



BETTER TOGETHER
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Enhancing the Quality of Life for the Aging Population:
An Innovative Collaboration of Professional Service
Providers Focusing on the Whole Person Will Serve our
Aging Population Better & Improve their Self-
determination & Quality of Life

David Wick, JD; David Sherman

This session is sponsored by



Care
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of Minnesota



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**ENHANCING THE QUALITY
OF LIFE FOR THE AGING
POPULATION:**

An Innovative Collaboration of Professional
Service Providers Serving the Whole Person

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WHO WE ARE?

- ▶ **David W. Wick, Esq.**
Wick Law
Nearly 40 years practicing law, 33 years of
which have focused on estate and tax
planning, elder law, trusts and estates.
- ▶ **David Sherman**
Disability Consulting Solutions, LLC
Over 30 years serving the disability
community in person-centered planning,
MA/Elderly Waiver application process,
and advocacy.

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Goal: To Age On Your Terms

▶ Seven Common Wishes include:

1. Aging in Place
2. Having a Say in Care
3. Staying as independent and active as possible;
4. Participation by Loved Ones in Caregiving, but not imposing a burden on them
5. Receiving aggressive health care where there is a reasonable chance of cure, regaining consciousness, and social interaction; and when none of these is probable to receive comfort care & pain relief;
6. Continuing dietary, social, and other daily social and religious activities for as long as you can; and
7. Living free from abuse, neglect, and exploitation.

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Reality: Client's Wishes are not Known or Followed

▶ **Historical Drivers of the Care Plan:**

- **Caregiver's** wishes & convenience;
- **Health care provider's focus on curative care & "fight" with disease**, rather than palliative care;
- **The Cost Payer's** rules;
 - Insurance Co. provisions
 - Medicare rules;
 - Medical Assistance/Waiver Rules; and
- **Legal Forms.**

▶ **Who is Missing?**

- **THE PERSON!**



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Reality of Professional Silos

- ▶ Health Care Providers;
- ▶ Insurance agents;
- ▶ Govt. benefit planners (if any);
- ▶ CPAs; and
- ▶ Attorneys.

These advisors rarely communicate.

Professionals provide contradictory advice, and rarely speak with family caregivers who often are not involved until a crisis occurs.

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The Standard Care Plan

- ▶ Historical Care Plan
 - Health Care Model – focus on curing
 - System-Driven
 - No Wonder Patients express dissatisfaction
- ▶ Standard Estate Plan/Trust or POA – a form-driven plan
 - Provides fiduciary with broad power;
 - Little direction, and
 - Little accountability
 - Person's voice is lost;
 - Person is lonely and feels ignored;
 - Sole caregiver becomes resentful & burned out;
 - No wonder Exploitation occurs.

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We Can Do Better!

HOW?

Communicate!
Communicate!
Communicate!

AND?

Work with a Team!



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How to Communicate?

1. **Articulate** Your Purpose & Your Goals!
2. **Ensure Your Voice is Heard!**
3. **Write Down your expressed goals!**
4. **Communicate Your Written Plan;**
5. **Make Your Written Plan Enforceable;**
6. **Build Your Team!**
7. **Review & Update Your Plan.**

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The Qualities of A Person-Centered Legal Care Plan

1. Ensures the client’s voice is heard;
2. Client builds/mentors his/her Care team;
3. Team of like-minded Professionals;
4. Flexibility;
5. Protection for Vulnerable Adults.

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A Person-Centered Care Plan: Typical Components

1. Supported Decision Making;
2. Written Statements:
 - Expressive Statements™;
 - Person-Centered Support & Services Plan & Risk Management Plan;
3. Person-Centered Legal documents;
4. Directed Trusteeship;
5. LTC funding plan; and Accountability, Abuse Protection, & ID Theft Protection Plan.

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Component 1: Supported Decision Making: What is It?

