Planning for the Future of Dependent Loved Ones

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Riderwood Senior Living Community

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  - Charitable Planning
  - Fiduciary Administration
  - Estate Planning, including Special Needs Planning
  - Wills and Trusts

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- Ms. Gorsky focuses her practice on trusts and estates law.
- Recognitions
  - *The Best Lawyers in America®*, Columbia Trusts and Estates "Ones to Watch" (2021, 2022)
  - *Maryland Super Lawyers®*, Estate & Probate "Rising Stars" (2020–22)
- Education
  - University of Baltimore School of Law, 2015, LL.M., Taxation
  - University of Baltimore School of Law, 2014, J.D., magna cum laude
- Practice Areas
  - Wills, Trusts, Powers of Attorney, Advance Health Care Directives, Beneficiary Designations, Asset Transfers, Estate and Gift Tax, Special Needs Planning, Long-Term Care Medical Assistance Planning, Guardianships, Wealth Preservation, Business Succession Planning

Importance of Good Plans for Dependents

- Adults and children with developmental, mental, psychological and physical disabilities can have varying degrees of independence

- Some may have high degrees of independence, while others need one or more advocates to look out for their interests

- With adequate planning and a supportive network of family, friends and health care and disability providers, your adult dependent can lead a meaningful, satisfying life, and any inheritance you plan to leave can be protected and properly used for the dependent as well

What is Estate Planning?

- "Estate planning" is the process of planning how you want to transfer your money and other assets to others during your lifetime or at your death.

- Most people want to direct how their money or assets will be distributed, minimize taxes, and choose who will provide support for an adult family member with a disability who needs assistance.

  - This can be accomplished by setting up a plan that includes a will, special needs trust, and/or other pertinent documents.

What is Estate Planning - More

- Good plans will have a financial component that structures how assets are to be managed and spent on behalf of a person with a disability and names who will have authority to handle the assets.

    - It may outline who will help the individual with a disability make other life decisions, if necessary, such as where he or she will live or what type of health care he or she will receive.

Questions to Consider When Planning

- What assets do you want to leave to your dependent?
- What types of support does your dependent need?
- How can you maximize your dependent's independence, inclusion in all facets of community life, and ability to enjoy the highest quality of life possible?
- Who else in your dependent's life should be involved in the planning process?

Benefits of Good Planning

- Assurance that your dependent loved one's personal and financial future accounts for both what the dependent wishes for themselves and what you hope to provide;
- Maximize your dependent's independence, dignity and the control he or she has over his or her own life;
- Ensure that the involvement and resources of your friends, relatives, service providers, and others are directed the way you envision;
- You can safeguard your dependent's future and have peace of mind that your dependent loved one will live a full and productive life, have a job or participate in other meaningful activities, and have his or her needs and wishes fulfilled

Government Benefits

- Both financial assistance and health care benefits are very important for many people with disabilities.
- A good plan can ensure that a person keeps needed benefits and is able to use the additional assistance from family to purchase items that government benefits do not cover to enrich his or her quality of life.
- Benefits we will be discussing today include:
  - Supplemental Security Income (SSI)
  - Medicaid (also known as Medical Assistance)
  - Social Security Disability Insurance (SSDI)
  - Medicare

Supplemental Security Income (SSI)

- SSI is a federal entitlement program administered by the Social Security Administration.
- SSI benefits are intended to cover food and shelter.
- SSI is available to people who have disabilities, are elderly, or blind and have very limited income and assets. Children with disabilities, as well as adults, can receive SSI.
- People who receive SSI also receive Medicaid.

Medicaid/Medical Assistance

- Many people with disabilities rely heavily on Medicaid as their health insurance, and may need it more than cash benefits such as SSI.

- Medicaid covers the medical expenses of people with disabilities who have very low income and assets.

- In Maryland, SSI recipients are automatically covered by Medicaid.

- The same eligibility criteria for SSI applies for Medicaid.

SSI/Medicaid Qualifications

- To receive SSI and/or Medicaid, an individual may not have more than $2,000 in assets. Assets that are considered include cash, bank accounts, stocks and bonds, personal property, real estate, and any other item of value that a person owns.
- The Social Security Administration, however, does not count everything a person owns in determining eligibility. Things that are not counted include: the home the person lives in, his car, burial plots, personal effects and household goods, and some insurance policies with a value of $1,500 or less, and up to $100,000 in funds in an ABLE account.
- The amount of SSI a person receives is affected by how much income he or she has from other sources, including earnings.

