ESTATE PLANNING FOR THE FAMILY WITH A DISABLED CHILD*

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INTRODUCTION

Most of the same general estate planning considerations that apply to a family with a handicapped child are applicable to any family of similar composition with equivalent assets.[1] The fundamental goals of estate planning—to conserve family wealth and distribute it in accordance with the wishes of the decedent while attempting to minimize taxes and outside interference—are common to all families. Accordingly, while the support and welfare of the handicapped child are important considerations, the estate planner and the estate planning client are equally concerned about securing the support of the client's spouse after death and the welfare of other children. In addition, if the estate is of sufficient size, the responsible planner must consider using the marital deduction[2] and other tax-saving devices. The planner also may wish to employ revocable trusts with pour-over wills[3] to ensure smooth and

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1. In this article, "handicap" refers to any chronic condition, mental or physical, that prevents a person from meeting basic living needs without assistance. While various statutes contain more specific definitions of "handicap," "disability," "mental disability," etc., the focus herein is on the child's dependency, to some degree, on others for a safe and comfortable existence.

2. I.R.C. § 2056 (1982 & Supp. V 1987).

3. The revocable trust with pour-over will is an estate planning technique for reducing or eliminating the need for probate, and its accompanying delay and expense. The settlor places his or her assets in a trust during the settlor's lifetime while reserving lifetime use of them, the right to revoke the trust, and the right to add to or subtract from the trust corpus. Under the trust instrument, the trust benefits pass to named beneficiaries upon the death of the settlor in the same manner as under a will, but without the need for probate. The "pour-over" will, executed either simultaneously with the trust or sometime later, applies only to those assets not included in the trust, and provides that these assets "pour over" to the trust, *i.e.*, they become part of the trust corpus. *See generally*, D. WESTFALL & G. MAIR, ESTATE PLANNING LAW AND TAXATION ¶ 1.07[2][a] (2d ed. 1989).

prompt administration. Finally, the planner should advise the handicapped child's parents to execute durable powers of attorney[4] in order to protect against the parents' disability and incompetence.

I. Preliminary Considerations for Handicapped Children

A. General Approach

The family with a handicapped child will wish, to the fullest extent possible, to meet the needs of the handicapped child when the parents are no longer able to do so. Accordingly, the planner often drafts special provisions for the child's physical care and for the custodianship of assets to be used for that purpose. Because the details of these provisions are determined by the degree of the child's handicap and the family resources,[5] careful information-gathering is the planner's first task.

The estate planner thus needs to obtain detailed information concerning the client's family situation, assets, and wishes with regard to the disposition of those assets. In addition, certain facts about the handicapped child are required. The planner should be familiar with the present degree of the child's disability and with the prognosis for improvement or deterioration.[6] Also, the proposed management program created by physicians and other professionals must be considered, and its projected cost established.

B. Allocation of Resources

With these facts in hand, the planner can begin to work with the client on a plan for the allocation of estate resources between the handicapped child and other beneficiaries. The client's current feelings are the logical starting point. For example, some parents may come into the planner's office wishing to make available the maximum resources possible to aid the handicapped child—even to the exclusion of other children—while others may feel that an equal or unequal division of assets is desirable. Still others may

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4. A durable power of attorney is one that is not affected by the later disability or incapacity of the principal. *See* 14 V.S.A. § 3051 (1989).

5. Frolik, *Estate Planning for Parents of Mentally Disabled Children*, 40 U. Pitt. L. Rev. 305, 321 (1979).

6. Owens & Jordan, *Estate Planning for Parents of Mentally Disabled Children*, 126 Tr. & Est. 41, 42 (Sept. 1987).

wish to rely exclusively on public sources of support for the handicapped child and transfer all of their assets at death to other children.[7]

The family's wealth is a crucial factor in establishing the final allocation plan. If the family has very substantial assets, sufficient to provide for all anticipated needs of the handicapped child for his or her life, the considerations will be different than the ones that would arise for a smaller estate. Unless the wealthier family wishes to conserve assets, there may be little or no need to structure the estate plan in such a way as to avoid losing government benefits. In contrast, the family with minimal assets may decide to make no provision for the handicapped child in order to avoid any reduction in or repayment of government benefits, while at the same time providing a small nest egg for other children.[8] The family that stands to benefit most from careful estate planning in this area is the family with a moderate estate which is inadequate to support the handicapped child independently for life (without government assistance) while also providing for other children, if any.

C. Provisions for Personal Care

In addition to allocating the family's financial resources, the estate plan must usually include special provisions for the physical care of the handicapped child. The child's parents will naturally be extremely concerned that the child's personal care continue uninterrupted when they are no longer living or otherwise unable to provide assistance. Arrangements to ensure continued care can vary from an informal understanding with a family member or close personal friend to a formal guardianship.

Individual arrangements for the personal care of the handicapped child before and after the child attains the age of majority have the appeal of informality and flexibility. Such arrangements (usually made with a parent's or child's sibling, other close relative, or a trusted friend) are particularly attractive when the child's handicap is mild. Unfortunately, these arrangements also have serious drawbacks. For example, the person volunteering to assume the parents' role has neither the legal rights nor the obligations of

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7. Frolik, *supra* note 5, at 322.

