

4-2022

The Generational Squeeze: A Commentary on Multi-Generational Special Needs and Benefit Planning in Georgia

Christopher Wages

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Disability Law Commons](#), [Elder Law Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Wages, Christopher (2022) "The Generational Squeeze: A Commentary on Multi-Generational Special Needs and Benefit Planning in Georgia," *Mercer Law Review*: Vol. 73: No. 3, Article 14.
Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol73/iss3/14

This Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

The Generational Squeeze: A Commentary on Multi- Generational Special Needs and Benefit Planning in Georgia

Christopher Wages*

I. INTRODUCTION

As the generation of baby boomers—individuals born between 1946 and 1964—grow older, their children are being progressively squeezed between caring for aging parents and the demands of a family of their own, giving rise to the term “sandwich generation.” The current population of fifty-three million baby boomers over the age of sixty-five accounts for 16% of the populace.¹ As such, younger generations are finding themselves sandwiched between the financial, emotional, and physical needs of their aging parents and young children. This challenging situation is further exacerbated for families dealing with disabilities, and this scenario is only becoming more ubiquitous. In addition to baby boomers experiencing physical and cognitive challenges precipitated by age, the prevalence of developmental and physical disabilities among children is growing. The Centers for Disease Control (CDC) and Prevention issued a report noting an increase in developmental disabilities among children under the age of seventeen since 2009.²

*Attorney at Law, Campbell and Brannon. Auburn University (Bachelor of Science in Business Administration); Mercer University School of Law (Juris Doctor, Cum Laude). Mercer Law Review; Articles Editor (Volume 71). Member, State Bar of Georgia.

1. *2019 American Community Survey 1-Year Estimates*, UNITED STATES CENSUS BUREAU, <https://data.census.gov/cedsci/profile?q=United%20States&g=0100000US> (last visited Nov. 13, 2021).

2. *Increase in Developmental Disabilities Among Children in the United States*, CDC (Sept. 13, 2021), <https://www.cdc.gov/ncbddd/developmentaldisabilities/features/increase-in-developmental-disabilities.html>.

Today, sixty-one million individuals, or 26% of the nation's population, have one or more disabilities.³ One in four disabled adults are also cared for at home by parents over the age of sixty.⁴ As parents lose the ability to caretake, younger generations are left to take up the mantle of caring for their disabled siblings and other family members.

This Article discusses the implications and complexities of proper planning for the long-term care of a substantial and growing percentage of individuals with physical and mental disabilities. A thorough understanding of the tenuous balance between preserving social benefits and employing special needs trusts crosses several legal disciplines, including estate planning; family law, in cases of divorce; and plaintiffs' litigation that result in disability settlements.

II. A SHIFT FROM INSTITUTIONALIZATION TO COMMUNITY SUPPORT

The 1999 United States Supreme Court decision in *Olmstead v. L.C.*,⁵ called for the integration of individuals with disabilities into supportive communities, spurring a shift from the then-prevailing practice of segregating disabled individuals into institutional settings such as nursing homes and state hospitals.⁶ The respondents brought suit under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 1983⁷ and 42 U.S.C. §§ 12131–12134,⁸ for healthcare officials' refusal to relocate mentally disabled persons from an institution into a community-based treatment program.⁹ The Court held that in evaluating reasonable modifications, a court must consider available resources, including the cost of providing community-based care and the range of services provided to others with mental disabilities.¹⁰ Prior to *Olmstead*, half the states, including Georgia, spent less than 8% of

3. *Disability Impacts All of Us*, CDC (Sept. 16, 2020), https://www.cdc.gov/ncbddd/disabilityandhealth/documents/disabilities_impacts_all_of_us.pdf.

4. *Caregiver Statistics: Demographics*, FAMILY CAREGIVER ALLIANCE, <https://www.caregiver.org/resource/caregiver-statistics-demographics/?via=caregiver-resources,all-resources> (last visited Nov. 13, 2021).

5. 527 U.S. 581 (1999).

6. *Id.* at 587.

7. 42 U.S.C. § 1983 (1996).

8. 42 U.S.C. §§ 12131–12134 (1990).

