



## COMMITTEE REPORT: ELDER CARE / SPECIAL NEEDS

By **Michael Gilfix**

# How Will Your Clients' Families Know What They Want?

If they suffer from a disability or illness, help them prepare a letter of guidance

**F**or decades, we've advised parents of children with disabilities to write and annually maintain a "letter of guidance." This letter explains how a caregiver and a trustee can take the best possible care of that child.

This approach has been consistently recommended because a special needs trust typically gives great flexibility to the trustee but is light on the daily minutia of life. Yet, the minutia of life determines the quality of life.

This same approach should apply to the clients themselves. They should let their future caregivers know about their quirks, eccentricities and unique needs should they end up suffering from dementia or some other disability that interferes with their communication skills. What should be done to avoid upsetting the client? How should your client handle challenging situations to prevent crises and hospitalization?

Caregivers shouldn't have to learn about these things by trial and error. I strongly recommend that every client prepare a letter of guidance as part of an estate plan. This might be called an "Ethical Will," "Letter to My Children" or "Special Instructions" to a successor trustee.

The letter of guidance has advantages that an advance health care directive (AHCD) doesn't. The AHCD includes instructions about home care or institutional care that are in your client's trust and a durable power of attorney. Yet, such language is embedded and essentially frozen unless there are

subsequent amendments. Your clients can update the letter of guidance annually to reflect evolving thoughts as they age and as their health and other factors change.

### Letter of Guidance

You can give clients a list of suggested topics to address. The client will typically write the letter without your involvement. This means there are no legal fees as this letter is written, updated and made available to caregivers and family members.

Here are some examples of topics you can suggest that the client include:

**Where do you want to live?** Most clients indicate they want to be cared for at home as they convalesce or age. Many expressly wish to die at home with hospice support. This is easy to say, but what are the practical implications? Is there a point, for example, when the impact on a spouse/caregiver would be physically damaging? If so, is placement in a facility—assisted living or skilled nursing—acceptable or even preferred? To what extent are there cost considerations?

**What type of entertainment do you want?** We routinely draft AHCDs in which clients specify the kind of music they want to be played in their room if they're ever unable to communicate their wishes. For example, in my AHCD, I favorably identify several classical music composers—and explicitly state that no rap music is to be played in my room. Our tastes in music evolve, often toward more nostalgia than current genres. The letter of guidance can also include this information.

**What type of food do you prefer?** Are particular foods or snacks strongly preferred at a specific time of day? Is there an order in which food should be



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presented? How should specific dishes be prepared? Should they be hot or cold? Are there comfort foods that are strongly preferred?

Don't we all have strong feelings about these points? Particularly if a client becomes physically restricted, the quality and taste of food becomes even more important.

**What other items should be provided?** Some to consider include:

- Photos and videos. For example, videos of family events, favorite vacations and anything else that warms the heart. What are the areas of interest? Are specific blogs, videos and television stations appropriate?
- Visits from friends and relatives. Are there particular relatives or friends who should be strongly encouraged to visit? Are there relatives and friends who should be *discouraged* from visiting?

**What charitable and political support do you want to continue?** Your client may want to suggest or request that their heirs continue to support carefully selected eleemosynary objectives. Your client should draft this language to avoid direction or mandate. Otherwise, confusion and even challenges to an estate plan will result.

For example, Mr. & Mrs. S wrote a letter to their children telling them they want each of them to make a \$1,000 charitable gift to a particular organization the family has supported over the years. Nothing was said about this in their trust or their wills.

One of the three children viewed this as a mandate, while the other two viewed it as advisory. Because the amounts were modest, no serious conflict arose after the parents passed away. If the referenced amount was \$100,000, it's easy to imagine problems and even litigation in the context of the estate's administration.


### What Not to Include

If your client wants to disinherit or leave less to a particular child, details about the rationale are best excluded from a letter of guidance. The disfavored child may view the letter and find factual inaccuracies or, at minimum, rationales that could

be objectively challenged. The language could open the door to a challenge to the distribution plan by the disfavored child.

Avoid explicit rationales for disfavoring a particular child because of religious beliefs.

### Supplement, Don't Complicate

The letter of guidance is meant to be just that: guidance. It isn't meant to modify the terms of a trust, nor is it intended to have any tax or other complicated implications. Accordingly, your client shouldn't give powers to anyone that could compromise the integrity of a trust, unintentionally trigger tax problems or otherwise interfere with the efficient management of an estate or the trust administration process after your client dies. 

### SPOTLIGHT



#### Fishing Village

*Quiet Harbor, Gloucester* by Jane Peterson sold for \$127,500 at Doyle's Impressionist & Modern Art / Post-War & Contemporary Art auction on May 8, 2024 in New York City. Peterson was an American Impressionist and Expressionist painter. She took inspiration from the scenic beaches along the Massachusetts coast as well as her travels.