Fiduciary Guide

A Lay-Person's Guide to Understanding Your Role as Successor Trustee

Financial Services of America

Disclaimer

This guide is intended for general, informational purposes only. Because each situation is different, this is not intended to be a substitute for legal, tax, or other professional advice. It is recommended that you always seek the advice of a lawyer, CPA, financial advisor or other professionals before beginning, and during, your duties as trustee. Great care has been taken to provide accurate information in this guide; however, the author and every person involved in the creation and distribution of this document disclaim any warranty as to the accuracy or completeness of the contents. All parties associated with the creation and distribution of this guide disclaim any liability arising from negligence or any cause of action, to any party, for the guide's contents or any consequences arising from its use.

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SECTION 1 | Introduction to the Fiduciary Guide

This may be the first time you have been designated as an agent under an estate plan. This Guide will help you understand your role as an agent under an estate plan. Being appointed in an estate plan is a great honor and responsibility. Your appointment makes you a fiduciary, and should you accept the appointment, you are obligated to follow the instructions contained in the plan and comply with state, federal and local law while exercising your fiduciary duties.

Being an "agent" in someone's estate plan typically comes in the form of serving as:

- Agent under a power of attorney (healthcare or financial)
- Trustee of a trust, or
- Personal Representative (formerly known as Executor/Executrix) of a decedent's estate.

In each "agent" role listed above, you are acting in a "fiduciary" capacity. The law requires a fiduciary to make decisions for someone else's benefit, not their own. It does not matter if you are the person's spouse or child. The size of the estate you are managing does not change the fact you must satisfy your legal duties and act in good faith. You must take the job seriously. You must treat the position like a job. The law requires you to act promptly. Other events in your life should not interfere with your responsibilities and do not serve as an excuse if you fail to do the job in a prompt and timely manner. You must follow the instructions left in any applicable legal document and comply with the applicable local, state and federal law. Ignorance of the document terms or the law is not an excuse. Failure to follow the rules can result in legal action being taken against you and could result in your removal as a fiduciary, or worse.

The person that appointed you understands the complexity of your role and wants to protect you from civil and criminal liability. As such, that person has authorized you to seek guidance from professionals while exercising your duties. They have also asked us to provide you with this Guide. They encourage you to use their team of medical, insurance, financial, tax, and legal professionals to provide you with support and guidance while you handle their affairs.

Although this Guide was developed by The Law Offices of Benjamin T. Vader, PLLC, a law firm that specializes in estate planning and elder law, it is not intended to provide legal advice or serve as a substitute for your own legal counsel. If you have questions or concerns about your role as a fiduciary, we recommend that you seek the guidance of the appropriate legal professional.

SECTION 2 | Living Trust Basics

What is a "trust?"
A trust can take many forms, but for purposes of this Guide, a trust is a legal entity or arrangement to hold property created through a signed, legal document. A trust provides for the management and distribution of the creator's assets by a trustee for the benefit of a beneficiary. The trust instrument identifies the trustee and beneficiary(ies) and typically provides detailed instructions to the trustee regarding the management and distribution of the assets held in the trust.

What is a "living trust?"
A living trust is a type of trust typically designed to avoid probate by providing a trustee with the powers, instructions, and rules necessary to manage and distribute assets transferred to the trust by the Settlor during the Settlor's lifetime and upon the Settlor's death. It is important to note that a living trust only covers assets that are owned by the trust, as discussed below.

Who creates a trust?
The person who creates the trust is known as the "settlor," "grantor," or "trustor." This individual creating the trust will be referred to in this Guide as the Settlor.

Who manages the property owned by the trust?
The person who manages the assets and follows the instructions in the trust is the Trustee. A Trustee must follow the terms of the trust and comply with state, federal and local law while exercising their fiduciary duties. Typically, the Settlor serves as Trustee while the Settlor is alive and has capacity. The trust should specify when there is a change in the trusteeship.

Who is entitled to receive the benefits of a trust?
The individual(s) or entity who are designated in the trust to receive income or other distributions are called "beneficiaries." While the Settlor is alive, a living trust typically provides that the assets of the trust must be used for the benefit of the Settlor. Upon the death of the Settlor, a living trust typically becomes irrevocable and designates beneficiaries to receive the trust assets after the financial obligations of the Settlor are satisfied.

Does a living trust require probate court supervision?
A living trust typically states that court supervision is not required. Assets owned by a well-drafted, fully funded, and properly administered living trust do not typically require probate court supervision or involvement. However, if a trustee is breaching a duty, a beneficiary may file a petition with the probate court seeking court intervention.

What can a trustee of a living trust do?
The trustee of a living trust has only those powers that are stated in the trust or authorized by law. A living trust typically provides broad powers to allow the trustee to manage financial accounts and real estate for the benefit of the trust beneficiaries. However, it is important to recognize that the powers only apply to those assets that the trust owns. The trust does not apply to medical decisions or assets not owned by the trust.

What assets are in the trust?
The trust only covers assets that are owned by the trust. You can tell if an asset is in the trust because the trust's name should appear on the account or asset title.

How do assets get put in the trust?
When a person creates a trust, they must also take steps to put their assets into the trust. This is called "funding." Funding does not happen automatically when a trust is created. It requires that each asset or account be updated to list the trust's name on the title of the asset or account. Generally, there are two ways to put an asset into a trust. The account can be transferred into the trust right away, or the trust can be listed as the beneficiary, so the transfer occurs automatically upon the death of the account owner. The title for each asset that is supposed to go into the trust must be updated after the trust is created. If the asset is not in the trust when the Settlor dies, it may go into probate.

Can a living trust be changed?
A living trust is typically revocable during the lifetime of the Settlor, meaning it can be changed by the Settlor. A living trust typically becomes irrevocable upon the Settlor's death, at which point the trust cannot be changed. It is important for the Settlor to review the trust periodically to ensure it is up to date with the Settlor's wishes and in compliance with the law.