Social Security Disability Insurance (SSDI)

- SSDI is a cash benefit paid to individuals with disabilities and their parents who have worked enough to be covered by the Social Security system.

- Adults with developmental disabilities who have not paid enough into the Social Security system, may receive dependents' benefits under a parent's work record if the parent worked enough to be covered, and has a disability or is retired.

Social Security Disability Insurance (SSDI) More

- A person can also qualify under a parent's work record if the parent has died, through the survivors' benefits program. In order to receive dependents' or survivors' benefits, the person's disability must have begun before he or she was 22 years old and be expected to last for at least a year.

- The amount a person receives in SSDI depends on how much he, or his parent, earned while working.

- The amount of assets a person has does not affect his SSDI benefit. However, income may affect SSDI benefits.

- People who qualify for SSDI can qualify for Medicare.

Medicare

- Medicare is the federal health insurance program for individuals receiving Social Security Disability Insurance (SSDI) or Social Security Retirement benefits
- A person automatically receives Medicare after being eligible for SSDI for two years, whether qualifying on his own or through a parent's work record.
- Medicare Part A covers hospitalizations and related services.

Medicare - More

- Medicare Part B covers outpatient treatment and physician services.

- Medicare Part D covers prescription drugs and medications for people who receive Medicare.

- Because Medicare does not cover the entire cost of a recipients' care, people may purchase private insurance to pay the co-payments and deductibles. This type of insurance is referred to as "supplemental," "secondary," or "Medi-gap" insurance and only covers the portion Medicare does not cover. If you qualify for both Medicare and Medicaid, Medicaid will pay for co-pay and deductibles not covered by Medicare.

Before Making Gifts

- Before making gifts to someone who is receiving any kind of government benefits, you want to make sure you have a good understanding of what kinds of benefits they are receiving and how any possible gift may affect such benefits

- Additionally, you want to make sure you also discuss large gifts with the Riderwood Finance Office – as a general matter, anyone entering Riderwood as a resident would have had to engage in a financial disclosure upon entry. Most CCRCs also include the possibility of audit in their contracts, so you want to make sure you are not engaging in financial transactions that could result in a breach of your Riderwood contract.

Before Making Gifts…More

- Bottom line: Don’t forget about the Riderwood Finance Office when doing any estate or financial planning, including making gifts to friends, family and dependent loved ones

Gifting vs. Paying Expenses Directly

- In 2022, you can gift up to $16,000 per person, per year, as part of your annual gift tax exclusion without having to report such transfer to the IRS

- Because SSI and Medicaid are asset and income-based benefits, these kinds of benefits will be directly impacted by any gift made to such a benefit-receiving individual

- Gifts made to a benefits recipient can qualify as income or an available resource to the recipient

Gifting vs.Paying Expenses Directly- More

- If an eligible person has no income at all, he or she will receive the maximum amount of available benefits. This amount will be reduced if the person has income or receives other types of support for food or shelter.
- Food or shelter provided at reduced or no cost is called “in-kind support.”
- It is important to make sure that the amount of in-kind support doesn’t cause loss of SSI altogether, unless Medicaid is not needed. When someone loses all their SSI, they also lose Medicaid.

Effect of In-Kind Support on SSI

- A person is considered living in another person’s household if he or she is living with a parent or someone else who owns or rents the home, and doesn’t pay rent and/or for food, or pays very little. In this situation, the Social Security Administration will reduce his or her benefits by 1/3 of the maximum SSI payment, regardless of the actual value of the support he or she receives.

  - For example, the full SSI benefit for an eligible single person in 2022 was $841 per month; a 1/3 reduction would subtract $280 per month. This occurs even if the actual value of the support is less than $280. So, in-kind support is only really useful if it is worth more than the 1/3 reduction of SSI.

Effect of In-Kind Support on SSI -More

- When an individual is living in his or her own household, SSI counts the value of in-kind support up to a "presumed maximum value" (PMV), regardless of its actual value. The PMV is 1/3 of the maximum SSI payment plus $20 ($300 for an individual in 2022). If you can prove that the actual value of an in-kind support is less than the PMV, only the actual value will be considered.

Note: *These are general descriptions and a variety of criteria and exemptions apply when benefits are calculated - additionally, benefit and gifting figures can change annually - so please check with so be sure to consult a knowledgeable advocate or attorney when planning regarding public benefits.*

Examples in Practice

- Your son lives in his own apartment with a rent of $800/month. You (or a trust) directly pay the landlord $500, while your son pays $300. You also give your son about $50 worth of groceries a month.

