

**TRANSITIONING THE SPECIAL NEEDS CHILD
TO ADULTHOOD:
FROM NAVIGATING SSI TO SPECIAL NEEDS TRUSTS**

Presented by:

HON. OSCAR KAZEN, *San Antonio*
Judge, Bexar County Probate Court 1

Written and Presented by:

KAREN L. MARVEL, *San Antonio*
Marvel & Wong, PLLC

Co-authors:

BRANDON J. WONG
MEGAN R. MEYERSON
Marvel & Wong, PLLC
San Antonio

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CHAPTER 29

Oscar Kazen

Judge / Bexar County Probate Court No. 1

Judge Oscar J. Kazen is the Presiding Judge of Bexar County Probate Court 1 and previously served as Associate Probate Judge for Bexar County Probate Court 1.

Shortly after his appointment, in 2007, he realized his passion for helping individuals with mental illness in the justice system. Judge Kazen created, and oversaw, the implementation of the first fully-operational civil AOT court in Texas, serving as the intersection between the law and treatment of individuals with serious mental illness, in a 52-county area.

This court has served as a national model, saving lives and lessening the suffering of those with serious mental illness by offering an alternative to hospitalization. Prior to his appointment as an associate probate judge, he served as presiding judge of Bexar County Court at Law No. 9 and was a managing partner of Kazen & Robberson.

Judge Kazen earned his J.D. from Thurgood Marshall School of Law and his B.A. from The University of Texas. Before attending college, Judge Kazen served in the United States Marine Corp. He is married to Melissa.

Karen L. Marvel

Marvel & Wong, PLLC

Tower Life Building

310 S. Saint Mary's Street, Suite 1010

San Antonio, TX 78205-0003

T 210-201-3832 F 210-446-3822

E Karen@mwfamilylaw.com W www.mwfamilylaw.com

LICENSE & MEMBERSHIPS

Attorney and Counselor at Law, Texas, 1987

Board Certified - Family Law, Texas Board of Legal Specialization 2008 - present

State Bar of Texas & Family Law Section

Board of Directors, Family Law Section of San Antonio Bar Association, 2002 - 2010;

President, 2007-2008

Texas Academy of Family Law Specialists - 2009 - present

Texas Family Law Foundation - Legislative Review Committee: 2009, 2011; 2013

San Antonio Family Lawyer's Association, Board of Directors 2011- 2012; President 2013-'14

College of the State Bar of Texas - 2012 - present

EDUCATION

J.D., Texas Tech University School of Law, 1987

B.A. in English (Writing) and Psychology, McMurry University, Abilene, TX 1984

HONORS/RECOGNITIONS

Texas Super Lawyers 2008 - present Family Law

San Antonio's Best Lawyers - Family Law, Scene in SA magazine 2007 - present

Texas Honorary Life Member, Harmony Hills Elementary PTA, 2010

SELECTED PUBLICATIONS & PRESENTATIONS (Author, Co-Author, Presenter)

Attorney General Special Collections Unit & the Mysteries Contained Therein, 44th Advanced Family Law Course, 2018

Child Support Collection/Liens: Creative Forms & Concepts, Advanced Family Law Drafting, 2017

When Your Good Deed Goes Bad - How Child Support for an Adult Child with a Disability Can Reduce SSI Benefits (and How to Fix It), State Bar Family Law Section Report, Fall 2017

Child Support Enforcement - It Only Takes One, 41st Advanced Family Law Course, 2015

All Things Enforcement, 41st Advanced Family Law Course Associate Judge's Workshop, 2015

Acknowledged contributor, *O'Connor's Family Law Handbook 2009; 2010* (Jones-McClure)

Essay featured in *Women Attorneys Speak Out!* by Judi Craig, Ph.D., MCC, (Thomson-West 2008)

Creative Ways to Collect & Defend Child Support Claims, 2009 Marriage Dissolution Institute

(selected by Pro Bono Project of Texas Bar Family Law Section for distribution in *Family Law Essentials*)

Creative Ways to Collect & Enforce Child Support Claims, 2009 State Bar College Summer School (selected by Texas Bar CLE for rebroadcast as part of "Best of 2009" series)

Child Support Workshop (with Frederick Adams, David Farr & Hon. Marilea Lewis), 35th Advanced Family Law Course, 2009

Child Support & the Special Needs Child, 2012 State Bar College Summer School

Creative Ways to Set Child Support, 2011 State Bar College Summer School

Creative Ways to Enforce Child Support Claims, 2010 State Bar College Summer School

Judicial & Administrative Remedies for Enforcing Child Support, 2010 Texas Academy of Family Law Specialists Trial Institute

Caution! Watch Out for Acronyms on the Interstate Case Highway, 2010 UT Parent-Child Relationships:

Critical Thinking for Critical Issues

Obtaining Child Support, 2009 UT Parent Child Relationships: Critical Thinking for Critical Issues

Unique Child Support Remedies Webcast, paper author and panelist, 2009, State Bar of Texas

Trial Treasures in Tampa, Trial Brief Author & planning committee, 2009, Texas Academy of Family Law Specialists Trial Institute

Dealing with Children with Special Needs; 2008 Marriage Dissolution Institute

Setting & Collecting Child Support; 2007 State Bar of Texas Annual Meeting

State Bar Pro Bono Law Project Speaker: 9/2005 Eagle Pass; 6/2007 Kerrville; 9/2007 Big Spring, 9/2010, Kingsville; 8/2012 Corpus Christi