What does the Trustee do when the Settlor dies?
This depends on what the trust says. However, some key responsibilities of the Trustee include:

- **Provide notice to creditors.** A living trust is typically responsible for the Settlor's bills and debts upon the death of the Settlor. The law requires the Trustee to publish notice of the Settlor's death and the existence of the Trust in the legal news to ensure potential creditors are aware of the Trust and the Settlor's death. If a creditor is a "known" creditor, i.e., there is evidence in the Settlor's records that a debt is owed, the Trustee must provide the creditor with a copy of the notice published in the legal news. If the Trustee distributes the assets and does not pay a creditor without a basis for not paying the creditor, the Trustee can be held personally liable for the debt.

- **Provide notice to trust beneficiaries.** Within 63 days of the date of the Settlor's death, the Trustee must provide the trust beneficiaries with notice of the Trust's existence and the beneficiary's right to request a copy of the terms of the Trust that affect the beneficiary's share.

- **Make an Inventory and collect assets.** The Trustee has a duty to collect all assets belonging to the Trust and protect those assets. This may include changing locks, selling property, collecting insurance proceeds, and liquidating financial accounts. The Trustee should make an inventory of all trust assets, regardless of value, and provide the inventory to the trust beneficiaries within a reasonable period time, usually 60 days after the Trustee begins to serve.

- **Provide information to the beneficiaries of the Trust.** The Trustee has a duty to provide the beneficiaries with a report of the trust assets, receipts and liabilities no less than annually and upon the termination or conclusion of the Trust administration. The Trustee also has a duty to promptly respond to requests for information from the beneficiaries, provided that the request is reasonable.

- **Pay valid debts.** Once the notice to creditors is published, creditors must submit any claims within 120 days from the date of publication. At the end of the 120 days, the Trustee should address all creditor claims by either paying the claim or disallowing the claim. The Trustee must have a valid legal basis for disallowing a claim.

- **File tax returns.** The Trustee is responsible for making sure the Settlor's final tax return is filed and any taxes owed are paid.

- **Keep records.** The Trustee has a legal duty to keep detailed records regarding the administration of the Trust. This includes records of all assets, payments made and received, and the time spent by the Trustee.

- **Distribute assets to beneficiaries.** Once the items above are completed, the Trustee must distribute the assets according to the terms of the Trust to the beneficiaries. Before making final distributions, the Trustee should obtain written consent from the beneficiaries to make the distribution(s). It is also advisable to obtain written approval of the Trustee's actions in the form of a waiver and release from the beneficiaries.

What are the benefits of a living trust versus a simple will?
Many people believe that if their estate is "simple," they only need a simple will. It does not matter how simple an estate is, a will is not valid until the court admits it to probate, so all wills must go through probate court. This can result in significant costs and court involvement. Further, a person receiving an inheritance under a will may have their inheritance exposed to creditors and may lose government benefits that they were previously receiving. Additionally, through the Estate Recovery Act passed in 2007, the State of Michigan has the right to be reimbursed for certain Medicaid benefits paid on your behalf if your assets go through probate upon your death.

A probate estate administration has all of the requirements of a trust administration described above but has the added hassle of doing it all through the probate court in a much more formal manner. This can substantially increase the time and expense of administering the assets.

A properly drafted Living Trust can eliminate these issues and provide a cost-effective method for dealing with a deceased individual's outstanding financial matters (bills, funeral expenses, etc.) and transferring the deceased individual's remaining assets to his or her family. A Living Trust can also protect the individual's beneficiaries if they have any kind of known or unanticipated problem (divorce, disability, bankruptcy, poor financial decisions, substance abuse, incarceration, student loans, credit card debt, tax problems, underage beneficiaries/minors, etc.) and can protect against Medicaid Estate Recovery by the State of Michigan under the current law.

COMMON MISTAKES WHEN ADMINISTERING A TRUST

Not funding the trust.
A living trust is designed to avoid probate. The benefits and protections of the trust only apply to assets the trust owns. If an asset is not funded into the trust by Settlor before death, it may go through probate and the protections of the trust may not apply.

Making distributions too early.
The trustee is personally responsible for seeing that the assets of the trust are administered properly. This includes ensuring that all valid claims are addressed by payment or disallowance. If distributions are made before the claims are addressed, the Trustee can be held personally liable for the unsatisfied claims.

Not providing notice to creditors and information to beneficiaries.
The law requires that the Trustee provide legal notice to creditors and beneficiaries right away. The law also requires the Trustee keep the beneficiaries reasonably informed about the administration of the Trust and promptly respond to reasonable requests for information from the beneficiary. Failure to do so can result in personal liability for the Trustee and may provide legal grounds for removing the Trustee.

Failing to administer the trust in a prompt manner.
The Trustee has a duty to administer the trust in an expeditious manner. Many Trustees are family members who have lives of their own. The Trustee cannot let their personal lives interfere with their duty to administer the trust in a prompt manner.

SECTION 3 | Financial Power of Attorney Basics

A power of attorney ("POA") is a legal document in which one person gives authority to another person to act on their behalf. The person giving the authority is called the "Principal." The person receiving the authority to act for the Principal is called the "Agent." Most powers of attorney cover either medical decisions or financial decisions. This section provides some basic information on financial powers of attorney. If you are serving as an Agent under a financial power of attorney, you first must read the power of attorney. You should also review this Guide for additional information.

When does a POA become active?
The document itself should designate when the Agent's power becomes active. There are two types of POAs: "springing" and "immediate." Springing means the POA is not active until a specified event occurs which usually involves doctor certifications that the Principal is unable to act. Immediate means that the Agent can act as soon as the POA is signed. We recommend that financial POAs become effective immediately. Michigan law requires that medical/healthcare POAs be springing.

What can the Agent do under the POA?
The Agent can only do what is authorized in the POA document. Any power not expressly covered in the document is not given to the Agent. As a result, it is important that a power of attorney contain all powers the Agent may need to accomplish the goals and objectives of the Principal when creating the power of attorney.

Is there anything that can't be included in a POA?
Some government benefits may require a special fiduciary and may not honor a POA. For example, Social Security requires a Representative Payee who is approved by the Social Security Administration. The Department of Veterans Affairs may require the appointment of a VA Fiduciary if the benefit recipient is incapacitated. Both agencies have an internal process to appoint such a person and neither require probate. A POA will not let you appear in court on behalf of the Principal without being represented by an attorney.

