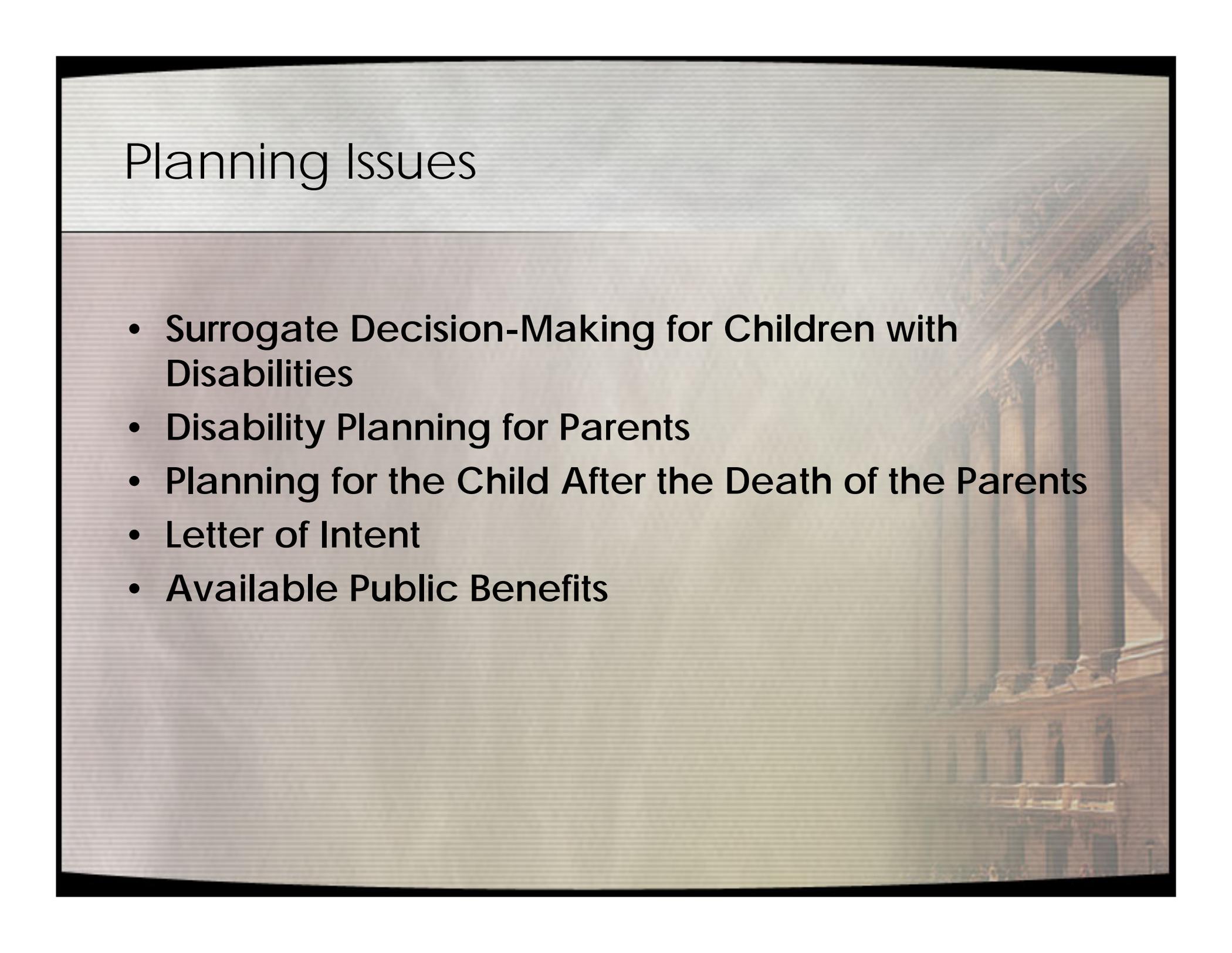


# Planning for Parents of Children With Disabilities

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# Planning Issues

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- **Surrogate Decision-Making for Children with Disabilities**
- **Disability Planning for Parents**
- **Planning for the Child After the Death of the Parents**
- **Letter of Intent**
- **Available Public Benefits**