- The $550 you provide is in-kind support, but SSI only counts $300, which is the presumed maximum value. Your son's SSI check will be reduced by $300. However, if you give your son money rather than paying the landlord and grocery store, SSI will consider the full $550 as income.

Examples in Practice - More

- You, or a trust, make a $15,000 down payment on a condominium owned by your daughter. You make your payment directly to the lender. This is considered income to your daughter in the month she settles on her home, but only up to the PMV amount. Her SSI is reduced $300 <u>for that month</u>. If you opted to pay mortgage payments each month to the lender rather than a lump-sum down payment, your daughter's SSI check will be reduced $300 <u>each month</u>.

- Your daughter rents an affordable apartment using a rental assistance program. She covers all of her expenses except for her heating bill, which you pay. The amount is $100. SSI considers this in-kind support and will reduce your daughter's SSI check by $300. If you show that the actual benefit to your daughter is only $100, SSI will reduce her check by that amount.

Estate Planning by Caregiver

- Wills
  - A Last Will and Testament is a legal document that stipulates your wishes and instructions regarding who will, at your death, receive your money, property, and other assets that you own alone. It also states who will be responsible for carrying out the will's instructions and any limits or restrictions.
  - Your will also serves a platform for naming a guardian for children under the age of 18 or adult children with disabilities. The court will usually comply with the wishes expressed in your will unless there are unusual circumstances. Even if you have not been appointed guardian, you should still name your choice of guardian so that a court has this guidance for any future appointment.

Estate Planning by Caregiver- More

- Your will may also include a trust for your child or someone else, to take effect when you die. Your will may direct that a share of your estate goes to a trust that already exists. A supplemental or special needs trust can receive that person’s share of your estate so that his or her benefits will not be affected.

Estate Planning by Caregiver- More

- Trusts
  - A trust is a legal agreement that provides a way for someone to take care of assets, including money or property, for someone else.
  - Families can leave assets to a trustee acting on behalf of an individual with a disability while preserving their eligibility for public benefits. A trust can also own a house, cash from savings or life insurance proceeds, or other property.

Estate Planning by Caregiver- More

- Trusts are usually created by a will or a separate “trust agreement.”

- Trusts created by will are called “testamentary” trusts and become effective upon your death.

- Trusts that take effect while you are alive are called “inter vivos” trusts or “living trusts” and are created by a trust agreement.

Special or Supplemental Needs Trusts

- If a person who is eligible for means-testing benefits directly receives money or other assets through a gift, inheritance, or some other way, eligibility for these benefits may be lost. If this occurs, the person typically must spend down the assets until they are below the program limits, and then re-apply for benefits.

- A special or supplemental needs trust set up for the benefit of a dependent can hold an inheritance which could be used to pay for such non-covered expenses and simultaneously not jeopardize such dependent's benefits.

Special or Supplemental Needs Trusts-More

- **Examples of the types of things generally allowed to be paid from a special needs trust include:**
  - clothing, communications and assistive devices
  - education expenses like tuition, fees and books
  - computer equipment and services, cable and telephone equipment and services
  - vacations, transportation, memberships, subscriptions,
  - hobbies, pets
  - a vehicle and necessary modifications
  - sporting goods, and equipment
  - medical expenses not covered by government benefits or private insurance such as cosmetic surgery
  - cultural and artistic activities.

Special or Supplemental Needs Trusts-More

- There are three general types of "special" or "supplemental" needs trusts:
  - Third Party Trusts
  - Stand Alone First Party Trusts
  - Pooled Special Needs Trusts

Third Party Trusts

- A third party, such as a parent, grandparent, or friend may wish to set up a trust for the benefit of someone who has a disability.

- Typically, the trustee is given complete discretion in making distributions from the trust, so that it is clear that the beneficiary has no control over the trust assets. This is important so that the trust does not affect the beneficiary's eligibility for government benefits.

Third Party Trusts- More

- The trustee may be instructed to limit distributions to those things not covered by government benefits; that is, to supplement the beneficiary's benefits and not duplicate what the government already provides. That said, it is also helpful to give the trustee the flexibility to make distributions in the best interests of the beneficiary.

- With a third party trust, the grantor decides who will receive the trust assets when the initial beneficiary (the dependent) dies.

- Usually third party trusts are created within wills and revocable trusts.

Stand Alone First Party Trusts

- Individuals with disabilities can also create their own stand alone trusts to preserve their own assets and still qualify for SSI and Medicaid.

- A single person under the age of 65 who meets the SSI definition of disability, whether as a child or adult, can establish his or her own trust if they are competent enough to do so.