SELECTED SIGNIFICANT CASES

Granado v. Meza, 398 S.W.3d 193 (Tex. 2013) [clerical error by Attorney General does not relieve obligor of child support obligation]

In Re M.C.C., 142 S.W.3d 504 (Tex. 2006) [legislative amendments to statutes apply prospectively; interest rate on child support is rate in effect at time obligation accrued until 1/1/2002, thereafter 6% simple interest on all balances not reduced to money judgment]

Holmes v. Williams, 355 S.W.3d 215 (Tex. App. – Houston [1st Dist.] 2011, no pet.) [child support lien 157.323 can be used to establish arrears when court loses jurisdiction under 157.005 to enter cumulative money judgment]

In the Interest of S.C.S. 48 S.W.3d 831 (Tex. App.–Houston [14th Dist.] 2001) pet. denied *per curiam, sub. nom. Sprouse v. Sprouse*, 92 S.W.3d 502 (Tex. 2002) [time periods for securing child support judgments are jurisdictional – legislature may extend time for a remedy]

In the Interest of D.T., No. 12-05-00420-CV, 2007 WL 4465250 (Tex. App.– Tyler 2007, no pet.) [child support lien reaches community property retirement of new spouse when lien was perfected before divorce and new spouse does not raise evidence of his/her interest]

COMMUNITY ACTIVITIES

Band Parents Association of Winston Churchill HS Vice President – Corporate Fundraising 2016-2018
First Presbyterian Church, San Antonio, Godly Play Teacher 2005-present; JOY Ministry; Shawl Ministry (Circle 5); Deacon on Rotation

Eisenhower MS PTA, Executive Board, 2011-2014

Harmony Hills Elementary PTA, San Antonio, 3rd VP, 2010-2011

Autism Society of Greater San Antonio, Board Member, volunteer General Counsel 2005 - 2008

GOLD Youth Leadership Foundation (Giving Opportunities for Leadership Development), Program Chair 2003, Board of Directors, 2003- 2006, general counsel to non-profit corporation

Hugh O'Brian Youth Leadership, West Texas Leadership Seminar, leadership training program for high school sophomores: Senior Staff, 1992-2002; Corporate Board 1994-2002; President of Board 1994-1999

Megan R. Meyerson

Marvel & Wong, PLLC

310 S. St. Mary's Street, Suite 1010, San Antonio, TX 78205

megan@mwfamilylaw.com · 210-446-1211

LICENSES

Texas, Attorney and Counselor at Law, 2018

EDUCATION

University of Nebraska College of Law Conferred: 5/2018

Juris Doctor, with Distinction

Pro Bono Certificate, Silver level (53 hours completed)

Nebraska Wesleyan University Conferred 5/2013

Bachelor of Arts

Major: K-12 Spanish Education

LANGUAGES

Spanish; Portuguese

EXPERIENCE

Marvel & Wong, PLLC 05/2018–Present

Associate Attorney practicing family law

University of Nebraska General Counsel 04/2017–04/2018

Assisted associate general counsel in researching a large variety of legal issues including education, civil rights, contract, property, and immigration law

University of Nebraska Civil Clinic – Senior Certified Law Student 01/2018-05/2018

Represented low-income citizens, seniors, and veterans in a wide variety of civil and administrative cases

Department of Justice Executive Office of Immigration Review – Extern 01/2017–05/2017

Evaluated cases, prepared, edited, and proofread judicial opinions

Lancaster County Public Defender's Office – Law Clerk 02/2016–04/2017

Fulbright Scholar – English Teaching Assistant 02/2014–11/2014

PUBLICATIONS

Attorney General Special Collections Unit & the Mysteries Contained Therein (with Karen L. Marvel), 44th Advanced Family Law Course, 2018

Beyond the 'To Be' Syndrome - Co-author Published: 2015

HONORS

CALI Excellence for the Future Recipient – Civil Clinic 05/2018

The "CALI award" is given to the student with the highest performing student in a class

INADR 2018 International Law School Mediation Tournament 02/2018

Recipient of "Spirit of Mediation" Award voted on by competitors

University of Nebraska Client Counseling Competition Champion – 2018

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TRANSITIONING THE SPECIAL NEEDS CHILD TO ADULTHOOD: FROM NAVIGATING SSI TO SPECIAL NEEDS TRUSTS

1) SCOPE OF ARTICLE.

This article addresses the issues family law lawyers face when the child in the case is 18 or older but has a physical or intellectual disability that limits the child's ability to act independently and be self-sufficient. For purposes of this article, "child" refers to a person over 18 who is subject to the continuing jurisdiction of the court as the result of a SAPCR. This article will discuss possession and access, child support and when the probate court jumps into the fray. This article will not discuss the mechanics of applying for Supplemental Security Income (SSI) as there are many articles and online references available.

2) ACKNOWLEDGEMENTS.

Thanks to Gary Ashmore for permitting the use of his article, *Drop Me off at the Probate Court on My Way to Family Court: The Overlap Between These Two Areas of Law* (Ashmore, Gary; Peters, Lori Ashmore; and Nikolopoulos, Andy) prepared and presented for the April, 2011 Texas College for Judicial Studies seminar. Also, the works of Wesley Wright, Keith Maples and Pi-Yi Mayo at previous CLE courses are cited here. The child support section was adapted from an article published in the Family Law Section Report, Fall 2016. (Marvel, Karen; Wong, Brandon; Rojo, Carmen; and Schooler, Diann Hanson, *When Your Good Deed Goes Bad - How Child Support for an Adult Child with a Disability Can Reduce SSI Benefits (and How to Fix It)*).