# Surrogate Decision-Making for the Adult Child With Disabilities

- Child can execute general durable power of attorney (financial decisions)
- Child can execute advance medical directive (for medical decisions)
- Guardian (and standby guardian) can be appointed for child (personal, medical and residential decisions)
- Conservator (and standby conservator) can be appointed for child (financial decisions)
- Representative payee appointed for Social Security benefit payments

# Options When Child Reaches Age 18 for Educational Decisions

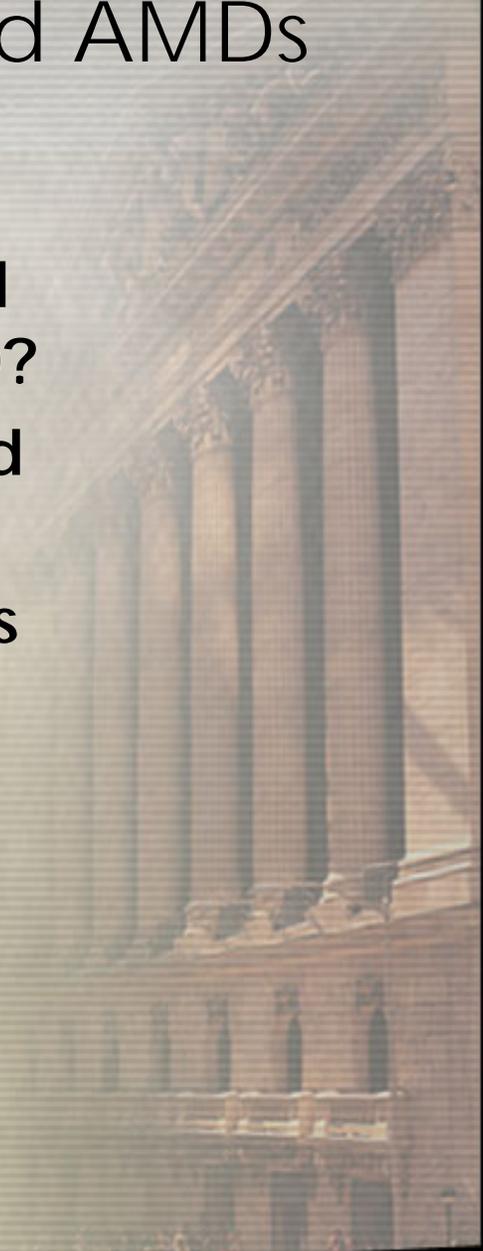
- **Adult child declared legally incompetent and court appoints representative to make decisions for child**
- **Adult child designates, by power of attorney, another adult to be child's agent for educational program decisions**
- **Adult student certified as unable to provide informed consent and educational representative appointed**

# DPOA/AMD vs. Guardianship and Conservatorship

- **DPOA/AMD**
  - Preserves child's independence
  - Preserves child's legal rights
  - Streamlines decision-making
  - Child can revoke documents
- **Guardianship and Conservatorship**
  - Can provide additional protection for child
  - Removes child's legal rights
  - Providers may prefer to work with independent competent child rather than guardian/conservator
- **Legal Incapacitation**
  - Emphasis is on functional capacity, not disease
  - Poor judgment alone is not sufficient proof of incapacitation

# Capacity to Execute DPOAs and AMDs

- Does child understand the “nature and consequences” of the DPOA and AMD?
- Document capacity with witnesses and memorandum
- When in doubt obtain opinion of child’s physician, preferably in writing



# Guardianship of Adults

- **Guardianship is of the person**
- **Ability to make decisions for an incapacitated person**
  - Residential
  - Medical
  - Educational
  - Employment
- **May be limited or general**



# Conservatorship of Adults

- Conservatorship is of the estate
- Ability to make financial decisions for an incapacitated person
- May be limited or general



# Appointment Process

- Petition to appoint Guardian and/or Conservator filed
  - Can be done when child turns 18
  - Can be done up to six months in advance of child turning age 18
- Parents can also nominate standby Guardian and/or Conservator at the same time
- Petitioner does not have to be the person seeking appointment
- Guardian and Conservator can be the same person
- Can have Co-Guardians and Co-Conservators