Can a POA be changed?
Yes. The Principal is typically the only person who can change a POA. The Principal must have capacity to change a POA.

Does a power of attorney avoid probate?
A validly executed POA can avoid probate if the POA document expressly covers all decisions that need to be made for the Principal. The purpose of a POA is to designate an Agent to act for the Principal if the Principal cannot act for themselves. The purpose of a probate court proceeding is to protect a person if they cannot act for themselves and appoint someone to take care of the person. If the person has a POA, they have already taken steps to protect themselves by appointing an agent, and the court does not need to be involved. Persons with comprehensive POAs do not typically need probate court involvement during their lifetimes because they have proactively empowered a trusted individual to act if they cannot.

When a person has a POA, do they give up the right to make their own decisions?
No. The POA is a delegation of the Principal's authority to the Agent to allow the Agent to make decisions for the Principal. Only a court can remove or suspend a person's authority to make their own decisions. This process occurs through the probate court in Michigan through a guardianship and/or conservatorship proceeding. Occasionally, an Agent under a POA may need to petition the probate court to remove a person's power to make their own decisions if they are making poor decisions which harm themselves. While a POA allows for the Agent to help the Principal, it does not strip the Principal of their right to make decisions, even bad decisions.

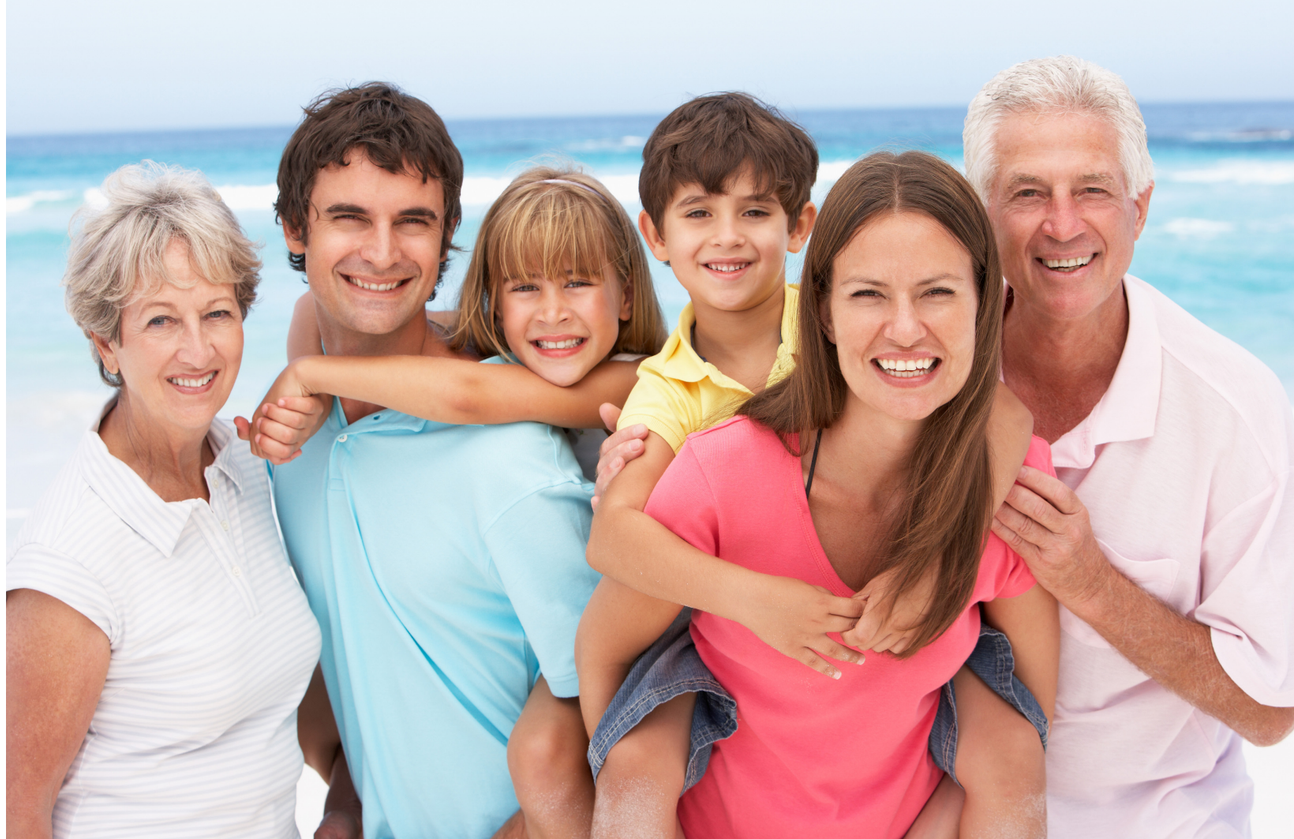
What if there is more than one Agent named in the POA?
The POA should state whether Co-Agents can act alone or if they must act together. Either way, if there are Co-Agents, they should work together and share information about decisions. If Co-Agents cannot agree on a course of action and the POA requires unanimous consent, court involvement may be required to break the stalemate.

Can the Agent be compensated?
Only if the POA or state law allows for compensation. If you are considering compensating yourself as Agent, you should read the other sections in this Guide addressing this situation.

What kind of records should I keep if I am an Agent?
Good ones. It is very important that you keep records of your actions while serving as Agent. The other sections in this Guide provide more details regarding this question.

If I am acting as Agent and I want to get legal or other professional advice, do I have to pay for it from my own money?
No. Provided that you are acting in good faith and are seeking advice in connection with your responsibilities as Agent, you are permitted to use the Principal's assets to seek legal and other professional advice.

How do I get the bank to recognize my POA?
In order to confirm the POA, you should bring or send the complete POA to the institution that you need to deal with. Sometimes, a POA may not be accepted right away. So, you should do this step right away to avoid hassle in an emergency. Never give away the original document. You can get certified copies of the original document. If someone will not accept your authority as agent, talk to a supervisor. If they still won't accept it, talk to a lawyer. State law may require the business or person to accept the power of attorney.



SECTION 4 | Serving as Agent or Trustee

This section of the Guide provides basic information for individuals serving in a fiduciary capacity involving making financial decisions while serving as:

- An agent under a durable financial power of attorney,
- A trustee under a trust, and
- A personal representative of a probate estate.

