:
  - ▶ Designate a person to serve as court-appointed fiduciary if court intervention is required.
  - ▶ Provide when power of attorney becomes effective; either when power of attorney is executed or when principal becomes incapacitated.
  - ▶ Define how incapacity is determined



# Power of Attorney for Health Care And Advance Medical Directive

- ▶ Purpose of Document:
  - ▶ Designate Agent to make health care decisions for you when you can no longer effectively make health care decisions for yourself.
  - ▶ Set out the manner in which decisions should be made
  - ▶ Provide instructions for specific decisions



# Power of Attorney for Health Care And Advance Medical Directive, con't.

- ▶ Decision-Making Standards
  - ▶ In the absence of specific instructions for specific purposes, agent is generally required to use “substituted judgment standard.”
    - ▶ Substituted Judgment: What would the principal do if they were unable to make the decision themselves?
  - ▶ If, after good faith effort to apply substituted judgment, agent cannot determine what principal would do, apply “best interest standard.”
    - ▶ Best Interest Standard: consider the benefits, burdens, and risks of specific treatment, course of treatment, or withholding or withdrawing treatment or course of treatment.



# Power of Attorney for Health Care And Advance Medical Directive, con't.

- ▶ Applying Substituted Judgment
  - ▶ Instructions of principal, including considering effect of decision on family members
  - ▶ Principal's personal values, religious beliefs, prior medical decisions.
- ▶ Consider including instruction to consult with specific designated persons.
  - ▶ Family members
  - ▶ Clergy
  - ▶ Close friend(s)



# Power of Attorney for Health Care And Advance Medical Directive, con't.

- ▶ Specific Issues to Address:
  - ▶ Maintain principal in own home or consider assisted living facility
  - ▶ Hospice Care
  - ▶ Experimental Treatment or Procedures
  - ▶ Anatomical Gifts / Organ Donation
  - ▶ Consent to, or withhold consent for, autopsy
  - ▶ Authorize cremation

# Power of Attorney for Health Care And Advance Medical Directive, con't.

- ▶ End of life decisions (“Living Will”)
- ▶ Generally addressed circumstances:
  - ▶ Terminal Condition
  - ▶ “End Stage Condition”
  - ▶ “Persistent Vegetative Status”
- ▶ Specific Instructions to Consider:
  - ▶ Authorize, or suspend, artificially-provided nutrition or hydration
  - ▶ Use of pain medication
- ▶ Address stages of dementia



# Standby Guardian for Minor

- ▶ Parent can designate a person to assume the role of legal custodian of minor child if parent becomes unable to care for child:
  - ▶ - incapacity
  - ▶ - during period of debilitation due to chronic or terminal illness
  - ▶ - death
- ▶ This is not a surrender of parental rights
- ▶ Standby guardian is required to act consistent with parent's instructions or known desires of parent
- ▶ Required court order, either before or soon after inception of standby guardianship



# Court-Appointed Guardian or Conservator

- ▶ A court-appointed guardian or conservator will be required if:
  - ▶ There is no advance plan
  - ▶ Advance plan is incomplete or does not address specific need or issue
  - ▶ Advance plan arrangement is not working properly
  - ▶ Person lacked capacity to execute advance plan
  - ▶ A minor child becomes entitled to receive money or other asset.



# Court-Appointed Guardian or Conservator

- ▶ State law governs court-appointed surrogates
- ▶ Law varies from state to state
- ▶ Some states have government agencies that are involved in cases involving incapacitated adults; other states use court-supervised guardian or conservator
- ▶ Some states apply to both incapacitated adults and minors; other states have some processes and standards for adults and different processes and standards for handling assets of minors.



# Adult Guardian or Conservator: Intervention Proceeding

- ▶ This label makes sense:
  - ▶ A court intervenes into the subject's life and enters orders regarding some, if not all, of the personal, medical, or financial affairs of an incapacitated person.
- ▶ An intervention proceeding results in loss of legal rights
- ▶ Generally, a higher standard of proof of need for intervention is required.