# Appointment Process

- Circuit Court appoints Guardian ad litem (GAL) for proceedings
  - Attorney licensed in VA with special training
  - GAL visits incapacitated person
  - Advises incapacitated person of their legal rights
  - Files report with court
- Notice provided to incapacitated person and all persons named in petition
- Doctor's evaluation
- Hearing on petition to appoint
- Court appoints Guardian and/or Conservator who then qualifies before the Clerk of Court

# Duties

- Guardian
  - File annual report with Department of Social Services
- Conservator
  - Same Fiduciary duties as agent under Durable Power of Attorney
  - File annual accountings with Commissioner of Accounts
- Bond normally required
- May require court permission for some particular acts (sell real estate, make gifts)

# Termination of Guardianship

- Petition can be filed by incapacitated person, Guardian or Conservator, or any other person
- Court must find that termination is in the best interests of the incapacitated person
- Person is no longer in need of assistance or protection
- Person's understanding or capacity to manage estate and personal affairs has changed so as to warrant termination
- Court declares person restored to capacity and discharges Guardian or Conservator

# Public Guardianship and Conservatorship

- Virginia Public Guardian and Conservator Program
- Local or regional programs or 501(c)(3) tax-exempt charitable organization
  - Catholic Charities of Eastern Virginia, Inc.
- Public Guardian and/or Conservator can be appointed when
  - Incapacitated person's funds are insufficient to fully compensate private Guardian and/or Conservator or
  - No proper and suitable person available to serve or
  - No Guardian and/or Conservator appointed within one month of adjudication of incapacity

# Disability Planning for Parents

- **General Durable Power of Attorney**
  - Authorize agent to spend funds to support child
- **Revocable Living Trust**
  - Appoints Trustee to act in event of your disability
  - Trustee authorized to spend funds for child

# Providing for Child After Parents' Death

- Disinheritance
- Outright Gift
- Distribute to Siblings/Moral Obligations
- Support Trusts
- Special Needs Trusts
  - Pooled Special Needs Trust
  - Third-Party Special Needs Trust

# Pooled Special Needs Trust

- Non-profit association
- Each beneficiary has own subaccount
- Parent can set up during parent's lifetime and fund during lifetime or at death
- Funded by third party - no Medicaid payback required at death of beneficiary
- Commonwealth Community Trust is an example of a pooled trust that serves clients in Virginia

# Third Party Special Needs Trust

- Developed to manage resources for benefit of child
- Maintain eligibility for public benefits (SSI/Medicaid)
- Can be created by will, by revocable living trust or by inter vivos trust agreement
- Revocable inter vivos special needs trust considered part of parents' estate for estate tax purposes
- Creation and funding of irrevocable inter vivos special needs trust treated as gift for gift tax purposes

# Trust Agreement Provisions

- Trust established by family and not child
- Trust managed by trustee other than child
- Trust should determine who will receive trust assets after child's death
- Trust should provide for successor Trustees
- Trust must provide that Beneficiary cannot revoke or amend Trust, or direct Trustee to make payments