There is a separate section addressing fiduciaries involved in medical decisions later in this Guide. As a fiduciary, you must be trustworthy, honest, and act in good faith. If you do not meet these standards, you could be sued and removed as a fiduciary and/or have to pay money. It is even possible that the police or sheriff could investigate you and you could go to jail. **That's why it's always important to remember: It's not your money!**

When you act as a fiduciary, there are numerous legal duties that can arise depending on the circumstances. This Guide is not intended to cover them all. Listed below are some key concepts and core duties that must be considered in all situations involving serving as Agent or Trustee.

ACT ONLY IN THE PRINCIPAL OR BENEFICIARY'S BEST INTERESTS!

As a fiduciary, you must always put the principal or beneficiary's interests first. Suggestions on how to accomplish this include:

- **Read the document.** The first thing you should do is read the governing document (trust, will, power of attorney) and do what it says. Understand when the power granted under the governing document becomes effective. It may be right away or only when the creator can no longer make their own decisions. Your authority is strictly limited to what the document and state law allow. Above all else, follow the instructions and rules established in the document, even if you have the best intentions in doing something different.

- **Communicate.** When deciding what decision is in the best interests of your principal or beneficiary, to the extent possible, communicate with the person. The person's ability to communicate may change from time to time, but even after it becomes clear that you must make decisions, ask the person what they want if they can communicate. Make the decisions you think the person would have wanted, unless doing so would harm the person. To the extent you are conflicted about what to do or need guidance, seek the counsel of an attorney or other professional who can provide insight and expertise.

- **Avoid conflicts of interest.** It is common for financial fiduciaries who are also family members to face decisions that can create a conflict of interest. A conflict of interest happens if you make a decision about the property that may benefit someone else at the expense of the principal/beneficiary. As a fiduciary, you have a strict duty to avoid conflicts of interest—and should avoid even the appearance of a conflict of interest. As a result, it is advisable to consult with an estate planning and elder law attorney if these circumstances arise.

- **Don't make gifts or borrow or loan money.** Don't borrow, loan, or give the principal or beneficiary's assets to yourself or others. Even if the power of attorney, trust or applicable law clearly allow you to make gifts to yourself or others, be very careful to avoid conflicts of interest, as discussed above. For example, if the principal gave money every week to a church, the power of attorney may allow you to continue doing that. However, this seemingly harmless act may reduce the inheritance of a beneficiary or be viewed as a "divestment" for purposes of qualifying the principal for government benefits such as Medicaid or Social Security. There are some scenarios in which making a gift or transfer may be in everyone's best interests, such as for tax planning purposes or as part of a strategy to qualify the person for Medicaid benefits. However, before making any transfer that could be viewed as a gift, consult with a professional to make sure that the transfer does not have negative tax consequences, result in a loss of government benefits, or conflict with the terms of the person's power of attorney, will, or trust.

- **Be careful when paying yourself or other friends and family for goods or services.** You cannot pay yourself for the time you spend acting as an agent, unless the governing document (will, trust, or power of attorney) and applicable state law allow you to do so. If you are allowed to pay yourself, you need to show that your fee is reasonable.

    - Carefully document your expenses, how much time you spend, how much you are charging, and what you do. Additionally, if you employ others, particularly family members or friends, you should document the transactions in detail in the same manner.

    - Paying yourself or family members to serve as a caregiver for an aging relative can be construed as a disqualifying divestment for Medicaid purposes unless there is a Medicaid compliant caregiver contract in place at the time the services were provided.

    - If you intend to engage in any of these types of transactions with yourself, friends or family members, it can be perceived as "self-dealing" and you should consult with an elder law and estate planning attorney for guidance.

MANAGE THE MONEY AND PROPERTY CAREFULLY!

As a fiduciary, you might pay bills, oversee bank accounts, and pay for things needed for the principal or beneficiary. You may make investments, pay taxes, collect rent or unpaid debts, procure, modify or cancel insurance, and handle other things written in the power of attorney, trust or will. You have a duty to manage the money and property with care and exercise due diligence. Use good judgment and common sense and always act in good faith. As a fiduciary, you must be even more careful with the principal and beneficiary's money than you might be with your own! As a result, you should consult with professionals when making decisions and handling financial affairs to ensure that you are in compliance with your fiduciary duties.

Here are some suggested guidelines to make sound financial decisions:

- **Identify the principal or trust's money, property, income, debts, and bills right away and make a list.** Keep it up date. To make careful decisions, you need to know what the principal or trust owns and owes. You may want to speak to the principal's financial and insurance professionals to make sure you are aware of all financial matters. Examples of items that might appear on your list include:
  - Checking and savings accounts and certificates of deposit (CDs);
  - Cash;
  - Pension, retirement, annuity, rental, or other income;
  - Real estate;
  - Cars and other vehicles;
  - Insurance policies;
  - Mutual funds, stocks and bonds;
  - Jewelry, furniture, and any other items of value;
  - Unpaid credit card bills and other outstanding loans
  - Recurring bills, such as insurance, utilities, property taxes, etc.

- **Take steps to protect the property.** Keep the money and property safe. You may need to put valuable items in safe deposit boxes, change locks on property, and make sure the home and other property is secured to limit access and insured against loss. Make sure bank accounts earn interest if possible and have low or no fees. Review bank and other financial statements promptly. If the principal or trust owns any real estate, keep it in good condition.

- **Invest carefully.** If you are making investment decisions, talk to a financial professional. Discuss choices and goals for investing based on the needs of the principal or beneficiary and the investment time horizon.

- **Act promptly and get the job done.** It is important to pay the financial obligations in a timely manner. Failure to act in a prompt and timely manner can result in legal action being taken against you and could result in your removal as a fiduciary, or worse.

- **Review insurance policies with a professional.** Insurance needs and rates can change over time, so it is important to make sure the appropriate coverage is in place.

- **Determine if any money is owed to the principal or trust.** Find out if anyone owes money to the principal or trust, and try to collect it.

