FINANCIAL AND ESTATE PLANNING FOR PARENTS OF A CHILD WITH HANDICAPS

Charles G. Davis
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CHARLES G. DAVIS*

I. INTRODUCTION†

Society's changing attitudes have resulted in a significant number of individuals with handicaps remaining within the community rather than being housed in institutions.1 This new field of law focuses on the unique problems that persons with handicaps face and how society responds to those problems.

Minimal attention has been directed to the area of financial and estate planning for a family with a child who has a handicapping condition.2 When parents have a child with a handicap serious enough to limit the child's capacity for self care and self support, they must plan for more than just child support until the child reaches his majority and for the disposition of their estate at death.

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† The material cited in footnotes 46 and 47 is protected from disclosure under 42 U.S.C.A. § 1306(a) (West Supp. 1975-81) and 20 C.F.R. §§ 401.300-.350 (1982). Therefore, complete citation is not possible and the name of the claimant has been changed to preserve anonymity.

1. As a result of society's changing attitudes, "future litigation probably will involve... the ultimate right, the right not to be condemned to institutions through default of the community's responsibility to provide the support that is necessary for people with disabilities to survive and function." Wald, Basic Personal and Civil Rights (Principal Paper), in THE MENTALLY RETARDED CITIZEN AND THE LAW 2, 3-4 (M. Kindred, J. Cohen, D. Penrod & T. Shaffer eds. 1976) (collection of papers sponsored by the President's Committee on Mental Retardation) [hereinafter cited as THE MENTALLY RETARDED CITIZEN]. Further, societal change has created, as noted by several prominent commentators, the "chronic patient". "Who is the young chronic patient?... We have called them an emerging, uninstitutionalized generation; many of them are persons who in the past would have become long-stay patients in mental institutions... Today, however, they spend little if any time in our psychiatric institution." Pepper, Rygiewicz & Kirschner, The Uninstitutionalized Generation: A New Breed of Psychiatric Patient, in THE YOUNG ADULT CHRONIC PATIENT, 3 (B. Pepper & H. Rygiewicz eds. 1982).

Prudent estate planning mandates that parents consider support of
the child for the entire expected length of the child's life. Most par-
ents look forward to the day of the empty nest, with their children
independent; they look forward to the comfort of retirement sur-
rrounded by grandchildren. Parents of a child with a handicapping
condition, on the other hand, can anticipate only a lifetime of con-
cern. They worry greatly about the future welfare of their child in
the years when they are no longer alive. The needs of such families
can only be met by lifetime financial guidance and planning.

Planning for parents of a child with handicaps requires a famili-
arity with federal and state entitlement programs normally known
only to practitioners specializing in social services law. A detailed
and intensive financial and estate plan is a necessity to a family with
a modest estate; one that normally would not require sophisticated
tax and estate planning, and one serviced by the general practitioner
or small law firm.

The usual goal of financial and estate planning is to minimize
the impact of federal and local estate taxes.3 Achievement of
financial and psychological security is usually only a secondary goal.
The utilization of accepted tax saving mechanisms may result in the
decrease of family assets. The estate planner's skill in tax avoidance
often takes lower priority than planning for the welfare of the child
with handicaps.4

It is the intent of this article to provide practical guidance to the
practitioner in planning for the overall financial needs of a family
with a child with handicaps.

A. The Requirement of a "Handicapping Condition"

Definitions for handicapping conditions are numerous.5 Each
turns on the purpose for which it was created. This article defines a
handicapping condition as either: (1) A condition resulting in an
"inability to engage in any substantial gainful activity by reason of
any medically determinable physical or mental impairment which
can be expected to result in death or [which] has lasted or can be
expected to last for a continuous period of not less than [twelve]

or (2) a medically determinable condition which impairs an individual's "ability to receive and evaluate information effectively and/or to communicate decisions is impaired to such an extent that [the person lacks] the capacity to manage [his] financial resources and/or to meet [the] essential requirements for [his] physical health or safety." This definition encompasses not only those individuals who are developmentally disabled (suffering from mental retardation), or individuals who are emotionally disturbed, but also individuals whose mental capacities are unimpaired but whose physical impairment is such that they are unable to engage in any substantial gainful activity and thereby are required to rely upon the largess of federal, state, and local entitlement programs. The person's family must prepare a financial and estate plan that takes into account the realities of dependence upon the receipt of Social Security Disability Benefits, Supplemental Security Income, Medicaid, or other federal, state, or local entitlement programs, inclusive of living in whole or in part, continuously or from time to time in a state institution.

B. Goals of Financial Planning

The primary goals of financial planning are: (1) To assure that the individual with the handicap remains qualified for federal, state, and local entitlement programs; and (2) to secure the family's assets and the child's inheritance from the reach of state and local agencies providing services to the child. These goals are not secured at the death of the parents, but must be planned and achieved at the time that the handicapping condition becomes known. The requisite financial planning must be commenced at the birth of the child, the onset of the illness, the date of the accident, or the final diagnosis of the suspected impairment.

In order to advise a family and to prepare a financial plan for it, the estate planner must have a working knowledge of federal, state, and local entitlement programs, an accurate understanding of the child's handicapping condition, and the effect of that condition on both the child and the child's family.


II. FEDERAL, STATE, AND LOCAL ENTITLEMENT PROGRAMS

The present array of publicly funded service programs may be grouped into three categories: (1) fee for services; (2) insurance programs not based upon financial needs; and (3) programs based upon financial need.

A. Fee for Services

Numerous local and state service programs are based upon a fee for services rendered. Examples of these programs are state developmental disability and psychiatric institutions and community outpatient clinics. That fee is usually charged to the parent of a minor child or to the adult consumer directly, based upon the individual's ability to pay.\(^8\) The per diem rate in an institutional setting can erode a life's savings in a short period.

Some states have enacted statutes that provide financial relief to the family if the child is institutionalized but the child's own assets are nevertheless chargeable.\(^9\) Formulas exist for a sliding scale of payments based on the amount of the family's income and the nature of its expenses. Transferring custody of the child with handicaps to the Department of Social Services by a voluntary surrender agreement is another method utilized to save family assets. Under such transfer, the parents remain partially liable for reimbursement based on their ability to pay.\(^10\)

It is imperative that the child's assets be fully utilized prior to that point in time when services are requested. The planner is remiss to rely upon tax saving devices such as the Uniform Gift to Minors Act\(^11\) and the simple trust, the effect of which will cause the asset to be considered an asset of the child.

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8. *E.g.*, N.Y. MENTAL HYG. LAW § 41.25(a)-(c) (McKinney 1978).
   (a) As a prerequisite for state aid, local governmental units and voluntary agencies shall establish fee or payment schedules for clinical services and may establish fee or payment schedules for other services reflecting costs of services, pursuant to regulations of the commissioner.
   (b) Fees charged or payments requested shall take into account costs and ability to pay, considering resources available from private and public health insurance and medical aid programs.
   (c) No person shall be denied services for the mentally disabled because of inability to pay.

9. *Id.*; see also id. § 43.01 (McKinney 1978 & Supp. 1982).

10. *E.g.*, id. § 43.03 (McKinney 1978).

B. Insurance Programs

The major insurance program which is not based upon financial need is Social Security Disability Benefits.\(^\text{12}\) Under this program, the child of a worker entitled to retirement, disability, or survivor's benefits can collect benefits based on the parent’s earnings record, provided that: the child's disability began before the age of twenty-two; the child is unmarried; and the child is dependent upon the worker for support.\(^\text{13}\)

Disability, for Social Security purposes, means “the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than [twelve] months.”\(^\text{14}\)

Under this definition, the individual with the handicap need not have worked under Social Security to qualify. Further, the program provides that the recipient’s real or personal assets do not serve to impair the benefits received.\(^\text{15}\) The recipient’s earnings or ability to earn may reduce or extinguish that individual’s right to receive benefits.\(^\text{16}\)

C. Programs Based Upon Financial Need

The most important programs are those based upon the recipient’s financial need. The two foremost programs are Supplemental Security Income (SSI) for aged, blind, and persons with disabilities having limited income and resources,\(^\text{17}\) and Medical Assistance, also known as Medicaid.\(^\text{18}\)

It may be argued that the benefits received from these programs are not substantial enough to require a family to restructure and plan their entire financial existence around the securing of these benefits. When viewed solely from the actual dollars received, the argument is plausible. Less than five-thousand dollars a year may be

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16. See statutes and regulation cited supra note 6; see also 20 C.F.R. §§ 404.1571-1575.
received from SSI, with a higher grant given for persons living in community residences. Many states, however, fund their group home and community residences utilizing the SSI benefits, matching them dollar for dollar with state funds.\textsuperscript{19} Now the approximate benefits of 5,000 dollars per year becomes a real value of 10,000 dollars a year or more. That sum is significant.