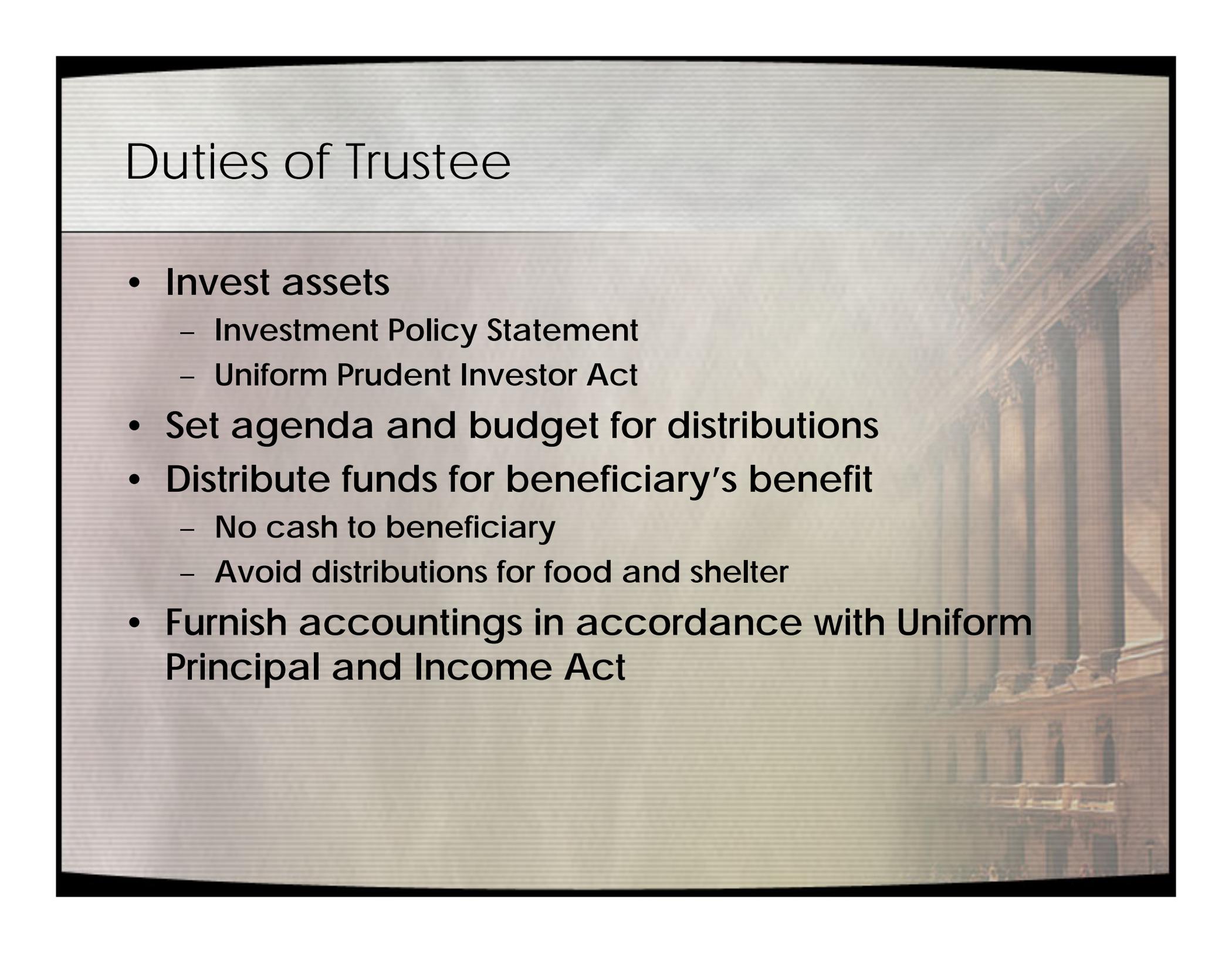
# Trust Agreement Provisions

- Purpose clause – funds for supplemental needs
  - Distinguishes trust from standard “support, maintenance and health” trusts
- Discretion – Permits Trustee to use sole and complete discretion with respect to use of income and principal to meet beneficiary’s special needs
- Amendment clause – Allows Trustee to amend Trust to comply with changes in the law

# Selection of Trustee

- Parents – during their lifetimes
- Family members
- Professional Trustees – banks, trust companies, CPAs, other professionals
  - Family members as Trust Protectors – can remove Trustee and replace with another professional Trustee
  - Family members as Co-Trustees
- Non-profit organizations

# Duties of Trustee



- **Invest assets**
  - Investment Policy Statement
  - Uniform Prudent Investor Act
- **Set agenda and budget for distributions**
- **Distribute funds for beneficiary's benefit**
  - No cash to beneficiary
  - Avoid distributions for food and shelter
- **Furnish accountings in accordance with Uniform Principal and Income Act**

# Funding the Trust

- **Calculating cost of care**
  - Life Care Planner
    - Prepares life care plan and calculates cost of care
- **Life insurance – excellent way to fund SNTs to ensure funds are available**
- **Retirement plans**
- **Other assets**
- **NOTE: Social Security benefits, Survivor Benefit Plan benefits, Civil Service Survivor Benefits, VA benefits cannot be assigned directly to special needs trusts**
  - Benefits considered income in the month received

