

# After You Are Gone: Using Letters of Intent to Coordinate the Roles of Guardians and Trustees

by Lewis B. Hershey, PhD, MA

## ABSTRACT

Clients with special needs, especially those whose disabilities present in childhood, may be beneficiaries of one or more special needs planning tools while subject to guardianship. Each of these tools brings into play the opportunity to provide guidance for coordinating the wishes of the grantor with the responsibilities and obligations of other third-party entities such as guardians and trustees. To avoid potential conflicts and provide maximum protection to the beneficiary, this article reviews the issues likely facing the grantor(s) and provides strategic guidance to financial planners to advise clients on how to effectively coordinate each of these roles.

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## Introduction

**E**state planning takes on a special dimension when the client is planning for the lifelong requirements of a child with special needs or disability.<sup>1</sup> While disability can present at any age, this article focuses on the needs of planning for the future needs of a child whose disability presents in childhood, or in the case of an ABLE account eligible child, before the age of 26.<sup>2</sup> Additionally, the focus here is on beneficiaries who are subject to guardianship, where a third party is responsible for making decisions for the beneficiary.<sup>3</sup>

Most, if not all, such circumstances arise where parents are both financial providers and caregivers for their disabled child. In such cases, the parents will have already spent years coping with both the challenges of providing as normal a life as possible for their child and trying to figure out how to plan and pay for their care in the future. As such, this article focuses on the need to balance the roles others will play in providing for their disabled heir after both parents have died. As used here, the phrase, “after you are gone” is especially significant. It reminds both the parents as grantors and the financial planner(s) they work with that much must be anticipated in advance to ensure that the roles of guardians and trustees complement and coordinate with each other to provide as similar outcomes for the beneficiary as was possible while the parents were alive.

Caregiving for an aging population is a key chal-

lenge for society going forward and even more so for people with disabilities.<sup>4</sup> For people with disabilities subject to guardianship, it is even more challenging still.<sup>5</sup> For financial planners then, it is crucial to have coordination among trustees and guardians. For the family, this coordination can be facilitated by use of a letter of intent (LOI).

The following sections briefly review the roles of guardian, trustee, and LOI to provide an overview for how their coordination can facilitate the needs of servicing intergenerational special needs or disability planning.

### The Role of the Guardian

A guardian is a legal representative appointed by a probate court to act on behalf of the person subject to guardianship in one or more capacities. Guardianship may be permanent or temporary, and if the latter, it is subject to renewal and review. It may be of the estate or of the person.<sup>6</sup> If there is a limit to what the guardian can do on behalf of the person subject to guardianship, the court will specify what areas are covered by guardianship. Like insurance, guardianship is administered at the state level, and guardianship does not automatically transfer to another state should the parties move from one state to another.<sup>7</sup> Most states have mechanisms for parties in a guardianship to petition the new state to accept the terms previously issued by the court upon relocation of the parties.

The role of the guardian is to protect the person subject to guardianship from exploitation and/or predation. That said, guardianship does limit the rights of the person subject to guardianship and some advocates strongly prefer other, less intrusive, legal means for servicing individuals with disabilities, such a durable power of attorney.<sup>8</sup> Nevertheless, in some circumstances, protection of the person is only possible under a guardianship, and it is such cases as these that are the focus of this discussion.

### The Role of the Trustee

The *Cambridge Dictionary* definition of a trustee is "...a person, often one of a group, who controls prop-

erty and/or money for another person or an organization."<sup>9</sup> A trustee is a third-party who administers and manages assets placed into a trust and provided by a grantor or settler for the benefit of one or more beneficiaries.<sup>10</sup> Trustees may be individuals or firms, such as the wealth management unit of a bank. A trustee holds title to the assets in the trust but is also a fiduciary who is legally obligated to put the interests of the beneficiary or beneficiaries above all else. While the trustee has discretion to make financial decisions, the terms of the trust document will inform those decisions made on behalf of the beneficiary.<sup>11</sup>

The role of the trustee then is to implement the wishes of the grantor who has provided assets for the care and maintenance of the beneficiary. Additionally, the trustee is a fiduciary who by law must put the interests of the beneficiary above all other interests.<sup>12</sup>

### The Role of Letters of Intent

LOI are statements of value and information created by a grantor or grantors, often the parents, who have set up the means for supporting the beneficiary subject to guardianship, most often their child with disabilities. LOI are not legally binding but can provide insight to both trustees and guardians about the beneficiary and the outcomes the grantor is hoping to secure for their future.

The role of LOI then is to communicate the values and hopes of the grantor for the beneficiary into the future. There are many sources to help clients prepare LOI, including some that provide fillable templates.<sup>13</sup> For the financial planner though, it is critical to educate clients with special needs planning issues that the role of LOI is part of their overall strategic plan to provide for their beneficiary with disabilities.