3) POSSESSION AND ACCESS FOR THE ADULT DISABLED CHILD.

a) Applicable Statutes.

POSSESSION OF OR ACCESS TO ADULT DISABLED CHILD. (a) A court may render an order for the possession of or access to an adult disabled child that is appropriate under the circumstances.

(b) Possession of or access to an adult disabled child is enforceable in the manner provided by Chapter 157. An adult disabled child may refuse possession or access if the adult disabled child is mentally competent.¹

No cases interpret this statute. The term "mentally competent" is not defined by the Texas Family Code. The only reference to competency falls under Chapter 55, in Title 3 (Juvenile Justice Code), that states a child with an intellectual disability who "lacks capacity to understand the proceedings in juvenile court or to assist in the child's own defense is unfit to proceed" for a determination in a criminal matter.²

There are some additional helpful definitions. The Health and Safety Code states "'intellectual disability' means significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."³ An additional definition states mental illness is "an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior."⁴ The Estates Code expands and tries to cover all the bases with this definition of an incapacitated person: "In this code or any other law, a reference to any of the following means an incapacitated person:

- (1) a person who is mentally, physically, or legally incompetent;
- (2) a person who is judicially declared incompetent;
- (3) an incompetent or an incompetent person;
- (4) a person of unsound mind; or
- (5) a habitual drunkard."⁵

The Estates Code states the criteria for a guardianship of the person. "(a) Before appointing a guardian for a proposed ward, the court must: (1) find by clear and convincing evidence that: (A) the proposed ward is an incapacitated person.⁶ And an "incapacitated person" under the Estates Code also "means:

...

- (2) an adult who, because of a physical or mental condition, is substantially unable to:
 - (A) provide food, clothing, or shelter for himself or herself;
 - (B) care for the person's own physical health; or
 - (C) manage the person's own financial affairs. . . ."⁷

¹ TEX. FAM. CODE §154.309.

² TEX. FAM. CODE §55.31.

³ TEX. HEALTH & SAFETY CODE §591.003(7-a).

⁴ TEX. HEALTH & SAFETY CODE §571.003(14).

⁵ TEX. ESTATES CODE §1001.003.

⁶ TEX. ESTATES CODE §1101.101(a)(1)(A).

⁷ TEX. ESTATES CODE §1001.003.

b) Analysis

i) Mentally Competent.

In many cases “mentally competent” can be ascertained on its face. A child with a diagnosis of severe intellectual disability who has the approximate mental age and judgment of a ten year old would not be presumed to be “mentally competent” although the child attends day habilitation or camps and even holds a job with a job coach or supported employment. But the child with cerebral palsy, non-verbal and wheelchair bound, may possess average or higher intelligence and although eligible for child support, can also make their own decisions about how s/he spends their time.

ii) Nothing is Black & White.

As always, the cases that demand litigation fall closer to the edges. In the absence of a guardianship, (which requires a finding that the child is incapacitated), the court must presume the child is competent to make decisions about possession and access. If there are disagreements between the parents, a court can hear testimony from the child. But no judge wants to hear from a child from the witness stand – even if the child is an adult. Instead, file a motion to have the court interview the child in chambers to ascertain preferences on possession and access as provided for children under the age of 18.⁸ Other evidence to present to the court includes the child’s Individualized Education Program (IEP) prepared at the public school that gives an overview of the child’s strengths and weaknesses. While the IEP focuses on the educational needs of the child, it necessarily includes evaluations of the child’s overall functional abilities and often includes IQ testing or other developmental assessments. Use the IEP to support your position on the child’s best interest for possession and access.

4) CHILD SUPPORT FOR A DISABLED CHILD

The Texas Family Code provides that child support can be payable if a child is incapable of self-support resulting from a physical or mental disability known to exist before the termination of the child support obligation.⁹ This child support paid by a parent supplements a vast web of state and federal aid, some with 12 year waiting lists for acceptance, that are

intended to help disabled individuals and their families.¹⁰ A continuing child support payment through a court order can actually eliminate an adult child’s eligibility for SSI and Medicaid. However, a properly crafted order and the use of other mechanisms including special needs trusts preserve the child’s eligibility and allows payments to maintain the standard of living and meet the child’s needs.¹¹

a) Case Study

Melissa and Fabian divorced in 2010 and have one child, Crystal, born in 2010. Crystal has cerebral palsy along with some intellectual disabilities and is now, as of last year, crutch dependent. Crystal functions at a 13-year old level with no expected change. Crystal turned 18 and completed high school programs in June, 2018. Melissa earns \$60,000 a year and Fabian earns \$180,000. Crystal was not eligible for SSI or Medicaid as a minor based on her parents’ income. The day she turned 18, Crystal qualified for SSI and Medicaid. Melissa applied for SSI a few months before Crystal’s birthday so the benefits began August, 2018 per SSI regulations. In January of 2018 Melissa and Fabian modified the child support order (by agreement, without using lawyers) to continue at \$1,710 monthly so long as Crystal lived. Melissa and Fabian also agreed to name Melissa as guardian of Crystal’s person and estate, which was granted by the probate court shortly after Crystal’s 18th birthday. Crystal enrolled in her school district’s post high school program for disabled students, where she works on life skills. She can stay there through her 22nd birthday and will be awarded her high school diploma then.