Many parents believe that providing the child with a comprehensive private plan of medical insurance obviates the necessity for Medicaid benefits. This approach is unrealistic. Many individuals with handicaps do not qualify for private or group medical plans.\textsuperscript{20} Additionally, the cost of private medical insurance is increasing annually.

In 1971, Congress added Intermediate Care Facilities (ICF) to the list of optional services that states could offer under their Medicaid program.\textsuperscript{21} An IFC is merely another label for a group home or community residence. Medicaid funds have now become a vehicle for funding group homes for individuals with developmental disabilities and persons with related conditions. Recently, some states have utilized Medicaid funding and the ICF concept to include individuals with emotional disturbances through the establishment and funding of Residential Treatment Facilities (RTF).\textsuperscript{22} These are group homes for persons with emotional disturbances.

Given the total benefits available through SSI and Medicaid, the estate planner must become familiar with the monetary aspects of qualifying an individual for these programs. One of the goals of a financial plan is to assure that the individual with the handicap will remain qualified for these programs.

\textsuperscript{19} See, e.g., N.Y. MENTAL HEALTH HYG. LAW § 41.33 (McKinney 1978). The statute indicates that "[t]he commissioner . . . may provide state aid to . . . voluntary agencies in an amount not to exceed fifty percent for the total operating costs of such community residences." \textit{Id}.

\textsuperscript{20} See generally Follmann, \textit{Insurance (Principal Paper)}, in \textit{THE MENTALLY RETARDED CITIZEN, supra} note 1, at 145; Smith, \textit{Insurance (Reaction Comment)}, in \textit{THE MENTALLY RETARDED CITIZEN, supra} note 1, at 165; Friday, \textit{Insurance (Reaction Comment)}, in \textit{THE MENTALLY RETARDED CITIZEN, supra} note 1, at 167.


\textsuperscript{22} New York State has redefined the meaning of psychiatric hospital to create a group home for the emotionally disturbed, so as to qualify for funding. "Residential treatment facilities for children and youth are a sub-class of the class of facilities defined to be 'hospitals' . . . ." N.Y. MENTAL HYG. LAW § 1.03(33)(McKinney Supp. 1982).
III. Qualifying the Individual with the Handicap for SSI and Medical Assistance Benefits

A. SSI

Eligibility for SSI benefits rests not only upon the fact that the individual possesses some type of disability, as previously defined, but also upon the fact that the individual has limited income and resources. The higher the level of an individual with disabilities' income, the lower the amount of benefits that the individual will receive. If the individual's income exceeds certain levels, benefits cease completely. Further, a person may not be eligible if his assets could be converted to cash and used for his own support and maintenance.

1. Income

The Social Security Regulations define income as follows: "Income is anything you receive in cash or in kind that you can use to meet your needs for food, clothing or shelter. In-kind income is not cash, but is actually food, clothing or shelter, or something you can use to get one of these." The limitation of income to items received for the use of food, clothing, or shelter is critical because many items received by individuals with handicaps cannot be used for food, clothing, or shelter. The Regulations go on to exclude from income the following items:

(a) medical care and services,
(b) social services designed to provide vocational rehabilitation, i.e., a home aid to assist with housekeeping and cooking, or items of a similar nature,
(c) receipts from the sale, exchange, or replacement of any existing resource,
(d) income tax refunds,
(e) payments by credit life or credit disability insurance,
(f) repayment of a loan (interest however on the loan is considered income),

25. Id. § 416.1201(a) (1982).
(g) payment of the handicapped individual's bills by a third party directly to a creditor is not income if the payment is for items which are not food, clothing or shelter,

(h) replacement of income already received which has been lost, destroyed or stolen,

(i) weatherization assistance.27

Expenditures can be made if they are not for food, clothing and shelter. Educational services of all kinds fall into this category. Leisure and recreational activities such as movies, vacations, or bowling are but a few. These are examples of expenditures allowed by the Social Security Act. They represent activities that go directly to the individual's quality of life and are permitted without penalty.

Income is divided into two classifications, earned and unearned. The rules applicable to each differ with regard to their impact upon benefits received and their valuation.28 Earned income refers to wages received from employment or net earnings from self-employment. It may be paid to the person either in cash or in kind.29 In-kind payments are valued based upon current market value.30

Among others, the following payments are excluded from earned income: (1) Up to thirty dollars in a calendar quarter, if such income is received infrequently or irregularly.31 Items included under this category would be odd jobs, and to a certain extent, income from sheltered workshop programs; and (2) earnings of up to 1,620 dollars per calendar year, if the individual with a handicap qualifies as a disabled child who is a student regularly attending school.32

The most likely source of funds for the individual with a handicap will be unearned income. Such income is defined as "all income that is not earned income."33 It does not matter whether such income is received in cash or in kind.34

Although the definition is inclusive, the regulations implementing the act list examples of unearned income:

(a) Annuities, pensions and other periodic payments;35

(b) Alimony and support payment;36

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28. Id. § 416.1104 (1982).
29. Id. § 416.1110 (1982).
30. Id. § 416.1111(c) (1982).
31. Id. § 416.1111(c)(1) (1982).
32. Id. § 416.1112(c)(2) (1982).
33. Id. § 416.1120 (1982).
34. Id.
35. Id. § 416.1121(a) (1982).
36. Id. § 416.1121(b) (1982). One should note that a well intentioned separation
(c) Dividends, interest, and royalties;\textsuperscript{37}
(d) Rents;\textsuperscript{38}
(e) Proceeds of life insurance policy;\textsuperscript{39}
(f) Prizes and awards;\textsuperscript{40}
(g) Gifts and inheritance;\textsuperscript{41} and
(h) Support and maintenance in kind.\textsuperscript{42}

Because the provision of food, clothing, and shelter by parent or relative is the most common form of in-kind support and maintenance received by an individual with a handicap, substantial regulations have been developed, both defining and regulating this area: \textsuperscript{43} "In-kind support and maintenance means any food, clothing or shelter that is given to you or that you receive because someone else pays for it. Shelter includes room, rent, mortgage payments, real property taxes, heating fuel, gas, electricity, water, sewerage, and garbage collection services." \textsuperscript{44}

The regulations do, however, provide a hint for a method for avoiding this pitfall: "You are not receiving in-kind support and maintenance in the form of room or rent if you are paying the amount charged under a business arrangement." \textsuperscript{45} Therefore, it is possible to create a lease agreement between parents and an adult child that would comply with this section and allow the individual to receive the highest level of benefit payments. Still, this area must be approached with caution. Full documentation of this business arrangement must exist. Under Social Security Administration policy, an agreement of this nature will be considered bona fide only if it is

\textsuperscript{37} Id. § 416.1121(c) (1982). This area is critical because of its implications for the creation and structuring of inter vivos or testamentary trusts for the benefit of the individual with the handicap.
\textsuperscript{38} Id. § 416.1121(d) (1982).
\textsuperscript{39} Id. § 416.1121(e) (1982).
\textsuperscript{40} Id. § 416.1121(f) (1982).
\textsuperscript{41} Id. § 416.1121(g) (1982). Included within this definition is anything that comes to the individual as a result of someone's death. Therefore, all survivor benefits of whatever nature and kind are included.
\textsuperscript{42} Id. § 416.1121(h) (1982). This is the actual provision of food, clothing or shelter to the individual with the handicap. Such an individual living in the home of his parents would be receiving in-kind food and shelter.
\textsuperscript{43} Id. § 416.1130 (1982).
\textsuperscript{44} Id. § 416.1130(b) (1982).
\textsuperscript{45} Id.
legally binding under state law. The parent must take the position that if the child does not pay the “rent” that the child will have to leave the house. Many parents find it difficult to make this statement, however, it is the sine qua non of this exception.