It is in the planning and preparation of LOI that financial planners (and/or the attorney who drafts the trust itself) can play an especially important role. While assisting clients in choosing guardians and trustees, these decisions are coguided by statutes and law. But the LOI is almost uniquely a document where the financial planner can provide

added value. LOI are statements of desire, hope, “what if,” and what might be possible. The financial planner and/or the trust attorney are positioned to help the client give voice to such aspirations relative to the disposition of their assets after death, because they already established a relationship of hope and forward-looking planning where the client can be comfortable expressing what they most want to happen, “...after you are gone.”

### **Coordinating Roles to Protect the Beneficiary**

For the financial planner then, helping clients coordinate the roles of guardian and trustee is facilitated by the careful preparation of the LOI, which should be shared with both the guardian and the trustee. For purposes of maximum protection for the beneficiary, the guardian and trustee should be separate individuals, or in the case of the trustee, an independent financial service provider such as the wealth management division of a well-established bank. To avoid possible conflicts of interest, the financial advisor should help the client ensure that management of the bulk of the financial assets dedicated to providing support for the beneficiary is never under the control of the person making personal decisions for the beneficiary. Additionally, by making the trustee a professional service firm already in the business of serving as a fiduciary, the client is able to leverage the expertise of the trustee well into the future.

The open-ended nature of providing for a beneficiary with disabilities that is subject to guardianship is another reason for having the guardian and the trustee be separate entities. A professional financial service organization has institutional memory and can be self-perpetuating; officers servicing the trust are maintained and replaced over time without interruption of the services to the beneficiary.

Individual guardians, however, are mortal and who fills the role of guardian may have to be revised from time to time depending upon how long the beneficiary lives. Initially, one or both parents are

likely to serve as guardian. Where possible, a standby guardian should be appointed upon renewal of guardianship, with the parent(s) selecting an individual familiar with the beneficiary while the parent or parents are still alive.<sup>14</sup> The standby guardian might be a family member, such as a sibling, or a friend or associate of the family. The financial planner can help the client with this process of identifying a suitable standby guardian.

LOI can help facilitate coordination of roles by providing contact information for all key stakeholders who provide services for the beneficiary, including all health and social contact information. Important dates should be included as well and shared with both the guardian and the trustee. Some of these dates such as birthdays and anniversaries are annual events, but others may be far off in the future and/or contingent. For example, a beneficiary receiving Supplemental Security Income (SSI) will be eligible for an increase in that amount if and when both parents are retired and drawing Social Security.<sup>15</sup>

### **Using LOI to Coordinate the Roles of Guardians and Trustees in the Future: Two Scenarios**

While not exhaustive, two scenarios can help illustrate how LOI can help coordinate the roles of guardians and trustees going forward.

#### **Scenario 1: Funding an ABLE Account from a Special Needs Trust**

LOI can be used to express the grantor's wish that a special needs trust (SNT) created by the grantor for the benefit of a disabled family member should provide funding as needed for a separate ABLE account for that disabled person. The guardian may well be responsible for the ABLE account, while the trustee administers the SNT. While the coordination of SNTs and ABLE accounts is discussed elsewhere,<sup>16</sup> an LOI can request that the SNT maintain the ABLE account's funding as a means for providing direct support to the beneficiary. This enhances the

ability of the SNT to support the beneficiary while maintaining their eligibility for public benefits like SSI and Medicaid. As noted at ABLEnow online:

Unlike certain SNTs, funds in an ABLÉ account can be used to pay food, housing, and housing-related expenses. A SNT can disburse up to the annual ABLÉ contribution limit directly into a beneficiary's ABLÉ account for these qualified disability expenses that exceed the monthly SSI benefit. SNT beneficiaries can use their trust and ABLÉ account together to minimize fees and grow funds tax-free through ABLÉ investment options.<sup>17</sup>

Additionally, the LOI can ask that the trustee for the SNT consider future changes to ABLÉ accounts, such as increases in annual contributions in order to enhance the support for the disabled beneficiary. This in turn allows the guardian more flexibility to support the beneficiary.

### Scenario 2: Guidance for Changes in Eligibility for Benefits Due to Aging

The LOI can also make known the grantor's wishes for the disabled beneficiary as they age.