When Melissa submitted her court orders to the Social Security Administration (SSA) as required, SSA informed Melissa the child support she received from Fabian counted as income to Crystal and the offset from Crystal’s “income” reduced Crystal’s SSI payment to zero. Crystal is a “head of household” adult for purposes of SSI even though she lives with Melissa. Under SSA regulations and federal preemption, Crystal is the recipient of the child support despite the language of the court order, the statutory construction of the Texas Family Code and the guardianship. This finding also made Crystal ineligible for Medicaid.¹²

⁸ TEX. FAM. CODE § 153.009(b) (court may interview child in chambers on preferences for possession and access.)

⁹ Tex. Fam. Code §154.302(a).

¹⁰ For example, as of 12/31/2018, over 70,000 disabled Texans (children and adults) remain on a waiting list for CLASS benefits, which provides funds for respite care, case management, adaptive aids and minor home modifications. These benefits supplement Medicaid and/or SSI and are part of state funded services. <https://www.hhs.texas.gov> (last accessed 07/24/2019)

¹¹ The authors thank Pi-Yi Mayo, Baytown and Keith D. Maples, Dallas, for their previous work and articles in this area of law. Wesley Wright’s article cited below was also a great resource on Special Needs Trusts.

¹² Program Operations Manual for Social Security Administration SI 00830.420. Link at <https://secure.ssa.gov/poms.nsf/lnx/0500830420> last viewed 07/24/2019.

Melissa walks into your office, distraught and angry, she needs lots of solutions in a short amount of time. She has already been told by her neighborhood Attorney General office they cannot fix her problem. She believes Fabian will agree to work out something. She is hoping for a miracle. Do you have one?

b) Analysis: How SSI and Medicaid Work

Supplemental Security Income (SSI) is a program funded through the Social Security Administration (SSA) for individuals who do not qualify for social security disability insurance benefits, are blind or are disabled.¹³ Several variables determine whether the child will be awarded SSI before the age of 18. Those typically include parents' income levels and the severity of the child's disability. When the child turns 18, the SSA considers the child's income only and looks at the child's disability to determine eligibility. The criteria for eligibility is a medically determinable physical or mental impairment (including an emotional or learning problem) which: results in the inability to do any substantial gainful activity; and 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.¹⁴

In Texas, if the adult child qualifies for SSI, the child also qualifies for Medicaid coverage, which provides many advantages to the child, depending on the level of disability.¹⁵ One of the advantages of Medicaid is almost all medical care is provided at no cost to the recipient. The disadvantage is that fewer doctors accept Medicaid, especially in rural areas. That means treatment options, especially in mental health, are limited or scarce. Medicaid is a state administered program with funding from both the federal and state government.¹⁶ In this day and age of high deductibles and vanishing policies, Medicaid is a godsend to many parents – particularly those who have children requiring medical treatment for chronic conditions.

c) Using a Special Needs Trust to Protect Medicaid Benefits and Keep Child Support

A Special Needs Trust (SNT) generally provides the protection Melissa needs to shelter Crystal's child support and maintain Crystal's eligibility for SSI, but, more importantly, the protection and benefit of Medicaid. In Crystal's case, her physical condition continues to deteriorate. Special needs trusts can provide the additional necessities and extras for a disabled individual as government benefits, by design, only provide for basic food, shelter and health care.¹⁷

There are three types of special needs trusts that could benefit Melissa and Crystal.

i) First-Party Special Needs Trust.

The first type of special needs trust is referred to as a "first-party special needs trust." A first-party trust holds assets that belong to the person with special needs, such as an inheritance or an accident settlement, so that the individual may still qualify for Medicaid.¹⁸ Importantly, all assets in the trust are property of the beneficiary. To qualify for a first-party trust, the beneficiary must be under the age of 65 and disabled; the trust must be created by a parent, grandparent, guardian, or a court; the state paying Medicaid benefits must be designated as the primary beneficiary of the trust; and the assets in the trust may be used only for the benefit of the Medicaid beneficiary.¹⁹

While first-party trusts are helpful for an individual with disabilities to remain eligible for Medicaid benefits, it does have its downfalls. First, only resources may be placed in a special needs trust, not income. Second, if the trust remains in effect after the individual turns 65, the assets in the trust will be subject to Medicaid transfer penalty rules such as the five year look back period. Finally, and perhaps most importantly, first-party trusts are subject to Medicaid "payback" provisions, meaning upon death of the beneficiary, the assets of the first-party trust are required to be used to reimburse the government for Medicaid

¹³ A great deal of confusion abounds from the two programs in Social Security for the disabled. SSI is a subsistence program that pays a minimal amount for individuals who never worked or minimally worked. 42 U.S.C. §1381. Social Security Disability Insurance Program (SSDI) pays benefits to a worker [and sometimes dependents] who become disabled after working and earning quarters in the system. <https://secure.ssa.gov/apps10/poms.nsf/lnx/0400115001>. Last viewed 07/24/2019. SSDI is scaled based on a person's earnings. SSI is the same for all.

¹⁴ 7 42 U.S.C. §1382c(a)(3).

¹⁵

<https://secure.ssa.gov/apps10/poms.nsf/lnx/050173000>

9DAL (Texas agreement with SSA for Medicaid) last viewed 07/24/2019.