Stand Alone First Party Trusts- More

- The trust agreement must provide that when the beneficiary dies, assets remaining in the trust must be repaid to all states which have provided Medicaid benefits to the beneficiary, up to the amount of benefits paid during the beneficiary's lifetime. Any remaining funds may be directed to the beneficiary's heirs, estate, or, if the beneficiary is capable of making the decision at the time the trust is created, to whomever the beneficiary chooses.
- This type of trust is often referred to as a "payback trust" or "OBRA trust" or a "d4A trust."
  - It may be necessary to obtain a court order to create or fund this type of trust.
  - The Maryland Medical Assistance Office of Eligibility Services must review and approve this kind of trust.

Pooled Special Needs Trusts

- Pooled special needs trusts are operated by non-profit organizations and serve multiple beneficiaries. While each beneficiary has his or her own individual account, total assets are pooled for investment and management purposes. The non-profit organization selects the trustee. Beneficiaries get the services of a professional trustee and different investment options because there is more money overall to invest.
- The beneficiary must meet the SSI definition for disability, whether as a child or adult and there is no age limit. If the beneficiary is over the age of 65 and receives SSI, he or she may be subject to a transfer penalty for putting assets into a pooled trust. However, Maryland law currently allows transfers to pooled trusts by people with disabilities of all ages without penalty.

Pooled Special Needs Trusts-More

- An account in a pooled trust may be established by the beneficiary, a parent, grandparent, guardian, or court.

- Unlike the stand-alone first party trust, when the beneficiary dies, the pooled trust may keep the funds remaining in the beneficiary’s account. If the trust does not do so, the assets in the account must be used to reimburse all states which have provided Medicaid benefits to the beneficiary, up to the amount of benefits paid during the beneficiary’s lifetime.

Fiduciary Considerations

- Trustees are responsible for administering trusts.
- Name a successor trustee to take over if the first trustee is unable or unwilling to serve.
- Identify people who can designate successor trustees when necessary and if you are unable.
- The will or trust agreement should instruct the trustee how and when to use trust assets. It may give the trustee guidelines but allow the trustee to use his or her judgment or discretion to make decisions on how to use the trust assets for the beneficiary.

Fiduciary Considerations- More

- The trustees also have the responsibility of managing and investing the trust assets, filing tax returns, keeping track of all transactions, and preparing any required accountings or reports.

- Possible trustees: family members, friends, attorneys or other professionals, corporate trustees including banks and other financial institutions, or may select a pooled asset special needs trust.

Fiduciary Considerations- More

- Trustees are entitled to be paid for their services.
  - Financial institutions may require a minimum balance to hold trust funds and may charge fees for services that may be based on the trust assets or income.
  - A pooled special needs trust will typically charge an enrollment fee and an annual fee.
  - Friends or family members may be willing to serve as trustee for little or no cost.

Dependents Planning for Themselves

- In addition to the stand alone first party trust already discussed, disabled adult individuals and dependents who are competent enough to do so, should also explore putting planning in place for themselves.
- Doing their own planning can maximize a dependent's independence, memorialize their wishes and intentions and ensure they are included in the process of planning for their own life.
- Dependents can plan for themselves by setting up advance directives for health care decisions and powers of attorney for financial and property management.
- Dependents can also explore setting up ABLE Accounts.

Advance Directives

- An advance directive may be referred to as a “health care power of attorney,” “medical power of attorney,” or “living will.”

- The person signing the advance directive must be over age 18, competent to make an advance directive, and able to communicate his or her health care wishes, or at a minimum who should make those health care decisions for them.

Advance Directives- More

- A “health care agent” can make health care decisions on behalf of another person. A person names his or her own health care agent in an “advance directive.” Advance directives can also be used to communicate one’s wishes regarding medical treatment and other health care issues. Advance directives may include instructions to the agent regarding whether to provide, withhold, or withdraw certain medical treatments, often referred to as life-sustaining treatment.

- An advance directive for mental health services allows a person to decide what mental health services they want if and when they become incapable of making those decisions.

Powers of Attorney

- Through a power of attorney, a competent adult can choose a person they trust as an agent to act on his or her behalf to make legal and financial decisions.

- The power of attorney must be in writing and must be witnessed and notarized.

- The power of attorney can be broad or it can be limited so that the agent can only make certain types of decisions or take certain actions, such as write checks from a checking account or sell the individual’s home.

Powers of Attorney- More

- A power of attorney is "durable" if it remains effective after the individual becomes incapable of making his or her own financial and legal decisions.

- The power of attorney can be written to become effective as soon as it is signed or only after the individual becomes unable to make his or her own financial decisions.