When the beneficiary is eligible for Social Security, their SSI converts to Social Security Disability Insurance (SSDI) and is no longer subject to wealth/income restrictions. The same is true of their Medicare eligibility—currently at 65 (unless they are already dual eligible)—such that, depending upon their medical needs, maintaining their eligibility for Medicaid may no longer be necessary and the restrictions of an SNT might also be allowed to lapse if it is the best financial interest of the beneficiary at that time. The LOI can explicitly ask that the trustee and the guardian work together to manage such changes as the beneficiary ages.<sup>18</sup>

Although LOI are not legally binding, they may provide the best means for grantors to make their wishes known for the trustees and guardians who will be responsible for making decisions for beneficiaries with disabilities subject to guardianship possibly for the rest of their lives. As such, the financial planner

brings much value-added benefit to helping clients prepare this unofficial yet critical part of the planning process to help coordinate the roles of guardian and trustee. ■

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(1) Current trends in disability planning are moving away from the term “special needs” and towards “disability” as a more appropriate description. See, for example, Annemarie M. Kelly et al., “Financial Health Assessments by People with Disabilities and Their Families during the COVID-19 Pandemic: Opportunities and Obstacles for Financial Planners,” *Journal of Financial Service Professionals* 76, no. 5 (2022): 46-55, esp. endnote 1; and Eric Garcia, *We're Not Broken: Changing the Autism Conversation* (Boston: Houghton Mifflin Harcourt, 2021). ABLÉ is an acronym for The Stephen Beck, Jr. Achieving a Better Life Experience Act (ABLE Act) of 2014, Pub. L. No. 113–295 (codified at 26 U.S.C. § 529A).

(2) Legislation moving the eligibility for ABLÉ accounts from 26 to 46 has been passed and will become effective on January 1, 2026. The SECURE Act additionally removes one obstacle from SNP: the need for all contingent beneficiaries of an SNT to be living persons. Previously, having a nonhuman contingent beneficiary, such as a charity, would void the stretch provision for the disabled beneficiary. As Smith notes, changes to the law under the SECURE Act remove this trip-wire to financial planning so long as the “residuary beneficiary” is a 501(c)(3) charity and not “a donor-advised fund or a private foundation.” See Christopher Smith, “SECURE 2.0: Michigan Advocacy Helps Pass the Special Needs Trust Improvement Act,” Chalgian & Tripp blog, March 15, 2023; accessed at: <https://mielderlaw.com/blog/secure-2-0-michigan-advocacy-helps-pass-the-special-needs-trust-improvement-act/>.

(3) Guardianship is invasive and, for some stakeholders, controversial. For a discussion of positive aspects of guardianship, see Annemarie M. Kelly, Lewis B. Hershey, and Christina N. Marsack-Topolewski, “Implementing Guardianship Policies in Special Needs Planning: Five Potential Positives,” *Journal of Financial Service Professionals* 74, no. 6 (2020): 49-63. For a discussion of areas of concern regarding guardianship, see Annemarie M. Kelly, Lewis B. Hershey, and Christina N. Marsack-Topolewski, “Implementing Guardianship

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Policies in Special Needs Planning: Five Possible Pitfalls,” *Journal of Financial Service Professionals* 74, no. 5 (2020): 42-54.

(4) For a review of the health problems related to aging, see Victor J. Dzau et al., “Enabling Healthful Aging for All—The National Academy of Medicine Grand Challenge in Healthy Longevity,” *New England Journal of Medicine* 381 (2019): 1699-1701; accessed at: <https://www.nejm.org/doi/full/10.1056/NEJMp1912298?query=TOC>.

(5) For a review of the planning tools financial advisors can utilize to service their aging clients, see, for example, Steve Parrish, “A Survey of Planning Tools for Addressing Clients’ Diminished Capacity,” *Journal of Financial Service Professionals* 76, no. 4 (2022): 76-88; Kelly O. Dancy and Emily G. Loe, “Gray Tsunami: Advice for Planning with Elderly Clients,” *Journal of Financial Service Professionals* 75, no. 3 (2021): 49-57; and Harry L. Ehrenberg, “Special Needs Estate Planning—Seven Overlooked Challenges,” *Journal of Financial Service Professionals* 73, no. 5 (2019): 56-63.

(6) For a summary of types of guardianship, see Parrish (2022), endnote 5, esp. Table 1.

(7) For a comprehensive review of guardianship law, see, for example, Annemarie M. Kelly, Lewis B. Hershey, and Christina N. Marsack-Topolewski, “A 50-State Review of Guardianship Laws: Specific Concerns for Special Needs Planning,” *Journal of Financial Service Professionals* 75, no. 1 (2021): 59-79.

(8) As noted previously, guardianship and the role of guardians are state-specific, so financial planners should work with clients to seek appropriate legal advice in the state where they reside. States also vary in how the court provides information to prospective guardians. For example, in Nevada, self-help websites include links to PDFs provided by the state that guardians are required to read and sign. See Family Law Self-Help Center, “Powers & Duties of a Guardian”; accessed at: <https://www.familylawselfhelpcenter.org/self-help/guardianship/overview/powers-and-duties-of-a-guardian#:~:text=For%20Guardians%20Over%20the%20Person,treatments%2C%20require%20court%20approval>. In Michigan, attorneys often have their own websites with open access to help prospective clients learn more about guardianship and the responsibilities of guardians. See, for example, “The Power and Duties of a Guardian in Michigan,” Patrick and Associates, PLLC; accessed at: <https://patricklegal.com/powers-duties-of-guardian-michigan/>; and “Durable Power of Attorney,” Patrick and Associates, PLLC; accessed at: <https://patricklegal.com/power-of-attorney/>.