8. Davis, *Financial and Estate Planning for Parents of a Child with Handicaps*, 5 W. NEW ENG. L. REV. 495, 511 (1983).

a statutory guardian,[9] which tends to limit severely any such volunteer's ability to make binding decisions on behalf of the child. In addition, even the most trustworthy individual can become unwilling or unable to continue providing assistance.[10] In that instance, unless some formal provision has been made for the selection of a successor, the selection process, qualifications, and identity of any such successor are left to the courts.

Whether a legal guardian is required for a handicapped child who has reached the age of majority will depend upon the nature and severity of the handicap. Individuals with only physical handicaps, or with mild mental handicaps, can and should be allowed to lead as normal a life as possible, with a minimum of outside interference. In the case of severe mental handicaps, however, some type of statutory guardianship is probably unavoidable.[11]

In Vermont, as in most states, the natural parents of a child are the child's legal guardians until the child reaches the age of majority.[12] Unless there has been a court adjudication of incompetency, however, a minor who has reached the age of majority is presumed competent and his or her parents no longer have the statutory right to handle the child's affairs or make decisions concerning his or her well-being.[13]

Vermont has not adopted the provisions of the Uniform Probate Code concerning the protection of disabled persons and their property, but instead has a statutory system providing for the ap-

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9. A statutory guardian is a person appointed and supervised by the probate court to act for another person (the "ward") as financial manager, legal representative, and personal custodian. The guardian's actions and decisions are ordinarily legally binding upon the ward. *See generally* 14 V.S.A. §§ 2602-2693 (1989).

10. Davis, *supra* note 8, at 511.

11. In fact, if the parents of the handicapped child do not pursue a guardianship, several classes of other persons are statutorily authorized to do so. "Any person interested in the welfare" of the individual may petition the probate court for the appointment of a guardian for a "mentally disabled" adult. 14 V.S.A. § 3063 (1989). "Interested" persons may include, without limitation, near relatives, public officials, social workers, physicians, and clergymen. *Id.* § 3061(7). "Mentally disabled" persons include both the mentally retarded and those with other mental disorders that seriously impair functioning. *Id.* §§ 3061(1), (4), (5).

12. 14 V.S.A. § 2641 (1989). In Vermont, however, the natural parents do not have all of the legal power of a court-appointed guardian. For example, a natural parent cannot, without first being appointed legal guardian, settle a claim exceeding $1,500 on behalf of a minor child. *Id.* § 2643. The law specifically allows the appointment of a parent as legal guardian. *Id.* § 2648.

13. Frolik, *supra* note 5, at 310.

pointment of either a total guardian[14] or a limited guardian[15] for mentally disabled[16] adults.[17] In addition, the court may order the guardian to provide the ward with those benefits and services to which he is lawfully entitled and which he needs to promote his own social and financial independence, including educational, residential, nutritional services, medical and dental services, therapeutic and habilitative services, adult education, vocational rehabilitation, and other appropriate services.[18]

Despite the discretion afforded the probate court under the statute, and despite the availability of two kinds of guardianships (total and limited), formal guardianships can be cumbersome and inflexible. Nearly all parents, however, will want as much control as possible over their adult child's living circumstances, if the alternative is control by strangers. Accordingly, the parents of a mentally disabled child should seriously consider commencing a guardianship proceeding in probate court when the child reaches the age of eighteen. In addition, each parent's will should exercise that parent's statutory right to appoint a guardian and alternate guardians for his or her handicapped minor child or mentally disabled adult child.[19]

In addition to providing for total and limited guardianships, Vermont provides for guardianships "of the person" of mentally retarded adults who are unable to manage by themselves.[20] At the

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14. 14 V.S.A. § 3069 (1989).

15. *Id.* § 3070.

16. *See supra* note 9 for the statutory definition of "mentally disabled."

17. In Vermont, the probate court may appoint a "total" guardian for a mentally disabled adult upon determining that the adult is "unable to manage, without the supervision of a guardian, all aspects of his personal care and financial affairs." 14 V.S.A. § 3069(a) (1989). Such a guardian has the power to exercise general supervision of the ward, approve or reject the ward's contracts (including sales and encumbrances of property), supervise the ward's income and resources, consent to medical treatment of the ward, collect claims and debts, and defend actions on the ward's behalf. *Id.* § 3069(b)(1)-(6). Section 3070 permits the court to appoint a limited guardian of a mentally disabled adult who "is unable to manage some, but not all, aspects of his personal care and financial affairs." *Id.* § 3070(a). The court must specify which of the powers available to a total guardian the limited guardian shall have, and may impose other limits on the guardian's authority. *Id.*

18. *Id.* § 3071.

19. *Id.* § 2656.