The rent charged by the family must be set at the current market value. If the rent is set lower than the current market value, the difference between the lower rent and the current market value will be considered unearned in-kind income and will be deducted from the benefits received.

2. Group Homes

The development of group homes is the very essence of the movement to deinstitutionalize individuals with handicaps. As previously indicated, many states match the SSI grant and utilize that as the funding basis for a group home. A matching grant by the state is specifically excluded from in-kind income. If a parent is obligated to pay to the group home a sum in excess of the individual’s SSI benefits, then that amount will be considered in-kind income and will be deducted from the benefits and the state’s matching funds.

3. Deeming of Income

A parent’s income will be deemed to be the child’s income until the child reaches twenty-one years of age or ceases to be a stu-

46. In order for a loan to be bona fide for SSI purposes the following must be met:
   (A) borrower’s acknowledgment of obligation to repay with or without interest and
   (B) timetable and plan for repayment (e.g., borrower plans to repay the loan when he receives future anticipated income (see (C) below)); and
   (C) the borrower’s express intent to repay either by pledging real or personal property or anticipated income.

There is no timetable or plan for repayment, therefore, we cannot find difference in rent as loan.


47. “Mr. W. . . . testified that if his son is unable . . . to pay the $430.00 a month he will have to leave the house. I do not find this to be credible testimony, but rather a self-serving statement made to support his position in this matter.” In re Sidney W., Claimant, Claim for Supplemental Security Income (January 27, 1983) (unpublished).


50. See supra note 19.


52. Id. §§ 416.1140, 416.1143-.1145 (1982).

53. Id. § 416.1160 (1982).
dent after age eighteen. In most instances this will prohibit a child from receiving benefits. A child who is away at school and not subject to parental control will not have parental income deemed to be the child's income. Although the emancipation of the over eighteen-year-old student while away at college will secure benefits, the family must forego the deduction for this child.

B. Medical Assistance Programs

Title XIX of the Social Security Act, enacted in 1965, authorizes federal grants to states for medical assistance for low income persons who are disabled. Payments for services are made directly by the state, to the individuals or entities that furnish the service. In most situations the states have a common application process for SSI and Medicaid with similar requirements for both programs. Caution must be exercised, however, because there are state by state variations that would result in a differential in terms of available assets.

IV. Resources

Parental concern in planning for a child with handicaps centers around procedure for the creation of a fund to care for the child's needs when the parents are no longer there. The purpose of such a fund is to assure that the child will not be a drain on the assets of the other children. The creation of the fund must be accomplished in such a manner so as not to be considered a resource which would disqualify the child with a handicap from SSI and Medicaid benefits. The regulations define resources as

- cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).

Resources may be either liquid, which includes those assets that

54. Id. § 416.1167(d) (1982).
55. Id. § 416.1167(a)(2) (1982).
are cash or are financial instruments which are convertible to cash,\textsuperscript{59} or nonliquid, which includes all other properties both real and personal.\textsuperscript{60}

An individual is eligible for benefits if his available "resources do not exceed 1,500 dollars and all other eligibility requirements are met."\textsuperscript{61} It is critical to note that resources of even one dollar more than the 1,500 dollar threshold will result in the denial of benefits. Many times parents create an account for the child in the amount of 1,500 dollars forgetting that very shortly interest will accumulate and that the accumulation will render the individual ineligible. One dollar may result in the loss of three to four hundred dollars in benefits, or if the individual is in a group home, up to 1,000 dollars or more in benefits.

The regulations exclude the following items from resources:

1. After October of 1976, the entire value of an individual's home, which he uses as his principal place of residence. Caution should be exercised in this area because an item such as the home may be considered an asset or a resource with regard to other benefit programs used in coordination with SSI benefits.\textsuperscript{62} Additionally, if an individual decides to sell, the proceeds from the sale of the home will be considered a resource if they are not utilized to purchase another home within three months from the date of receipt of the proceeds of the sale.\textsuperscript{63}

2. Household goods and personal effects to the total value of 2,000 dollars.\textsuperscript{64}

3. One automobile to the extent that its current market value does not exceed 4,500 dollars. One automobile may be totally excluded regardless of its value if it is necessary for employment, for medical treatment, or specifically modified to transport a person with a handicap.\textsuperscript{65}

4. The property of a trade or business that is

\textsuperscript{59} 20 C.F.R. § 416.1201(b) (1982).
\textsuperscript{60} Id. § 416.1201(c) (1982).
\textsuperscript{61} Id. § 416.1205(a) (1982).
\textsuperscript{62} Id. § 1212(a)(2)-(c) (1982).
\textsuperscript{63} Id. § 416.1212(d) (1982).
\textsuperscript{64} Id. § 416.1210(b) (1982).
\textsuperscript{65} Id. § 416.1210(c) (1982).
essential to the means of self-support.  

(5) Nonbusiness property that is essential to the means of self-support.  

(6) Resources of the individual that are necessary to fulfill an approved plan for achieving self-support.  

(7) The cash surrender value of life insurance up to 1,500 dollars.  

(8) Cash including any interest earned on the cash or in-kind replacement received from any source for purposes of repairing or replacing an excluded resource as previously defined.  

V. IMPLICATIONS FOR PLANNING  

Because most of the federal, state, and local entitlement programs are affected by the available income and resources of a person with a handicap, the goals of financial planning should be: (1) To assure that the individual with the handicap remains qualified for federal, state and local entitlement programs; and (2) to secure the family's assets and the beneficiary's inheritance from the reach of the state and local agencies which provide services to the beneficiary.

The individual with the handicap must be pauperized. All sources of unearned income and resources must be found and detoured. The beneficiary, however, should not be discouraged from earning income. The psychological benefits to the individual from receiving earnings for work performed far outweigh the impact that the earnings may have on the benefit programs.

The pauperization of an individual with a handicap appears to be a simple process. In practice it requires the detective skills of a Sherlock Holmes. The utilization of a family estate planning questionnaire is a tool by which the planner systematically gathers the facts necessary to devise a plan. The questionnaire is usually considered a guide to the kind of information required in the plan. Most questionnaires are designed primarily to elicit information concerning matters which may affect taxation. The questionnaires pres-  

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66. Id. § 416.1210(d) (1982).  
67. Id. § 416.1210(e) (1982).  
68. Id. § 416.1210(f) (1982).  
69. Id. § 416.1210(h) (1982).  
70. See id. § 416.1232(a) (1982).  
71. F. Hoops, supra note 3, § 19, at 24-25.  
72. Id.
ently in use must be modified when dealing with a family that has a child with handicaps. In this instance, the questionnaire will be utilized to elicit information concerning matters affecting the individual’s qualification status for federal, state, and local entitlement programs. The amount of detail required is substantial and two general areas, discussed in this section, must be explored.

A. Actual Assets Presently in the Name of the Individual with a Handicap

One of the most difficult problems with respect to pauperization is dealing with assets presently in the name of the individual with a handicap. Usually, families that have not been advised create savings accounts and investments under the Uniform Gift to Minors Act in the name of their child. These assets must be disposed of prior to the child’s application for benefits. No general rule may be established because every asset is different and every family's needs are unique. Many times no easy answer to disposal exists.

The problem of assets held directly in the name of the individual with the handicap may be compounded by the appointment of a guardian, committee, or conservator. This author is opposed to the creation of such entities unless they can be justified on the grounds of a compelling legal need. The difficulties that may be created by the appointment of a guardian for a child with a handicap are exemplified by a New York State law.