(9) <https://dictionary.cambridge.org/us/dictionary/english/trustee>.

(10) Different types of trusts may be employed to service the financial needs of beneficiaries with disabilities. While a comparison of different trusts is beyond the scope of this article, coordinating the roles of guardian, trustee, and LOI are prudent regardless of the type of trust or trusts set up to support the needs of beneficiaries with disabilities.

(11) As the present study is concerned with the role the trustee plays

in coordination with a guardian, the selection of the trustee, though important, is beyond the scope of the present discussion. Still, as Reardon notes, “The selection of a trustee—individual, corporate, or both—is an involved topic.” See Dennis C. Reardon, “The Estate Planning Interview,” *Journal of Financial Service Professionals* 70, no. 5 (2016): 19-22, especially the section “Selection of Fiduciaries.” (12) As Barrett notes, “The trustee is a fiduciary. As a fiduciary, the trustee must act with reasonable care in administering the trust and selecting trust investments; avoid any conflict of interest or self-dealing in holding, purchasing and selling trust assets; and diligently avoid breaching any of the trustee’s many duties to the settlor and the trust beneficiaries.” See Timothy Barrett, “Trusts 101: Why Have a Trust?” [kiplinger.com](https://www.kiplinger.com/article/retirement/t021-c032-s014-trusts-101-why-have-a-trust.html), June 11, 2019; accessed at: <https://www.kiplinger.com/article/retirement/t021-c032-s014-trusts-101-why-have-a-trust.html>.

(13) See, for example, AARP, “State Your Intentions with a Letter of Instruction,” *AARP Education & Outreach*, April 2009; accessed at: [https://www.aarp.org/money/estate-planning/info-04-2009/letter\\_of\\_instruction.html](https://www.aarp.org/money/estate-planning/info-04-2009/letter_of_instruction.html); Patrick Hicks, “How to Write a Letter of Instruction: A Step-by-Step Guide,” *Trust and Will*, 2023; accessed at: <https://trustandwill.com/learn/how-to-write-a-letter-of-instruction>; and Cumberland Trust, “A Closer Look at Letters of Intent: Special Needs,” January 27, 2020; accessed at: <https://cumberlandtrust.com/a-closer-look-at-letters-of-intent-special-needs/>. For a downloadable template for LOI for a child with special needs, see <https://cumberlandtrust.com/wp-content/uploads/2021/09/Cumberland-Trust-Letter-of-Intent-Special-Needs-Trusts.pdf>.

(14) As noted above, guardianship exists on the state level and often through the probate court of individual counties. As such, financial planners will need to help clients make decisions about selecting standby or replacement guardians following the process appropriate for the state in which they reside. For example, in Michigan, most guardianships are for a 5-year fixed term, which is renewable. Prior to the end of the guardianship period, the court will contact the guardian and set a date for a new appointment at which time the guardian can request amendments to the guardianship, including selecting a new standby guardian. For types of guardianship available in Washtenaw County, MI, see <https://www.washtenaw.org/1210/Guardianships>.

(15) Upon the parents’ retirement, the beneficiary of SSI, like the spouse, will be entitled to one-half the amount of the larger of the two parents’ Social Security benefits. Upon the death of that parent, the amount moves to three-fourths of that parent’s benefit. See Caleb Harty, “How Much Should Go into Your Special Needs Trust?” [kiplinger.com](https://www.kiplinger.com/article/retirement/t021-c032-s014-how-much-should-go-into-your-special-needs-trust.html), June 10, 2019; accessed at: <https://www.kiplinger.com/article/retirement/t021-c032-s014-how-much-should-go-into-your-special-needs-trust.html>.

(16) See Annemarie M. Kelly and Lewis B. Hershey, “Coordinating an ABLE Account and a Special Needs Trust,” *Journal of Financial Service Professionals* 77, no. 1 (2023): 47-57.



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(17) See “Consider a Special Needs Trust with ABLEnow,” ABLEnow blog, 2023; accessed at: <https://www.ablenow.com/blog/articles/consider-a-special-needs-trust-with-ablenow/#:~:text=A%20SNT%20can%20disburse%20up,free%20through%20ABLE%20investment%20options>.

(18) “Don’t Forget: Some SSI Beneficiaries Can Switch to SSDI When a Parent’s Circumstances Change,” Special Needs Answers, April 5, 2016; and ElderLawNet, Inc., October 23, 2023; accessed at: <https://specialneedsanswers.com/dont-forget-some-ssi-beneficiaries-can-switch-to-ssdi-when-a-parents-circumstances-change-15560#>.

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