

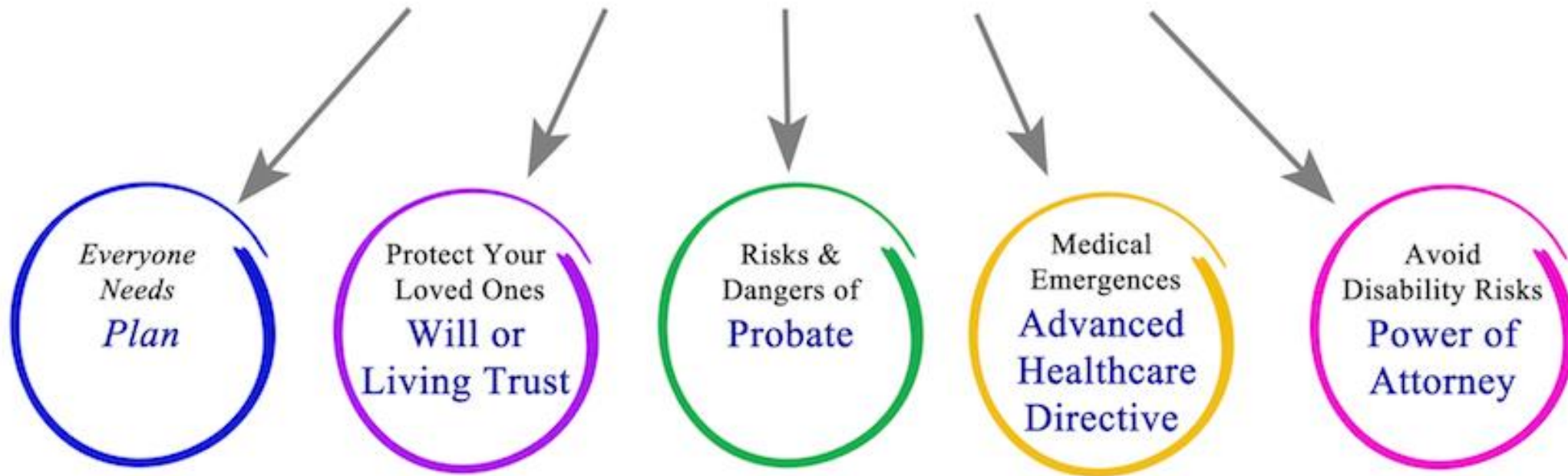
SPECIAL NEEDS PLANNING + GUARDIANSHIPS

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Purpose Of Estate Planning

THINGS TO KNOW ABOUT
ESTATE PLANNING



Questions Your Estate Plan Should Answer

How Will Assets Transfer?

- What Will I Transfer?
- To Whom?
- How?
- When?



Who Makes Decisions When I Cannot?

- For Me?
- For My Children?



*"We have an agreement in principle.
The question is, do we all have the same principles?"*

What are Special Needs Trusts (SNTs)?

- An SNT is a legal arrangement and fiduciary relationship
- SNTs allows a mentally or physical disabled person to maintain eligibility for public assistance disability benefits, including means tested benefits such as Supplemental Security Income (SSI) and Medicaid
- Assets held in the SNT do not count for the purposes of qualifying for public assistance, as long as they are not used for certain food or shelter expenditures
- No limits to the amount of assets allowed in the SNT
- *New:* Fee authorization requirement for funded trusts that are created to preserve SSI benefits



Basics of Special Needs Trusts

Established by one or more **Settlors**

For the benefit of a person with disabilities (**Beneficiary**)