9. *Olmstead*, 527 U.S. at 593–94.

10. *Id.* at 607.

Medicaid funding on home-based services for the disabled.¹¹ Over the past decade, the number of individuals with disabilities living in an institution has started to decline, reaching 2.81% in 2019.¹² The holding in *Olmstead* has led to increased integration of individuals with disabilities into supportive environments with live-in caregivers to help with day-to-day activities. Today, 86% of long-term care is provided in a home or by community-based services that allow adults with disabilities to live without being cut off from community, family, and friends, which habitually occurs in a nursing home or institutional setting.¹³

Personal care is the linchpin in helping disabled individuals live in the community and avoid institutionalization. Guardianships, conservatorships, and representative payees are supportive options that can help disabled adults live more independent lives outside of the institutional setting.

III. GUARDIANSHIP

Legal petitions, such as guardianships or conservatorships, are intended to optimize protection for a disabled individual and should be tailored to preserve as much independence and autonomy possible. A guardianship should be “the least restrictive form of . . . assistance, taking into consideration the ward’s functional limitations, personal needs, and preferences.”¹⁴ Additionally, all guardianships “shall be designed to encourage the development of maximum self-reliance and independence in the adult and shall be ordered only to the extent necessitated by the adult’s actual and adaptive limitations after a determination that less restrictive alternatives to the guardianship are not available or appropriate.”¹⁵ While guardianships are helpful, petitioning to make an individual become declared a ward is a weighty decision:

Unless the court’s order specifies that one or more of the following powers are to be retained by the ward, the appointment of a guardian shall remove from the ward the power to: (1) Contract marriage; (2)

11. See Gary A. Smith, *Status Report: Litigation Concerning Services for People with Disabilities*, HUMAN SERVS. RSCH INST. (May 23, 2007), <https://www.hsri.org/files/uploads/news/litigation052307.pdf>.

12. See *2020 Annual Report: Disability Statistics and Demographics*, DISABILITY COMPENDIUM, <https://disabilitycompendium.org/> (last visited Nov. 13, 2021).

13. *Filling in the Long-Term Care Gaps: Hearing on “Role of Private Insurance in Long-Term Care” Before the S. Spec. Comm. on Aging*, 111th Cong. 1, 2 (2009) (statement of Diane Rowland, Sc.D., Executive Vice President, Henry J. Kaiser Family Foundation).

14. O.C.G.A. § 29-4-20(a)(6) (2004).

15. O.C.G.A. § 29-4-1(f) (2019).

Make, modify, or terminate other contracts; (3) Consent to medical treatment; (4) Establish a residence or dwelling place; (5) Change domicile; (6) Revoke a revocable trust established by the ward; and (7) Bring or defend any action at law or equity, except an action relating to the guardianship.¹⁶

Options to consider before petitioning for full legal guardianship include: providing support with limited or joint bank accounts; representative payee; financial power of attorney; conservatorship; medical release forms; and advance directives for health care.¹⁷ The rights and obligations of the guardian include the right to make decisions concerning the ward's support, care, education, health, and welfare.¹⁸ The guardian at all times must "act as a fiduciary in the ward's best interest and exercise reasonable care, diligence, and prudence," as well as make reports to the probate court on a regular basis.¹⁹ While the legislature intended to grant guardians broad authority to make decisions and act on behalf of an adult ward, these powers are not without limits. Rather, the grant of powers and rights to the guardian is expressly made subject to orders of the probate court.²⁰

If a full guardianship is not required, a representative payee can receive and manage Social Security funds to pay for basic needs for the beneficiary, such as food, clothing, housing, and medical care.²¹ Leftover money must be placed in a savings account, and the representative payee must show a simple accounting of the funds.²² Parents, spouses, guardians, or friends can be a representative payee; but, unlike a guardianship, being a representative payee does not grant authority to execute binding contracts on behalf of the beneficiary.²³

Conservatorships can be helpful to individuals who struggle making financial decisions. Anyone, including the individual with the disability, can petition for the appointment of a conservator.²⁴ "The court may appoint a conservator for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible

16. O.C.G.A. § 29-4-21(a) (2007).

17. *See generally* O.C.G.A. § 29-4-22 (2004).

