Case Comments and Notes

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Chronique de Jurisprudence et Notes

Estate Planning Considerations for Parents of Disabled Children

Estate planning for families with a mentally or physically disabled child is a particularly challenging area; not only must the estate planner prepare an effective financial plan, he must be sensitive to the emotional needs of disabled persons and their families. The planner will be required to provide creative solutions that allow disabled persons to get maximum benefit from both government assistance and the estate left for their benefit, and at the same time provide an environment that will make their lives as enjoyable as possible.

Creating an appropriate plan for the protection of a disabled dependant will mean a closer investigation of the families' needs than would be the case with a normal estate plan and this, in turn, will reflect itself in an increased cost to the client. Planners should make it a point to meet the disabled person so they can form their own opinion on his or her abilities to handle money and assets. In many cases it will also be necessary to consult trust company representatves, insurance agents, accountants and the proposed executors.[1]

THE FINANCIAL PLAN

Families with a disabled child face a two-fold difficulty: they must plan for retirement and, at the same time, accumulate assets sufficient to care for the needs of the disabled. As a planner it will be important to determine the abilities and needs of the disabled person in order to ascertain how much money will be needed for maintenance.[2] The cost of maintaining a disabled dependant will be high; it will probably be impossible for the average middle-income family to provide the necessary funds, for example, to institutionalize a disabled child for life. For this reason the estate planner should choose a course which will provide the disabled with maximum benefit from the family assets and from available

[1]McLaughlin, P., "Estate Planning for the Parents of Mentally Retarded Persons", *Law and Mental Retardation: a monograph series* (Toronto: C.A.M.R., 1977), at 3.

[2]Hecht, M. D., "Reaction Comment", *The Mentally Retarded and the Law* (New York: MacMillan Publishing Co., Inc., 1976), at 131.

government assistance. Because most lawyers lack experience in financial planning, families with such needs should be advised to seek the advice of experts in this field in order to assure funding for the future needs of the disabled.

Once the financial requirements of the client are determined the estate planner can explore a number of planning options: (1) planning the estate as if no disability existed; (2) giving money to a friend or relative and imposing a moral obligation; (3) disinheriting the disabled child; (4) proposing a trust scheme.[3]

Planning the Estate as if no disability existed.

This option should be considered when the disabled person's handicap does not readily affect his or her ability to work or to make decisions. Such persons may, for example, have only a slight physical or mental handicap that does not justify an elaborate plan, quite apart from the expectations of overly-protective parents.[4]

It is important to fully understand the needs and the limitations of the disabled person before drafting an estate plan as if no disability existed. A direct gift to a disabled person may, for example, disqualify him or her from any benefits for which he may be eligible through the Department of Social Services. And, too, the disabled must be competent to handle his or her own affairs so that it will not be necessary, at some future date, to make an application under the *Infirm Persons Act* to have a Committee appointed to administer the asset or money given.[5]

Imposing a moral obligation on a friend or relative.

Many families are attracted to this concept because they see it as providing surrogate parents for the handicapped person and, at the same time, providing for the cheaper and easier administration of their estate.

Even if your client is fortunate enough to have someone both suitable and willing to take up these obligations, there are problems that should be considered. The obligated person may, for example, die or become disabled by age, or might not be as honest as the parents thought. Because a moral obligation may not be legally binding it may be difficult to force the obligated person to spend the money for the disabled. The majority of estate planners have concluded, for these reasons, that moral obligations do not adequately serve the needs of a disabled person.[6]

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[3]Frolih, A., "Estate Planning for Parents of Mentally Disabled Children" (1978-79), 40 *Pittsburg Law Review* 305, at 321.

[4]*Ibid.*, at 322.

[5]*Infirm Persons Act*, R.S.N.B. 1973, c.I-8, s. 3.

[6]*Supra*, footnote 3, at 325.