Administered by a **Trustee**

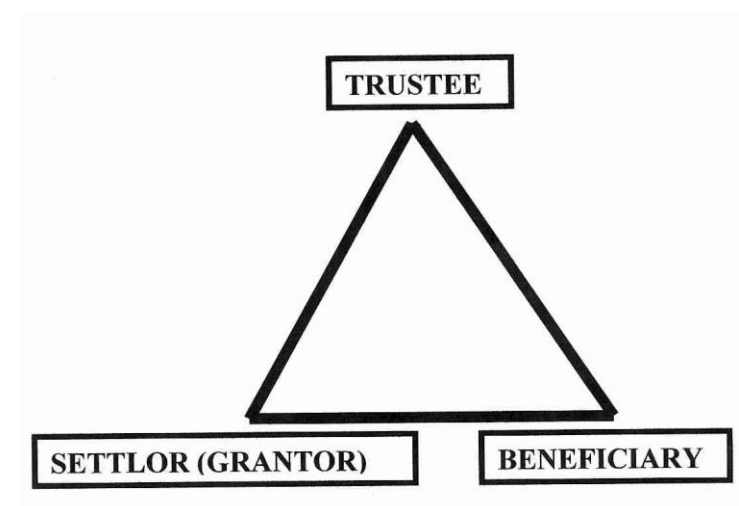
Individual such as parent, child or relative

Attorney

Trust company or financial institution

Non-profit organization

Co-trustee



Intended to provide “supplemental care” and is not a basic support trust

First Party Special Needs Trusts

Funded with the **Beneficiary's** assets

Sole benefit rule

Common sources:

- Personal injury settlement

- Inheritance

- Life insurance

Assets are **subject to payback** at the beneficiary's death

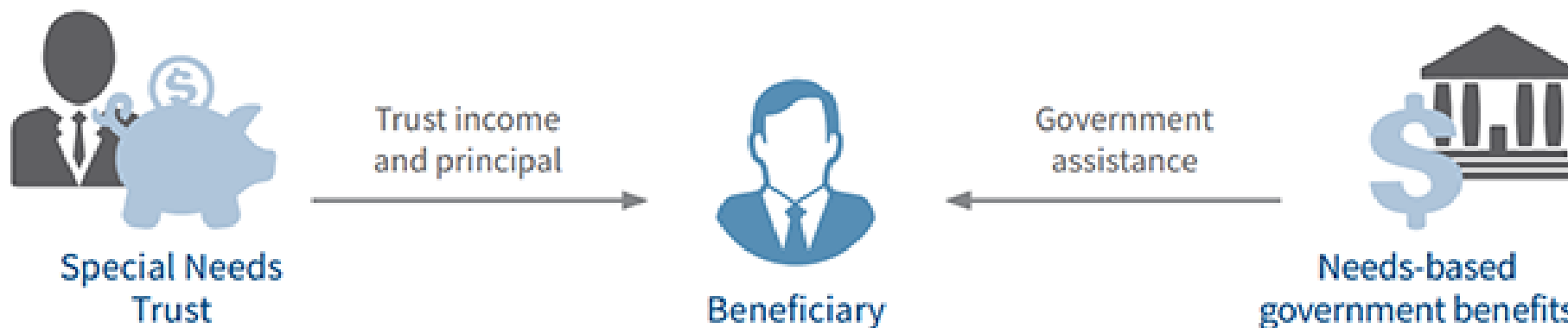
Assets can be distributed to an ABLÉ account

Also known as "Self-Settled" Special Needs Trusts



First Party Special Needs Trusts (cont'd)

- Beneficiary **must be under age 65** when the trust is established and funded (no additions are permitted after age 65)
- Special Needs Trust Fairness Act allows capable individuals to create a trust (previously without parent, grandparent, or guardian, would require a court order)



Third Party Special Needs Trusts

- Funded with **assets of a person other than the Beneficiary**
- Common sources:
 - Inheritance as part of an estate plan
 - Life Insurance with the SNT as the beneficiary
- The assets used to fund the trust are not, and have never been, owned by the beneficiary
- The third party (parent, grandparent, friend, etc.) creates the trust for the benefit of the disabled individual



Third Party Special Needs Trusts (cont'd)

- There is **no age limitation** on the Beneficiary
- Third party trusts are **not subject to payback**
- Allows for remainder beneficiaries to receive distributions after death of Beneficiary
- Often established as part of an estate plan



Pooled Trusts

- A **pooled trust** is a trust established and administered by a non-profit organization, such as **Wis pact** and **Life Navigators**
- A separate account is established for each beneficiary of the trust, but for the purposes of investment and management of funds, the trust pools these accounts
- Can have First or Third Party Trusts
- Reasons to have pooled trust vs. independent:
 - Don't have a comfortable option for trustee
 - Small amount of assets to be administered



