

HAPPY

New Year

Elder Law and Special
Needs Planning

January 2024 Newsletter



How insurers can mitigate their exposure when it comes to beneficiary designations



Richard I. Miller, Esq.

Richard Miller, Esq. Authors Article for **InsuranceNewsNet** Titled “How Insurers Can Mitigate Their Exposure When it Comes to Beneficiary Designations”

“One of the biggest myths and misconceptions of estate planning is that a will controls the disposition of all one’s assets at death. This is not the case. Failing to distinguish the difference between probate and non-probate assets could lead to unintended and costly consequences not only for the person who owns the asset, but also for life insurers that serve as custodians of the assets.”

In the current issue of **InsuranceNewsNet**, Mandelbaum Barrett PC Elder Law Chair **Richard I. Miller, Esq.** discusses how insurance agents and institutions are encouraged to examine and evaluate their policies and procedures involving beneficiary designations and take the action necessary to confirm best practices are being followed.

[Read the full article here.](#)



The Darlene Williams Estate Dispute: How Millions Made Off the Sale of T-Rex Bones Led to A Family Battle Over Conflicting Wills



SHAWNA BROWN, COUNSEL
ELDER LAW PRACTICE GROUP

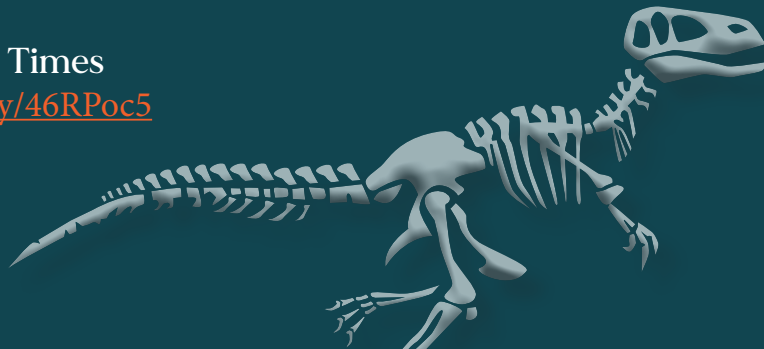


The Darlene Williams Estate Dispute: How Millions Made Off the Sale of T-Rex Bones Led to a Family Battle Over Conflicting Wills

You may have heard about Darlene Williams who died in 2020 years after the \$8 million sale of a fossilized T-Rex skeleton which was found on her family’s ranch in South Dakota in 1990. Today, her children are battling it out in court, pointing to conflicting wills! This headline-making case shines light on the challenges that many families face.

Explore the estate dispute with **Shawna Kirchner Brown, Esq.** from the Elder Law Practice Group at Mandelbaum Barrett PC. Learn why clear and legally sound estate planning is crucial to avoid conflicts when valuable assets are at stake.

Read the full New York Times article here: <https://bit.ly/46RPoc5>





Remote Witnessing: The Shifting Legal Landscape for Health Care Proxies and Wills

A health care agent is the person you designate to make medical decisions on your behalf in the event you are unable to make such decisions yourself. Appointing a trusted friend or family member as your agent ensures your health care providers follow your wishes. For example, a Health Care Proxy can authorize the implementation of medical services, including the removal of life-sustaining treatment.

A health care agent is appointed by an individual executing a Health Care Proxy. Historically, to be effective, the Health Care Proxy required an individual to sign in the physical presence of two witnesses. However, on November 17, 2023, New York Governor, Kathy Hochul, signed an amendment to Public Health Law Sec. 2981, which allows Health Care Proxies to be executed and witnessed remotely, using audio-video technology.

To do so, the principal, if not known personally by the witnesses, must display their photo ID to the camera. Then, the principal must sign the Proxy during the audio-video conference. The remote witnesses must receive a legible copy of the signed document by fax or other electronic means within 24 hours. Finally, the witnesses must sign the Proxy and send it back to the principal.