- **Take steps to have the power of attorney or trust certificate accepted.** Sometimes banks or other businesses won't do what you, acting as an agent, want them to do. A bank may refuse to accept the trust or power of attorney and want the principal to sign. This is a problem if principal has lost the ability to act or has died. As soon as you need to act, contact any financial institutions (such as banks) or people that you may need to deal with and give them copies of the power of attorney or certificate of trust.
  - Never give away the original document. You can get certified copies of the original document.
  - If someone will not accept your authority as agent, talk to a supervisor. If they still won't accept it, talk to a lawyer. State law may require the business or person to accept the power of attorney.

- **Determine if the principal or beneficiary receives or can receive government benefits such as Medicaid, Social Security and/or Veteran's benefits.** These benefits might include pensions, disability, Social Security, Medicare, Medicaid, Veterans benefits, housing assistance, or food stamps (now known as Supplemental Nutrition Assistance Program or SNAP). The Medicaid program provides medical assistance and long-term care to low-income people. Medicaid eligibility strategies are discussed in detail later in this Guide. Eligibility requirements are complicated and we recommend you get legal advice and be very careful about decisions that may affect eligibility for Medicaid.

KEEP THE PROPERTY SEPARATE!

Never mix the principal or trust's money or property with your own or someone else's. Mixing money or property makes it unclear who owns what. Confused records can get you in trouble with family, the court, and also with government agencies such as adult protective services and the police or sheriff. Follow these guidelines:

- **Separate means separate.** Never deposit the money or property into your own or someone else's bank account or investment account.
- **Avoid joint accounts.** If the money or property is already in a joint account with you or someone else, get legal advice before making any change.
- **Keep title to the money and property in the principal or trust's name.** This is so other people can see right away that the money and property belong to principal or trust and is not yours.
- **Know how to sign.** Sign all checks and other documents relating to the money or property to show that you are acting as an agent. For example, you might sign "John Doe, agent for Jane Doe" or "John Doe, Trustee." Never just sign your name or the principal's name.
- **Pay applicable expenses from the principal or trust's funds, not your personal funds.** Spending your money and then paying yourself back makes it hard to keep good records. If you really need to use your money, keep receipts for the expense and maintain a good record of why, what, and when you paid yourself.

KEEP GOOD RECORDS!

You must keep true and complete records of the trust or principal's money and property. The power of attorney, trust, will, or state law may say that someone else can review your records to check up on you. Unless the power of attorney, trust, will, or state law says you can't share your records, you may want to let another family member or an attorney review them as a precaution.

You should practice good recordkeeping habits. Good habits include:

- **Keep a detailed list of all expenses, income and other deposits.** Records should include details of all checks written or deposited including dates, reasons, names of people or companies involved, and other important information.
- **Keep receipts and notes, even for small expenses.** For example, write "$50, groceries, ABC Grocery Store, May 2" in your records soon after you spend the money.
- Avoid paying in cash. Try not to pay ANY expenses with cash. Also, try not to use an ATM card to withdraw cash or write checks to "Cash." If you need to use cash, be sure to keep receipts or notes.
- Keep records of your time and expenses. The power of attorney, trust, will, or state law may say that you can be paid for acting as fiduciary. If you will be paid, be sure your fee is reasonable. You are obligated to keep detailed records of what work you did, how much time it took, when you did it, and why you did it.

How can you avoid problems with family or friends?

Family or friends may not agree with your decisions. To help reduce any friction, follow the guidelines above and review the other sections of this Guide. Sharing information may help. For example, you might want to share any accountings or records you prepare even if you are not required to do so. You may want to discuss big decisions with those people who are impacted by the decisions. It usually is easier to deal with questions about a decision when it happens than to deal with suspicion and anger that may build over a long time. In the end, you must make the final decisions. Some family or friends may be so difficult that it is better not to share information with them. Use your best judgment and consult with professionals to ensure you follow your fiduciary responsibilities.

SECTION 5 | Medical power of attorney
(serving as patient advocate)

In Michigan, a Healthcare Power of Attorney is called a Patient Advocate Designation (referred to herein as "PAD"). The individual creating the PAD is the Patient and the individual designated to make the decisions is called the Patient Advocate. A PAD is typically used to avoid the need for a court appointed guardian. As discussed below in the Scope of Authority of Patient Advocate section, if the PAD covers the decision that needs to be made, a court appointed guardian is not required.

In Michigan, an individual 18 years of age or older who is of sound mind at the time a patient advocate designation is made may designate in writing another individual who is 18 years of age or older to exercise powers concerning care, custody, and medical or mental health treatment decisions for the individual making the patient advocate designation. A patient advocate designation must be in writing, signed, and witnessed by 2 individuals, dated, and executed voluntarily.
If you are designated as the Patient Advocate, you have been given a tremendous responsibility. This material is designed to provide you with some general information on how to fulfill your responsibilities, but it is not legal advice or a substitute for legal advice. If you have questions, you should contact an attorney promptly.

When Does a Patient Advocate Have Authority to Act?
Michigan law requires that an individual participate in their own treatment decisions if they can. Certain requirements must be met before a Patient Advocate has the authority to make decisions on behalf of a Patient:

- **Patient Advocate Must Sign Acceptance Form** - Before a PAD can be implemented, a copy of the PAD must be given to the proposed Patient Advocate and the proposed Patient Advocate must sign an acceptance of the PAD.

- **PAD Must be In Patient's Medical Record** - Before the PAD may be used, it must be made part of the patient's medical record with, as applicable, the Patient's attending physician, the mental health professional providing treatment to the Patient, the facility where the Patient is located, or the community mental health services program or hospital that is providing mental health services to the Patien

- Two Doctors Must Certify Patient Is Unable to Participate in Decisions. The authority of a Patient Advocate to make decisions only occurs when the Patient is unable to participate in medical treatment or, as applicable, mental health treatment decisions. The Patient's attending physician and another physician or licensed psychologist must determine upon examination of the Patient whether the Patient is unable to participate in medical treatment decisions. The determination must:
  - Be in writing,
  - Made part of the patient's medical record, and
  - Must be reviewed not less than annually.

A PAD is suspended if the Patient regains the ability to participate in decisions regarding medical treatment or mental health treatment, as applicable. The suspension is effective as long as the Patient is able to participate in those decisions.