18. O.C.G.A. § 29-4-22(a) (2004).

19. *Id.*

20. *Id.*; O.C.G.A. § 29-4-23 (2011).

21. *A Guide for Representative Payees*, SOCIAL SECURITY ADMINISTRATION 3, <https://www.ssa.gov/pubs/EN-05-10076.pdf> (last visited Nov. 13, 2021).

22. Social Security Administration, *supra* note 21, at 6.

23. *Id.* at 2.

24. *See generally* O.C.G.A. § 29-5-2 (2004).

decisions concerning the management of his or her property.”²⁵ It is possible to petition for the appointment of a conservator with or without seeking a guardianship, and it is also possible for the court to appoint two different people as guardian and conservator. While most care is provided voluntarily and without pay by friends and families, 8% of disabled individuals require additional or alternative support and rely exclusively on paid assistance.²⁶ Regardless of the individual circumstances, understanding the maze of rules and qualifications for public benefits is essential in obtaining and keeping the benefits for the long-term care of disabled individuals.

IV. TAX-FREE SAVINGS ACCOUNT FOR INDIVIDUALS WITH DISABILITIES

On December 19, 2014, the Achieving a Better Life Experience (ABLE) Act²⁷ was signed into federal law.²⁸ ABLE legislation 529A is similar to 529 college savings plans. But, rather than saving for education, ABLE creates a savings account for individuals with disabilities.²⁹ The ABLE Act amends the Internal Revenue Code (IRC) to create tax-free savings accounts to alleviate the financial burdens for individuals with disabilities.³⁰ ABLE accounts allow disabled individuals the opportunity to maintain a bank account without jeopardizing eligibility for crucial federal benefits.³¹

Funds in an ABLE account may be used to pay for qualified expenses, such as medical care, housing, and transportation, among other expenses. ABLE accounts are intended to supplement, not supplant, benefits from other sources such as Medicaid and Social Security Insurance.³² Qualifying for an ABLE account requires proof of a condition that began prior to reaching age twenty-six.³³ Participants must also satisfy Title II and Title XVI of the Social Security Act Section 416(i)³⁴, which requires proof of an “inability to engage in any substantial gainful activity by reason of any medically determinable

25. O.C.G.A. § 29-5-1(a) (2019).

26. See Family Caregiver Alliance, *supra* note 4.

27. H.R. Res. 5711, 113th Cong. (2014) (enacted).

28. 26 U.S.C. § 529A (2018).

29. H.R. Res. 5711, Sec. 101.

30. See *ABLE Accounts-Tax Benefit for People with Disabilities*, IRS (Jul. 15, 2021), <https://www.irs.gov/government-entities/federal-state-local-governments/able-accounts-tax-benefit-for-people-with-disabilities>.

31. IRS, *supra* note 30.

32. O.C.G.A. § 30-9-2 (2016).

33. 26 U.S.C. § 529A(e)(1)(A) (2018).

34. 42 U.S.C. § 416(i) (2021).

physical or mental impairment which can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months.”³⁵ A disability is defined as a “medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, . . . or that has lasted or can be expected to last for a continuous period of not less than 12 months,” or is expected to result in death; which causes the child to not participate in any substantial gainful activity.³⁶

While anyone can contribute money into an ABLE account, each disabled individual can have only one ABLE account.³⁷ If the account owner dies with funds remaining in the ABLE account, those funds must be used to pay any outstanding Qualified Disability Expense (QDE) bills, including funeral expenses, and to reimburse Medicaid for all benefits received.³⁸ Any remaining funds can then be distributed to the account holder’s legal beneficiaries.³⁹ The federal ABLE Act authorizes individual states to administer their own ABLE programs.⁴⁰

Georgia’s ABLE program, launched in 2017, allows disabled individuals to maintain a tax-free bank account to pay for expenses related to their disability.⁴¹ These expenses include: basic living expenses; housing; healthcare; transportation; education; assistive technology; employment training; personal support services; legal fees; wellness; and financial management services.⁴² Subject to some restrictions, the balance in a Georgia ABLE account does not affect need-based financial aid such as Medicaid or Supplement Security Insurance. Georgia ABLE participants can choose from among five investment options, including four mutual fund-based investments and one savings option insured by the Federal Deposit Insurance Corporation (FDIC).⁴³ While ABLE accounts play an important role in the overall support for individuals with disabilities, they have limitations and are not intended to replace special needs trusts. Rather, the ABLE accounts should be one device among many as part of a comprehensive special needs plan.