In 1969, the State of New York adopted article 17A of its Surrogate’s Court Procedure Act entitled, “Guardians of Mentally Retarded Persons.” The Act allows the appointment of a guardian over the person and property of a person certified as incapable of managing himself and/or his affairs by reason of mental retardation. All property of the individual with the handicap must be secured by a bond, unless the court directs that the guardian, jointly with a person designated by the court, collect and receive the moneys and other property of the individual with the handicap and deposit

74. In determining the resources of an individual ... there shall be included ... any resource (or interest therein) owned by such individual ... within the preceding 24 months if such individual ... gave away or sold such resource or interest at less than fair market value of such resource or interest for the purpose of establishing eligibility for benefits or assistance under this chapter.
76. Id. § 1750.
them in the name of the guardian subject to the further order of the court.\footnote{Id. § 1708 (McKinney 1967).}

The result is that every item in the name of the individual with the handicap is now subject to the order of the court. All income of the individual, including the token earnings received from a sheltered workshop program, must be collected by the guardian and put under the control of the court. Each time that the guardian wishes to utilize any of the money to benefit the individual with the handicap, an application to the court must be made. The result is a loss of flexibility, increased cost and the possible accumulation of moneys in excess of 1,500 dollars, leading to disqualification from SSI benefits.

B. \textit{Survivor Benefits}

Another critical area related to pauperization is the need to locate assets that may flow to the child with the handicap upon the death of another. The obvious areas are life insurance and pension benefits. Most employer-offered group term life insurance policies and pension benefits list the spouse as the primary beneficiary and "my children" as contingent beneficiaries. The same is also true for the popular Individual Retirement Accounts (IRA). Existence of policies of insurance secured while a parent was in the armed service must be explored. Automobile insurance policies may provide for survivor benefits upon death of the insured. Trust savings accounts as well as joint bank accounts and joint holdings of any type are also potential sources of assets for children with handicaps.

Many grandparents set about creating small accounts for their grandchildren with disabilities. They buy stocks or bonds under the Uniform Gifts to Minors Act\footnote{Model Uniform Gifts to Minors Act (rev. 1966).} or provide for their grandchild in their wills. Naturally, assets flowing from such potential donors must be explored. Here, the planner becomes involved in a particularly difficult family situation. Many aged grandparents cannot be approached by their own children with questions as to the amount or disposition of their assets. Yet, no matter how difficult the area is for the family to deal with, it must be addressed. On more than one occasion a small inheritance has unintentionally flowed to the state or has wreaked unintended havoc on benefit receipt.
VI. Alternatives Available to the Planner to Provide a Fund for the Benefit of Persons with Handicaps

It is obvious that one tool of the planner which is precluded is the actual outright transfer by gift, by operation of law, by inheritance or otherwise to an individual with a handicap. Failing the ability to dispose of assets in an outright manner, three alternatives remain: an outright gift to the sibling of a child with a handicap, with instructions for the use of the money; complete disinheritance of the child with the handicap; and creation of a trust for the life of the beneficiary.

A. Gift to the Sibling

Many parents have learned the basic rule that a child with a handicap may not have any assets. They know that they cannot leave any part of their estate to the child directly. The solution that they have found, and the solution that many attorneys recommend because of its simplicity, is to leave the share that would have gone to the child with the handicap to one of the siblings with a letter to the sibling that the money is to be used for the benefit of the child who is handicapped.

This procedure relies upon the fact that the particular sibling chosen has always shown empathy for the less fortunate brother or sister, and appears to be the one who may best be relied upon to care for the child with the handicap after the parents have died. In essence, the parents place their hopes for the continued welfare of the child with the handicap with the child’s sibling.

Unfortunately this simple process is fraught with danger. The money will be available to the creditors of the actual beneficiary. All that is required is a business reversal, an uninsured liability claim, or a divorce action to dissipate the fund. The existence of an easily accessible nonregulated fund may tempt the strongest of individuals or their spouses. This method should therefore only be recommended if the amount bequeathed is very small.

B. Disinheritance

The question continually arises as to the actual amount to allocate for the benefit of the child with a handicap. The issue becomes particularly focused when the handicapping condition is of such a nature and the impairment is so substantial that the child really cannot benefit from the existence of a large fund of money. The argu-
ment then arises that targeting the family assets towards the "normal" children will benefit the family as a whole.

The allocation of resources is a particularly personal issue within a family. There does exist a maximum amount that would benefit the child with the handicap. Increasing the amount beyond that point would not add greater benefit to the life of the child and for some individuals with handicaps, that maximum amount may be negligible.

The outright disinheritance of a child with handicaps should be approached with caution. Creation of a "contingency fund" may be the only method to insure that the individual is cared for and assisted in time of need.

C. Trusts

The creation of a testamentary or inter vivos trust fund for the life of an individual with a handicap is the most viable tool in the hands of the planner. The trust must be constructed with a view toward the entitlement programs and the right of the state and local service providers to seek reimbursement for services rendered to the individual with the handicap. This article will now examine the drafting of a Luxuries Trust, which is a trust designed to increase the quality of the handicapped individual’s life.

The drafting of an appropriate trust for the benefit of an individual with handicaps during the individual’s life must follow the primary goals in the financial and estate plan. Those goals are to secure the trust fund from the reach of the state and local agencies which provide services to the beneficiary, and to assure that the beneficiary remains qualified for federal, state, and local entitlement programs.

1. Securing the Trust Fund from the Reach of State and Local Agencies

The drafter need not look far for the conceptual base of a trust designed to secure the trust fund against the creditor’s of the beneficiary. Spendthrift trusts are an accepted and often utilized tool of the planner. A spendthrift trust may be defined as a trust that is

79. One of the greatest developments of the common law is the trust. The trust device has many applications in family estate planning. As a tool it is unsurpassed. In its simplest terms, a trust is an arrangement by which the legal incidents of ownership of property are broken up into two or more parts, and the benefits of such parts are divided in accordance with the terms of the trust.

F. Hoops, supra note 3, § 11, at 13.
intended to secure the trust fund against the improvidence of the cestui que trust by protecting it against his creditors and rendering it inalienable by him before payment. . . . [A] settlor is under no legal or moral obligation to the creditors of the beneficiary of a spendthrift trust, and the creation of such a trust takes nothing from a creditor of the beneficiary to which he previously had the right to look for payment.80

The utilization of a spendthrift trust allows the parents of a child with a handicap "to provide protection from the hardships of life for their [child] . . . who may for one reason or another, be unable to earn a living, or to preserve and keep such property as they may obtain and who may meet hardships due to their own folly or misfortunes."81

No specific phraseology is necessary to create a spendthrift trust. The intent of the settlor should be expressed in a specific manner to impose restrictions on the voluntary or involuntary alienation of the beneficiary’s interest.82

2. Public Policy

The utilization of a spendthrift trust to bar reimbursement to the state or its agencies for care and services provided to an individual with handicaps has been challenged in many states.83 The issue frequently arises in a suit by the agency or institution against the trustees of the fund to compel the trustees to pay the income or principal to the agency or institution. The cases turn on two issues: first, the existence of a state statute dispositive of the issue; and second, the stated purpose of the settlor and the discretion given the trustees.

Where the state statute is dispositive of the issue, the estate planner is left only with the choice of moving the corpus of the trust to a state whose law is more favorable to the creation of this form of spendthrift trust. Several states have enacted statutes allowing a testator, who is no longer domiciled in the state of the will’s execution and the location of the property, to elect to have the disposition of the property governed by the laws of that state. The testator’s elec-

81. G. Bogert & G. Bogert, The Law of Trusts and Trustees § 222, at 387 (rev. 2d ed. 1979) (footnote omitted) [hereinafter cited as G. Bogert]; Zeoli v. Comm’r, 179 Conn. 83, 425 A.2d 553 (1979) (trust for the benefit of mentally handicapped sisters was a spendthrift trust as the trustee was provided the power, under a will, to accumulate and withhold trust income); See also Annot., 21 A.L.R. 4th 729 (1983).
82. Id. § 225, at 470.
83. Id. § 224, at 461-62 & 462 n.44.
tion provides that the intrinsic validity of the will, including the tes-
tator's general capacity, the effect of the will, and the interpretation
thereof, are to be determined by the law of that state. This devel-
opment may provide the flexibility necessary to create a valid provi-
sion although the domicile of the testator at the time of his death
may be in opposition to a spendthrift trust.