In a similar vein, legislation has been introduced in New Jersey to allow Last Will and Testaments to be witnessed and notarized by those in the “electronic presence,” of the testator. This bill has been pending since 2022. It remains unclear if this legislation will be passed and, if so, in what form.

In advancing the laws described above, New York and New Jersey are following the legal trend to adapt to the widespread use of audio-video technology. As remote witnessing and execution of documents becomes more common, legal disputes surrounding the signing process are likely to arise. In this changing landscape, it is especially important to consult a qualified attorney in the preparation and execution of your estate planning documents.

The Elder Law attorneys at Mandelbaum Barrett PC are here to assist with any questions you may have.



What Does Incapacitated Mean in Elder Law and Estate Planning?

When working with an attorney to prepare for your future and address the challenges associated with aging, you will likely come across the term “incapacitated.”

Incapacitated Definition

Someone who is incapacitated cannot make personal decisions or understand legal documents. An incapacitated person requires a surrogate decision-maker, such as an agent under a health care power of attorney or a guardian.

When a person has the mental state to execute a valid legal document, such as a will or trust, this is known as having capacity. Capacity is the opposite of incapacity. If a court finds that a person signed a will while incapacitated, the court can invalidate the will.

(Note that while certain states use the term “incapacity,” others refer to this same concept as “incompetence.”)

Causes of Incapacity

You or your loved one could become incapacitated for a variety of reasons, including illnesses, injuries, and disabilities. A person with a severe developmental disability may be legally incapacitated for their entire adult life.

Someone who experiences a disability later in life may become incapacitated after the onset of an illness or injury. For example, an older adult who develops dementia may become incapacitated once the dementia progresses, such that the individual cannot understand a legal document or make personal decisions.

Incapacity in Elder Law

Elder law involves preparing for and addressing incapacity associated with injury, illness, disability, or aging. It is

essential to understand the concept of incapacity applies to power of attorneys, wills and estate planning, and guardianship of an adult.

Power of Attorney

A **power of attorney** is a legal document that allows you to appoint someone else to make decisions for you.

- A health care power of attorney allows you to select someone to make health care decisions for you. You can also give your agent instructions for the type of care you would like to receive, including end-of-life care.
- With a power of attorney for property, you can give someone the authority to handle your financial affairs, such as paying your bills and managing your accounts.

Creating a valid power of attorney requires you to have mental capacity to understand the contents of the power of attorney. If you become incapacitated, a power of attorney allows you to preserve your autonomy, as you have selected a surrogate decision-maker to make decisions according to your wishes.

Depending on how you and your attorney structure your power of attorney, it could take effect only after you become incapacitated, once a physician determines that you cannot make decisions for yourself. However, many choose to allow trusted individuals authority as soon as they create a power of attorney, as this avoids having to wait for a physician’s determination of incapacity.

The court may appoint a guardian for those who become incapacitated without a power of attorney.



Guardianship of an Adult

Incapacity is a central concept in the **guardianship of an adult**. Guardianship of an adult is a court-supervised arrangement where one person assumes responsibility for an adult who is incapacitated.

The court must first determine that a person is incapacitated before permitting someone to become the legal guardian of an adult. In making this determination, the court relies on evidence from the individual's physician.

According to the **National Core Indicators Data Brief**, those with significant autism, severe intellectual disability, or Down syndrome are more likely to have guardians.

Wills and Estate Planning

Making a will or any **estate planning document** that needs your signature, such as a trust or transfer on death deed, requires you to have capacity. You must understand what you are signing.

A will is only valid if you had the required mental capacity when you signed it. The court can invalidate your will if it finds that you were incapacitated when you signed it.

For people with cognitive difficulties impacting capacity, it is possible for capacity to fluctuate. A person with dementia may cycle through periods of lucidity and incapacity.