MSA Section 524.102, Subd. 16. states:

“Supported decision making’ means **assistance** from one or more persons of an individual's choosing **in understanding** the nature and consequences **of potential personal and financial decisions which enables the individual to make the decisions** and, when consistent with the individual's wishes, in communicating a decision once made.”

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Supported Decision Making Has PROVEN Health Benefits

A scientific study shows that 93% of persons with diminished capacity significantly improve their mental & physical health and well-being when they control decisions about even small tasks such as taking care of a plant.

Professor Jennifer L. Wright, U. of St. Thomas (2010) at p. 354-356.



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Component 1: Supported Decision Making is All Around Us!

- ▶ “Student-led” Individual Education Plans (IEP’s)
- ▶ Person-Centered Planning in Medical Assistance/Waiver Programs


Minnesota law allows you to create whatever SDM arrangement is appropriate for your own circumstances.

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Component 1: What is "Incapacity?"

"Incapacity" is Complicated.

It can change based on individual experience.	It can change based on the situation.	It can change based on the "support" given, and	It varies depending on the type of decision to be made.
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Having capacity and decision-making is constrained by personal choices, values, relationships, and culture. What may seem illogical to some may be perfectly reasonable to others in different settings, experiences and value preferences.

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a key: the "incapacity" Provision


"Capacity" and "Incapacity" are complicated & unique. The line between the two is often blurred.

But, the "incapacity" provision in documents typically is like an ON-OFF SWITCH.

In reality, "incapacity" rarely happens quickly.

Examples of progressive long-term diseases include:

- o Alzheimer's disease; and
- o Parkinson's disease.



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Planners should customize the "incapacity" Provision

The provision to transfer authority to an agent, supporter, or fiduciary depends on:

- o the nature of your incapacitating condition, illness, or chronic disease;
- o may reflect a gradual onset of incapacity; and
- o now could reflect "supported decision making."

The authority-transferring clause should be customized to the person's needs & wishes, and perhaps to the new standard in Minnesota!



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Component 2: Written Statement of Your Wishes

1. "Expressive Statements"™; and/or
2. A Person-Centered Support and Services Plan;

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Component 2.a: "Expressive Statements"™ When You are Unable to Make a Decision

- ▶ Expressive Statements
 - Written, signed & dated;
 - Describe your likes, dislikes, dreams & fears;
 - Describe your daily routines, dietary preferences, leisure and social activities, personal care practices, and existing health care practices;
 - Specifies your preferred place to live and receive care; and
 - More!!!

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Component 2.b.: Written Support & Services Plan

- ▶ For those who have:
 - received a diagnosis;
 - need for long-term care; or
 - suffered a long-term care event.
- ▶ Components include:
 - Client-driven Goals;
 - Personal & Objective assessment;
 - Action plan;
 - Measurement Standard; and
 - Annual review;
- ▶ Coordinate with LTC insurance, or MA/EW
 - Budget

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Component 3: Private Legal Tools to Fulfill Your Written Plan!

1. Person-Centered Durable Power of Attorney (and/or Payee Representative); and/or
2. Person-Centered Revocable Living Trust; and
3. Person-Centered Health Care Directive.

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Component 3.a: Durable Power of Attorney

1. Appoints an Agent to **Substitute** for You;
2. Provides broad specified powers for your named Agent to act;
3. Avoids Conservatorships; and
4. May provide for monitoring/accounting.

Consider incorporating Written Statements or the Support & Services Plan into the Power of Attorney document!

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Component 3.b.: Revocable Trust Provisions to Consider:

1. **Incorporate SDM and Written Statements** (Expressive Statements or Support & Services Plan);
2. **Co-trusteeship** while alive & able (to train & mentor preferred helper);
3. **Determination of "Incapacity";**
4. **Directed Trusteeship** upon incapacity;
5. **Accountability** of trustee(s); and
6. **Appropriate Income Tax provisions for:**
 - a. Tax reporting;
 - b. Distributable Net Income Deduction;
 - c. Capital Gain; and
 - d. Tax Regime for the Irrevocable Disability Trust.