Distributions



- May pay for things that the beneficiary needs/wants
- May reimburse others for funds paid on behalf of beneficiary
- Limitations on distributions for food or shelter
- Cannot distribute cash directly to the beneficiary
- First party trusts have strict “sole benefit” rule
- Results of violating cash or SSI limitations, or sole benefit rule:
 - Distributions treated as income that reduces SSI benefit
 - Violation of sole benefit rule can make entire trust a countable asset

Special Needs Trusts and ABLE Accounts

- ABLE accounts are useful tools for individuals who are working and would like to accumulate assets and control them
 - Beneficiary may possess direct access to funds when appropriate
 - Pay for Qualified Disability Expenses and housing related expenses
 - Age of onset of disability before turning 26
 - Can have one account per person
 - There is a Medicaid Payback provision similar to First Party SNTs
- Should be able to transfer funds from SNT to ABLE account without penalty
 - In order to give control over small amount of funds
 - In order to minimize trust tax rates



Special Needs Trusts and ABLE Accounts

Special Needs Trusts

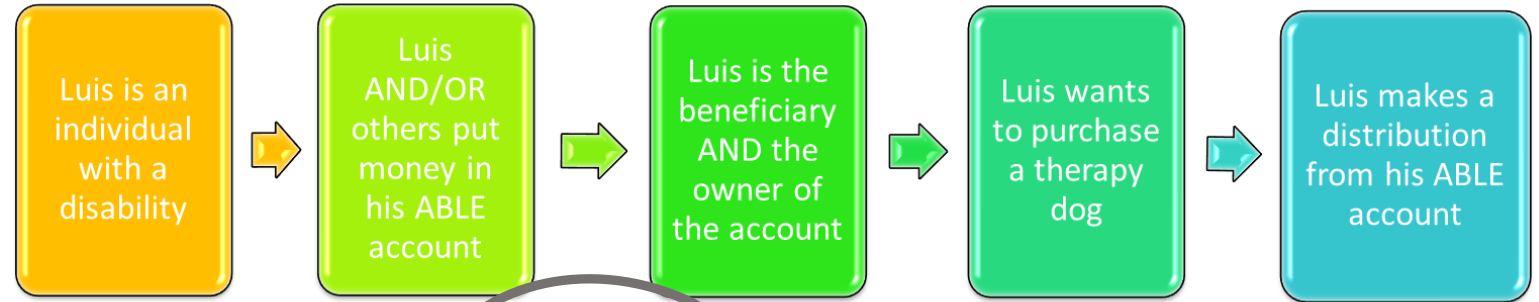
- Receive more than annual exclusion amount
- Exceed \$100,000 and still be exempt for purposes of SSI
- Provide oversight, planning strategies, financial management
- Pay for items that may not be “qualified disability expenses”
- Receive in-kind distributions vs. cash only
- Third party SNTs do not have a payback provision
- Beneficiary has **no control over assets**

ABLE Accounts:

- Can distribute cash directly to the beneficiary’s bank account, so long as used for qualified disability expenses OR not retained more than a month
- Can be used to pay for things that the beneficiary needs/wants that are “qualified disability expenses”
- Individual has **control over assets** and owns the account