Disinheritance

In the United States, with the exception of Louisiana, no state requires parents to provide, after their death, for the care and support of their disabled children.[7] Since most parents of handicapped children do not have estates sufficient to provide for the needs of the children it is common in the United States to disinherit them and divide the estate that does exist between able-bodied members of the family. The state is left to provide support for the handicapped child. In New Brunswick the *Testators Family Maintenance Act*[8] could prevent disinheritance, providing as it does for intervention by a court where there is inadequate provision for maintenance support for a dependant. Under subsection 2(1) of the Act the Department of Social Services could make such an application.[9] In *Re Hawker Estate*, a decision of the Saskatchewan Court of Queen's Bench, the testator left his entire estate to an able-bodied son with instructions to divide the estate as he saw fit. As the testator probably anticipated, the son decided to keep the entire estate for himself, ignoring the needs of three disabled children who were patients in a provincial institution.[10] An application under the *Dependants Relief Act* of Saskatchewan asserted that the testator had an obligation to provide support for the three disabled children. The court held that "the testator had a moral duty to make adequate provision for the proper maintenance of all dependent children even though they were being looked after by the state . . ."[11]. Saskatchewan's legislation is similar in wording and spirit to New Brunswick's act and, while there are no reported cases on point here, a similar result might be expected. While there has been some case law[12] that conflicts with *Re Hawker Estate* the general trend in Canada seems to follow the Saskatchewan ruling. Were this not the case dependant relief legislation across the country would quickly be rendered ineffectual.[13]

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[7]*Ibid.*

[8]*Testators Family Maintenance Act*, R.S.N.B. 1973, c.T-4.

[9]*Ibid.*, subsection 2(1).

[10]*Re Hawker Estate, Canadian Estate Planning and Administration Reporter*, (CCH Canada Limited) at 70,256; (Sask. Q.B., 1980).

[11]*Ibid.*

[12]*Re Deis and Deis*, 1981, 8 A.C.W.S. (2d) 449 (Sask. Q.B.); *Zajac* v. *Zwarycz* (1963), 39 D.L.R. (2d) 6 (Ont. H.C.J.).

[13]Swadron, B. B., and D. Sullivan, *Mental Retardation — The Law — Guardianship* (Toronto: National Institute on Mental Retardation, 1976), at 120.

Proposing a Trust Scheme

The best financial arrangement for parents with a disabled child is often a trust arrangement since each trust can be tailored to the individual needs of the family. A family with a large estate may, for example, create a mandatory trust directing that the income of the trust and capital, if necessary, be used to provide for the needs of the disabled child. Because the estate is large there will be no need of social assistance or other government aid. An average family, on the other hand, will not have a large enough estate to provide for the lifetime needs of a handicapped child, particularly if the child will be unemployable or will have to be institutionalized at some future date. Such an estate must be planned to provide the maximum benefit from the estate and from any government assistance offered.

To create an appropriate trust the planner must understand how various government aid programs work in his jurisdiction. Three statutes are of particular importance in New Brunswick: *Disabled Persons Allowance Act; Social Welfare Act;* and the federal *Disabled Persons Act.*[14] Distribution of funds provided by these Acts is governed by the Social Welfare Regulations.[15] The regulations determine a potential recipient's eligibility by means of a budget deficit method which measures needs against available resources. The term "available resources" is given a broad definition under the regulations:[16]

> 7.(1) For the purpose of this Regulation, available resources includes
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> (a) the total amount of all net income from earnings, allowances, pensions, revenue from business, fishing, lumbering, or farming operations, income from property not used as a residence by the recipient, income from roomers and boarders, income from investments, trust funds, bank accounts or insurance, regular gifts or gratuities whether in cash or kind;
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> (b) assured income; and
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> (c) any assets, revenue or income not specifically excluded under subsection (2).

The regulations enumerate certain things that can be received by a handicapped person that will not be included in available resources and will not therefore affect eligibility for social assistance. The two most important items for estate planning purposes are wage income up to $100.00 monthly, and contributions other than for ordinary maintenance.[17] The Department of Social Services, in its working guide for the

[14] *Disabled Persons Allowance Act,* R.S.N.B. 1973, c.D-11: *Social Welfare Act,* R.S.N.B. 1973, c.S-11; *Disabled Persons Act,* R.S.C. 1970, c.D-6.