35. *Id.*

36. 20 C.F.R. § 416.906 (2000) (defining disability for children); 20 C.F.R. § 416.905 (2012) (defining disability for adults); *see* 20 C.F.R. § 404.1505 (2012)(defining disability)

37. 26 U.S.C. § 529A(b) (2018).

38. 26 U.S.C. § 529A(f) (2018).

39. *Id.*

40. 26 U.S.C. § 529A(b)(1).

41. O.C.G.A. § 30-9-2.

42. 26 U.S.C. § 529A(e)(5) (2018).

43. O.C.G.A. §§ 30-9-8(b)–(c) (2016).

V. BENEFITS FOR DISABLED INDIVIDUALS

There are two primary types of government benefits available for disabled individuals—insurance-based benefits and welfare-based benefits. Insurance-based benefits are comprised of Social Security Disability Insurance (SSDI) and Medicare.⁴⁴ SSDI benefits are computed in quarters of coverage.⁴⁵ An individual has disability insured status when they have at least twenty credits during a forty-calendar quarter period, the “20/40 rule.”⁴⁶ The forty-calendar quarter period ends with the quarter that the individual is determined to be disabled.⁴⁷ Benefits may also be determined based on the record of a living parent through the Social Security Dependent’s Benefits program or on the record of a deceased parent through the Social Security Survivor’s Benefits program.⁴⁸ Children who become disabled before age twenty-two and have remained continuously disabled and unmarried may draw on their parents’ work records when the parent dies, retires, or becomes disabled themselves—but only if the parent has paid into the system.⁴⁹

Welfare-based benefits consist of Supplemental Security Income (SSI) and Medicaid. Unlike the insurance-based benefits, welfare-based programs place strict limits on eligibility based on an individual’s finances—including both their income and assets.⁵⁰ An individual is considered financially needy if income is limited and total “countable assets” do not exceed the established threshold.⁵¹ SSI is a federal welfare program established under Title XVI of the Social Security Act to provide assistance to older and disabled individuals who are financially needy.⁵² SSI pays a monthly income to impoverished individuals who are at least sixty-five years of age or are disabled.⁵³

44. See generally 42 U.S.C. § 423 (2020).

45. 42 U.S.C. § 423(a) (2020).

46. See *When Do You Have Disability Insured Status*, SOC. SEC. HANDBOOK, Sec. 207 (Aug. 9, 2005), https://www.ssa.gov/OP_Home/handbook/handbook.02/handbook-0207.html#:~:text=You%20have%20disability%20insured%20status%20if%20you%3A%201,that%20calendar%20quarter%20as%20explained%20in%20%EF%BF%BD%20203.

47. Soc. Sec. Handbook, *supra* note 46.

48. See *Benefits for Children*, SOCIAL SECURITY ADMINISTRATION (Jun. 2021), <https://www.ssa.gov/pubs/EN-05-10085.pdf>.

49. Social Security Administration, *supra* note 48.

50. See generally 42 U.S.C. § 1382 (2018).

51. See *2021 Medicaid Income and Resource Limits*, GA. MEDICAID <https://medicaid.georgia.gov/how-apply/basic-eligibility> (last visited Nov. 14, 2021).

52. 42 U.S.C. § 1381 (1972).

53. 42 U.S.C. § 1382(a) (2018).