20. 33 V.S.A. § 3604 (1981). The statute defines "mentally retarded person" as "any person who has been diagnosed as having significantly subaverage intellectual functioning which has been manifested prior to the age of 19 and which exists concurrently with defects in adaptive behavior." *Id.* § 3602(1). The guardianship program is available only to retarded persons at least 18 years old who need "supervision and protection for [their] own welfare or the public welfare" and who are not residing in a state school or hospital. *Id.* §§ 3604(1)-(3).

request of an "interested person,"[21] the state's attorney may petition the district court for appointment of the Commissioner of Mental Health as guardian of the mentally retarded adult.[22] The Commissioner, as guardian, can make a wide range of important personal decisions for the ward, including selection of residence, employment, care, and education, as well as economic decisions such as approving or forbidding the sale of property and the making of other contracts.[23] Such guardianships represent state control over the personal life of a loved one, as contrasted with the private guardianship by a person of the family's selection. For this reason alone, state guardianships will likely be unacceptable to most estate-planning clients.

II. Maximization of Resources

Like any other estate plan, a plan for the parents of a handicapped child should attempt to make the best use of available resources of the family, both during life and at death.

A. Lifetime Planning

During the lifetime of the parents, the handicapped child is apt to be highly dependent on the parents for physical and monetary support. Accordingly, steps can and should be taken during the parents' lifetime to insure continuation of such support.

The estate planner should attempt to identify those persons and institutions that are willing and able to carry on the physical support of the handicapped child and administer any assets for his or her benefit. Once the planner has identified these prospective caregivers, he or she can estimate the cost of the care. The parents should then take steps, if possible, to insure that their financial resources are adequate to continue assistance to the handicapped child after their death or disability. The planner should advise the parents, however, that under certain circumstances such resources may disqualify the child for certain kinds of public assistance.[24]

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21. "Interested person" is defined as "a responsible adult who has a direct interest in a mentally retarded person" including, without limitation, the "retarded person, a near relative, guardian, public official, social worker or clergyman." *Id.* § 3602(4).

22. *Id.* § 3605.

23. *Id.* § 3610.

24. *See infra* text accompanying notes 28-66.

Besides assessing their savings and investments, parents wishing to continue support for the handicapped child during their lifetime and after death should review and evaluate their death and disability insurance, retirement benefits, and other property.[25] If the present insurance and retirement programs are not adequate to meet the parents' estate planning objectives, the parents may need to sacrifice some additional current income. For example, if retirement benefits are expected to be inadequate to provide for the needs of both the parents and the handicapped child, the employer might be approached about a deferred compensation program. Similarly, if life insurance or disability insurance is inadequate, additional insurance coverage should be considered.[26] The parents also should plan for the ultimate disposition of a closely held business or similar illiquid asset.[27]

B. Government Benefits

An important consideration in any estate plan for a family with a handicapped child is the availability of, and qualification for, various federal and state government benefit programs. The estate planner should be familiar with the various programs available and their respective eligibility requirements.[28] These programs generally fall into three broad categories: pure insurance (non-need) type programs, programs based on need, and cost of care programs.[29]

1. Insurance Type Programs

There are several federal "insurance type" programs.[30] These include primary Social Security[31] and Medicare,[32] for which qualification does not depend on the applicant's finances.[33] An unmarried son or daughter who is disabled may qualify for these benefits if he or she became totally disabled before the age of twenty-two

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25. *See* Gorman, *Planning for the Physically and Mentally Handicapped*, 11 U. MIAMI INST. EST. PLAN. ¶ 1507.4 (1977).
26. *Id.*
27. *Id.*
28. Davis, *supra* note 8, at 497.
29. Owens & Jordan, *supra* note 6, at 42.
30. *See generally* Frolik, *supra* note 5, at 315-21.
31. 42 U.S.C.A. §§ 402-433 (West 1983 & Supp. 1989).
32. *Id.* §§ 1395-1395xx.
33. *Id.* §§ 402(a), (d), 426(b).

and depends on a covered parent who has retired, died, or become disabled.[34] Federal disability benefits continue until the child dies, marries an individual not eligible for benefits, or ceases to be disabled.[35]

2. *Need-Based Programs*

The second type of government assistance that may be available to the handicapped child includes programs such as Supplemental Security Income (SSI),[36] Medical Assistance (Medicaid),[37] welfare,[38] and free legal services.[39] These benefits, however, are available only to individuals who meet highly restrictive qualifications with respect to income and assets.[40]

To be eligible for SSI benefits (which are currently about $5,000.00 per year in Vermont, less the recipient's income[41]), the handicapped individual's overall income must be lower than the amount of the benefit.[42] The definition of income for SSI purposes is quite broad and includes, among other things, inherited or gifted property, Social Security payments, and other forms of unearned income.[43] There are, however, several items specifically excluded from the SSI definition of income. Most notable among these exceptions are: (1) payments received under state or local programs based upon need;[44] (2) grants, scholarships, or fellowships received for use in paying educational tuition and fees;[45] (3) medical care and services paid directly to the provider by someone else;[46] (4) property or services which could not be utilized for food, clothing,

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34. 42 U.S.C.A. § 402(d) (West Supp. 1989); Owens & Jordan, *supra* note 6, at 43. The operative definition of "disability" is found in 42 U.S.C.A. § 423(d) (West Supp. 1989). Basically, a "disability" is defined as an inability to engage in any "substantial gainful activity" because of a chronic or terminal condition. 42 U.S.C.A. § 423(d) (West Supp. 1989).