[15] (N.B.) Reg. 74-34.

[16] *Ibid.*, subsection 7(1).

[17] *Ibid.*, paragraphs 7(2) (*b*) & (*g*).

regulations, has applied a definition for the phrase "contributions other than for ordinary maintenance":

> Contributions other than for ordinary maintenance refers to small "per occasion" gifts of money or kind and these are not included in calculating available resources. However, if these contributions change to a state of liquid assets they need to be considered.[18]

What will be considered small "per occasion" gifts will be left to the discretion of the officer in charge of an individual claim. Since the definition supplied by the department is not legally binding, it may be that contributions other than for ordinary maintenance would be construed to cover emergency or rare expenses such as out-of-Province surgery or specialized items, such as an electric wheelchair.

The estate plan can provide for the conveyance of assets or payment of income to the disabled dependant by way of a mandatory or discretionary trust. The former is mandatory in the sense that the trustee must use the income of the trust for the beneficiary. Trusts of this type lack flexibility and do not adapt easily to changes in Social Welfare regulations. *Re Smith and Attorney General of Ontario et al*[19] illustrates yet another difficulty with mandatory trusts. In that case a trust was left to be administered in favour of a disabled child. The court held that the child did not qualify for social assistance because the beneficiary could force the trustee to make payments to him. Under the Ontario legislation the disabled child could not qualify for social assistance until the capital of the trust was reduced to $1,500. New Brunswick's Social Welfare Regulations have similar provisions.[20]

To avoid the problems associated with mandatory trusts, estate planners in other jurisdictions have used the discretionary trust. In this type of trust the trustee should be given an unfettered discretion as to how much money he may give out, when, and for what purpose. This sort of power will allow the trustee to adapt to changes in Social Welfare Regulations. It may be that trustees administering such a trust could not be forced to make payments in favour of the disabled dependant and, as a result, the problems posed by *Re Smith* would be avoided.

Choosing a trustee who is at once imaginative and sympathetic, and who has the ability to administer the trust and invest money effectively, will be a difficult task. While trust companies make the best custodians of trust funds, it may be that an individual trust officer does not impress the parents of a disabled child as sensitive to their child's needs. In such cases the family might consider appointing both the trust company and

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[18]Working Guide for Regulations Under the Social Welfare Act.

[19][1973] 2 O.R. (2d) 138.

[20]*Supra*, footnote 15, paragraphs 7(2)(*a*) & (*g*).

a friend, relative or citizen advocate as co-trustee. If the relative named as co-trustee is also the beneficiary of the balance of the trust fund on the death of the disabled child, it should be pointed out to the client that the co-trustee will be in a position of conflict of interest. Another alternative would be to appoint the trust company sole trustee and appoint an appropriate individual to be an advisor to the trustee. If the disabled dependant is capable of managing his or her own financial affairs it might be possible to appoint him as an advisor to the trustee.

When structuring a trust for a disabled person there are certain clauses that must be considered. Provision should be made for an alternate trustee since, in the event of an individual trustee's death, his or her personal representative would become the trustee,[21] and this may not be in accord with the Testator's wishes. The trustee should also be given power to encroach on the capital of the trust in the event special needs arise. Since a trustee has a duty to deal equitably on matters of investment and encroachment on capital with both the life beneficiary and the residual beneficiary, the will should include a clause that specifically relieves the trustee of this "even hand" duty.[22] A discretionary trust normally authorizes payment of ". . .so much of the income or capital or both as my trustee in the exercise of an absolute and unfettered discretion considers advisable." Under New Brunswick law the accumulation period cannot last for more than 21 years,[23] at which point the income must be paid out. The trustee should be given the power to convey the accumulated income to the residual beneficiaries or otherwise deal with it. The sample trust clause in the appendix attempts to deal with this issue.