As of 2020, this program ensured that such individuals received a minimum monthly income of \$783.00.⁵⁴ An individual qualifies as financially needy if “countable assets” do not exceed \$2,000.00 and an individual’s countable monthly income does not exceed \$794.00, or \$1,191.00 for couples.⁵⁵ Certain expenses related to the effect a disability has on an individual’s ability to work may be deducted when calculating the amount of SSI payments.⁵⁶ The Social Security Administration defines income—including gifts, inheritances, and earned or unearned cash—as “anything you receive in cash or in kind that you can use to meet your needs for food and shelter.”⁵⁷ SSI recipients in Georgia automatically become eligible for Medicaid benefits, but Medicaid is not limited only to SSI recipients.⁵⁸ Medicaid is a complex, joint program between the federal government and individual state governments which pays for essential healthcare for eligible individuals. While Congress establishes the eligibility standards, each state applies its own criterion. Georgia has multiple Medicaid programs, each with differing eligibility requirements and varying levels of coverage. Each Georgia program requires that the beneficiary be over age sixty-five, be disabled, and have no more than \$2,000.00 in countable resources.⁵⁹

VI. SPECIAL NEEDS PLANNING

The stakes are high in special needs planning as decisions made today considerably impact the lives of disabled individuals and their families for a lifetime. While disabled individuals often have access to funds from injury settlements, inheritances, or other sources, medical bills and essential expenses can ravage funds quickly. Special needs planning can preserve these funds without compromising eligibility for public benefits. Because eligibility rules for government benefit programs compete and occasionally conflict with one another, understanding the intricate regulations of public benefit policies is crucial in properly structuring a special needs trust. Whether establishing a first-party or third-party special needs trust, preserving current and future government benefits—namely Medicaid and SSI—is

54. See GA. Medicaid, *supra* note 51.

55. *Id.*

56. 42 U.S.C. § 1382(a)(1).

57. 20 C.F.R. § 416.1102 (2005).

58. *Medicaid ABCs*, GA. DEP’T OF CMTY. HEALTH, <https://dch.georgia.gov/medicaid-abcs> (last visited Nov. 14, 2021).

59. *Basic Eligibility*, GA. MEDICAID, <https://medicaid.georgia.gov/how-apply/basic-eligibility> (last visited Nov. 14, 2021).

crucial. A properly structured special needs trust will create and safeguard eligibility for public benefits, provide quality-of-life funds, and prolong the use of any available funds for the disabled individual, despite having assets that would otherwise disqualify these benefits.

Before special needs planning became widely utilized, disabled individuals relied primarily on family support and public benefits.⁶⁰ While public support programs pay for basic needs such as food, shelter, and medical care, they are not designed to provide or maintain quality-of-life services such as transportation, recreation, therapy, special equipment, or comfort items for beneficiaries.⁶¹ Prohibiting disabled individuals from supplementing public benefits with family funds became deleterious to beneficiaries and costly to agencies administering the benefits. This gap in care gave rise to special needs trusts. Special needs planning provides the critical infrastructure necessary to support disabled individuals and is important in many areas of law, including estate planning, elder law, special needs, family law, and personal injury, as issues arise for disabled individuals who receive an influx of funds from a settlement, inheritance, or gift. While the objective of special needs planning is not to preserve such funds indefinitely, it should endeavor to extend these funds to provide for disabled individuals without compromising eligibility for public benefits.

Special needs planning requires more than drafting a will or a trust. Planning requires both recognizing the potential need for a special needs trust for someone who may become eligible for any needs-based public benefits and avoiding the wrong type of special needs trust that may preclude future eligibility for benefits. Special needs trusts, also known as supplemental needs trusts, must be fully discretionary and irrevocable.⁶² In addition, special needs trusts should include language that conveys that the trust is intended to supplement, not supplant, public benefits.⁶³ Moreover, each special needs trust beneficiary must meet the Social Security Act's definition of disability, that is, an inability "to engage in substantial gainful activity (SGA) because of a medically determinable physical or mental impairment that is either:

60. See generally *World Report on Disability*, WHO 137 (2011), https://www.who.int/disabilities/world_report/2011/chapter5.pdf.

61. *Understanding Supplemental Security Income (SSI) Overview*, SOCIAL SECURITY ADMINISTRATION (2021), <https://www.ssa.gov/ssi/text-over-ussi.htm>.