35. 42 U.S.C.A. §§ 402(d)(1)(D), (G) (West Supp. 1989).

36. *Id.* §§ 1381-1383c (West 1983 & Supp. 1989).

37. *Id.* § 1396.

38. 33 V.S.A. §§ 2501-2584 (1981 & Supp. 1989).

39. 42 U.S.C.A. § 2996 (West Supp. 1989).

40. Frolik, *supra* note 5, at 315.

41. 42 U.S.C.A. § 1382(b)(1) (West 1983).

42. *Id.* § 1382(a)(1)(A).

43. *Id.* § 1382a(a). Both the income ceiling and the benefits are subject to cost-of-living adjustments. *See id.* § 1382f.

44. *Id.* § 1382a(b)(6).

45. *Id.* § 1382a(b)(7).

46. 20 C.F.R. § 416.1103(a)(1) (1989).

and shelter (such as the payment of a telephone bill by a trustee);[47] and (5) small amounts of earned as well as unearned income.[48] In addition, the handicapped individual will be disqualified for SSI if he or she has assets greater than $2,000, not taking into account certain excluded assets.[49] The primary exclusions include a home owned or occupied as a principal residence, a reasonable value for household goods, personal effects and an automobile, a small amount of life insurance, burial insurance, and insurance proceeds used to repair or replace an excluded asset.[50]

Medicaid is a federally funded, state-administered plan of medical assistance to, among others, disabled individuals.[51] Medicaid provides a vast range of medical services which includes hospitalization, out-patient hospital care, physician services, laboratory tests, and home health care.[52] Many states, including Vermont, determine Medicaid eligibility by following the federal SSI standards in both their definition of disability and their income and wealth limitations.[53] Medicaid is extremely important because it provides public funding for health-related care and services to individuals who do not require hospitalization.[54]

As a part of Vermont's welfare program, the state offers general financial aid to the "aged, blind and disabled"[55] in an amount that "shall be determined with due regard to the income, resources and maintenance available to [the needy person]."[56] In many states that provide assistance to the disabled, the state is expressly authorized or required by statute to seek reimbursement from beneficiaries.[57] The State of Vermont's ability to recover prior welfare payments appears to be limited to situations where "the recipient possessed income or property in excess of that reported to the [Department of Social Welfare]."[58] This would seem to preclude the state from recovering previously paid benefits from an individual

47. *Id.* § 416.1103(g).
48. 42 U.S.C.A. § 1382a(b)(2)(A),(3),(4) (West 1983 & Supp. 1989).
49. *Id.* § 1382(a)(1)(B).
50. *Id.* § 1382b; 20 C.F.R. § 416.1103(c) (1989).
51. 42 U.S.C.A. § 1396 (West 1983 & Supp. 1989).
52. *See, e.g.*, 33 V.S.A. §§ 2651b, 2652 (1981).
53. 42 U.S.C.A. § 1396d(a) (West 1983 & Supp. 1989).
54. *Id.*
55. 33 V.S.A. § 2651 (1981).
56. *Id.* § 2654.
57. *See* Mooney, *Discretionary Trusts: An Estate Plan to Supplement Public Assistance for Disabled Persons*, 25 ARIZ. L. REV. 939, 950-53 (1983).
58. 33 V.S.A. § 2573(b) (1981).

who acquired assets after the benefits were paid. In the absence of additional reimbursement authority under the current statute, the state still might attempt to recoup benefits under the equitable theory of unjust enrichment. Thorough planning therefore requires both securing the beneficiary's eligibility for need-based programs and insulating any assets from potential state claims for reimbursement.

In assessing the role of government benefits in an estate plan, the planner must know which assets and resources will be taken into account in determining eligibility. Whether or not the parents' assets will be included generally depends on state law.[59] Vermont follows the majority rule that the parents' financial responsibility for the child terminates when the child reaches the age of majority.[60] Since the adult child has no claim on his or her parents' assets, those assets should be disregarded in Medicaid and assistance eligibility calculations.

3. State-Administered Cost of Care Programs

In addition to Medicaid, many states offer additional programs for the benefit of aged and disabled citizens, including provisions for institutional care.[61] Generally, these programs are run on a cost-of-care basis, *i.e.*, the recipient is required to repay the state for the cost of the benefit when and if he or she is financially able.[62] The programs may be subsidized by the state, so that even fee-paying clients do not bear the full cost of the services. Vermont's community mental health program[63] is one example; a community mental health agency may be eligible for state funding, but only if it has a "uniform and reasonable schedule of fees for services provided to those persons who can afford to pay."[64]

Vermont also maintains a program for all mentally retarded

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59. *See* 42 U.S.C.A. § 1396d(a) (West 1983 & Supp. 1989).