In those states in which the reimbursement issue is not con-
trolled by statute, the determination of the court usually turns on two
factors: first, the expressed intent of the settlor; and second, the ex-
tent of the discretion of the trustee.

(a) The Expressed Intent of the Settlor

The classic language of the trust fund provides that the trustee
shall apply the net income and principal for the benefit of the benefi-
ciary to be used for his support, maintenance, welfare and education.
The utilization of this language is inappropriate under circumstances
pertaining to care of the individual with a handicap.

The District Court of Appeals for the First District of the State
of California ruled upon such a trust fund and defined the obliga-
tions of the trustee. That trust instrument provided: “I desire that
my trustee provide, out of the income of my properties, or if the
income should be inadequate, out of the proceeds from the sale of
the corpus of the trust, for the proper care, support and maintenance of
my son. . .”

That appellate court upheld the determination that it was an
abuse of the trustee's discretion to refuse to pay the Department of
Mental Hygiene of the State of California for the beneficiary's
care.

The successful invasion of a trust corpus by a state agency usu-
ally rests upon the presumption that the settlor intended to provide
for the needs of the beneficiary and to secure the beneficiary from
becoming a burden on publically funded programs. The decision in
In re Estate of Escher states that:

Trusts Law § 3-5.1 (McKinney 1981).
86. Id.
87. 94 Misc. 2d 952, 407 N.Y.S.2d 106 (Surr. Ct. 1978) aff'd sub nom., In re Gross,
The cases presume that a person would prefer paying for the needs of those dear to him in lieu of welfare contributing thereto. Since the expression of this philosophy, public assistance has evolved from being a “gift” into a “right” which must be provided by State and local governments to all who show need, without even regard to the capacity of their respective taxpayers to generate the required revenue to pay the mounting cost of this right. . . . In the context of modern society, the stigma attached to receiving the benefits of these programs has largely disappeared, particularly with reference to those programs designed to meet the astronomical cost of illness or institutional care of any sort.

Today, programs to pay medical and institutional care are viewed more as an insurance benefit than charity. In view of the vast costs involved, it is a benefit which logic suggests that most citizens would seek for their loved ones, should they require institutional care, in preference to rapidly expending their total assets before seeking the benefits of such programs. It is divorced from the realities of life to presume that if testator were aware of the facts as they now exist, he would desire to pay the immense cost for his daughter's care in preference to having society share this burden. To apply to these facts a conclusion that the testator would find accepting benefits to be a repugnant humiliation at becoming the object of charity is an anachronism. 88

The court in Escher stretched mightily to overcome the expressed intent of the testator “to provide for the payment of any and all expenses necessary for the maintenance and support of my said daughter Marie Escher by reason of any illness, accident, or other emergency. . . .” 89 The court rested its conclusion on the fact that the testator knew she was disabled at the time the will was created. 90 The court's basic reasoning, however, was that “in light of the current astronomical costs of extended institutional care, any other result would render meaningless most testamentary schemes bequeathing a remainder of a trust to surviving issue where the life beneficiary required such care.” 91

It is the better course of conduct to avoid the issue completely by eliminating this language from the purposes clause. Expansion of the basic spendthrift trust to specifically name the state and its agen-

88. Id. at 959, 407 N.Y.S.2d at 110-11.
89. Id. at 955, 407 N.Y.S.2d at 108.
90. Id. at 957, 407 N.Y.S.2d at 109-10.
cies as the creditors prohibited from taking the income or principal of the trust fund is recommended.

(b) *The Discretion of the Trustees*

The next aspect upon which the courts have based their justification for ordering the trustee to reimburse the institution is the extent of the trustees’ discretion. Where the trust instrument provides that the trust fund be utilized for the support and maintenance of the beneficiary, and the trustees’ discretion pertains only to the time or manner of the payment or to the size of the payment necessary to achieve the stated purpose, the trustees would be more likely to carry out the settlor’s intent than if the discretion of the trustees was absolute. 92

The trust instrument may provide that the trustee will have absolute and uncontrolled discretion with regard to any payment from the trust income or principal for the benefit of the beneficiary. 93 The settlor need not tie the trustees’ discretion to any standard or purpose. Under these circumstances a true discretionary trust has been created and the right of the beneficiary to receive any benefits at all does not exist. A state institution would be unable to secure the aid of a court in compelling the trustee to reimburse it for services provided to the beneficiary from the trust income or principal because the right of the beneficiary to the funds does not exist. 94 Further, the discretionary trust may contain a spendthrift clause, thereby increasing the protection.

3. Retaining Qualification for Federal, State, and Local Entitlement Programs

In drafting the trust to assure that the beneficiary remains qualified for federal, state, and local entitlement programs, there are three considerations. The first deals with the notion of vesting. The trust cannot provide for vesting of the trust principal in the beneficiary at a stated point in time. 95 At the point in time that the trust would vest, the beneficiary would be rendered disqualified for the federal and state entitlement programs.

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92. "[T]he residuary clause . . . gave the trustee no discretion in the payment of the ‘annual net income’ to the defendant Athorne. The trustee’s ‘absolute discretion’ under this clause is confined and restricted to the payment of a part or the whole of the principal . . . .” Athorne v. Athorne, 100 N.H. 413, 415, 128 A.2d 910, 912 (1957).
93. *See* G. Bogert, *supra* note 81, § 228, at 508.
94. *Id.* § 228, at 512.
95. *See supra* note 58.
The second area concerns payments. The purpose clause of the trust fund cannot provide that the trust income or principal be utilized for food, clothing, or shelter. The prior discussion indicated that payments specifically for these purposes directly or in kind would be deducted from the individual's monthly benefits.\(^96\) There cannot be \textit{mandated} payments of the income of the trust to the beneficiary. Such payments would be considered unearned income and deducted from the benefits of the individual.

The final consideration related to beneficiary qualification pertains to trustee discretion. The discretion of the trustees must be absolute and uncontrolled, specifically with respect to the utilization of the funds for any purpose that could be considered food, clothing, or shelter.\(^97\) To clarify the existence of such discretion, it is suggested that a general provision be included in the trust instrument prohibiting utilization of the trust funds for the beneficiary's food, clothing, and shelter requirements.

It is the object of the drafter of the trust to avoid classification of the income of the trust fund as income to the beneficiary or classification of the principal of the trust fund as a resource.

4. Contents of the Trust Provision

The various statutes, regulations, cases, and concepts discussed indicate the difficult path that must be followed by the drafter. That path has many impediments, but most if not all can be overcome. The following are suggestions as to the content of the trust. They are not meant to be dispositive of the issues and as such must be coordinated with local law.

(a) \textit{The Intention of the Settlor}

It is recommended that an introductory paragraph be utilized to express the settlor's understanding of the handicapping condition of the beneficiary, the availability of various entitlement programs to provide for the basic care of the beneficiary, and an awareness that the assets of the trust are insufficient to provide for the beneficiary's basic care.

(b) \textit{Purposes Clause}

A specific purpose clause is recommended. Although the existence of a purpose clause would in many ways detract from the abso-
finite discretion of the trustee and thereby limit the protective value of a true discretionary trust, its inclusion will provide guidance to the trustee. Stated purposes may include:

(i) to provide the beneficiary with a higher quality of life, beyond that provided by public entitlement programs; and

(ii) to provide the beneficiary with a proper funeral and burial.

(c) General Directive Provisions

The general provisions which may be included within the trust can be as expansive or as limiting as the drafter chooses. The following areas are suggested for inclusion:

(i) a specific direction to accumulate income;

(ii) a specific direction indicating that all expenditures of income or principal are within the sole and absolute discretion of the trustee;

(iii) an expanded spendthrift clause specifically including and naming the various state and local institutions who may wish to be creditors; and

(iv) a grant of authority to the trustee to provide for a gift to any community residence in which the beneficiary may be residing. 98

(d) Fail Safe Provisions

The interest of a beneficiary may be made terminable upon an attempt by creditors to reach the trust fund. In that event, a gift over to the remaindermen may be directed. This is a reservation of a power of revocation or vesting of such power in the trustee. 99 For the drafter, this may provide the final fail safe mechanism to avoid the fund’s capture by the state.

