

Key Concerns for Financial Planning for Beneficiaries Subject to Guardianship

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ABSTRACT

People with disabilities are often targets for exploitation. Persons with disabilities subject to guardianship require additional planning protections to safeguard them from financial predation. This article reviews the literature on this topic and identifies key areas of concern that financial advisors should address to protect this vulnerable population.

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Overview

Guardianships exist to protect individuals found by a court to be incapable of making important life decisions on their own. Guardianships can be whole or partial, depending upon the various levels of independence of the subject of the action.¹ Indeed, the topic of guardianship itself is complicated and extensive.² For purposes of this article, a guardianship addressing all aspects of decision making is assumed. The subsequent discussion considers specific concerns the financial advisor should address and the tools put in place to service the client to avoid future and unnecessary complications, or, in the worst case, exploitation of the person subject to guardianship.

To that end, this article reviews some (though not all) of the most typical planning tools or mechanisms used to provide for clients with disabilities who are also subject to guardianship, to assist financial planners in preparing comprehensive financial plans for their clients needing such planning. As such, the topics here might be thought of as a checklist for such planning and a minimum of such protections rather than a comprehensive detail of what might be needed or possible.

Notwithstanding, for every client with disabilities who is subject to guardianship, financial planners should provide advice to ensure ongoing protection of financial assets, changes in govern-

ment benefit eligibility, the person subject to guardianship, and provisions for a system of checks and balances for those persons and/or entities charged with direct decision making for the person subject to guardianship, such as the guardians themselves. In the latter case, an important distinction is made between the planning needs of a dependent child subject to guardianship due to disability that presents in childhood and the needs of an older, often retired adult, who is subject to guardianship later in life.³ While the latter is an important topic, the discussion here is restricted only to the former case, where the parents of a disabled child are the guardians and must plan for how the care they are providing will continue after their deaths.⁴

Protecting the Assets

Among the most common financial planning tools available to service clients subject to guardianship are special needs trusts (SNTs) and ABLÉ accounts.⁵ While a detailed discussion of both SNTs and ABLÉ accounts is beyond the scope of this article, a summary of their key features is provided below as background for discussing the financial planning concerns that arise when the beneficiary of these planning tools is subject to guardianship.

Special Needs Trusts—SNTs are specially crafted trusts designed to maintain eligibility of government benefits, primarily Medicaid, Supplementary Security Income (SSI), and the Supplemental Nutrition Assistance Program (SNAP). These trusts supplement, but do not replace, public benefits. If structured properly, they are not subject to Medicaid recapture at the beneficiary's death. They do not have limits in terms of contributions or account balance totals that might affect eligibility for public services or benefits. Additionally, the account balance can be passed on to the trust's remainder beneficiary(s) after the disabled beneficiary dies. SNTs can be either first-party (funded with assets of the beneficiary) or third-party (funded with assets from others). A key distinction for planning purposes is that first-party

SNTs are subject to Medicaid recapture upon the death of the beneficiary.⁶

ABLE Accounts—ABLE accounts are tax-advantaged savings accounts that allow contributions to grow tax free for the benefit of the account owner up to \$100,000 and still qualify the disabled person for public benefits such as Medicaid, SSI, and SNAP.⁷ An important difference between SNTs and ABLÉ accounts is that the latter can be used for a much wider range of expenses than SNTs. ABLÉ account balances after the death of the beneficiary can be subject to Medicaid recapture.⁸ Additionally, an ABLÉ account can only be inherited by a disabled sibling of the account owner.

Taken together, SNTs and ABLÉ accounts can work in concert to maximize the quality of life for the disabled beneficiary.⁹ When the beneficiary is subject to guardianship, such coordination is more complicated. That is in part because, in an ideal situation, the beneficiary controls the ABLÉ account on their own and works directly with the trustee for distributions from the SNT. Under an initial guardianship, the guardian (likely one or both parents) is the intermediary in both cases between the person with a disability and the ABLÉ account and the SNT. Later, in the case of an SNT, that intermediary is likely the trustee. While individuals can serve as trustees, it is prudent that the grantor (often the parents of the disabled beneficiary) designate a professional fiduciary to manage the assets of the SNT, such as a bank trust department or the bank's wealth management unit. In the case of an ABLÉ account, the intermediary may well be the person designated as the guardian. When the guardian is one or both parents of the person subject to guardianship, this does not usually create a conflict as it is very likely that the parents are providing the funding or the majority of the funding for the ABLÉ account.