Distribution Process

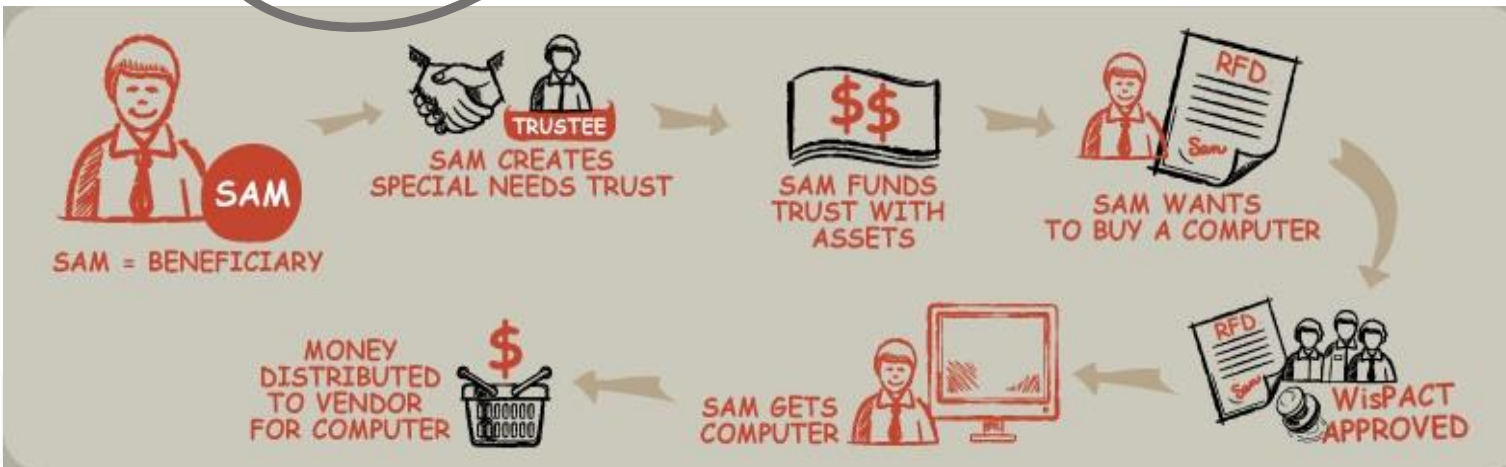
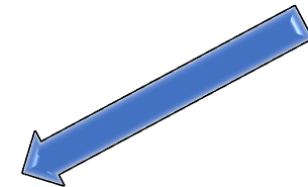


SPECIAL NEEDS TRUST



ABLE ACCOUNT

Luis uses the cash in his bank account to pay for dog



Powers Of Attorney

- Legal document where a person authorizes an **agent** who can act on their behalf if/when they become incapacitated
- Person must be age 18 or over and have capacity to understand what they are signing; It is valid when executed
- Doctor can determine whether there is testamentary capacity
- Can be broad in scope or limited to specific purposes (**general** vs. **limited**)
- Benefits: Low cost, private, and can select your agents



Powers Of Attorney

HEALTHCARE POWER OF ATTORNEY

- **Wis. Stat. § 155**
- Allows agent to make decisions regarding healthcare needs
- Typically activated when a person lacks the ability to make and understand medical decisions



FINANCIAL POWER OF ATTORNEY

- **Wis. Stat. § 244**
- Allows agent to made decisions regarding property
- Can be in effect immediately (durable) or upon incapacity (springing)



Guardianship

- Legal relationship under **Wis. Stat. § 54** where the Court gives a person (**Guardian**) the power to make decisions for another (**Ward**) who, because of incapacity, is not able to take care of their own affairs (can also have corporate guardians)
- Appointing a guardian requires a Court proceeding (**Hearing**)
- Court may also appoint:
 - Co-guardians (parents)
 - Standby guardian(s)
 - Successor guardian(s)
- Some counties require a hearing to appoint standby and/or successor



Guardianship

- Requires a medical evaluation
- Can be limited or broad in scope
- Some actions require Court approval (ex. selling real estate, establishing a trust)
- Can be necessary even if the Ward has Powers of Attorney

- **Guardianship of the Person**

Allows Guardian to make healthcare decisions as well as others
(ex. licenses, marriage, education and travel)

- **Guardianship of the Estate**

Allows Guardian to make financial decisions

Requires an Inventory and Annual Accounts to the Court



Conservatorship

- Voluntary court action taken by a person who wants assistance managing their assets, and does not require a finding of incompetency
Ex: paying bills, managing investments
- Only deals with financial decisions
- Requires a hearing, but no medical evaluation
- Requires the **Conservator** to file an Annual Account with the court
- **Wis. Stat. § 54.76** part of guardianship statute



Supported Decision-Making

- Under **Wis. Stat. §52**, an individual with a “Functional Impairment” selects **Supporters** to help them make choices, but they retain their decision-making capacity