The following contingencies may result in the termination of the trust fund:

(i) a ruling that the trust is against public policy;

(ii) a ruling that the trust fund may be subject to the claims of the state or local agencies for services rendered to the beneficiary; and

(iii) a ruling that the existence of the trust fund is to

98. See supra note 52 and accompanying text.
99. G. BOGERT, supra note 81, § 226, at 486.
be considered a resource to the beneficiary under entitlement programs.

The above outline should provide a guide for the drafting of a discretionary spendthrift trust for the life of a beneficiary. This Luxury Trust should achieve the goals of insuring that the handicapped beneficiary remains qualified for federal, state, and local entitlement programs and protects the trust fund from the reach of the state and local agencies providing services to the beneficiary.

5. Alternatives to the Individual Trust

Recently there has been a growing movement for the establishment of community trusts for individuals with developmental disabilities. These community trusts provide a means by which parents of children with handicaps are able to pool their monies in a joint trust. The attraction of this concept is that individuals with small estates may avoid the expense of trust creation and administration by using an already established trust. Further, these trust funds hold out the hope that a caring guardian will be provided for the individual with the handicap. For parents without other children to act as trustees and guardians, community trusts hold great promise. Two such trusts are explored below.

(a) The New York Retardate Trust

The New York Retardate Trust was created by the New York State Association for Retarded Children, Inc., in July of 1972. The trust may best be described in the words of the association itself in its pamphlet, “Guardianship of Mentally Retarded Persons”:

Unrestricted Trust—The first trust fund will accept gifts or bequests of $1,000 or more from parents, relatives or friends for the benefit of a designated retarded beneficiary. The entire income from such gift or bequest will be paid monthly, quarterly or annually, as the trustee shall best determine, to the guardian of the person or the beneficiary, or in the sole discretion of the trustees, for the benefit of the retarded person, such as payment for rent, clothes or medical expenses.

If authorized by the donor, the trustees may also, in their sole discretion, use all or a portion of the principal for medical or other emergency needs of the beneficiary, so long as no portion is used for reimbursement charges at state institutions.100

This unrestricted trust will hold slightly over 100,000 dollars by June 30, 1983. The basic intent of this trust program is to provide money management for sums of money below the minimum amount which a bank will accept as trustee, and to provide eventually, through the falling in of remainder amounts, sufficient income for staff personal who will act as advocates and guardians of the beneficiaries.

An analysis of the purpose provisions of this Retardate Trust indicates that the entire net income is to go to the beneficiary and is to be used for rent and other living expenses, such as clothing and private medical care. Although the trust specifically prohibits the utilization of the principal to pay the reimbursement charges of a state institution, the money and the expectancy of that money will be considered unearned income.

(b) The Virginia Beach Community Trust

In contrast to the New York Retardate Trust is the Virginia Beach Community Trust Program. That trust was set up by the Virginia Beach Community Services Board and makes the following directives to the trustees:

[T]o provide for the needs of the beneficiary over and above basic maintenance, support, medical, and dental care, paid for by any local, state or federal government or agency or department thereof. To this end the Trustees may provide such resources and experiences as will contribute to and make the beneficiary's life as pleasant, comfortable and happy as feasible.

The trust prohibits reimbursement to a state or local agency and contains wording limiting the availability of the trust corpus and income as resources and income under the various entitlement programs.

The trust fund includes a specific spendthrift provision. The provision's construction indicates that the trust is a discretionary trust. The trust fund includes a provision empowering the trustee to terminate the trust fund upon a determination that the income or principal is liable for the beneficiary's basic care.

The research and development of the Virginia Beach Commu-

101. The Virginia Beach Community Trust, Master Trust Agreement is reprinted in Appendix A. The Virginia Beach Community Trust Instrument of Adoption is reprinted in Appendix B.

The Community Trust Project's research has identified fifteen similar trust and estate planning programs for persons with developmental disabilities.

The structure of the Virginia Beach Community Trust is closer to the principles discussed in this article. The New York State Retardate Trust may create a problem for the beneficiary. The planner cannot rely on the existence of a community trust without exploring its content prior to recommending its utilization.

(c) The Burial Trust Fund

Some states have created enabling legislation to allow their Department of Social Services to create a burial trust fund for recipients of SSI benefits. In those instances when an SSI recipient requests, the local social services district would then be responsible for setting up, maintaining, and administering a burial trust fund during the lifetime of the recipient. Upon the death of the recipient, the local district would issue payments from the trust to cover the funeral expenses.

In order that the trust fund not be considered a resource under applicable laws, the recipient is denied access to the trust fund upon its establishment. Further, the trust fund is irrevocable. The statutes provide a maximum amount that can be placed in the trust fund, usually equal to the SSI Resource Exemption. It should be noted, however, that the income from the trust is to be distributed directly to the beneficiary and results in a reduction of SSI benefits.

The value of this trust fund is that it may be set up easily and requires no administrative concerns by the family. It does not con-

103. See Appendix C.
104. As applicable federal law, rules and regulations so provide, a recipient of supplemental security income benefits may accumulate an irrevocable trust fund of up to two thousand dollars for the exclusive purpose of their funeral and burial. Such trust fund shall remain the responsibility of the local social services officials to administer for funeral and burial expenses of the recipient. Those persons who establish such a trust fund with a local social services department shall be given the opportunity to select the funeral director of their choice to provide for their burial arrangements. Funds in such trust fund shall be placed in an interest bearing account. Interest from such account shall be reported as "countable income" pursuant to section two hundred eight of this chapter. The cost of administering the trust shall be reimbursable under section two hundred twelve of this chapter.

N.Y. SOC. SERV. LAW § 209(b) (McKinney Supp. 1982).
flict with any other trust funds and would be a simple means of disposing of 1,500 dollars worth of the beneficiary's assets.

VII. Conclusion

The legal community is being called upon to represent an emerging noninstitutionalized generation of individuals with handicapping conditions and their families. This new population of clients and their attendant legal problems offer a challenge to the established bar. That challenge must be met in the highest tradition of our profession.

The field of financial and estate planning is one area which requires an immediate response. The basic skills and tools exist. The knowledge is there. The practitioner need only become aware of those specific laws and rules which impact upon this community to provide the needed response.

It is our responsibility to assist the parents of children with handicaps. We must help these families attain a financially secure future for their children. A sensitive and well reasoned financial and estate plan will assist in obtaining that goal and assure a high quality of life to the individual with handicaps.
APPENDIX A

VIRGINIA BEACH COMMUNITY TRUST MASTER TRUST AGREEMENT*

The Trustees of the Virginia Beach Community Trust (hereinafter called "Trustees") hereby establish a Master Trust Agreement for the convenience of Settlors who qualify and wish to adopt it. If a Settlor executes an Instrument of Adoption incorporating this Master Trust Agreement by reference which is accepted by the Trustees, the Trustees agree to hold, administer and distribute the income and principal of the Trust in accordance with the terms and provisions hereinafter set out.

ARTICLE I

DIRECTIVES TO TRUSTEES

1. The Trustees shall make distributions to or for the beneficiary in accordance with the applicable provision outlined in a, b, or c of item five (5) of the Instrument of Adoption.

2a. In applying the Trust Fund for the benefit of the beneficiary, the Trustees shall have the discretion to provide for the needs of the beneficiary over and above basic maintenance, support, medical, and dental care, paid for by any local, state or federal government or agency or department thereof. To this end the Trustees may provide such resources and experiences as will contribute to and make the beneficiary's life as pleasant, comfortable and happy as feasible. Nothing herein shall preclude the Trustees from purchasing those services and items which promote the beneficiary's happiness, welfare and development, including, but not limited to, vacation and recreation trips away from place of residence, expenses for a traveling companion (if requested), entertainment expenses, clothing and transportation costs.

2b. Distributions to or for the beneficiary shall include the purchase of services from providers. However, distribu-

* Copyright © 1982, Virginia Beach Community Trust. Reprinted with the permission of the Trustees of the Virginia Beach Community Trust. This agreement was compiled in part from similar trust agreements developed by the New York State Association for Retarded Children and the Inland Counties Regional Center, Inc. See Appendix C.
tions may not be made to the Trustees themselves to provide such services to the beneficiary.