When the role of guardian passes on to someone other than the parents (in the case of a disabled child subject to guardianship), special care in determining who is to be guardian and what decisions

will be under their authority is a key concern for financial planning.¹⁰ In the court order establishing or renewing a guardianship, the areas of decision making must be specifically named. Ideally, it would be at the hearing where provisions are made for someone other than the guardian to be appointed to manage the ABLÉ account assets, if possible, a corporate fiduciary. In such cases, additional planning may be required to appoint a personal representative to request ABLÉ expenditures on behalf of the account owner subject to guardianship while the funds are protected from either predation or spendthrift by the fiduciary.¹¹ Such expertise is the responsibility of the estate planning attorney who is involved in the financial planning process, ideally at the outset of the process.

Monitoring Changes in Eligibility

Among the concerns for financial planning for persons subject to guardianship are potential changes in eligibility over time. For example, eligibility for an ABLÉ account itself is subject to a pending change on January 1, 2026, with the qualifying age for the onset of disability moving from before age 26 to before age 46.¹²

Similarly, disabled persons who receive SSI will be eligible for an increase in their payments when their parents begin taking their own Social Security benefits if the disabled person's disability began before age 22 and they are not married.¹³

Because the process is complex, the advice of the financial planner can be crucial, particularly with respect to covering these issues well in advance and including them in the planning document. For example, when *either* parent becomes disabled, dies, or starts taking their own Social Security, additional changes come into play.¹⁴ The conditions under which this change of eligibility applies are part of the disabled adult child (DAC) provision of Social Security Disability Benefits, which may qualify the DAC for up to one-half of the parent's Social Security Retirement or Disability Benefit

and 75 percent at the parent's death.¹⁵ Consider the following situation:

Scenario One: A married couple has a disabled adult daughter living at home who receives SSI. The mother, having worked in the past, has been out of the paid workforce ever since the birth of the child and is a stay-at-home caregiver full time. At 62, she begins to draw Social Security of \$532 a month, based upon her relatively lower paid earnings history. Her disabled daughter receives \$943 a month in SSI. The DAC provision would allow the disabled adult child to qualify for 50 percent of the parent's Social Security, and that amount (\$266) offsets the SSI. The daughter receives the same amount as before, \$943 a month—\$266 from DAC and the remainder from SSI. She will also pick up Medicare coverage while retaining Medicaid. Additionally, she will be eligible for a dual eligible Medicare Advantage plan. Some of these plans provide monthly subsidies for food and rent. But when the second parent also retires, the situation may have changed, as is considered in the next scenario.

Scenario Two: The father of the same disabled child has continued working and is now prepared to retire at age 70½. As such, his Social Security has reached its full benefit and, based upon his work record, he will receive \$4,000 a month. At that amount, the disabled adult daughter is eligible for half of his benefit, or \$2,000 a month. That amount will completely offset the SSI. With the loss of the SSI, the daughter will lose her Medicaid eligibility. Her Medicaid eligibility can be reinstated under the Pickle exception, named for its Congressional sponsor.¹⁶ Likewise, when that same parent dies, another change in eligibility occurs:

Scenario Three: The father of the same disabled child dies after his Social Security retirement benefit of \$4,000 a month begins. Her benefit will be increased to \$3,000 a month—75 percent of his benefit. It will be necessary for her guardian to file under the Pickle exception again, due to the increase in her benefit.

These three scenarios summarize important changes in eligibility over time. As such, these

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changes require careful consideration for legal and tax implications and so the advice of an attorney with tax and SNP expertise is warranted.

Protecting the Person: Building-in Checks and Balances through Planning

While comprehensive financial planning requires attention to ensure the available financial means are leveraged and managed with care and professionalism, it is also the case that comprehensive planning addresses the physical, social, and emotional well-being of the beneficiary. Persons subject to guardianship vary widely in the degree of their ability to participate in their own care, but share on at least one level the recognition that their care and maintenance must be provided by others.