Consult With an Elder Law Attorney

As you age, it is a good idea to meet with your estate planner early and begin the process of developing a will and estate plan. Dementia, a disease that can affect capacity, impacts approximately 10 percent of adults 65 and older, according to **Columbia University**.

By working with an Elder Law attorney, you can help prevent others from challenging the validity of your will after you pass and ensure that you have a valid will in place.

The Elder Law attorneys at Mandelbaum Barrett PC are available to meet with you and discuss your estate planning needs.

MB MANDELBAUM
BARRETT PC
ATTORNEYS AT LAW



What is a Medicare Flex Card?

Some Medicare Advantage beneficiaries receive **Medicare Flex Cards**, pre-paid debit cards for qualifying expenses, as part of their benefits. The U.S. government does not issue Medicare flex cards. This benefit is only available on select **Medicare Advantage plans**, a private alternative to Medicare.



What is the Medicare Extra Help Program?

Traditional Medicare does not offer flex cards. Certain Medicare Advantage plans provide beneficiaries with flex cards that can pay for qualifying goods and services.

Plans offering a flex card typically supply a quarterly or annual allowance. On average, Medicare flex cards contain \$500 of debit, and it is rare to receive more, according to **Medicare FAQ**.

While plans differ in what beneficiaries may use the debit to cover, coverable expenses may include the following:

- Over-the-counter (OTC) and prescription medications
- A grocery allowance for healthy food, such as whole fruits, vegetables, and proteins
- Co-payments for dental, hearing, and vision appointments
- Eyeglasses and contact lenses
- Hearing aids
- Dentures
- OTC medical supplies

The Medicare flex card will not cover all expenses. Beneficiaries cannot use these cards to pay for processed food, restaurant meals, electricity, or rent. The plan administrator must approve the items for which the beneficiary can use the card.

Who Qualifies for the Flex Card?

You are eligible for a Medicare flex card if you qualify for a Medicare Advantage Plan with a flex card benefit. To enroll in **Medicare Advantage**, you must:

- be eligible for traditional Medicare Part A and Part B.
- be 65 years or older or have a qualifying disability. (Those who receive Social Security disability benefits for at least two years become eligible for Medicare.)

- have paid taxes into the Medicare trust funds through your work or a spouse's work.

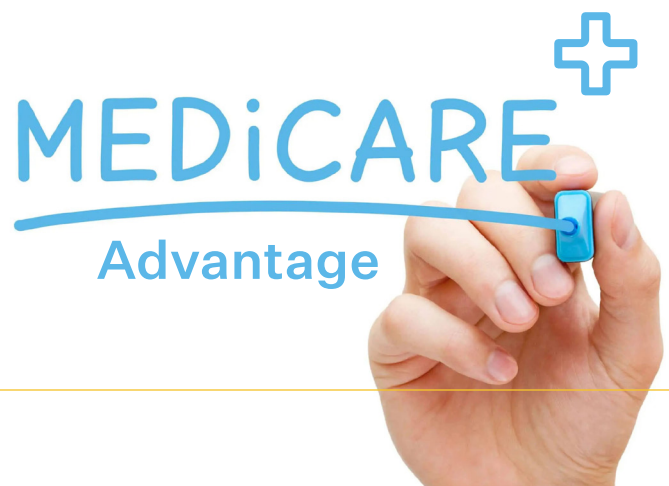
In addition to meeting the general eligibility requirements for traditional Medicare, whether you can obtain a Medicare Advantage plan with a flex card could depend on your location. Medicare Advantage plans have specific service areas where they operate.

Privately run Medicare plans are common. The **Kaiser Family Foundation** reports that more than 28 million people were enrolled in a Medicare Advantage plan in 2022, constituting almost half of the eligible Medicare population at 48 percent. These plans accounted for 55 percent of all federal Medicare spending. In 2022, the average beneficiary could choose from 39 Medicare Advantage plans, though not all of these plans offer a debit card benefit.