3a. The intent of the Settlor is for the Trustees to use the Trust Fund to promote the happiness, welfare and development of the beneficiary without in any way reducing the services or financial assistance in basic maintenance, support, medical or dental care the beneficiary receives without charge from any local, state or federal government or agency or department thereof, and without using any portion of the Trust Fund, income or principal, to reimburse any local, state or federal government or agency or department thereof for basic maintenance, support, medical and dental care received by the beneficiary. The intent of the Settlor is that the Trust Fund's income and principal, is not to be considered income to, nor assets of, the beneficiary for any purposes including but not limited to determination of income or assets as stated in any rules and regulations set forth by any local, state or federal government or agency or department thereof. The Trustees shall honor these intentions.

3b. In the event of a lawful determination by a court of agency of competent authority, that the Trust Fund's income or principal is liable for basic maintenance, support, medical and dental care for the beneficiary which would otherwise be provided by local, state or federal government or an agency or department thereof, the Trust Fund shall therefore terminate as though the beneficiary had died, and the Trustees shall distribute the then remaining funds and assets to the takers of the remainder named in the Instrument of Adoption or, if there be none, to the Settlor or his estate.

4. No interest in the income or principal of the Trust Fund shall be liable for any present or future debt of the beneficiary to the Commonwealth of Virginia or to any other creditor and neither the beneficiary nor his guardian have the power to anticipate, alienate or encumber any interest in the Trust Fund's principal or income.

5. The Trustees shall regard the Trust Fund as existing primarily for the benefit of the beneficiary and secondarily for the benefits of the takers or the remainder. Accord-
ingly, the Trustees shall exercise their discretion as to disbursements and investments with this standard in mind.

6. The Trustees shall exercise reasonable diligence; however they shall not be liable for any acts or omissions done or permitted in good faith.

7. The Trustees shall not be required to make an accounting to any public official except to the extent otherwise required by law. The Trustees shall, however, keep and maintain complete and open accounts of the Trust principal and income and any expenditures from the Trust Fund. Anyone having an interest in the Trust Fund shall have the right to inspect the accounts at reasonable times and with reasonable notice to the Trustees. When the respective share of any beneficiary of the Trust Fund is greater than One Thousand Dollars ($1,000.00) the Trustees shall make an annual accounting to the respective Settlor, or if the Settlor is deceased, to the beneficiary or the beneficiary’s legal guardian.

8. All discretions conferred on the Trustees by the Master Trust Agreement and Instrument of Adoption shall be absolute, and their exercise by the Trustees shall be conclusive and binding on all persons.

9. The Trustees shall have the power to commingle assets held by them in trusts established by various settlors adopting the Master Trust Agreement by Instruments of Adoption. The Trustees have responsibility to minimize payment of administrative expenses of the Trust Fund and seek to pay such expenses from other sources, such as a charitable fund, should same be established and funded, to the extent possible. The Trust Fund shall pay Trustees for administrative expenses of the Trust Fund not paid from any other source.

10. The application of the Trust Fund shall continue as provided until the Trust assets are expended by disbursements on behalf of the beneficiary or until the death of the beneficiary, whichever event shall first occur. If assets remain in the Trust Fund at the death of the beneficiary, the Trustees shall immediately distribute the remaining funds and assets to the takers of the remainder named in the Instrument of Adoption, of if there be none, to the Settlor or his estate.
11. The agreement between the Settlor and the Trustees shall be revocable unless otherwise specifically designated by the Settlor in the Instrument of Adoption, or unless created under the will of the Settlor.
Where the sole Settlor has elected that the Trust shall be revocable (in item seven (b) of the Instrument of Adoption) and the Settlor revokes the Trust, the Trustees shall deliver the then remaining assets of the Trust to the Settlor.
Where there is more than one Settlor and they have elected that the Trust shall be revocable so long as any Settlor lives (item seven (c) of the Instrument of Adoption), all such then living Settlors must unanimously act in order to revoke the Trust. The Trustees, upon revocation, shall deliver the then remaining assets of the Trust to the then living Settlors in equal shares, without regard to the proportion to which they have contributed to the Trust.
Where there is more than one Settlor and they have elected that the Trust cannot be revoked after the death of any one Settlor (item seven (d) of the Instrument of Adoption) then, so long as all Settlors shall live, all Settlors must unanimously act in order to revoke the Trust. The Trustees, upon revocation shall deliver the then remaining assets of the Trust to the Settlors in equal shares without regard to the proportion to which they have contributed to the Trust.

12. Settlor may add to Trust at any time (during his life) other property to be held under the terms of this agreement. Trustees shall also accept additional assets from any source including the estate of Settlor to be held under the terms of this agreement.
ARTICLE II

TRUSTEES' AND SUCCESSOR TRUSTEES' APPOINTMENT
AND REMOVAL

1. The original Trustees shall be the following five (5):
   - Mr. Smith, C.P.A.
   - Mrs. Jones, Esq.
   - Ms. Doe, Esq.
   - Mr. Roe
   - Mrs. Wood, C.L.U.

2. There shall at all times be not less than three (3) nor more than five (5) Trustees who shall serve without compensation other than reimbursement for necessary expenses. No less than two of the Trustees shall be related to a person with a developmental disability. Upon the resignation, removal or death of a Trustee, a Successor Trustee shall be selected by the Board of Directors of the Virginia Beach Community Services Board or its successor, hereafter referred to as the Board, unless they are no longer an entity, in which case the Board of Directors of the Tidewater Chapter of the Association for Retarded Citizens, hereafter referred to as ARC-Tidewater, would serve this function. The Successor Trustees shall assume authority upon written notice of appointment and written acceptance thereof.

3. Amendments in the Master Trust Agreement to be effective and binding on all parties, hereto, must be approved by the Board or its successor, unless they are no longer an entity, in which case the Board of Directors of ARC-Tidewater would serve this function.

4. A Trustee can be removed by a majority of the other Trustees for any reason or no reason. The removal of a Trustee shall be effected by a written instrument containing a duly attested copy of the vote for removal, addressed to the subject Trustee and signed by the presiding officer of the applicable Board. Any Trustee may also be removed by court order.

5. Every Successor Trustee shall have all the rights, title, powers, duties, exemptions and limitations of the original Trustees; but no Successor Trustee shall in any way be liable or responsible for anything done or omitted in the administra-
tion of the Trust prior to the date of his or her becoming a Successor Trustee.

6. No surety shall be required on the bond of any Trustee.
ARTICLE III

ORGANIZATION AND DUTIES OF TRUSTEES

1. The Trustees shall elect their own Chairman, Secretary and Treasurer, who shall serve a term of one year.

2. The Chairman shall preside at all meetings of Trustees.

3. The Secretary shall maintain a record of all donors, beneficiaries and their remaindermen and the amounts, terms and restrictions of all gifts, bequests and donations; he shall keep a record of all meetings of Trustees and other information necessary to the proper management of the Trust Fund.

4. The Treasurer shall keep accounts of the Trust Fund and the receipts, income and expenditures thereon; he shall see that all bills approved by the Trustees are paid when approved by said Trustees; shall keep and have charge of the accounts of the Trustees, the vouchers therefore, and the monies, securities and books of the Trust; shall deposit all funds of the Trust to its credit in such financial institutions as the Trustees shall approve, to be drawn only on checks signed in accordance with resolutions as adopted from time to time by the Trustees, he shall invest the funds of the Trust in such amount and in such securities as the Trustees shall direct; shall issue notes of the Trustees only in the transaction of their business and when signed as aforesaid; shall at the annual meeting and each regular meeting of the Trustees, present a detailed report by items of the receipts and expenditures of the Trust Fund during the period preceding; shall at the annual meeting, present a general report of the receipts and expenditures during the fiscal year; and shall, when required by the applicable Board under item two of Article II give bond to the Trustees in such sums as shall be fixed by the Board with or without surety as the Board may require.