¹⁶ Maples, Keith D. & Mayo, Pi-Yi, Child Support for Children with Disabilities, 36th Annual Advanced Family Law Course, State Bar of Texas 2010, Ch. 44, p. 3

¹⁷ Wright, Wesley E. The ABCs of SNT's: Introducing Special Needs Trusts, 2015 State Bar College Summer School, State Bar of Texas, Ch. 25, p. 1 (hereafter Wright).

¹⁸ *Id.*

¹⁹ *Id.*

expenses incurred by the beneficiary when he or she passes away.²⁰

Why would people use a trust that gives money to the government? Self-settled trusts are generally used to avoid a period of ineligibility for Medicaid benefits when a party has a large amount of personal resources from a tort recovery or an inheritance. While that trust may be available here, it is most likely not the best vehicle for the particular facts of this case.

ii) Pooled Special Needs Trust.

The second option is a pooled special needs trust. The pooled trust is managed by a third party organization. The most popular is the ARC of Texas, which has online forms and staff members who can assist with the creation of this trust.²¹ A pooled trust can be self-settled or set up by a third party (see below). The pooled trust allows for lower management fees and asset aggregation, especially with modest trust assets. When the beneficiary dies, if self-settled, it works like a self-settled trust and monies owed to Medicaid are recouped before any refund is given to the family. But there is some dispute on disposition of the remainder upon death if the trust is third party funded which is beyond the scope of this article.²²

iii) Third Party Special Needs Trust.

A third-party trust is funded with the assets of the third party, typically the parents or other family members, not the beneficiary of the trust.²³ The assets held in trust may include a house, stocks, bonds, and other types of investments.²⁴ Since third-party trusts do not contain assets of the beneficiary, and therefore the only requirement is that the distribution of the trust assets be in the sole discretion of the trustee, and no beneficiary may demand distribution.²⁵

There are many positives to third-party trusts, one of the biggest being the absence of a Medicaid “payback” provision. Because third-party trusts are not statutory, when the beneficiary with special needs dies, any funds remaining in the trust can pass to other family members without having to be used to reimburse the government for Medicaid expenses.²⁶ Another positive to third-party trusts is the complete freedom of the trustee to disburse funds to the beneficiary for supplemental needs beyond those covered by

government benefits. However, while this third-party freedom sounds ideal in theory, this freedom may defeat the very purpose of the trust when put in action. For example, if a trustee deposits funds into the third-party trust and freely distributes to the individual with disabilities without regard to amount disbursed, the well-intentioned third-party trustee may inadvertently cause the individual with disabilities to become ineligible for Medicaid. For this reason, it is very important that family members take care in determining who the trustee is, and whether the selected trustee has the time and initiative to educate themselves about the Medicaid eligibility requirements.

iv) Overview of Use of Special Needs Trusts.

Although the funding mechanisms differ, the operation of the trusts work the same. The trustee can pay funds directly to vendors for the benefit of the beneficiary for certain items such as housing or a vehicle. The trust CANNOT pay funds directly to Melissa (see exception below) or to Crystal without Crystal losing SSI eligibility. Here are some things the trust can do:²⁷

1. Trustee can buy or lease a property and charge rent (or not) for the beneficiary to live in the property. Trustee pays the mortgage company or lessor directly from the trust without the money coming into Melissa’s or Crystal’s hands.
2. Purchase a vehicle for Melissa to use in transporting Crystal. Trustee pays the finance company directly. It can also pay for gasoline, oil, insurance and maintenance.
3. Additional medical and supportive services not covered by Medicaid or state programs (such as CLASS, HBA or MDCP).²⁸
4. Pay Melissa or a third party for attendant care under a contract for a reasonable wage.
5. Pay for dental work not covered by Medicaid.
6. Fund educational or vocational services for Crystal.
7. Purchase a computer, internet services, telephone and utility.
8. Pay for recreation and short-term vacations.
9. Buy fitness equipment or gym membership.

²⁰ Wright, W. p. 2.

²¹ <https://www.thearcoftexas.org/trust/> (last accessed 7/24/2019); TEX. ESTATES CODE, chap. 1302, *et. seq.*

²² Wright, W. p. 3.

²³ When a Special Needs Trust is Not the Only or Best Choice (2019), <http://www.disabilityresource.org/41-when-a-special-needs-trust-is-not-the-only-or-best-choice> (last visited June 23 ,2019).

²⁴ *Id* at 10.

²⁵ Wright, W., p. 4, 23.

²⁶ *Id.* at 10.

²⁷ Wright, W. p. 42.

²⁸ The state programs available in Texas can be found at <http://www.dads.state.tx.us/services/listofservices.html#physical> (last accessed 7/24/2019).

10. Pay vendors for personal services for Crystal like lawn mowing, haircuts, grocery shopping.
11. Buy pets and pet supplies.

Here is a list of what the **trust cannot do**:²⁹

1. Pay the mortgage for an existing property in Melissa's name.
2. Buy food.
3. Pay real estate taxes.
4. Pay rent.
5. Pay gas, electricity, water and sewer monthly payments.
6. Buy PMI insurance required by mortgage company.

If the trust pays for these items, the results to Crystal would be a 1/3 reduction in SSI benefits for the month when these items were paid.

d) The Decision.