Medicare Advantage Considerations

While Medicare Advantage may offer additional benefits compared to traditional Medicare, it can also be more expensive. Depending on the situation, the plan's cost might not be worth the flex card benefit.

If you are considering enrolling in a Medicare Advantage plan, be wary of **predatory marketing tactics**.



Misleading Claims About Medicare Flex Cards



According to AARP, some advertisements present misleading claims about Medicare Advantage flex cards. These advertisements say that Medicare beneficiaries could receive a flex card with up to thousands of dollars in funds from the U.S. government to spend on anything they wish. As they prey on consumers, these ads direct viewers to a website requesting personal information, such as Social Security, bank account, and credit card numbers.

A similar scam claims to provide individuals with new Medicare cards but takes personal information for wrongful use. If you need a replacement card, you can call Medicare (800-633-4227) or download the card from your Medicare account. No representative from Medicare will call you to send you a new card.

To stay safe from scammers, keep the following in mind.

- You will not receive a valid flex card if you have traditional Medicare, as this program does not offer such debit cards. Anyone offering you a new Medicare card is likely a predator.
- If you have Medicare Advantage, review your plan to determine whether a flex card is part of your benefits. Remember that it is unlikely the allowance will be in the thousands of dollars.

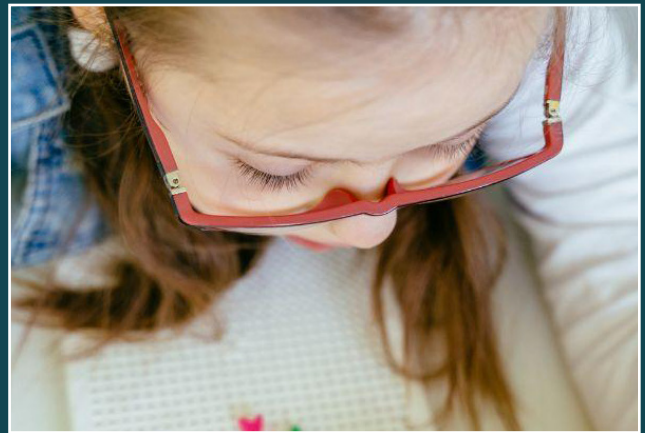
Contact an Elder Law Attorney

If you are eligible for Medicare, the Elder Law attorneys at Mandelbaum Barrett PC are here to discuss whether a Medicare Advantage plan with a flex card is right for you. They can help you make decisions and protect yourself from misleading claims.



Intellectual and Developmental Disability: What is an IDD?

Intellectual or developmental disability, known as IDD, affects approximately 7.39 million people in the United States, according to a 2019 estimate by the [University of Minnesota](#).



Typically present at birth or onsetting in childhood, IDDs adversely impact a person's physical, neurological, or emotional development.

Two categories of disabilities comprise IDDs: intellectual disabilities and developmental disabilities.

- Intellectual disabilities involve problems with cognitive functioning or intelligence. These disabilities affect learning, reasoning, and problem-solving, causing deficits in social and life skills.
- Developmental disabilities are a broader category encompassing intellectual as well as physical disabilities. The [Centers for Disease Control and Prevention \(CDC\)](#) defines developmental disabilities as impairments that affect mobility, learning, language, or behavior.

According to the [Eunice Kennedy Shriver National Institute of Child Health and Human Development](#), IDDs can relate to several systems in the human body.

- Involving the brain and spinal cord, impairments in the nervous system can adversely affect cognitive functioning, behavior, speech, and language, and may cause seizures and movement difficulties. IDDs that involve the nervous system include autism spectrum disorder (ASD), cerebral palsy, Down syndrome, and Fragile X syndrome.
- Sensory system issues can cause difficulties with sight, hearing, touch, taste, or smell. The brain may have trouble processing sensory information. Children born prematurely may experience low vision or hearing.
- Problems in how the body processes food and uses energy for growth implicate the metabolic system, causing IDDs. Metabolic conditions that can lead to IDDs include phenylketonuria and congenital hypothyroidism.