5. An annual meeting where officers will be elected, shall be held with other regular meetings as shall be set by the Trustees, but in no event shall there be less than two (2) regular meetings per year. Special meetings of the Trustees may be called by the Chairman of the Trustees, or by any three (3) Trustees upon seven (7) days notice thereof in writing setting forth the time and place of the meeting and the subject matter thereof. Notice of said meeting may be waived in writing by all Trustees. A majority of the Trust-
ees then acting at any duly held meeting thereof shall constitute a quorum; and any action shall be by a majority vote of all Trustees. A meeting need not be called or held to make any decision to take any action but any decision of action may be upon written documents signed by a majority of the Trustees.

ARTICLE IV

POWERS OF TRUSTEES

The Trustees shall have, in addition to the powers granted by law and by the Trust Instrument, all of the powers set forth in Section 64.1-57 of the Code of Virginia as in effect on the date hereof, the provisions which are hereby expressly incorporated herein by reference, which powers are not inconsistent with the intentions of the Settlor as herein above set out and as set out in the Instrument of Adoption.

In addition, the Trustees and their successors shall have all the following powers which are to be construed in the broadest manner consistent with the validity and the purposes of the Trust agreement:

1. To hold securities even after default in the payment of interest or dividends, and to hold non-income producing assets.

2. To enter into transactions with other fiduciaries including the Trustees themselves when they also act for other trusts and estates, and to commingle funds.

3. The Trustees shall have the power to commingle the Trust Fund with trust funds of other Virginia Beach Trusts for developmentally disabled clients administered by the Trustees, so long as the Trustees meet the requirements of Article I, paragraph 9 of these Provisions.

4. The Trustees may in their discretion provide for the payment of guardians, guardians ad litem, attorneys, psychologists, or any other expenses involved in the process of appointing or removing guardians.

5. In the event that the amount of assets of the Trust Fund shall become so small that continuance of the Trust Fund shall, in the sole discretion of the Trustees be inadvisable, the Trustees, notwithstanding any other provision to the contrary, shall have the power to dissolve the Trust Fund by unanimous vote; provided that upon Trust Fund dissolution
the Trustees distribute any remaining principal and income to the takers of the remainder named in the Instrument of Adoption or, if there be none, to the Settlor or his estate.

IN WITNESS WHEREOF, this instrument has been duly executed this 16th day of April, 1982, by the respective parties hereto above written.

VIRGINIA BEACH COMMUNITY TRUST

By:________________________

Trustee

________________________

Trustee

________________________

Trustee

________________________

Trustee

________________________

Trustee
APPENDIX B

VIRGINIA BEACH COMMUNITY TRUST*

INSTRUMENT OF ADOPTION

The undersigned Settlor(s) hereby establish(s) a Trust under the Virginia Beach Community Trust's Master Trust Agreement. The terms of the Settlor's Trust are set forth in the Instrument of Adoption and the applicable provisions of the Virginia Beach Community Trust's Master Trust Agreement (dated April 16, 1982) hereby adopted and incorporated herein by reference hereto.

This is a binding legal document. You are advised to seek professional advice before signing.

1. AGREEMENT NUMBER: __________________________
2. TRUSTEES: __________________________________

3. NAME(S) OF SETTLOR(S): ADDRESS AND TELEPHONE NUMBER OF SETTLOR(S):

4. NAME OF BENEFICIARY: ADDRESS AND TELEPHONE NUMBER OF BENEFICIARY:

5. DISTRIBUTIONS TO OR FOR THE BENEFICIARY: INITIALS OF SETTLOR(S)

* Reprinted with the permission of the Trustees of the Virginia Beach Community Trust.
(a) Income to or for the beneficiary in Trustees' discretion; no principal to or for beneficiary.

(b) Income and principal distributed to or for the beneficiary in Trustees' discretion.

(c) Also, Trustees to pay final expenses of burial, funeral, and related expense of:

6. DISTRIBUTIONS UPON THE DEATH OF BENEFICIARY:
Upon the death of the beneficiary the distribution shall be made to the following individual(s) or other entities:

Name of remainderman(men) and amount or percentage of Trust Fund to be distributed:  ________________  
INITIALS OF SETTLOR(S)  ________________  

7. REVOCABILITY OF TRUST (Choose one alternative)

(a) The Trust cannot be revoked.

(b) The Trust can be revoked so long as individual settlor lives.

(c) The Trust can be revoked so long as any settlor lives (where there is more than one settlor).

(d) The Trust cannot be revoked after the death of any one settlor (where there is more than one settlor).
8. Where the Trust is to be funded by a devise or bequest in the Settlor's will, the will must expressly authorize amendment of the terms of this Trust after the testator's death.

This provision is part of Settlor's will.

9. PROFESSIONAL REPRESENTATION:
Settlor has been represented with regard to the VIRGINIA BEACH COMMUNITY TRUST by:
Name: __________________________________
Address: ________________________________
Phone Number: _________________________

In witness whereof the undersigned Settlor(s) has/have signed this agreement and understands same and agree(s) to be bound by the terms thereof and the Trustees have signed this agreement hereby accepting this Trust this ______ day of __________, 19__. The Settlors confirm that simultaneously with the execution of this instrument or prior thereto the assets set forth on the attached schedule are or were transferred to the Trustees hereunder.
VIRGINIA BEACH COMMUNITY TRUST

AGREEMENT NUMBER: ______________________

ASSET TRANSFER AND BENEFICIARY DESIGNATION RECORD

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<th>DATE OF TRANSFER</th>
<th>DESCRIPTION OF ASSET OR BENEFICIARY DESIGNATION OF INSURANCE CONTRACT</th>
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<th>SIGNATURE OF REPRESENTATIVE OF SETTLOR</th>
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APPENDIX C

TRUST PROGRAMS FOR THE DEVELOPMENTALLY DISABLED*

* These fifteen Trusts and Estate Planning programs have been identified through the Virginia Beach Community Trust Project's research.

1. Iowa Developmental Disabilities Council
   Developmental Disabilities Program
   523 East 12th Street
   Des Moines, Iowa 50319

2. Foundation for the Handicapped
   1600 West Armory Way
   Seattle, Washington 98119

3. New York Retardate Trust
   (Guardianship Trust)
   New York State Association for Retarded Children
   175 Fifth Avenue
   New York, NY 10010
   1600 Main Place Tower
   Buffalo, New York 14202

4. The Washington Association for Retarded Children Trust Fund
   3010 N.W. Market
   Seattle, Washington 98107

5. Inland Counties Master Trust
   Inland Counties Regional Center, Inc.
   814 North Arrowhead Avenue
   P.O. Box 6127
   San Bernardino, California 92412
   (714) 888-6631

6. Sentry Fund
   Kent County Association for Retarded Citizens
   1225-37 Lake Drive, S.E.
   Grand Rapids, Michigan 49506

7. The MARC Retardate Trust
   Massachusetts Association for Retarded Citizens
   217 South Street
   Waltham, Massachusetts 02154

8. Maryland Trust for Retarded Citizens
   (301) 384-5687

9. Guardianship, Advocacy & Protective Services (GAPS)
   Association for Retarded Citizens of Oregon
   3085 River Road North
   Salem, Oregon 97303
   (503) 390-0330

10. Donald Sappern & Co.
    (Private Insurance Consulting Firm)
    253 Riverside Avenue
    Westport, Connecticut 06880
    (203) 226-1288

11. CARC Advisory & Guardianship Plan
    Connecticut Association for Retarded Citizens
    15 High Street
    Hartford, Connecticut 06103
    (203) 522-1179

12. Association for Retarded Citizens in Greater New Haven, Inc.
    One State Street
    New Haven, Connecticut 06511
    (203) 787-1247

13. Association for Retarded Citizens
    North San Diego County
    Arthur Traber, President
    1221 Ridge Road
    Vista, California 92083

14. Star Systems
    Consultation & Training in Human Services
    Suite B-2
    7200 Gresham Road
    Philadelphia, PA 19119

15. Virginia Beach Community Trust Program
    Community Services Board
    MR/DD Programs
    Pembroke Six, Suite 218
    Virginia Beach, VA 23462