60. *See* 15 V.S.A. §§ 201, 202 (1989); 33 V.S.A. § 2711(11) (Supp. 1989).

61. *See* Frolik, *supra* note 5, at 315-16. Vermont has additional programs available for the disabled such as protective services for mentally retarded citizens, 33 V.S.A. §§ 3601-3617 (1981), and burial assistance, 33 V.S.A. § 3101 (1981 & Supp. 1989). *See also supra* text accompanying notes 11-23.

62. Frolik, *supra* note 5, at 321; Mooney, *supra* note 57, at 952; Richmond, *Planning for Orphans, Quasi Orphans and Disabled Persons*, 18 U. MIAMI INST. EST. PLAN. ¶¶ 1500, 1505.2 (1984).

63. 18 V.S.A. §§ 8901-8913 (1987 & Supp. 1989).

64. *Id.* § 8910(b).

persons placed in the custody of the Commissioner of Mental Health by order of a district court.[65] This latter program is available to all mentally retarded wards without regard to income or resources, and without specific obligation to reimburse the state. Some families might object to participating in the program, however, because it permits the district court to commit the retarded person to the Brandon Training School "*either for an indefinite period* or for a limited period for the purpose of accomplishing specific treatment or habilitation goals."[66]

C. *Transfers of Property for the Benefit of the Handicapped Child and Other Children*

One of the primary goals of estate planning for the parents of a handicapped child is to make assets available for the benefit of the child without interfering with benefits received from public assistance programs. To that end, several planning options must be considered in conjunction with their respective impact on the handicapped child's siblings and other prospective beneficiaries.

1. Disinheritance

One planning option available to the parents is to disinherit the handicapped child.[67] This is not necessarily the heartless act of abandonment it seems to be. If the parents' estate is small enough that the assets would not contribute materially to the welfare of the handicapped child, disinheritance of the child may leave him or her no worse off (while leaving the other family members better off) than would a bequest to the child. Even though gifts or bequests can be structured in a manner which probably would not disqualify the child for public assistance or subject the assets to reimbursement claims,[68] the cost of such arrangements can be prohibitive. Accordingly, the parents may wish simply to leave their assets to their other children or perhaps to a charity or institution with the hope that the beneficiaries will do whatever they can to assist the handicapped child.

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65. *Id.* § 8835 (1987).

66. *Id.* § 8828 (emphasis added) Brandon Training School is a school "established for the custody, treatment, education, habilitation and remedial care of mentally retarded persons in Vermont." 18 V.S.A. § 8838(a) (1987).

67. Frolik, *supra* note 5, at 325.

68. *See* text accompanying notes 78-101.

2. *Transfer to a Third Party*

An alternative used frequently by parents with limited assets is the simple transfer to a third party, often a sibling of the handicapped child, with precatory language indicating that the assets are to be used for the benefit of the handicapped child.[69] Like the informal guardianships discussed above,[70] this type of arrangement has the advantages of simplicity, low cost, and the participation of a custodian in whom the parents presumably have a high degree of trust. The main problem with such arrangements is that, like informal guardianships, they generally have no legal effect.[71] In addition, the assets become available to the creditors of the person acting as custodian and also to the potential claims of his or her spouse in a divorce.[72] Since the person holding the assets is the outright owner, there is no guarantee that he or she will not simply lose interest[73] or exploit the assets for personal needs.[74] In short, this arrangement may be preferable to disinheritance where the estate is small, but the drawbacks are significant.

3. *Transfer to Guardian*

To insure that any assets earmarked for a handicapped child are actually used for his or her benefit, the parent may transfer the assets to the child's legal guardian.[75] This, of course, is subject to all of the drawbacks of a legal guardianship including its cumbersome nature as well as its time-consuming and expensive restrictions. In addition, any assets held by the guardian are subject to the claims of the creditors of the handicapped child and the reimbursement claims of state welfare agencies.[76] Moreover, those assets are taken into account in determining eligibility for SSI and

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69. Frolik, *supra* note 5, at 323.
70. *See supra* text accompanying notes 9 & 10.
71. Frolik, *supra* note 5, at 323.
72. Richmond, *supra* note 62, § 1504.4(B).
73. Frolik, *supra* note 5, at 324.
74. Richmond, *supra* note 62, § 1504.4.
75. *Id.* § 1504.2.
76. The assets of a person under guardianship are available to satisfy claims of the person's creditors. Aldrich v. Williams, 12 Vt. 413 (1840). Although some cases suggest that a guardianship creates a trust, *see, e.g., In re* Houghton, 118 Vt. 228, 105 A.2d 257 (1954), it is reasonably clear that such pronouncements refer to the guardian's position as a fiduciary, not to the creation of a separate legal entity exempt from creditor claims or to any title of the guardian to the ward's assets. *See* Richardson v. Passumpsic Sav. Bank, 111 Vt. 181, 13 A.2d 184 (1940).

Medicaid.[77] While such a transfer puts the funds in the hands of a person with a clear legal duty to use those funds only for the benefit of the handicapped child, it is far less flexible than a properly drafted trust.