Examples of IDDs

Beginning in childhood, IDDs comprise many impairments that may affect one's skills and abilities as they navigate school, friendships, and extracurricular activities.

- **Autism Spectrum Disorders (ASD)** – Those with ASD experience problems with social interaction and restricted or repetitive behaviors. According to the CDC, ASD typically onsets before age 3 and can be diagnosed as early as 18 months.
- **Cerebral Palsy (CP)** – Affecting **one in 345** children in the United States, cerebral palsy refers to disorders impacting movement, balance, and posture. Abnormal brain development or injury impairs the ability of a person with CP to control their muscles.
- **Down Syndrome** – When a baby is born with an additional copy of chromosome 21, it affects the development of their body and brain, causing mental and physical challenges. **One in 700** babies are born with Down syndrome each year.



- **Fetal Alcohol Spectrum Disorders (FASDs)** – Alcohol exposure before birth can cause physical problems and difficulties with behavior and learning. FASDs include several disorders that vary in severity.
 - Fetal alcohol syndrome (FAS) sits at the most severe end of the spectrum. Those with FAS have problems with the nervous system and growth, as well as facial differences.
 - Alcohol-Related Neurodevelopmental Disorder (ARND) involves intellectual disability and learning problems.
 - Alcohol-Related Birth Defects (ARBD) involve issues with the heart, kidneys, bones, or hearing.
 - Individuals with neurobehavioral disorder associated with prenatal alcohol exposure have deficits in three areas: thinking and memory, behavior, and daily living.
- **Fragile X Syndrome** – A genetic condition, Fragile X syndrome causes changes in a protein essential to brain development, resulting in intellectual disability. The CDC reports that **one in 7,000 boys and one in 11,000 girls** are born with the condition. Symptoms tend to be more severe in boys than in girls.

Types of Support Available

Several services are available to support those with IDD and their families.

- States have IDD agencies offering publicly funded services and resources. Yet the University of Minnesota reports that state IDD agencies serve only 22 percent of individuals with IDD. Nineteen percent obtained one or more long-term support or services from their state.

Find an IDD agency **near you** to begin accessing support.

- Children with IDD with limited income and resources can apply for Supplemental Security Income (SSI). SSI benefits are available for children with IDD that are seriously limiting and that last or are expected to last for at least a year.
- The Individuals with Disabilities Education Act (IDEA) makes appropriate public education available to children with disabilities. Under the law, children are entitled to an individualized education plan (IEP). Parents can work with teachers, administrators, and their children to create an IEP that addresses classroom needs.

The Special Needs attorneys at Mandelbaum Barrett PC are here to answer any questions you may have.



AROUND OUR FIRM



Congratulations to Elder Law Associate **Dan Stone, Esq.**, who was sworn into the **NJ Bar** on Thanksgiving with his family present. Dan is a proud third generation attorney in **Essex County**.

As part of the **International Society of Primerus Law Firms™ #GlobalDayofService2023** in December, Team Mandelbaum actively gathered toys in support of **TeamPAR's 23rd Annual Selfless Elves Toy Drive**.

Our contribution exceeded 100 toys and various items, all of which were graciously donated to JBWS, a comprehensive domestic violence and abuse prevention agency located in Morris County. We are delighted to have played a part in brightening the day of those in need with these donations!



Thank you for placing your trust in our team!

Team Mandelbaum



FOLLOW US ON SOCIAL MEDIA!



DISCLAIMER

The information provided in any article does not, and is not intended to, constitute legal advice; instead, all information and content contained in this article is for general informational purposes only.

Additionally, the views expressed in or through this article are those of the individual author writing in his individual capacity. All liability with respect to actions taken or not taken based on the content of this article are hereby expressly disclaimed. The content in this article is provided “as is”; no representations are made that the content is error-free.