Special needs trusts can be expensive to create and maintain. In this case, Melissa and Crystal may be best served by joining the ARC pooled special needs trust and directing that the child support pay for items for Crystal. The trust could lease a house and car for Crystal's benefit in the name of the trust.³⁰ Some people feel that using the ARC removes their control of money that rightfully belongs to the person or their child. Each family must carefully evaluate and weigh the cost and time involved with establishing and managing a trust. Wright recommends someone other than a family member be named as trustee, adding additional cost and paper-work to the third party trust.³¹

e) Legislative Update.

Effective 9/1/2019, child support payments made to a special needs trust shall be made directly to the trust without being paid through the State Disbursement Unit. However, this change only applies to a non-Title IV-D (Texas Attorney General) case. If the Attorney General is a party, payments for the trust can be set up to be paid to the child support obligee, in care of the State Disbursement Unit.³²

5) USING AN ABLE ACCOUNT.

a) Overview.

Achieving a Better Life Experience accounts, or ABLE accounts, are tax advantage savings accounts for individuals with disabilities and their families. ABLE accounts were created as a result of the 2014 ABLE Act for the purpose of providing an additional means for people with disabilities to provide for basic needs such as income, health care, food, and housing. The ABLE Act is intended to encourage and assist individuals with disabilities to maintain health, independence, and quality of life, and to "provide secure funding for disability-related expenses of beneficiaries with disabilities that will supplement, but not supplant, benefits provided through private insurance, title XVI (Supplemental Security Income) and title XIX (Medicaid) of the Social Security Act, the beneficiary's employment, and other sources."³³ Contrary to SSI, SNAP, and Medicaid's requirement that beneficiaries may have no more than \$2,000 in assets to remain eligible, the ABLE Act raises that bar to \$100,000.³⁴

While SSI, SNAP, and Medicaid are indispensable for people with disabilities, these programs operate in a way that tends to require the beneficiary to remain living well below the poverty line. To counter this unfortunate reality, ABLE Accounts permit funds to be deposited by any person in any amount up to \$15,000 annually.³⁵ The balance of the ABLE account may continue to grow to \$100,000 before its balance has any effect on eligibility for SSI. When the \$100,000 exemption threshold is met, the beneficiaries SSI cash benefit will be suspended until the balance again falls below \$100,000. Despite the effects an ABLE account may have on SSI when the balance reaches \$100,000, the beneficiary will remain eligible to receive medical assistance through Medicaid.³⁶

It is important to note that while a deposit into an ABLE account made by the beneficiary is not taxed, a deposit made by any other person is *not* tax deductible. However, the breadth of uses for funds in an ABLE Account provides extreme flexibility to the beneficiary and his or her family. Specifically, the balance in the ABLE Account may be used for any expense related to the designated beneficiary as a result of living with a disability, including the beneficiary's education, housing, transportation, employment training and support, assistive technology, personal support services,

²⁹ 17 <https://secure.ssa.gov/poms.nsf/lnx/0500835300>.

³⁰ <https://www.thearcoftexas.org/trust/>

³¹ Wright, W., p. 36.

³² TEX. FAM. CODE §§234.001; 234.007.

³³ ABLE Act, §101

³⁴ ABLE Act, § 103

³⁵ Total annual contributions for ABLE Accounts are determined by State and align with the with 529 savings account limitations. In Texas, that amount is \$15,000 annually.

³⁶ Crenshaw & Ander, Text - H.R.647 - 113th Congress (2013-2014): ABLE Act of 2014 Congress.gov (2015), <https://www.congress.gov/bill/113th-congress/house-bill/647/text> (last visited Jun 23, 2019).

health care expenses, prevention and wellness, financial management and administrative services, legal fees, expenses for oversight and monitoring, funeral and burial expenses, and any other expense which helps to improve the beneficiary's health, independence, and/or quality of life.³⁷

b) Who is Eligible for ABLE Accounts?

An eligible individual is any individual with a significant disability with an age of onset of disability before turning 26 years of age.³⁸ While a "severe" disability can be highly fact dependent, the Social Security Administration typically considers whether the individual's condition significantly interferes with the individual's normal activities of daily living, ability or inability to engage in work activity, and for children, the child's ability to engage in age-appropriate activities.³⁹ Furthermore, the Social Security Administration will consider whether the condition has lasted at least 12 months, whether it imposes enough physical or mental limitations, or both, that it eliminates the claimant's ability to go back to one of their former jobs, and whether it is severe enough that the claimant cannot be expected to use their education and work skills, and remaining functional abilities, to do some type of other work.⁴⁰

An individual above the age of 26 may still qualify as long as the disabling condition occurred prior to the individual's 26th birthday. If an individual wishing to open an ABLE account meets both terms of eligibility and is already receiving SSI and/or SSDI, the individual is automatically eligible to establish an ABLE account. However, if an individual meets the age requirement but is not a recipient of SSI and/or SSDI, that individual may still be eligible to open an ABLE account if the individual can provide proof that they meet the Social Security Administration's criteria for significant functional disability, and the individual receives a letter of certification from a licensed physician.⁴¹

Finally, an individual who is eligible to open an ABLE account must be able to make an initial minimum contribution of \$50, an annual minimum contribution of \$25, and pay the annual fee of \$48 per year.

c) Analysis: ABLE Accounts vs. Special Needs Trusts – Which is Better for my Client?