Can you help a person with decisions before the PAD is activated?
In many instances, an individual may require assistance before the PAD can be activated. In these instances, the "helper" cannot make decisions for the individual, but they can assist the individual with other things, including scheduling doctor appointments, picking up prescriptions and other tasks. However, they may need access to the individual's protected health information.

If the individual has a "HIPAA Authorization," the people designated in the Authorization have access to the individual's protected information. The Authorization should be reviewed to confirm when the authority to access protected heath information is triggered and who has the authority to access information.

What can a Patient Advocate do?
Once the PAD is activated, the Patient Advocate has the authority to make all decisions expressly covered in the PAD. The Patient Advocate's authority, however, is limited to those decisions covered in the PAD. If the PAD does not cover the decision that needs to be made, a court appointed guardian will likely be required. As a result, it is important to review the PAD to ensure it covers all relevant decisions before it needs to be activated. A PAD should expressly cover:

- Medical Treatment Decisions
- Mental Health Treatment Decisions
- Care and Custody Decisions
- End of Life Treatment Decisions

Generally speaking, if the PAD is properly drafted, the Patient Advocate has broad ranging authority, but must act in the Patient's best interests and in a manner consistent with the Patient's expressed wishes.

A person providing care, custody, or medical or mental health treatment to a Patient is bound by sound practice and by a Patient Advocate's instructions if the Patient Advocate is in compliance with the PAD and the law, but is not bound by the Patient Advocate's instructions if the Patient Advocate is not in compliance.

If a dispute arises as to whether a Patient Advocate is acting consistent with the patient's best interests or is not complying with Michigan law, a petition may be filed with the probate court in the county in which the Patient resides or is located requesting the court's determination as to the continuation of the designation or the removal of the Patient Advocate.

If you have questions about Patient Advocate authority, or if you run into problems using a PAD, you should contact an attorney.

End of Life Treatment Decisions

A Patient Advocate may make a decision to withhold or withdraw treatment that would allow the Patient to die only if the Patient has expressed in a clear and convincing manner that the Patient Advocate is authorized to make such a decision, and that the Patient has acknowledged that such a decision could or would allow the Patient's death.

Typically, the PAD will address end of life treatment decisions and spell out the Patient's wishes in those scenarios. Alternatively, the Patient may have created an "Advance Directive" or "Living Will" which identifies the Patient's wishes which is then incorporated into the PAD. Although Michigan does not have a statute expressly recognizing "Advance Directives" or "Living Wills," case law provides that if the Patient's wishes are verifiable by clear and convincing evidence, treatment can be refused or withdrawn. The PAD, Advance Directive, and/or Living Will typically satisfies this requirement if properly executed.

A current desire expressed by the Patient to continue a specific life-extending care or medical treatment is binding, regardless of the ability or inability of the patient to participate in care, custody, or medical treatment decisions or the patient's competency. So, to the extent the Patient has providing conflicting expressions regarding whether or not to continue treatment, the latest expression controls even if the Patient is no longer competent.

Additionally, treatment cannot be refused or discontinued if the Patient is pregnant. A PAD cannot be interpreted to condone, allow, permit, authorize, or approve suicide or homicide. Although some states permit physician assisted suicide to end the life of a terminally ill patient, Michigan law does not permit this.
It is advisable to consult with an attorney and the Patient's family before deciding to refuse or discontinue treatment if the circumstances allow for the time to do so.

Patient Advocate Legal Responsibilities

Michigan law imposes numerous "fiduciary" responsibilities upon a Patient Advocate. What this means can vary greatly depending on the circumstances. The Patient must act in the best interests of the Patient. Additionally, the Patient Advocate must take reasonable steps to follow the desires, instructions, or guidelines given by the Patient while the Patient was able to participate in decisions, whether given orally or as written in the PAD.

A Patient Advocate may not delegate his or her powers to another individual without prior authorization by the Patient. The PAD should expressly address this issue.
It is advisable to consult with an attorney if you have questions about what your legal responsibilities are or to address questions about specific circumstances or decisions.

Compensation of Patient Advocate/Caretaker – Contract for Services

Generally speaking, being compensated to make decisions under a PAD for a Patient is not permitted. However, reimbursement of expenses incurred is permitted. This would include reimbursement for transportation, legal fees, and other costs incurred while serving as Patient Advocate.

A person serving as a caretaker may be compensated. Caretakers may perform a variety of services for the Patient, including providing assistance with activities of daily living, shopping, transportation, cleaning, supervision, etc. However, services provided by a child to a parent are presumed to be for free in absence of an agreement between the parent, or their representative to the contrary.

Whenever an individual is serving as a caretaker, any agreement to perform services should be in writing. Although Michigan contract law may not require a written agreement, Michigan Medicaid policy has very stringent requirements on what a caretaker agreement must contain. This is highly relevant if the Patient subsequently needs nursing home care and seeks Medicaid assistance to pay for care.

It is strongly recommended that you consult with an attorney before hiring a caretaker, paying a caretaker, reimbursing Patient Advocate expenses, or signing any contract for services, including a contract with a nursing home. You may end up personally liable for monies due or disqualifying the Patient for Medicaid eligibility if proper action is not taken, so it is imperative that your actions comply with all applicable laws.

Preparing to Serve as Patient Advocate
A Patient Advocate must be able to handle the stress of making "life or death" decisions. If you are not prepared to assume these responsibilities, you may want to consider declining or resigning the appointment. If you are prepared to handle these responsibilities, you should consult with an attorney to ensure that you follow Michigan law. Additionally, you should do the following:

- Locate, review, and make a copy for your records all relevant legal documents, including:
  - Patient Advocate Designation,
  - HIPAA Authorization, and
  - Advance Directive, Living Will, or Declaration of Intent document addressing "End of Life" treatment decisions.

- Make sure the legal documents identified above are placed in the Patient's medical records at the nearest hospital and with the Patient's primary care physician at the next appointment.

- Speak with Patient about his/her wishes and discuss the Patient's preferences regarding end of life treatment decisions.

- Discuss with the Patient his/her:
  - current and recent medical conditions,
  - current and past treatments,
  - current and recent medicines, and
  - medical treatment personnel currently treating/assisting the Patient and those who treated the Patient in the recent past.