4. Transfer in Trust

The device of choice in planning estates for parents of handicapped children who wish to transfer assets for the benefit of the handicapped child is an inter vivos or testamentary trust.[78] Generally, inter vivos trusts are preferable because they allow for greater privacy and avoid the expense and delays of probate.[79] There are several varieties of trusts and trust provisions which may be used in planning for the family with a handicapped child.

A "mandatory trust" is a trust in which the trustee has little or no discretion over the "required, minimum"[80] distributions of income and principal to the beneficiary which are mandated, under certain circumstances, by the terms of the trust.[81] Unfortunately, the distributions of a mandatory trust will most likely be deemed as income of a handicapped child in determining his or her eligibility for SSI, Medicaid, and other need-based state and federal benefits. Such trusts are also subject to the claims of creditors and reimbursement claims of state agencies.[82] Accordingly, the mandatory trust should be avoided in cases where government assistance is a part of the estate plan.[83]

A "support trust" is one in which the trustee is given limited discretion to apply income or principal of the trust for the support of the beneficiary.[84] The pure support trust has many of the same drawbacks with respect to creditors and public assistance as a mandatory trust.[85] Even if the trust assets are not included as income of the handicapped child,[86] payments for his or her support

77. Mooney, *supra* note 57, at 940-41.

78. *Id.* at 940. An inter vivos trust is one that comes into existence during the settlor's life. A testamentary trust is created under the settlor's will.

79. Frolik, *supra* note 5, at 338.

80. *Id.* at 327.

81. *Id.*

82. Mooney, *supra* note 57, at 944.

83. *Id.*

84. *See* Frolik, *supra* note 5, at 330-33; Mooney, *supra* note 57, at 945-50.

85. Mooney, *supra* note 57, at 945.

86. 42 U.S.C.A. §§ 1382a(a)(1), (2) (West Supp. 1989).

which could be used for food, clothing, and shelter could threaten SSI benefits[87] and therefore Medicaid eligibility as well.[88] In addition, the trust may be subject to reimbursement claims by state agencies.[89] If a support trust is to be used, the circumstances and purposes for which support will be provided should be spelled out in detail. Specifically, the document should contain a provision indicating that it is the purpose of the trust only to supplement, and not to supplant, any state and federal benefits, and that income and principal should be distributed to the handicapped child only for items which will not disqualify him or her for public assistance.

A spendthrift provision[90] may be added to a support trust to assist in defeating claims of creditors and reimbursement claims of state agencies.[91] In Vermont, spendthrift clauses in trusts have been expressly sanctioned.[92] While spendthrift provisions are generally effective against claims of general creditors, their success in defeating the claims for reimbursement by state agencies has been mixed. Courts have used various theories to separate reimbursement claims of state agencies from those of general creditors. In some states, state agencies have recovered money from spendthrift trusts on the theory that the state has simply furthered an express purpose of the trust by supporting the beneficiary.[93] However, in states (such as Vermont) where spendthrift provisions are sanctioned, the strongest possible spendthrift provision should be placed in any trust for the benefit of a handicapped child.

A purely discretionary trust[94] for the benefit of a handicapped child coupled with a strong spendthrift provision has the highest probability of defeating claims of creditors and reimbursement

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87. *See supra* note 47 and accompanying text.

88. *See supra* note 53 and accompanying text.

89. Massey, *Protecting the Mentally Incompetent Child's Trust Interest from State Reimbursement Claims*, 58 DEN. L. J. 557, 561 (1981).

90. A "spendthrift provision" is a clause in a trust stating that a beneficiary's interest may not be conveyed in any way, and shall not be subject to claims of the beneficiary's creditors. For a typical spendthrift provision, see Huestis v. Manley, 110 Vt. 413, 418, 8 A.2d 644, 645-46 (1939).

91. Massey, *supra* note 89, at 562.

92. Huestis v. Manley, 110 Vt. 413, 419, 8 A.2d 644, 646 (1939).

93. Massey, *supra* note 89, at 563.

94. A "discretionary trust" is one in which the trustee has the power to disburse and withhold income and principal at will. The trust does not specify either specific events that would trigger distributions or the goals that the trustee must achieve. There is therefore no standard which could justify a legal action by the beneficiary to force a distribution. However, the trustee is still subject to the inherent limits to a fiduciary's discretion. *See* Frolik, *supra* note 5, at 328.

claims of state agencies. It also will not disqualify the handicapped child for SSI and Medicaid except to the extent that the trustee exercises his or her discretion for the benefit of the handicapped child in a way which is contrary to the qualification requirements for those programs.[95] The problem with totally discretionary trusts is that the settlor of the trust generally has little or no control over the trustee's distributions of income and principal. A common device used to provide guidelines to the trustee is the use of precatory language expressing the settlor's intent.[96] However, any such language must be drawn with great care so as not to convert the trust into a support trust. If the precatory language is strong enough to suggest that the trustee is legally obligated to distribute a certain amount of money, creditors or state agencies might be able to reach the distributions, and the child might be disqualified from receiving public assistance.[97] If used, the discretionary trust should specifically state that the settlor intends for the trust assets to be used only for purposes which will not disqualify the handicapped child from public assistance, and also that no trust assets should be used to provide—or reimburse for—any benefits available through any state or federal program.