62. Shana Siegel, *Understanding Special Needs Trusts*, THE NAT'L LAW REV. 1, 6 (Aug. 21, 2020), <https://www.natlawreview.com/article/understanding-special-needs-trusts>.

63. Siegel, *supra* note 62, at 4.

[e]xpected to result in death[,] [or] [h]as lasted, or is expected to last, for a continuous period of at least 12 months.”⁶⁴

As defined, “[w]ork is [deemed] ‘substantial’ if it involves doing significant physical or mental activities or a combination of both.”⁶⁵ “Gainful” work activity may include work performed on a full-time or part-time basis and can be of a nature generally performed “for profit, whether or not a profit is realized.”⁶⁶ Cash distributions made directly to the beneficiary of a special needs trust are treated by the Social Security Administration’s Program Operation Manual System (POMS) as “countable income.”⁶⁷ The trustee should not distribute cash to the beneficiary because doing so will reduce the beneficiary’s SSI payment and could render the beneficiary ineligible for Medicaid.⁶⁸

First-party and third-party trusts are usually lumped together as “special needs” trusts, but the two types differ for both tax purposes and benefit determinations.⁶⁹ First-party special needs trusts, also known as self-settled trusts, are funded with property belonging to a disabled individual often via the proceeds of litigation, inheritance, lottery winnings, divorce settlement, or sale of real property.⁷⁰ A first-party special needs trust can also be funded with the income or a brokerage account the disabled person established prior to this disability, but the beneficiary of the first-party trust must be under the age of sixty-five.⁷¹ In a case where a parent or guardian establishes a special needs trust funded with the settlement proceeds from a personal injury lawsuit or improperly directed inheritance, the disabled individual is nevertheless considered the grantor, thus making the trust a first-party trust.⁷²

Basically, a trust is self-settled if the beneficiary had the right to outright possession of the proceeds before the trust was established.⁷³ Self-settled special needs trusts must include a provision directing the

64. See *Red Book, How Do We Define Disability?*, SOC. SEC. ADMIN., <https://www.ssa.gov/redbook/eng/definedisability.htm?tl=0%2C1> (last visited Nov. 14, 2021).

65. Soc. Sec. Admin., *supra* note 64.

66. *Id.*

67. *Understanding Supplemental Security Income SSI Income*, SOCIAL SECURITY ADMINISTRATION (2021), <https://www.ssa.gov/ssi/text-income-ussi.htm>.

68. Social Security Administration, *supra* note 67.

69. Regan, *et. al.*, Tax, Estate & Financial Planning for the Elderly § 7.03[1] (2021).

70. Regan, *et. al.*, *supra* note 69, at § 7.03[2].

71. *Id.*

72. ADMINISTERING A SPECIAL NEEDS TRUST: A HANDBOOK FOR TRUSTEES, SPECIAL NEEDS ALLIANCE 6 (2021 ed.), <https://www.specialneedsalliance.org/wp-content/uploads/2021/03/SNA-2021-Handbook.pdf>.

73. SPECIAL NEEDS ALLIANCE, *supra* note 72, at 5.

trustee, if the trust contains any funds upon the death of the beneficiary, to repay the state Medicaid funds paid for the beneficiary.⁷⁴ Congress enacted 42 U.S.C. § 1396p(d)(4)(A),⁷⁵ allowing an individual to transfer assets that would otherwise disqualify him or her for public benefits into a first-party special needs trust without penalty.⁷⁶ First-party special needs trusts must be funded with the beneficiaries' assets for the sole benefit of the beneficiary.⁷⁷ Most importantly, the first-party special needs trust must include a payback provision stating that upon the death of the beneficiary, the trustee will notify and reimburse Medicaid from any money remaining in the trust payments to the beneficiary.⁷⁸

First-party trusts are often created following an event such as a settlement from an injury.⁷⁹ Funds left to a disabled grandchild can trigger implications and should be moved into a first-party special needs trust. Likewise, inheritance should go into a first-party trust rather than directly to a disabled person. Individuals who have worked and developed a disability later in life may have assets that would disqualify them from public benefits unless transferred into a first-party trust.⁸⁰ Child support from divorce decree or settlement that becomes money belonging to the child can also be put into a first-party special needs trust.⁸¹