Whether an ABLE Account or a Special Needs Trust is better for your client does not have a simple answer because the question is highly fact dependent. In all reality, the answer to this question is often "both."

i) When determining whether the ABLE Account or a Special Needs Trust is more appropriate for your client, it is important to consider the costs associated with the establishment and management of each. For example, your client may appreciate the absence of the Medicaid "payback" provision that can only be found in a Third-Party Special Needs Trust. However, your client may not have excess funds to spend on planning for the disabled family member. In that case, an ABLE Account may be far more appropriate than the Third-Party Special Needs Trust because an ABLE Account has minimal expenses and is far simpler to implement. Moreover, ABLE Accounts do not require anyone to file tax returns, and the income will generally not be subject to income taxes. This is not true for Third-Party Special Needs Trusts.

ii) Another important consideration when determining whether the ABLE Account or a Special Needs Trust is more appropriate is the potential uses of funds by the beneficiary. If the beneficiary has a wide array of uses for the trust assets, a first-party trust likely is not ideal, as withdrawals typically have to be approved by the Court. Both ABLE Accounts and Third-Party Special Needs Trusts on the other hand, provide a fairly broad array of uses without prior court approval. While the qualifying disability expenses for both ABLE Account and a Special Needs Trust are fairly broad, a Third-Party Special Needs Trusts allows the third-party trustee the absolute freedom to distribute the assets for things beyond the beneficiary's necessities. For example, the trustee of a third-party trust may use the trust assets to pay for the beneficiary's

³⁷ ABLE Act, § 102; What are ABLE Accounts?, What are ABLE Accounts? | ABLE National Resource Center, <http://www.ablenrc.org/about/what-are-able-accounts> (last visited Jun 23, 2019).

³⁸ Step #2: Who is Eligible?, Step #2: Who is Eligible? | ABLE National Resource Center, <http://ablenrc.org/step-2-who-eligible> (last visited Jun 23, 2019).

³⁹ Social Security Disability SSI - Eligibility Requirements and Criteria to Qualify, SOCIAL

SECURITY DISABILITY SSI - ELIGIBILITY REQUIREMENTS AND CRITERIA TO QUALIFY, <https://www.ssdrc.com/disabilityquestions4-5.html> (last visited Jun 23, 2019).

⁴⁰ *Id.*

⁴¹ ABLE National Resource Center; www.ablenrc.org/Step-2-Who-is-Eligible/ (last visited 07/24/2019).

classes, hobbies, luxury items, personal services, furniture, professional fees, computer equipment, pet supplies, transportation, and vacations.⁴² However, this freedom of a third-party trust should only be recommended to clients who have a clear understanding of what actions and disbursements will cause a beneficiary to become ineligible for benefits.

- iii) A third consideration when making a recommendation to your client is the age and disability of the beneficiary, and the age and health of the trustee. With an ABLE account and first-party special needs trust, any balance left in the account will first be used to repay publicly provided benefits. Typically, this uses the remainder of funds in the account. When a third-party special needs trust is established and implemented properly, the remaining assets in the trust will not be used to pay back the government, and instead may be distributed to other heirs or to a charity at the trustee's death. For these reasons, the age and disability of the beneficiary is important to consider so that the reality of the payback provision can be carefully considered. Furthermore, considering the age and health of the trustee can be a determining factor in whether the ABLE Account or Special Needs Trust is more appropriate in a situation, especially if the trustee is much older than the beneficiary.
- iv) A fourth consideration is the tax implications of both ABLE Accounts and Special Needs Trusts. If your client knows large sums of assets will be deposited into the account or trust each year, then an ABLE Account is highly preferable to any Special Needs Trust because any income that is generated by the Special Needs Trust and not paid out to the beneficiary within the accounting year is subject to a large tax rate. On the flip side, ABLE Accounts, including earnings, are entirely tax free if used for qualified disability expenses.
- v) A fifth consideration when determining whether the ABLE Account or Special Needs Trust is more appropriate is the amount of assets that can be safeguarded without impacting benefits. With an ABLE Account, only \$100,000 in assets may be accumulated

before the beneficiary loses his or her access to SSI benefits. In addition, ABLE Account contributions by gift are limited to \$15,000. A Special Needs Trust on the other hand allows unlimited amounts to be gifted/devised to a Third-Party Special Needs Trust without affecting SSI, and there is no limit to the amount of funds that can be bequeathed/gifted to a special needs trust. Therefore, if your client has already accumulated a large sum of assets and funds, the Third-Party Special Needs Trust may be more appropriate. However, if the client has accumulated a moderate amount of assets and funds, but is not near the \$100,000, the ABLE Account may be more appropriate, especially with the tax-free considerations.

d) It just depends.

These are just five of the major considerations that every attorney should review before making a recommendation to his or her client.⁴³ In many situations, and when properly implemented, both an ABLE Account and a Special Needs Trust are appropriate. When managed properly, the combination can help ensure the beneficiary is taken care of in his or her life necessities and provide for things the beneficiary enjoys, all while protecting the beneficiary's right to governmental assistances such as SSI, SNAP, and Medicaid.

6) ANOTHER OPTION – PAYMENT OF CHILD SUPPORT AS IN-KIND SUPPORT AND MAINTENANCE.

Back to our family of Crystal and her parents - as suggested by Maples and Mayo, a child support payment made in the form of food or shelter qualifies as in-kind support and maintenance (ISM). SSI benefits are reduced by 1/3 each month when ISM payments are received. If Fabian paid Melissa's mortgage payment of \$1,400 as child support, Crystal's SSI benefit would be reduced to \$491.11. But Melissa would still receive the benefit of her \$1,710 child support payment. Crystal's net support amount would be \$2,201.11. This amount is less than what Crystal would receive with a special needs trust but perhaps the overall cost/benefit of creating, funding and managing the trust is outweighed by Crystal's immediate needs. This advantage also preserves 100% of Crystal's Medicaid benefit, which is the main goal of Melissa and Fabian in order to enhance Crystal's quality of life. In short, ISM reduces the SSI

⁴² Wright, W. p. 42.