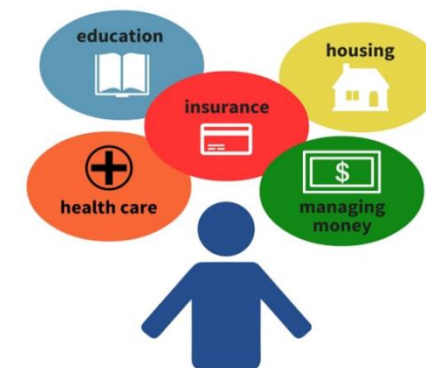
Functional Impairment is a physical, developmental, or mental condition that substantially limits one or more of an individual’s major life activities

- “Supporter” is an adult who is willing to enter into an agreement with an adult who has a functional impairment to provide supported decision-making

Gather information relevant to the decision

Evaluate and understand options and potential consequences

Communicate decisions to others



Supported Decision-Making Agreement

- An agreement which identifies an individual's method of decision-making
- Must be voluntarily entered into
- Must be in writing in substantially the same form provided by DHS
- Signed and dated with 2 witnesses or a notary
- No Court approval or oversight required
- Signed into Wisconsin Law on April 16, 2018
- May not be used as evidence of incapacity or incompetency
- The supporter cannot make a decision for a person with a disability and cannot bind the adult to a legal agreement



Comparison



Supported Decision-Making

- Helps those who need the least protection
- No court oversight
- Can bring an action against a Supporter for undue influence or abuse, but there is no provision holding them accountable for an individual's decisions

Guardianship & Conservatorship

- Guardian must protect the individual from abuse, neglect and exploitation
- Court monitors guardianships of the person and estate & conservatorships
- Standards:

Guardianship of the Person: The individual, because of impairment, is unable effectively to receive and evaluate information or to make or communicate decisions to such extent that the individual is unable to meet the essential requirements for the individual's physical health and safety.

Guardianship of the Estate: The individual, because of an impairment, is unable effectively to receive and evaluate information or to make or communicate decisions related to management of the individual's property or financial affairs.

**Less Vulnerable/
Higher Capacity**

CORRELATION BETWEEN INCREASED NEED FOR SUPPORT AND/OR PROTECTION AND DECREASE IN CAPACITY

**More Vulnerable/
Reduced Capacity**

Powers of Attorney

- Capacity to understand implications of document
- No current need for assistance in making decisions
- Valid when signed
- Must be activated (unless durable financial POA)
- No Court approval required

Conservatorship (finances)

- Voluntary
- Approved by Court
- Conservator is accountable to the Court
- Conservator can act for the Individual, who can also act on their own behalf

Supported Decision-Making

- Individual with Functional Impairment (does not need to be certified by Dr.)
- Individual makes own decisions
- Supporter has no authority to make decisions
- No Court approval required

Limited Guardianship

- Transfers some decision making authority to the Guardian (oversight)
- Appointed by the Court

Full Guardianship

- Transfers decision making authority to the Guardian
- Appointed by the Court
- Most protective option

SUMEETA A. KRISHNANEY

Attorney Krishnaney concentrates her practice on estate planning, including special needs planning and guardianships, charitable estate planning and business succession planning. She focuses on the preparation of trusts, including first and third party special needs trusts, wills, marital agreements, financial powers of attorney, and healthcare powers of attorney. Attorney Krishnaney represents clients in all matters relating to guardianship of the person and estate for adults who lack capacity, including protective placement and contested guardianships.



Attorney Krishnaney regularly speaks on the topics of special needs planning and guardianships. She is a dedicated advocate for individuals with special needs and is an active member of the Milwaukee community.

Education:

J. D.: Marquette University

M.B.A.: University of Wisconsin–Milwaukee

B.A.: University of Rochester

Professional and Civic Activities:

University School of Milwaukee, *Board of Trustees, Vice President*

Best Buddies Wisconsin, *Advisory Board for 7 years*

WisPACT, Inc., *Attorney Advisory Council*

Milwaukee Bar Association, *Member*

State Bar of Wisconsin, *Member*

Thank you.

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