Providing adequate protection to the person subject to guardianship requires careful consideration of what likely or possible threats exist for the individual. Living arrangements after the individual has left the care of their parents should be matched to those needs and range from a few visits each week, to daily visits for limited needs, to live-in help up to and including 24/7 monitoring. Where on this spectrum

of care needs the individual lies is critical in determining the financial planning necessary to provide adequate care and protection.

Closely related to protecting the assets is consideration for how much financial decision making is allowed under the guardianship and whether or not the guardian holds that authority. The guardian parent(s), while living, might control financial assets as well as the physical care of the adult child. However, it may be prudent to separate access to financial assets, such as an ABLÉ account, from the person making personal decisions for the person subject to guardianship once these roles have passed on to subsequent guardians and/or trustees.¹⁷ If so, consultation with an attorney with expertise in guardianship will be necessary.¹⁸

Summary and Conclusions

The key concerns for financial planning for people with disabilities subject to guardianship are complex and often interconnected. They also may change over time and circumstances, such that the financial planning process is ongoing and may need the expertise of one or more additional advisors, such as in tax and/

TABLE 1
Key Concerns for Financial Planning for People Subject to Guardianship

Key Concern	Potential Problems or Issues	Action Steps
ABLE Disability Onset Age Adjustment	Need to document possible eligibility for clients with pre-existing disability that occurred <i>after</i> age 26 but before age 46	Update client information
Possible SSI to Social Security Disability Insurance (SSDI) Adjustment	Need to document change in parents' status. Consideration for a Pickle Amendment exemption and/or application of the Disabled Americans Act of 1986	Consult with tax and/or attorney
SSI Decrease Due to Parent's Retirement, Disability, or Death	Need to document change in parent(s)' status	Meet with local SSA office

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or law.¹⁹ To help financial planners and clients alike, these key concerns are summarized in Table 1. ■

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(1) For a summary of types of guardianship, see Steve Parrish, “A Survey of Planning Tools for Addressing Clients’ Diminished Capacity,” *Journal of Financial Service Professionals* 76, no. 4 (2022): 76-88; esp. Table 1.

(2) For a more detailed review of guardianship law, see, for example, Annemarie Kelly, Lewis Hershey, and Christina 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. For a discussion of positive aspects of guardianship, see Annemarie Kelly, Lewis Hershey, and Christina 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 Kelly, Lewis Hershey, and Christina Marsack-Topolewski, “Implementing Guardianship Policies in Special Needs Planning: Five Possible Pitfalls,” *Journal of Financial Service Professionals* 74, no. 5 (2020): 42-54. For a summary of types of guardianship, see Parrish (2022), endnote 1.

(3) For a review of the planning tools financial advisors can utilize to service their aging clients, see, for example, Parrish (2022) endnote 1; 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.

(4) Indeed, the complexity and interplay of possible benefits, both public and private, suggest a number of additional topics for consideration, such as the relationship of SSI to Social Security Disability Insurance (SSDI) and the impact of group life insurance for the parents on the financial planning needs for the beneficiary subject to guardianship. For purposes of clarity and focus, it is suggested here that those topics can be best examined in future articles.

(5) ABLÉ is an acronym for The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014, PL No. 113-295 (codified at 26 U.S.C. § 529A).

(6) For a comparison of different types of SNTs, see “How Third-Party Special Needs Trusts Differ from Other SNTs,” Special Needs Answers, December 1, 2023; <https://specialneedsanswers.com/what-is-a-third-party-special-needs-trust-and-how-is-it-different-from-other-kinds-of-trusts-15111#>.

(7) See, for example, “Disability Benefits 101—Michigan. ABLÉ Accounts”; https://mi.db101.org/mi/programs/job_planning/able/program.htm#:~:text=And%20no%20matter%20how%20much,programs%20with%20a%20resource%20limit.

(8) Upon the death of an ABLÉ account beneficiary, the account balance may be subjected to recovery of Medicaid expenditures by the state. That said, while there are some specific exceptions for recovery for Medicare, the parameters by which Medicaid *might* not seek recovery are unclear. For a list of exceptions to Medicare estate recovery in Michigan, see, for example, Michigan Department of Health and Human Services, “Estate Recovery”; <https://www.michigan.gov/mdhhs/assistance-programs/medicaid/third-party-liability/estate-recovery>. For a discussion of *possible* exceptions to Medicaid recovery from an ABLÉ account, see, for example, “ABLE Accounts and Medicaid Payback,” *Special Needs Alliance* (a handout template for financial planners); <https://www.specialneedsalliance.org/wp-content/uploads/2017/09/Handout-5-ABLE-Medicaid-Payback-template.pdf>.