# Reporting Requirements

- **Beneficiary must report changes in circumstances**
  - To Social Security Administration if receiving SSI
  - To Department of Social Services and Department of Medical Assistance Services if receiving Medicaid
- **Changes include**
  - Funding of Third Party Pooled or Private Special Needs Trust
  - Changes in address, employment, living arrangements, income, resources, medical insurance coverage
  - Changes in marital status
  - Changes in physical or mental condition
  - Admission to medical facility
  - Travel outside United States
  - New eligibility for other public benefits

# Letter of Intent

- Written by parents or other family members
- Describes child's history
- Describes child's current status
- Describes parents' hopes for child's future
  - Residential placement
  - Education
  - Employment
  - Socialization
  - Religion
  - Medical care
  - Final Arrangements

# Planning Process

- Gather Information
- Seek Professional Advice
- Determine Objectives
- Review Existing Plan
- Prepare Revised Planning Documents
- Implement Revised Plan
- Regularly Review Plan



# Resources

- **Oast & Hook, P.C.**  
[www.oasthook.com](http://www.oasthook.com)
- **Special Needs Alliance**  
[www.specialneedsalliance.com](http://www.specialneedsalliance.com)
- **Virginia Guardianship Association**  
– (804) 828-9622
- **Norfolk Naval Legal Services Office**  
– (757) 341-4489 or (757) 341-4491

# Available Public Benefits

- Publicly Financed Education
- Supplemental Security Income
- Social Security Disability Income
- Medicare
- Medicaid
- Civil Service and Military Survivor Benefits

# Publicly Financed Education

- Federal Individuals With Disabilities Education Act (IDEA) and Virginia regulations
- Free public education provided to all children with disabilities age 2 to 21
- Least restrictive setting
- Individualized Education Program (IEP) developed by local education authority
- Parents may request mediation or due process hearing
- Parents' rights to participate transfer to child when child reaches age 18

# Supplemental Security Income

- Individual must be age 65 or older, blind or disabled
- A U.S. Citizen
- Not a resident of a public institution
- Must have less than \$2,000 in resources
- Income exclusions include
  - First \$20 of most income received in a month
  - First \$65 of earnings received in a month and one-half of earnings over \$65
  - Value of food stamps
  - Money someone else spends for items other than food or shelter
- Maximum monthly benefit \$674