# Intervention Proceedings

- ▶ “Incapacity” is the threshold concept for intervention.
- ▶ Incapacity is functional, and not a medical determination
- ▶ The issue in determining incapacity is whether the subject has the ability to receive and evaluate information, or communicate decisions, is impaired to such an extent that assistance is needed.
- ▶ Incapacity can be limited.
- ▶ Legal incapacity includes the need for court-ordered assistance.
- ▶ Incapacity is not legal incompetence.



# Intervention Proceedings, con't.

- ▶ Least Restrictive Alternative:
  - ▶ The court intervenes only to the extent needed to fix what is broken
- ▶ The determination of the nature and extent of the subject's incapacity guides the determination of the least restrictive alternative.
- ▶ The subject's or ward's views should be considered to the greatest extent possible.
- ▶ The substituted judgment standard should be applied in determining the guardian's or conservator's authority



# Intervention Proceedings, con't.

## Process and Procedures

- ▶ As appointment of a guardian or conservator is taking away a person's rights, due process requires procedural protections
  - ▶ Right to notice
    - ▶ Service of process is a prerequisite for court jurisdiction
  - ▶ Right to be heard
  - ▶ Right to counsel
    - ▶ The right to counsel effects the procedural protections and application of the least restrictive alternate standard.



# Intervention Proceedings, con't.

## Specific Issues

- ▶ Limiting the powers of the guardian or conservator or requiring specific actions is the way in which the least restrictive alternative is applied.
  - ▶ Require that ward be maintained in their own home
  - ▶ Prescribe, or prohibit, specific medical treatment or therapies
  - ▶ Authorize or direct assistance or support for spouse, child, or other family member
  - ▶ Allow ward to have a specific amount of money for ward's own unrestricted use.
  - ▶ Require specific expenditures:
    - ▶ Recreation
    - ▶ Church tithing
    - ▶ Travel
    - ▶ Personal gifts (Christmas or birthday gifts)



# Intervention Proceedings, con't.

## Specific Issues, con't.

- ▶ Some states give the court very extensive powers to address specific needs.
  - ▶ Transfer assets into a trust.
  - ▶ Exercise options for investment or retirement account
  - ▶ Authorize specific medical procedure



# Intervention Proceedings, con't.

## Administration of Guardianship or Conservatorship

- ▶ Conservator or guardian of property will generally be required to file a surety bond.
- ▶ Conservator or guardian of property will generally be required to file an accounting or report, or both, at least annually.
- ▶ Guardian of person may be required to regularly report to the court
  - ▶ Maintain regular contact with ward.
  - ▶ Actions to ensure well-being of ward



# Guardian of Property of Minor

- ▶ Common issue: Parents provide support for their minor children; minor children do not provide support for their parents.
  - ▶ Result is that minor guardianships tend to be closely monitored by a court.
- ▶ Guardian of property of minor may be required to obtain prior court approval of expenditures.

# PASSING TITLE & OWNERSHIP OF PROPERTY

- ▶ Several ways to pass title and ownership of property:
  - ▶ Gift: passing ownership for less than fair market value
  - ▶ Distribution through a trust
  - ▶ Probate and administration of decedent's estate
  - ▶ Designation of a beneficiary
    - ▶ Life Insurance
    - ▶ Retirement account or IRA
  - ▶ Joint ownership with right of survivorship



# PASSING TITLE & OWNERSHIP OF PROPERTY, con't.

- ▶ When a person dies, title and ownership of that person's property must pass to another owner
- ▶ Title can pass automatically by operation of law:
  - ▶ to joint owner through right of survivorship
  - ▶ by beneficiary designation
  - ▶ "pay on death" account
  - ▶ automatic succession by law (Real Property)
- ▶ Title can pass through probate and administration of a decedent's probate estate.



# Probate and Estate Administration

The property that is part of a decedent's "probate estate" is administered either pursuant to law, or is guided by the decedent's will.

"Probate" is the process of giving legal effect to a decedent's will.

- Admission of will to probate

- Appointment of personal representative ("executor" or "administrator")

Estate Administration is usually subject to supervision by a court, Register of Wills, or similar official.