Often, in order to insulate further the trust assets from claims of creditors and governmental agencies, a sprinkling provision[98] for the benefit of persons other than the handicapped child is advisable.[99] While this may place a significant burden on the trustee in the exercise of his or her discretion, such a provision helps to place the assets beyond the reach of creditors (including government agencies seeking reimbursement) by eliminating the argument that the trust assets are the exclusive beneficial property of the handicapped child.

The planner can further protect the trust fund by including a clause terminating the trust and conveying the trust assets to beneficiaries other than the handicapped child under certain circumstances, such as a successful reimbursement claim by a state agency.[100] Such an "in terrorem clause" may succeed in warding off

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95. Mooney, *supra* note 57, at 957.

96. Frolik, *supra* note 5, at 329-30.

97. *Id.* at 330. *See also supra* text accompanying notes 84-89.

98. A "sprinkling provision" authorizes the trustee to distribute assets, in amounts and at times of the trustee's choosing, to a number of beneficiaries.

99. Gorman, *supra* note 25, § 1507.8.

100. Davis, *supra* note 8, at 517.

government collection efforts by making it clear to the collecting agency that its efforts will be fruitless.

Another device which should be considered is a special power of appointment, placed in the hands of a relative or any other trusted individual. The holder of this power should preferably have the authority to appoint assets either for the benefit of the handicapped child, if needed,[101] or for the benefit of others, if it appeared that the trust would be frustrated by creditors' claims, reimbursement claims of state agencies, or changes in state or federal law that included trust assets in eligibility or disqualification determinations.

Relatively well-to-do planning clients may wish to take a different tack. These clients will probably want to reduce or eliminate death taxes, while also preserving some assets for beneficiaries other than the handicapped child. Both goals can be served by establishing an irrevocable life insurance trust[102] for the benefit of the handicapped child and leaving all other assets to the other children.[103] In this manner, the handicapped child's needs can be met without any increase in the parents' potential estate tax liability, and the assets for the benefit of the handicapped child will be effectively segregated from those being left for the benefit of other children.

Finally, the estate planner should inquire into whether there is any possibility that the handicapped child will receive inheritances or gifts from family members other than his or her parents.[104] Estate plans of these potential donors should be coordinated with those of the handicapped child's parents so that all of the resources will be efficiently used in a commonly designed plan.

III. Selection of Fiduciary

A primary consideration in any estate plan is the selection of

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101. Owens & Jordan, *supra* note 6, at 46-47.

102. An "irrevocable life insurance trust" is an estate planning device that is often used to provide a relatively large bequest while reducing or eliminating gift and estate taxes. An irrevocable trust is established by the settlor during his or her life and funded by periodic contributions. The contributions are used to pay the premiums on a life insurance policy on the settlor's life. The policy beneficiary is the trust. Any annual gift tax due is calculated only on the amount of the premium paid in a given year; the insurance proceeds are tax-free. *See* D. Westfall & G. Mair, *supra* note 3, ¶ 5.06.

103. Owens & Jordan, *supra* note 6, at 47.

104. *Id.* at 48.

fiduciaries. In an estate plan involving a handicapped child, the selection process is complicated by the special needs of the child. Generally, it will be desirable to have a caring and responsible individual both looking out for the physical needs of the handicapped child and perhaps acting as an advocate for him or her. However, that person might not have the financial skills necessary to function as a trustee.

A. Selection of Trustees

Generally, the choice of trustees is limited to one or more individuals, a corporate fiduciary, or a combination of the two.[105] A corporate trustee (such as a bank with a trust department) generally has the advantage of experience in administering trusts and investments,[106] and the ability to act free from the influence of interested parties. In addition, a corporate fiduciary is less likely than an individual to lose or squander the trust assets, and is more likely to have financial resources to replace the assets if held accountable for breach of fiduciary duty. The primary disadvantage of a corporate trustee lies in its potential lack of responsiveness to the individual needs of the handicapped child and other beneficiaries.[107]

An individual trustee, if properly selected, can be more responsive to the needs of the beneficiary than a corporate trustee.[108] On the other hand, an individual trustee may lack the knowledge and skills necessary to manage the trust assets adequately, and also may be influenced by possible conflicts of interest should the trustee's own heirs be beneficiaries under the trust.[109]

In many cases, therefore, it is desirable to combine the appointment of a corporate trustee with one or more individual cotrustees.[110] In the best scenario, this combines the financial expertise of the corporate trustee with the responsiveness of the individual trustees.[111] When this is done, it is frequently wise to divide the duties of the corporate and individual trustees, and assign each

105. Frolik, *supra* note 5, at 345-46.
106. *Id.* at 346.
107. *Id.*
108. *Id.* at 347.
109. *Id.* at 348.
110. *Id.* at 346-47.
111. *Id.*

duty to the person or entity most capable of performing it.[112]

B. Duties of Trustee

The general duties of a trustee are ordinarily to invest and preserve the assets and to distribute them in accordance with the expressed intentions of the settlor.[113] In the case of a trust with a handicapped child as beneficiary, however, a number of special duties are apt to fall upon the trustee (or upon the co-trustee who is to monitor the child's personal needs) for which he or she should be accountable.