- If the power of attorney is not durable, it will terminate and become ineffective when the person becomes unable to make his or her own decisions.

ABLE Accounts

- In 2014, Congress passed the Stephen Beck, Jr. Achieving a Better Life Experience Act (known as the ABLE Act) and created a new tax-favored savings account for certain individuals with disabilities that does not affect an individual's eligibility for means-tested government benefits.

- ABLE accounts permit qualifying individuals with disabilities to set aside funds for their own use without jeopardizing vital financial assistance and health care benefits.

ABLE Accounts- More

- ABLE accounts are intended to be used to pay for the beneficiary's "qualified disability expenses." Qualified disability expenses are intended to maintain or improve the health, independence, or qualify of life of the account owner. This includes basic living expenses, education, housing, transportation, employment training and support, assistive technology, personal support services, health care expenses, financial management, and administrative services.

- To be eligible for an ABLE account a person must have experienced the onset of blindness or disability prior to the age of 26; and meet the Social Security definition of disability. There is no upper age limit to opening an account, merely the need to meet the age requirements for onset of the disability.

ABLE Accounts-More

- The individual with disabilities is considered both the owner and the beneficiary of the ABLE account.

- For benefits purposes, ABLE account funds belong to the individual, and are considered an exempt resource, meaning the funds are not counted towards the $2,000 resource limit for SSI recipients, similar to the treatment of an individual's home or vehicle.

- An individual may have only one ABLE account.

ABLE Accounts-More

- Annual contributions are limited to the amount of the federal annual gift tax exclusion ($16,000 in 2022). ABLE accounts can accept contributions from the owner/beneficiary or from third parties (e.g., family members, friends, others), subject to the total annual contribution cap. A contribution to an ABLE account by a third party qualifies as a present interest gift for purposes of the federal annual gift tax exclusion.

- There is a lifetime contribution limit for ABLE accounts, equal to the state's limit on total contributions to the state's 529 College Savings Plan. For Maryland, this lifetime limit is $350,000.

ABLE Accounts-More

- When an ABLE account balance exceeds $100,000, any excess over this amount will count towards the individual's $2,000 resource limit for SSI; if the amount over $100,000 exceeds $2,000, then the individual's SSI eligibility will be placed into a special SSI suspension.
- If the individual does not have the capacity to establish, fund, or manage an ABLE account, then their agent under a power of attorney, guardian, or parent (in the case of a minor) may do so. Under the Maryland ABLE program, if a parent established the account before the beneficiary reached the age of 18, and if the individual is not capable of managing the account as an adult, the parent must either be named as an agent under the owner's power of attorney or be appointed as guardian.

ABLE Accounts-More

- An individual may enroll in any state's ABLE program that accepts out of state enrollees.

- Income earned in the ABLE account (interest, dividends, and capital gains) is tax free so long as the withdrawals are used for qualified disability expense. If withdrawals are made for purposes other than qualified disability expense, the income portion of the withdrawal would be subject to federal income tax and a 10% penalty.

What if the Dependent is not capable of doing their own planning?

- Parents have legal authority to make most major decisions for their minor children (under 18 years old). They are the “natural guardians” of their minor children and have this authority without a court order or any other special documentation.

- Adults are presumed to be competent to make their own decisions about their personal well-being and their money unless a court determines that they are not competent.

What if the Dependent is not capable of doing their own planning? More

- With respect to a person with a disability making decisions about personal (non-financial) matters, legal restrictions on their decision making must generally meet the “least restrictive alternative” standard. In other words, if none of the less-restrictive decision-making alternatives are possible, the family may pursue a guardianship. This involves going to court and having a judge decide whether to give some or most of the person’s decision-making rights to someone else, who is then accountable to the court.

Background on Guardianships

- Guardianship can be broad enough to cover all decisions or limited to certain kinds of decisions.

- It is vital to a person's independence to obtain guardianship only if necessary, and to limit the guardianship to the decisions needed.

Background on Guardianships-More

- Two (2) Types of Guardianships in Maryland:
  - Guardianship of the Person
    - A "guardian of the person" can generally make personal decisions such as where a person will live, what kinds of health care he or she will receive, and where he or she will go to school or work. Examples of personal decisions include decisions relating to safety, shelter, or health care.
  - Guardianship of the Property
    - A "guardian of the property" determines how a person's money is invested and spent. A guardian of the property can only make decisions about an individual's property and money, such as selling property, paying bills, or buying things. The guardian must give the court an annual accounting of how he or she spent the individual's money.

Questions?

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