Each set of circumstances is different, and you should not rely on this information as legal advice or a substitute for legal advice. Always consult with an attorney if you any questions regarding your role as Patient Advocate.

SECTION 6 | Medicaid Planning / Nursing Home Asset Protection

Let's face it, long-term care is extremely expensive. If you are facing financial stress or are being forced with the prospect of liquidating assets to pay for long-term care for yourself or a loved one, you need assistance from a Medicaid planning expert.

THE LAW OFFICES OF BENJAMIN T. VADER, P.L.L.C.

Our firm has been very successful in protecting assets and obtaining financial assistance from government programs, such as Medicaid, to pay for long term care. You and your family have been paying into these programs for years. With our proven strategies, we can help you obtain the benefits you or your loved one qualifies for and deserves.

Before things get out of control and before you and your family are stressed out financially, call The Law Offices of Benjamin T. Vader, PLLC, at (586) 268-4463 and start planning today.

OPTIONS TO PAY FOR LONG-TERM CARE COSTS

Out of Pocket
You can use your own resources to pay for long-term care costs. Assisted living facility costs typically range from $2,500-$10,000 per month. Skilled nursing facilities can cost anywhere from $6,000-12,000 per month.

Medicare
Medicare will only pay for 20-100 days of nursing home care after a qualifying 3-day hospital stay. Typically, Medicare does not cover any assisted living care and does not cover skilled nursing care for more than 100 consecutive days.

Long Term Care Insurance
This is private insurance which can pay for long-term care costs. The types of insurance and coverages provided vary greatly based on the terms of the policy. Some may not cover in-home care or assisted living. Premiums can be very expensive. Must be purchased before long-term care is required.

Medicaid
Medicaid a joint State and Federal program which help pay for certain health services for qualifying individuals. If you qualify, you may be able to get financial assistance to help pay for medical expenses such as nursing home care and assisted living costs.

Veteran's Benefits
The Department of Veteran's Affairs has an Improved Pension Benefit available to qualifying veterans who served during a time of war and are now housebound or need the aid and attendance of another with activities of daily living. This Benefit is also available to the surviving spouse of qualifying deceased veterans.

MEDICAID ELIGIBILITY – WELCOME TO THE MEDICAID MAZE

Medicaid is a program is designed for "needy" individuals. Eligibility is determined by the Michigan Department of Health and Human Resources. The eligibility requirements are numerous and complex and even simple errors can result in ineligibility. Some of the eligibility requirements for Medicaid coverage for long-term care costs include:

- Applicant must be over 65 or disabled.
- Countable assets must be below threshold. The countable asset threshold varies based on if applicant is single or married and cannot be exceeded. Assets of spouse are included in determining eligibility.
- Countable income must be below threshold. Monthly income of applicant must not exceed eligible monthly medical expenses.
- Medical eligibility requirements. The Michigan Medicaid Nursing Facility Level of Care Determination is Michigan's assessment test used to determine if the applicant meets the nursing home level of care and qualifies for Medicaid.

WHAT IS MEDICAID PLANNING?

A general definition of Medicaid planning is any assistance provided to a potential Medicaid applicant in advance of, and in preparation for their Medicaid application. Medicaid planning can be as simple as assistance with the collection and preparation of documents or as complicated as a complete re-structure of one's financial assets.

Why engage in medicaid planning?

- Long term care is very expensive and families want to ensure their loved one receives the care they require which they could not otherwise afford.
- Medicaid eligibility is extremely complicated and even simple errors can result in a denial which can be devastating to the health and happiness of the applicant, their caregivers and family members.
- The application and review process is time-consuming. Working with a Medicaid planner can accelerate this process.
- To ensure that the healthy spouse, who lives at home, will have the financial resources to continue doing so.
- To preserve a family's limited assets to ensure the next generation can live in a home or afford an education.

ADVANCE PLANNING STRATEGIES

There are numerous ways to plan in advance to protect assets for a situation where Medicaid benefits are not needed now, but may be needed in the future to help cover the costs of long-term care.

Examples of some strategies that can be used in advance are:

A. **Create an Estate Plan** – Durable Power of Attorney (Single or Married). If you become incapacitated, the person in charge of your affairs will need comprehensive legal authority to act on your behalf to protect assets and apply for benefits.

B. **Avoid Probate on Death (Single or Married).** In 2007, Michigan passed the Estate Recovery Act which allows the State of Michigan to recoup long term care benefits paid from the recipient's probate estate on death. Avoiding probate can avoid recovery.

C. **Ladybird Deed – Primary Residence (Single or Married).** A ladybird deed allows the property owner to retain ownership of their primary residence for life and designate a beneficiary on death thereby avoiding probate. This exempts and protects the property when applying for Medicaid and avoids probate and Estate Recovery upon death.

D. **Transfer Primary Residence into Trust (Married Only).** This strategy can be beneficial for married couples with less than $250,000 in non-primary residence assets because it can increase the amount of assets they can keep when applying.

E. **Testamentary Trust for Spouse (Married Only).** A married couple can create a trust under their will for the benefit of their surviving spouse known as a Testamentary Trust for Spouse. If properly drafted, the assets in this type of trust are not counted against the surviving spouse when applying for Medicaid.

F. **Irrevocable Divestment Trust – Dynasty Trust (Single or Married).** This type of trust is typically used to transfer assets to beneficiaries upon death while reserving the right to receive income during life. The principal will not be counted as an asset, but there will likely be a transfer penalty if the transfer occurs during the five-year lookback period before applying for Medicaid.

CRISIS PLANNING STRATEGIES

There are many strategies to obtain Medicaid eligibility even if the applicant is already in the nursing home. Examples of these strategies are:

A. **Spend Down Excess Assets (Married or Single).** This may include paying for qualifying items or services which the applicant will benefit from later such as paying off credit card or mortgage debt, making funeral arrangements, repairing the home or paying for legal services to assist in the Medicaid application process.

B. **Convert Countable Assets to Exempt Assets (Married or Single).** This strategy may include using excess countable assets to purchase an exempt asset such as purchasing an exempt qualifying annuity or promissory note.