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Component 3.c: Person-Centered Health Care Directive

1. Incorporates SDM
2. Expresses client wishes for care (i.e., progressions of dementia or other chronic illness, experimental treatments, food & water, pain relief, mental health treatments, COVID & vaccinations, DNR/DNI, and spiritual/religious);
3. Organ Donation wishes;
4. Funeral/Burial/Cremation; and
5. HIPAA compliant.

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Component 4: Minnesota Law: Directed Trusts to Distribute Responsibility Among the Team

Provision to divide fiduciary responsibilities among most knowledgeable & skilled individuals.

This provision of Minnesota trust law permits a person to incorporate their "Team" into the legal documents.

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Component 4: Benefits of Directed Trust

1. Avoids burn-out for caregiver;
2. Allocates responsibilities to appropriate & preferred helpers;
3. Minimizes feelings of resentment by sole caregiver;

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Component 4: Directed Trust Structure: Adopts "Team Senior" Approach

- 1. Administrative Trustee**
- 2. Advocate**
 - LTC insurance – to advise and advocate for long-term care insurance claims;
 - to advise and advocate for MA/EW/VA benefits;
 - To prepare annual care & services plan;
 - To watch for red flags of abuse;
- 3. Trust Investment Advisor**
- 4. Team Senior Advisor**
 - To communicate SDM decisions;
 - To advise on known personal wishes, goals, and needs; and
 - To monitor, remove & replace Advocate, Investment Advisor, and Trustee.

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Component 5: LTC Funding Plan

1. LTC Insurance;
2. MA/EW/Waivers;
3. VA "aid & attendance"
4. MA Annuities (to protect assets & provide income for a spouse);
5. Family Caregiving Agreements;
 - Avoids "burnout"
 - Minimizes resentment;
 - Minimizes family exploitation;
 - Provides reasonable compensation to loved ones who may resign from career or reduce hours;
 - Provides respite for caregivers.
6. Private Investments to Self-Ensure

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Component 6: Identity Theft Statistics: Fast Facts

- ▶ Losses from identity theft cost Americans \$5.8 billion
- ▶ The FTC received 5.7 million total fraud and identity theft reports, 1.4 million of which were consumer identity theft cases
- ▶ \$2.8 billion of losses were from imposter scams and
- ▶ \$392 million were from consumer online shopping
- ▶ Fraud cases are up 70% from 2020

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Component 6: Minimize Exploitation and ID Theft Protection

1. The Directed Trust Structure enhances the accountability of the trustee;
2. The Advocate looks for Red Flags;
3. The Advocate is a Mandated Reporter & visits the disabled person; and/or
4. Risk-Shifting.

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Case Studies

See Handouts!

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Issue Needing a Fix: Trust Income Tax Laws

1. Compressed Income tax brackets for Trusts (37% tax rate when trust has income of only \$14,450);
2. Capital Gains can result from mutual funds without an owner's knowledge & be stuck inside of a trust
3. Exclusion of Capital Gain on the sale of a home is not excluded if certain trusts own the home.

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Summary: Be Better Together!

- ▶ **Interdisciplinary Team** of Like-minded Professionals;
- ▶ **"Person-Centered"** Legal & Care Plan;
- ▶ **Directed Trust** to:
 - Incorporate the Care Team into the Legal Care Plan;
 - Enhance the accountability of the Care Team; and
 - Minimize risk of fraud and abuse;
- ▶ **Coordinate** the Legal Care Plan with appropriate financial strategies;
- ▶ **Plan for the Caregivers**; and
- ▶ Consider the **tax consequences** of the plan.

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Questions?

Our Contact Information:

David W. Wick
 651-238-5551
david@davidwicklaw.com

David Sherman
 612-709-9963
david@disabilityconsultingsolutions.com

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