⁴³ Special Needs Trusts vs. ABLE Accounts - Which is Better?, Special Needs Trusts vs. ABLE Accounts - Which

is Better? | Ed Slott and Company, LLC,
<https://www.irahelp.com/slottreport/special-needs-trusts-vs-able-accounts-which-better> (last visited Jun 23, 2019).

benefit but preserves the Medicaid benefit. For a child with multiple physical issues where the assets do not justify a special needs trust, this route may provide the best solution to protect the adult child's benefits.

The modification order will require very specific language that, as child support, a portion of the child support shall be paid directly to the mortgage company. Also, because the balance will continue to be paid to Melissa, be sure the Attorney General's office approves the language so that Fabian's obligation credits properly.

7) GUARDIANSHIP ALTERNATIVES.

a) Guardianships and Limited Guardianships.

A guardianship may be necessary in many situations, but the need arises when the child meets the criteria of incapacitated person. When a guardian is necessary, the court will appoint an attorney ad litem to represent the interests of the individual for whom guardianship is sought ("ward"). This attorney ad litem will consider the potential guardians and their motives for seeking guardianship. Once a guardian is appointed, many of the guardian's actions will still be subject to court approval, and importantly, yearly accountings must be filed. The guardianship duties do not cease at death of the beneficiary. Instead, additional accounting and further court proceedings are required to close the guardianship.⁴⁴

When a guardianship is necessary for an adult with only diminished capacity in some areas, it may be worth considering the option of a limited guardianship with your client. A limited guardianship allows the individual with a disability to make some decisions and control certain facets of his or her life. This limited guardianship is typically favored by the courts, as it allows the individual to maintain autonomy without placing themselves in physical or financial danger. While a limited guardianship is still expensive, it is much less costly than a full guardianship.

b) Supported Decision Making.

Because guardianships can be costly and time-consuming, it is important to educate your clients on the alternatives to guardianship and help the client make an educated decision as to which option is most appropriate. One alternative to guardianship is supported decision making, which is "a process of supporting and accommodating an adult with a

disability to enable the adult to make life decisions, including decisions related to where the adult wants to live, the services, supports, and medical care the adult wants to receive, whom the adult wants to live with, and where the adult wants to work, without impeding the self-determination of the adult."⁴⁵ The supported decision making agreement allows the individual to choose someone they trust, typically referred to as a "supporter", to help the individual obtain the information necessary to make an informed decision. The State does not place any restrictions beyond the requirement that both the individual with the disability and the supporter freely agree to the arrangement.⁴⁶

To establish a legally enforceable supported decision-making agreement, the individual and the supporter must fill out the appropriate supported decision-making agreement form and have it witnessed and notarized.⁴⁷ The agreement does not require involvement of attorneys or filing with the Court. This agreement may be ended at any time by the individual or their supporter, at a date determined at the beginning of the agreement, or by the Texas Department of Family and Protective Services if they find the supporter is abusing, neglecting, or exploiting the individual.⁴⁸

c) Powers of Attorney.

- i) In the case of a child who does not have an intellectual disability, consider securing a Power of Attorney naming a certain individual to act as his or her agent should he or she become incapacitated or incompetent in the future.⁴⁹ Within this document your client may determine the specific powers he or she wishes to give the agent, and whether the powers should become effective immediately or upon incapacitation (referred to as "springing"). While this option is likely the cheapest and quickest manner to avoid a guardianship proceeding, the Power of Attorney must be signed while the individual is still competent.
- ii) In addition to a financial power of attorney, the parent and child may also want a medical power of attorney. A medical power of attorney gives the agent the authority to make decisions concerning the health care of the individual if the individual should become

⁴⁴ See, generally, TEX. ESTATES CODE, chap. 1002, *et. seq.*

⁴⁵ TEXAS ESTATES CODE § 1357.002(3).

⁴⁶ Supported Decision-Making, Texas Council for Developmental Disabilities, <https://tcdd.texas.gov/resources/guardianship-alternatives/supported-decision-making/> (last visited Jun 23, 2019).

⁴⁷ The Supported Decision-Making Agreement form may be found in the Texas Estates Code, or the following link:

<https://tcdd.texas.gov/wp-content/uploads/2015/08/Supported-Decision-Making-Agreement-Oct15.pdf>

⁴⁸ TEX. ESTATES CODE § 1357.053(b).

⁴⁹ TEX. ESTATES CODE, chap. 751, *et. seq.*

unable to make decisions for him or herself. This medical power of attorney provides the agent the ability to determine the type of medical care the individual receives and permits the agent the authority to consent to or refuse psychiatric treatment.

8) CONCLUSION.

Just as every SAPCR case has similar parameters but different facts, the child requiring assistance after the age of 18 will need careful scrutiny of the facts and circumstances to help the parents navigate the system. If the case requires a special needs trust or an ABLE account, these statutory documents provide critical assistance to a special needs family. In setting child support, remember that the Attorney General should always receive notice via Rule 21a in the event this case is in their system. You can provide this family with peace of mind by using these special tools.