C. **Petition the Probate Court (Married or Single).** This type of strategy can involve petitioning the Probate Court to enter an order for the protection of the applicant or the applicant's dependents. This strategy can be used to protect income and assets.

D. **Half-a-loaf (Single Only).** This involves making a gift of approximately half of the applicant's assets and converting the other half to an income stream to pay for care during the resulting penalty period. This typically allows the applicant's family to protect half or more of the applicant's assets.

E. **Ladybird Deed (Single or Married).** A ladybird deed allows the property owner to retain ownership of their primary residence for life and designate a beneficiary on death thereby avoiding probate. This exempts the property when applying and avoids Estate Recovery.

COMMON MISTAKES

There are many strategies to obtain Medicaid eligibility even if the applicant is already in the nursing home. Examples of these strategies are:

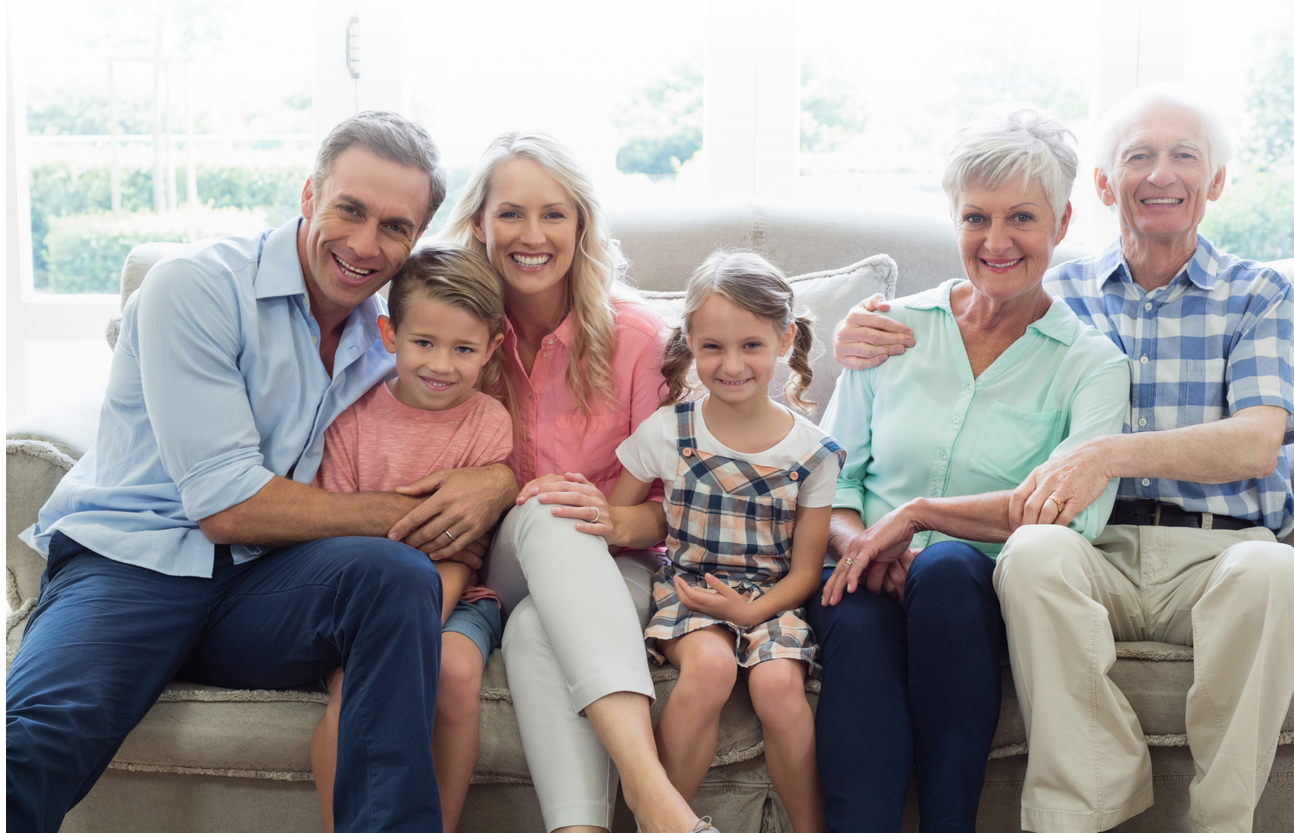
A. **Not having a plan - not taking action.** It is never too soon to take action and have a plan in place if nursing level care is required. As long as the person is alive, it is not too late to engage in medicaid planning.

B. **Having an insufficient power of attorney.** If the applicant needs assistance in managing their financial affairs, it is important that they have a power of attorney which expressly allows their agent to engage in medicaid planning and apply for benefits.

A. **Giving away assets - divestments.** Even if the applicant meets the eligibility criteria, he/she may be penalized for any activity the medicaid program determines is a "divestment." This typically involves any transfer of the applicant's assets within 60 months of application but can include things such as adding another owner, such as a child, to an account or parcel of real estate.

B. **Relying on the nursing home or government to tell you what to do.** The nursing home and government cannot and will not give you medicaid planning advice. It is not in the government's interest to tell you how to qualify.

C. **Not consulting a medicaid planning attorney.** This is a complex area of the law. Most people have no idea that there are strategies that can be used to protect assets and obtain eligibility sooner rather than later. Consulting with an attorney who specializes in this type of planning can save time and money and reduce stress.



SECTION 7 | Conclusion

As stated throughout this Guide, the Guide itself is not legal advice. The information contained herein is general in nature and is not intended to serve as a substitute for legal advice. Most people reading this Guide have not served as a fiduciary. It is easy to make a mistake, and a mistake can be expensive and result in the fiduciary being held personally liable for the costs associated with the mistake. Additionally, in severe situations, mistakes could result in criminal penalties. As a result, we strongly recommend that you seek advice from a qualified, competent attorney like those with the Law Offices of Benjamin T. Vader, PLLC to assist you in doing the job the right way.

We have low-cost consultations and educational seminars offered on a regular basis to help you navigate your responsibilities. Additionally, we provide complimentary estate plan document reviews to ensure your estate plan is up to date. Contact us today for more information or to set up a consultation.

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