While a payback provision is essential in a first-party trust, a payback provision should not be included in a third-party trust.⁸² Third-party trusts funded with third-party assets must be approved by Medicaid. For this reason, an *inter vivos* third-party special needs trust is a better choice than a testamentary third-party special needs trust because the testamentary trust cannot be approved until after death of grantor.⁸³ A third-party trust has no beneficiary age restrictions and is a viable planning tool for parents of children of any age who have disabilities.⁸⁴

74. *Id.* at 5–6.

75. 42 U.S.C. § 1396p(d)(4)(A)(2018).

76. 42 U.S.C. § 1396p(d)(4)(C)(2018).

77. *Id.*

78. *Id.*

79. SPECIAL NEEDS ALLIANCE, *supra* note 72, at 4.

80. *Program Operations Manual System (POMS)-SI 01120.203*, SOCIAL SECURITY ADMINISTRATION (Nov. 9, 2021), <https://secure.ssa.gov/poms.nsf/lnx/0501120203>.

81. See SPECIAL NEEDS ALLIANCE, *supra* note 72, at 5–6.

82. Regan, *et. al.*, *supra* note 69, at § 7.02[2].

83. *Id.*

84. *Id.*

The third-party trust is also a good choice for a disabled spouse, especially in the case of Alzheimer's. In some cases, pooled special needs trusts are the best option.⁸⁵ These trusts are separate accounts maintained by a non-profit association for the sole benefit of each individual disabled beneficiary.⁸⁶ Assets are pooled for investing and management purposes.⁸⁷ Pooled trusts are ideal for individuals who either require a special needs trust but do not have adequate funds to justify a professional fiduciary or who may not have a trustee to appoint. A disabled person can establish a first-party or third-party pooled special needs trust, though a first-party account must be funded with assets of an individual who is less than sixty-five years of age and can only be established by a parent, grandparent, court, legal guardian, or by the beneficiary himself—if he is competent to do so—or by the beneficiary's agent on his behalf.⁸⁸ Rather than signing a trust agreement, an individual would sign a joinder agreement to join into the trust.

First-party pooled trusts are restricted to individuals under the age of sixty-five because Georgia imposes a transfer penalty if the person is sixty-five or older. There is no age restriction or payback requirement for third-party pooled trusts.

VII. CONCLUSION

It is imperative to underscore the gravity of comprehensive financial and estate planning strategies to maximize government benefits in the lives of disabled individuals. Adults who are faced with caring for both elderly parents and children with disabilities struggle with a financial, personal, and logistical squeeze. Assisting these clients to maximize government benefits for both aging parents and children with special needs can preserve any generational wealth which can be used to enhance quality of life and experiences. The challenge lies in planning for the long-term care of both generations due to a myriad of factors, including inflation and changes in the law and tax code, along with the practical difficulties related to planning for the care of a disabled child long after parents are gone. A well-devised comprehensive estate plan and adequate nest egg that assure a loved one will be cared for is a priority for families facing this situation.

As discussed in this Article, attorneys practicing in this space should continuously study changes in the law, the tax code, and the eligibility

85. Regan, *et. al.*, *supra* note 69, at §§ 7.03[4], 7.04[2].

86. *Id.* at § 7.03[4].

87. 42 U.S.C. § 1396p(d)(4)(C)(ii) (2018).

88. Regan, *et. al.*, *supra* note 69, at § 7.03[2].

of public benefits. Unfortunately, there are likely looming changes to the tax code. Although the specifics of the changes are uncertain, an increase in tax revenue is almost guaranteed, given current government spending. Major changes to the tax code could erase substantial wealth from middle class families, which will affect a large percentage of individuals facing the circumstances discussed in this Article. Special needs planning is vitally important to individuals and families and requires a thorough and comprehensive assessment of each individual's personal needs for long-term care. With a robust knowledge of the laws and regulations regarding public benefits, attorneys can have a meaningful impact on ensuring a better quality of life for individuals with disabilities.