# Probate and Estate Administration, con't.

## Decedent's Will

A properly prepared will:

- ▶ designated the personal representative;
- ▶ defines the powers of the personal representative;
- ▶ provides for payment of all costs of funeral and disposition of remains;
- ▶ can name the person(s) to have custody and care of minor child upon death of the parents;
- ▶ names the beneficiaries of the estate;
- ▶ specifies arrangement for asset protection.



# Trusts

- ▶ A trust is a very creative means of holding property, providing asset protection, and determining when and how property is distributed to the beneficiaries of the trust.
- ▶ A trust can provide for administration of assets and income upon disability, and can provide for distribution of property upon death.
- ▶ Normally, a trust is a private arrangement.
  - ▶ A trust does not require court approval
  - ▶ Trust administration is not subject to court supervision



# Trusts

## Concept: Dividing Property Rights

Ownership of property involves a set of rights. These rights include:

- right to hold legal title;

- right to use the property;

- right to enjoy the benefits of the property;

- right to manage the property;

- right to direct the use of the property;

- right to hold the benefit and use of the property for a limited time, or for life; and

- right to pass ownership to another, either by gift or sale



# Trusts

## Dividing Property Rights, con't.

A trust separates the various rights of ownership of property.

Legal title is held by a trustee.

The trustee holds, manages, and uses the property pursuant to the instructions in the trust instrument.

The beneficiary enjoys the benefit of property as provided in the trust instrument, BUT does not own the trust property.

Trust property is distributed outright and free of trust as provided in the trust instrument, with the person receiving the distribution becoming the full owner



# Establishment of a Trust

- ▶ A trust is established by the “grantor” (also referred to as “settlor”), who transfers property, and all rights of ownership, into the trust.
  - ▶ The grantor’s transfer of ownership into a trust can be total and complete, creating an irrevocable trust.
  - ▶ The grantor’s transfer of ownership can be less than a total transfer of ownership, creating a revocable trust.
- ▶ The grantor can act in multiple roles at the same time:
  - ▶ Grantor;
  - ▶ Trustee;
  - ▶ Beneficiary.



# Revocable Trust: Property Management

- ▶ Grantor transfers property into trust, and is also the trustee and beneficiary.
- ▶ The grantor reserves the right to amend or revoke the trust.
  - ▶ In this way, the grantor exercises the rights of an owner of property.
  - ▶ The grantor can modify the trust to reflect changed circumstances
- ▶ The trust assets are held and used for the grantor' benefit (and for the grantor's family or other named beneficiary).
- ▶ Upon the grantor's / trustee's disability, a successor trustee takes over administration of the trust.
  - ▶ In this way, the trust operates much like a financial power of attorney



# Revocable Trust: Disposition of Property

- ▶ Upon the grantor's death, the trust is managed for the benefit of the successor beneficiary.
  - ▶ The successor beneficiary can be a spouse, or child, or other adult.
- ▶ Ultimately, the trust assets are distributed outright and free of trust.
- ▶ In this manner, a trust operates much like a will, but without the need for "probate"



# Irrevocable Trusts

- ▶ An irrevocable trust is established by a transfer of complete ownership of property into the trust.
  - ▶ An irrevocable trust can be modified only under very limited circumstances.
- ▶ A revocable trust becomes an irrevocable trust upon the death of the grantor.
- ▶ An irrevocable trust can be established by a will. (“Testamentary Trust”)
- ▶ A “special needs trust” is usually an irrevocable trust.



# Planning for Disposition of Assets and Asset Protection

The laws permits much flexibility for the disposition of assets in specific situations and protection of assets from mismanagement or dissipation.

- Balance needs of surviving spouse with the needs of minor or disabled children.
- Address circumstances of “blended families”, with the married couple each having children from prior relationships.
- Address current, or possible future, incapacity or disability of a spouse or child.
- Address circumstances that may require disproportionate distribution among beneficiaries of the same class.
- Deal with assets of high value or unique characteristics
- Address estate or inheritance tax considerations.