(9) For a comprehensive discussion of how SNTs and ABLÉ accounts can complement one another, see Annemarie Kelly and Lewis Hershey, “Coordinating an ABLÉ Account and a Special Needs Trust: Eight Best Practice Considerations,” *Journal of Financial Service Professionals* 77, no. 1 (2023): 47-57.

(10) For a discussion of issues about coordinating the role of trustees and guardians, see, for example, Lewis Hershey, “After You Are Gone: Using Letters of Intent to Coordinate the Roles of Guardians and Trustees,” *Journal of Financial Service Professionals* 78, no. 1 (2024): 48-53.

(11) Carving out different areas of responsibility to different individuals and/or corporate entities for persons subject to guardianship can be complicated but prudent if the ABLÉ account

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owner is not capable of managing the account and/or has other limitations that might make them targets for predation by third parties, including possible guardians. Options include splitting guardianship authority, appointing a conservator for the ABLÉ account, or use of an SSA-appointed representative payee who is not the guardian. See, for example, Lelia Wardwell Mander, “ABLE Accounts vs. Special Needs Trusts: Why Not Have It All?” *Special Needs Answers*, December 28, 2021; <https://specialneedsanswers.com/able-accounts-vs-special-needs-trusts-its-not-necessarily-either-or-18618>. Additionally, individual states may have different rules for who can act on behalf of the ABLÉ account holder, as an “Authorized Representative” or an “Authorized Individual” and these may be categorical or hierarchical, in the latter case requiring that both persons hold the same level of hierarchy. See Personal Communication with the Author, *Arkansas 529 Programs*, February 12, 2024.

(12) This change, known as the ABLÉ Age Adjustment Act, is summarized in a series of public information resources by the National Disability Institute and is estimated to increase the number of people eligible for an ABLÉ account by 6 million. See ABLÉ National Resource Center, “Step 2: Who is Eligible?”; <https://www.ablencr.org/get-started/am-i-eligible/#:~:text=You%20do%20not%20have%20to,occurred%20before%20your%2026th%20birthday>.

(13) See Caleb Harty, “How Much Should Go into Your Special Needs Trust?” *Kiplinger.com*, June 10, 2019; <https://www.kiplinger.com/article/retirement/t021-c032-s014-how-much-should-go-into-your-special-needs-trust.html>.

(14) See Joel Thrift Law, LLC, “Can You Transition from SSI Benefits to SSDI Benefits?”; <https://joelthrift.com/can-you-transition-from-ssi-benefits-to-ssdi-benefits/#:~:text=At%20first%20glance%2C%20it%20seems,disabled%2C%20passes%20away%20or%20retires>.

(15) See Social Security Administration, “Disability Benefits: How You Qualify”; <https://www.ssa.gov/benefits/disability/qualify.html>. Depending upon the circumstances, a change to SSDI from SSI might increase the benefits paid to the beneficiary above the threshold for continuing Medicaid eligibility. This unintended “enrichment” has been addressed by the so-called “Pickle Amendment” or “Pickle Exception” passed in 1976 to specifically ensure that those affected by the change of income remain eligible for Medicaid without interruption. Additionally, the Employment for Disabled Americans Act of 1986 (PL 99-643) similarly protects Medicaid eligibility from those moving from SSI to SSDI. As enforcement of SSA eligibility is conducted on the state level, financial planners should consult the local SSA offices in the state where their client is a resident. For a discussion of the Pickle exception, see Health Consumer Alliance, “The Pickle Program”; <https://healthconsumer.org/wp/wp-content/uploads/2018/06/cs020Pickle.pdf>. For a discussion/summary of the Employment Opportunities for Disabled Americans Act, see <https://www.ssa.gov/policy/docs/ssb/v50n3/v50n3p25.pdf>.

(16) See Joel Thrift Law, LLC, endnote 14.

(17) See Hershey (2024), endnote 10.

(18) *Ibid.*, see discussion and citations.

(19) This suggestion assumes that the financial advisor is not already a CPA and/or an attorney, either of which is already also current on the related applicable tax and law issues.