The trust instrument should require the trustee to keep itself apprised at all times of the mental and physical condition of the handicapped beneficiary. In addition, the trustee should be required to make periodic inspections of the beneficiary's living conditions and to stay informed of the beneficiary's general wants and needs. The trustee should be involved in planning special activities for the beneficiary that may be financed from trust assets, such as vacations, special schools, special camps, and other goods and services over and above the beneficiary's basic needs.[114]

C. Change or Removal of Trustee

The trust instrument should name successor trustees, as well as provide for the removal and appointment of successors to any trustee.[115] The power to remove and appoint a successor trustee should usually be held by a relative or family member with a knowledge of the handicapped child's needs. Such a provision tends to increase the responsiveness of a corporate trustee.[116]

D. Selection of Guardian

If the child's handicap requires the appointment of a guardian, the parents of the handicapped child should attempt to influence the choice of guardian as much as they can. The parents should clearly exercise the right which they have under state law to

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112. *Id.*
113. *See generally*, IIA SCOTT ON TRUSTS §§ 169-85 (4th ed. 1987).
114. Frolik, *supra* note 5, at 346-47.
115. *Id.* at 347.
116. *Id.* at 347-48.

appoint a guardian for the handicapped child in their will.[117] They should also consider the selection of a number of successor guardians. Almost certainly they will want to avoid the appointment of the Commissioner of Mental Health as guardian of the child's person under the applicable statute.[118]

E. Duties of Guardian

The duties of the guardian are largely defined by state law.[119] In Vermont, the guardian is primarily responsible for carrying out his or her responsibilities with a view to the personal and financial well-being of the handicapped child, including maintaining, defending, and settling legal actions.[120] Although the guardian's role may be somewhat more limited if a trust is established for the benefit of the child, it is still possible that financial resources will come into the hands of the guardian, to be administered in accordance with the statute.

The guardian of the handicapped child may have certain additional obligations or duties depending upon the authority granted under state law.[121] As a minimum, the guardian should monitor regularly the physical and mental condition of the handicapped child as well as the child's living arrangements. He or she should attempt to stay continuously apprised of any special needs, and should communicate periodically with the trustee. The guardian, if so authorized by the Probate Court, can be particularly helpful in certain estate planning areas by taking special action on behalf of the child, such as exercising powers of appointment, executing qualified disclaimers, making gifts, and entering into binding contracts for the benefit of the handicapped child. Generally, the effectiveness of the guardian will depend upon his or her willingness and ability to carry out these and other special duties.

IV. Income, Estate, and Gift Tax Implications

There are a number of income, estate, and gift tax implications which must be considered in planning for the family with a handicapped child. The handicapped child's parents may be able

117. 14 V.S.A. § 2656 (1989).
118. *See supra* text accompanying notes 20-23.
119. *See generally* 14 V.S.A. §§ 2602-3096 (1989).
120. *Id.* §§ 2658, 3069, 3070.
121. *See supra* note 17 for the distinction between total and limited guardianships.

to claim a dependency exemption for the child.[122] A single parent may be able to claim head of household status.[123] In addition, a deduction for certain payments made on behalf of the handicapped child, *e.g.*, medical and dental expenses, may be claimed if "not compensated for by insurance or otherwise."[124]

Certain medical and educational payments can be excluded from the donor's gift tax base if paid directly to the provider of the services.[125] If a trust is set up for the benefit of a handicapped child and subsequent beneficiaries are in a generation below that of the handicapped child, the generation-skipping tax[126] consequences must be considered.

Naturally, all of the general estate tax planning considerations which are not unique to families with handicapped children, such as the marital deduction and maximum use of annual and lifetime gift tax exclusions,[127] should be considered in the overall plan.

CONCLUSION

Estate planning for the family with a handicapped child presents unusual challenges and opportunities. The planner must be sensitive to the needs and desires of both the parents and the handicapped child. He or she must be familiar with the family's resources, and determine how they can best be combined with the various public assistance programs to yield maximum benefit to the handicapped child. The planner must also keep in mind the needs and desires of the other family members who are potential beneficiaries of the estate plan. Finally, the planner must carefully advise the parents of the handicapped child in the selection of appropriate fiduciaries to serve as both trustee and guardian. Few other types of estate planning will give the planner a greater opportunity to be a true counselor, as well as a scrivener.

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122. I.R.C. § 152 (1988).
123. *Id.* § 2(b)(1).
124. *Id.* § 213(a).
125. *Id.* § 2503(e) (1982).
126. *Id.* §§ 2601, 2611 (Supp. V 1987).
127. *Id.* §§ 2503(b), 2505 (1982).