Another consideration facing the estate planner is whether to make the trust testamentary or inter vivos. With a discretionary testamentary trust the estate may be faced with an application under the *Testators Family Maintenance Act.* The Department of Social Services, which will otherwise have to supply the day-to-day living needs of the disabled child, may argue that the effect of the discretionary trust is to disinherit the child. While it may be argued that social assistance payments may be reduced only in the event that the recipient is entitled to "liquid assets",[24] it is impossible to predict with certainty how the courts would handle such an application.

To better ensure that the disabled person will have more than the minimal existence provided by social assistance, the estate planner can establish an inter vivos trust. The trust would not form part of the

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[21]*Executors and Trustees Act,* R.S.N.B., 1973, c.E-13, s. 18.

[22]Waters, D. W., *Law of Trusts in Canada* (Carswell, 1974), at 690; McLaughlin, *Supra,* footnote 1, at 13.

[23]*Property Act,* R.S.N.B. 1973, c.P-19, s. 1.

[24]Dickson, Mary Louise, "Estate Planning to Provide for a Mentally Retarded Dependant", *Canadian Estate Planning and Administration Reporter,* (CCH Canada Limited) at 11,058.

testator's estate, thereby avoiding any application under the *Testators Family Maintenance Act.* There are, however, some disadvantages to this sort of arrangement: inter vivos trusts are generally taxed at higher rates than testamentary trusts. A revocable trust is taxed at the rate of the settlor as a result of the income attribution rules found in the *Income Tax Act.*[25] When the settlor of a revocable trust dies the trust becomes irrevocable and is taxed as such. For 1982 and subsequent taxation years, the tax payable by an irrevocable inter vivos trust will be determined by reference to a rate of 34 per cent of its annual amount taxable for the year.[26] Coupled with provincial income tax, such a trust's rate would exceed 50%.[27] Subject to certain qualifications, every 21 years there is a deemed disposition of the trust capital property for income tax purposes.[28] It should also be noted that neither an inter vivos nor a testamentary discretionary trust is able to take advantage of the preferred beneficiary election because of the discretionary element of the trust.[29] In order to ensure that the trust is not affected by the *Testators Family Maintenance Act,* therefore, the settlor must be willing to make certain tax sacrifices. In the case of an irrevocable trust, the planner must be fully satisfied that the settlor is willing and financially able to relinquish control over the trust property.

Since it will not be the purpose of the trust to supply all the necessaries of life for the disabled, merely to supplement available social assistance, a large trust fund will not be needed. Current Social Welfare Regulations will not allow the trust to convey much more than $100.00 monthly without jeopardizing the disabled person's eligibility for social assistance.[30] This should be kept in mind when determining the size of the trust. The trust could be established through a series of periodic payments or by making it the beneficiary of a life insurance policy on the settlor's life.[31]

While an inter vivos trust will not be subject to the *Testators Family Maintenance Act,* the estate of the settlor will be. If the settlor left all of his estate to his normal children, for example, the Department of Social Services could still bring an action under the Act.[32] If the application

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[25]*The Income Tax Act,* S.C. 1970-71-72, c. 63, s. 75(2).

[26]*Ibid.*, s. 122(1) and Resolution 101 of the November 12, 1981 budget.

[27]*Income Tax Act,* R.S.N.B. 1973, c. I-2, subsection 2(3).

[28]*Supra,* footnote 25, at subsection 104(4).

[29]*Ibid.*, subsections 104(14) & (15).

[30]*Supra,* footnote 15, paragraphs 7(2)(*a*) & (*g*).

[31]For a more detailed discussion of inter vivos trusts see Wardlaw, J. James, "Inter Vivos Trusts — A Basic Primer", (1979-81), 5 *E. & T.Q.* 297.

[32]*Supra,* footnote 8, subsection 2(1).

were successful the disposition of the settlor's estate would be altered to provide for the disabled child. The child, in turn, would not qualify for social assistance until the allotted portion was exhausted.