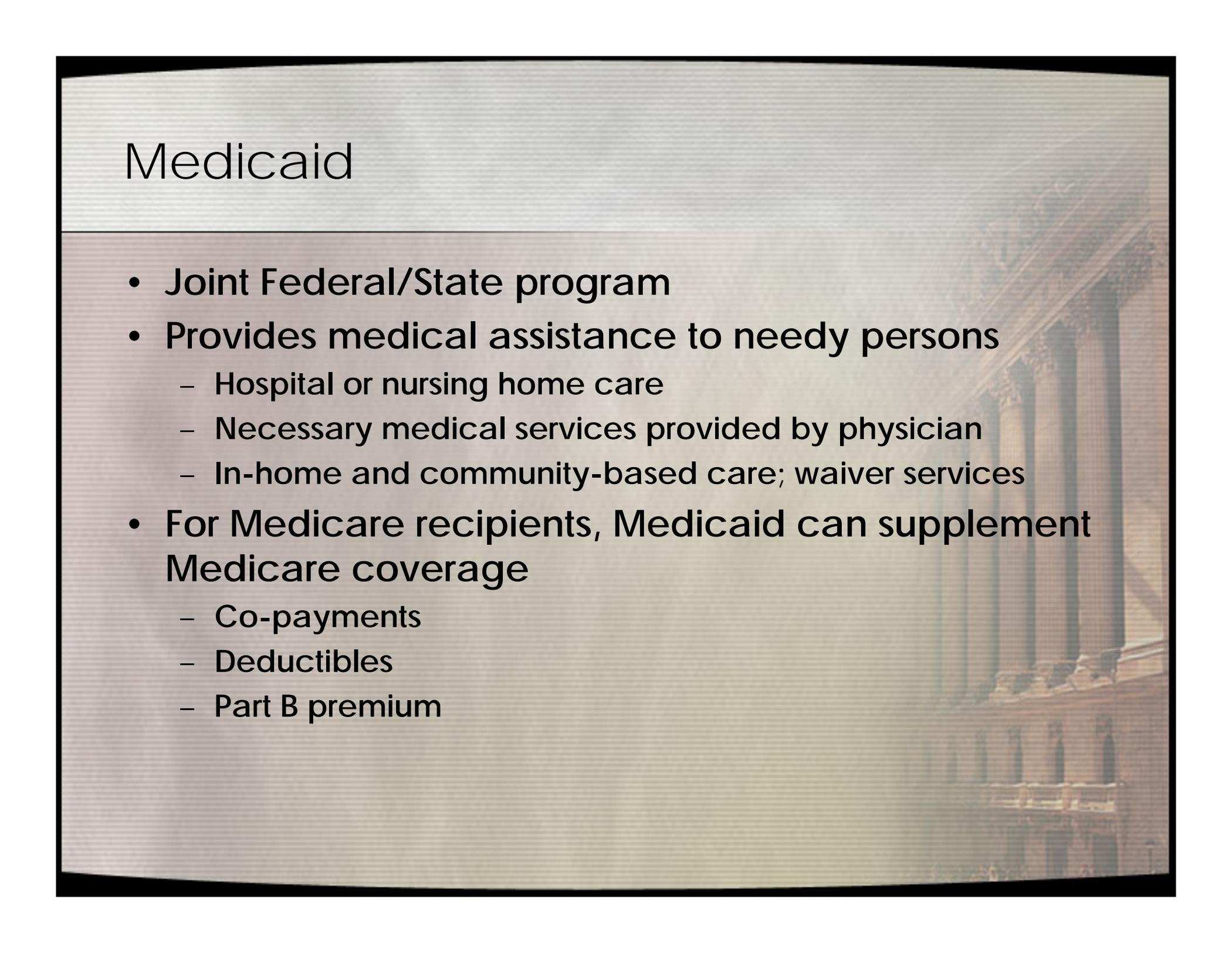
# Social Security Disability Income (SSDI)

- May be obtained on own employment record
- May be available on the record of a living parent (Social Security Dependent's Benefits)
- May be available on the record of a deceased parent (Social Security Survivors' Benefits)
- Children disabled prior to age 22 may draw benefits on parent's record as long as the child is disabled and unmarried
- Benefits based on worker's primary insurance amount (PIA)
  - Living parent – benefit is 50% of PIA
  - Deceased parent – benefit is 75% of PIA

# Medicare

- Available to SSDI recipients under age 65 after 24 months of qualified disability
- Part A covers inpatient hospital services, home health, and hospice benefits
- Part A also covers limited skilled nursing care, but not custodial care
- Part B covers physicians' charges, diagnostic tests, medical equipment, outpatient physical and speech therapy
- Beneficiaries must pay Part B premium
- Co-payments and deductibles
- No income or resource limits

# Medicaid



- Joint Federal/State program
- Provides medical assistance to needy persons
  - Hospital or nursing home care
  - Necessary medical services provided by physician
  - In-home and community-based care; waiver services
- For Medicare recipients, Medicaid can supplement Medicare coverage
  - Co-payments
  - Deductibles
  - Part B premium

# Medicaid Waiver Services

- Benefits available to children not eligible for full Medicaid because of deeming of income and resources from parents
- Child must meet pre-screening requirements
- Only child's income and resources considered for eligibility
- Mental Health/Mental Retardation Waiver
- Technology Assisted Individuals Waiver
- Developmental Disabilities Support Waiver

# Civil Service and Military Survivor Benefits

- Available for unmarried child over age 18 incapable of self-support because of mental or physical disability that began prior to age 18
- Child eligible for annuity after parent's death
- Children receiving Civil Service survivor annuity may be eligible for Federal Employees' Group Health benefits
- Children receiving military survivor's benefits may be eligible for TRICARE or TRICARE for Life
- Cannot assign such benefits to trusts

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- Guardianships and Conservatorships
  - Special Needs Planning
  - Estate and Tax Planning
  - Estate and Trust Administration
  - Long-term Care and Life Care Planning
  - Veterans' Benefits Planning
  - Care Management