# Asset Protection – Surviving Spouse

A common concern is asset protection for a surviving spouse who may become disabled or incapacitated, or who may require expensive medical care.

- Placing assets in a trust with a third party trustee instead of the surviving spouse is an often-used alternative.
- Creating a life estate in real property used as the family residence is means of ensuring that the surviving spouse has a place to live and also protecting the asset for successor beneficiaries.
- Providing for specified distributions pursuant to an “ascertainable standard” is a way of ensuring the use of assets for a specific purpose.



# Asset Protection – Children

A trust is the method of allowing for the beneficial use of assets by child but deferring control – ownership – until a future period of time when, hopefully, the child can exercise good judgment.

- The trustee expends funds for specific purposes provided in the trust or will that creates the trust. Examples include using trust assets primarily for education, for use for recreational, athletic, or artistic purposes, or for health and medical care.
- The trustee expends funds only if other resources are not available.
- The trustee expends funds to assist a beneficiary child to purchase a residence



# Asset Protection – Children, con't.

A trust can allow outright distribution to be deferred until a specified event or age. Examples include:

- The trustee distributes trust assets outright upon a beneficiary reaching age 25, or a percentage at one age and the remainder at another age.
- The trustee distributes assets conditioned on a specified event or circumstance, such as:
  - obtaining a college degree
  - completing military service
  - maintaining employment



# Asset Protection – Creditor Claims

A trust can include a provision providing that a beneficiary cannot pledge or assign their beneficial interest in a trust, and that the trustee is not bound by any attempted pledge or assignment.

- This provision is commonly referred to as a “spendthrift provision.”
- It prevents a beneficiary from attempting to purchase on credit, with the seller relying on the trust for payment.
- It prevents a beneficiary from attempting to “sell” their right to receive a future distribution for a discounted amount.



# Asset Protection – Disabled Beneficiary

A minor or adult with significant disabilities which require long-term medical care, either at home or in a long-term care facility, or extensive therapeutic service or medical equipment often need to access public benefits such as Supplemental Security Income (SSI) or Medicaid.

These are “means-tested” benefits.

The rules governing SSI and Medicaid are very complex and vary from state to state. Expert planning assistance is required.



# Asset Protection – Disabled Beneficiary, con't.

- ▶ Objective is to maintain the disabled person's eligibility for benefits.
  - ▶ Avoid parent's support being deemed income of the disabled person.
  - ▶ Avoid parent's income being deemed income of the disabled person.
  - ▶ Avoid parents assets becoming assets of the disabled person.
  - ▶ Avoid having assets to which a disabled person may become entitled to receive disqualifying disabled person from eligibility for benefits.



# Disabled Beneficiary: Parent Planning

Third Party Trust: A trust created by someone (the parent) other than the disabled person, using the grantor's assets or assets not owned by the disabled person.

- Trustee has sole discretion to distribute, or not distribute, principle or interest of the trust to or for the benefit of the minor child.

Parent's financial power of attorney or revocable trust includes provisions for use of assets and income for needs of disabled person.

Consider obtaining parent's own appointment as guardian of the person of adult disabled child.



# Disabled Beneficiary – Asset Protection

## Sources of Disqualifying Assets:

- Unexpected inheritance
- Receipt of assets as designated beneficiary
- Personal injury lawsuit: medical malpractice, auto accident, etc.

Receipt of these assets directly by disabled minor or adult could result in loss of eligibility for SSI, Medicaid, or other means-tested benefits.



# Disabled Beneficiary – Asset Protection, con't.

- ▶ Solution: Establish Special Needs Trust (Supplemental Needs Trust)
  - ▶ Federal Law permits establishment of “Section (d)(4)(A) trust”
  - ▶ Trust usually must be approved by the state agency that administers the Medicaid program in the disabled person’s state.
  - ▶ The expenditures from the trust must be consistent with the standards set out in the applicable regulations
  - ▶ The trust must include a “pay back” provision.
    - ▶ Upon the death of the death of the disabled person / Medicaid recipient, the government may have a claim for reimbursement up to the amount of benefits paid.