In the testamentary trust considered in *Re Smith and Attorney-General of Ontario et al.*, the testatrix directed the trustee to "... make payments either quarterly or more frequently as he in his discretion shall decide of the net income ... for the benefit and welfare of my grandson ...."[33] The Ontario Court of Appeal held that the interest of the beneficiary was a liquid asset in that the beneficiary could force the trustee to make payments. In the case of *Re Barrow,* the will directed the trustee to pay one-half of the net income to or for the benefit of his retarded daughter during the remainder of her life. Although a later paragraph in the will directed that any bequest of income or capital to any person under disability to handle his own affairs be held by the trustees "... until such time as such person ceases to be under disability or dies,"[34] the Supreme Court of Ontario held that the will did not postpone vesting of the daughter's share of the income from the estate, but merely the payment. Since the daughter resided in a facility operated by the Ministry of Community and Social Services, the public trustee as the daughter's statutory committee was therefore entitled to her share of the net income of the estate each year and to apply such amounts to the cost of her care. While New Brunswick does not have an office equivalent to that of the Ontario Public Trustee, a similar application may be brought by the Administrator of Estates when the individual concerned is a resident of a designated facility under the *Mental Health Act.*[36] In order to avoid the implications of *Re Smith and Attorney-General of Ontario* and *Re Barrow,* consideration might be given to the establishment of a totally discretionary trust. In the recent case of *Quinn et al. v. Executive Director and Director (Westmount Region) of Social Services,* the will directed the trustee to pay "... such sums, firstly out of income and secondly out of capital as my trustee in her sole discretion deems advisable for the education, care and maintenance of my daughter, ...".[37] The Manitoba Court of Appeal held that while the assets or the income therefrom might be available, this is not the test to be applied. It held that the contingent beneficial interest of the mentally handicapped beneficiary was not a financial resource and that the assets of the estate were not available for her care and maintenance.[38]

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[33][1973] 2 O.R. 138, at 139.

[34](1980), 29 O.R. (2d) 374, at 376.

[35]*Ibid.*, at 378.

[36]R.S.N.B. 1973, c. M-10.

[37](1981), 9 *E. & T.R.* 312, at 315.

[38]*Ibid.*, at 318.

While the case of *Re Deis and Deis*[39] does not deal with discretionary trusts, it does evidence a desire by courts in certain jurisdictions to release parents of the burden of financially supporting retarded adult children. In that case the intestate's estate, worth approximately $108,000.00, was left to his widow. The Saskatchewan Court of Queen's Bench held that the needs of a retarded son were being fully met by the Saskatchewan government and that, in a very real sense, the deceased, as a taxpayer, had provided for this assistance. As a member of society the deceased was entitled to the benefits of the province's financial resources and had, along with the rest of society, seen to it that those resources were directed to caring for persons unable to care for themselves.[40]

The effectiveness of estate plans for parents of disabled children, involving the use of discretionary testamentary trusts, will be governed to a great extent by the attitude of the courts towards such estate plans.

GUARDIANS

The selection of an appropriate guardian is a further important element in making the estate plan successful. The planner should consult the proposed guardian, if possible, to see if he or she understands the nature of the responsibility. It is also important to point out to the parents of mentally handicapped children that under New Brunswick laws a person who is over the age of nineteen years is presumed to have full capacity to manage his own affairs, whether he actually can or not.[41] The *Infirm Persons Act*[42] is an all or nothing statute under which on application to the court an individual is declared mentally competent or incompetent. When a person is declared mentally incompetent, the court can appoint a committee of the individual person and his estate. In other jurisdictions, such as Alberta, a more flexible statute has been adopted that allows varying degrees of guardianship, depending on the disabled persons ability and needs.[43] Under this act the court can appoint a plenary or a partial guardian if it is in the best interests of the person in respect of whom the application is made.[44] It is hoped that similar legislation will be adopted in New Brunswick.

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[39]*Canadian Estate Planning and Administration Reporter*, (CCH Canada Limited) at 70, 274; (1981), 8 *A.C.W.S.* (2d) 449.

[40]*Ibid.*, at 70, 275.

[41]See Dickson, Mary Louise, "Planning for Retarded and Disabled People in Ontario", (1979-81), 5 *E. & T.Q.* 339, and 365.

[42]R.S.N.B. 1973, c. I-8.

[43]*Dependent Adults*, R.S.A. 1980, c. D-32.

[44]*Ibid.*, subsection 2(1).

CONCLUSION

Estate planning is not an exact science. While it is seldom routine or simple,[45] even greater skills are required when it involves parents of disabled children. With constant change in the law and its application there are no guarantees that the plan proposed today will be appropriate tomorrow. While discretionary trusts appear to be the best vehicle for providing the maximum benefit from the estate and any government assistance offered, they are far from perfect. Their effectiveness will be governed by changes in relevant legislation, the exercise of the discretion of the officer in social services in charge of claims, the attitude of the courts towards such estate plans, and the ability of the trustee to adapt to the changing needs of the disabled person.

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[45]See Hull, Rodney, "The Avoidance of Malpractice in Estate Planning and Administration", (1979-81), 5 *E. & T.Q.*

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APPENDIX

The following precedent* is intended for use in a Will establishing a discretionary trust as discussed in the foregoing. The same clause with appropriate revisions may be used in an agreement creating inter vivos trusts.

This precedent is merely a suggestion to be used as a basis for further refinement to meet individual circumstances. It assumes that the estate has been divided into shares, with one share being left in a discretionary trust for a mentally retarded daughter and the other shares being left to the other children or other beneficiaries:

> If my daughter, _____ , survives me, I authorize my Trustee to set aside and to keep invested her share of my estate and to pay to her or spend on her behalf from time to time so much of the income or capital or both of her share as my Trustee in the exercise of an absolute and unfettered discretion deems it to be advisable. Neither this share nor any portion re-

*McLaughlin, P., "Estate Planning for the Parents of Mentally Retarded Persons", *Law and Mental Retardation: a monograph series* (Toronto: C.A.M.R. 1977), at 25-27. Precedent is reproduced with the permission of the National Institute on Mental Retardation.

maining from time to time nor any income therefrom shall vest in my said daughter and the only interest she shall have shall be in payments actually made to her and received by her or in property purchased for her. Without in any way binding the discretion of my Trustee, it is my wish that in making decisions concerning payments to or expenditures on behalf of my said daughter my Trustee should consult with and be guided by the recommendations of her brother,_____. Without in any way binding the discretion of my Trustee, it is also my wish that in exercising his discretion in accordance with the provisions of this paragraph, my Trustee should provide extra comforts and amenities of life for my said daughter without substantially impairing the benefits which she might receive from other sources, including but not limited to governmental sources. In order to maximize such benefits, I specifically authorize my Trustee to make payments varying in amount and at such time or times or such regular periodic payments as my Trustee in the exercise of an absolute and unfettered discretion deems it to be advisable. I specifically relieve my Trustee of his duty to maintain an even hand between the life tenant and the remaindermen of this trust, it being my intention that my Trustee should have access in his absolute and unfettered discretion to the entire income and capital of the fund for payments to or on behalf of my said daughter. All accumulated income shall be paid or spent before any encroachments on capital are made. Any income not paid or spent in any year shall be accumulated by my Trustee, provided that any income not paid or spent before the expiry of twenty-one years from my death or such longer or shorter period as is allowed by the laws of the Province of New Brunswick, as amended from time to time, shall be paid to her or spent on her behalf at the latest possible time allowed, after which time any income not paid to my said daughter in any year shall be donated to the _____ Association for the Mentally Retarded or to such other charitable organization concerned with the mentally retarded as my Trustee in the exercise of an absolute and unfettered discretion decides. Upon the death of my said daughter, the amount remaining of her share together with any income accumulated thereon shall be held in trust by my Trustee for her surviving children, if any, in equal shares to be distributed to them when they reach the age of majority. If she leaves no children surviving her, the amount remaining of her share together with any income accumulated thereon shall be transferred by my Trustee to the shares of any other issue of mine then alive in equal shares per stirpes. If no other issue of mine survive my daughter, then the amount remaining of her share together with any accumulated income shall fall into the residue of my estate.

D.C.
J.R.