My first involvement in Estate Planning for the mentally handicapped dependant began about eight years ago when I was asked by the local (Bedford/Sackville) branch of the Canadian Association of the Mentally Retarded (C.A.M.R.)—now Canadian Association for Community Living (C.A.C.L.)—to assist in preparing will precedents that specifically addressed the needs of mentally handicapped dependents. After undertaking this task I contacted numerous members of the Nova Scotia Bar, senior and junior members, from large, medium and small firms, some specialists in Estate work, others general practitioners, for advice on how they dealt with the issue of Estate Planning for the mentally handicapped. In addition I sought further information from several Estate Planners from local branches of Trust Companies. And, at the same time, I reviewed what case law and legal literature I was able to find on the subject. As a result of these inquiries, research and efforts I concluded that, at least in Nova Scotia, very little attention had been given to Estate Planning for the mentally handicapped, and the approaches by practitioners with respect to will planning were, at best, Ad Hoc. Some of these approaches included: 1) planning an estate as if no disability existed, 2) leaving funds to a friend or relative with an informal understanding that he or she would look after the handicapped dependant, 3) disinheriting the handicapped dependant, 4) establishing a trust scheme (usually a mandatory trust or "vested" trust) setting aside either capital, income from capital, or both, for the use and benefit of the mentally handicapped dependant. At that time, in 1980, I was not aware of any use in Nova Scotia of a "discretionary trust" in Estate planning for the mentally handicapped. If it was in use its use was certainly not well known.

In Ontario and "points west" at that time (1980ish) the use of the discretionary trust was just beginning. Paul McLaughlin of the Ontario and Alberta Bars (now practising in Calgary) on behalf of the National office of C.A.M.R. prepared a brochure entitled "Estate Planning for the Parents of Mentally Retarded Persons" in which he discussed the use of the discretionary trust and provided a sample discretionary trust clause. This brochure has been widely distributed and is still available.
from C.A.C.L. (formerly C.A.M.R.). A sample clause, very similar to that proposed by Mr. McLaughlin but "vetted" for use in Nova Scotia by omitting references to Ontario legislation, is attached as appendix "A" to this paper.

The purpose of the discretionary trust is to preserve and protect capital and income arising from capital to provide extra amenities (i.e. spending money, extra food and meals out, clothing, recreation, sports, vacations, etc.) for the mentally handicapped while at the same time not impairing or disentitling the beneficiary from receiving whatever primary care benefits to which he or she would be entitled under municipal or provincial legislation. This purpose is clearly evident in the language of the sample discretionary trust clause attached in Appendix "A". In small to medium size estates monies left to a mentally handicapped dependant would likely be used very quickly for primary care needs if not protected by a discretionary trust. Most provincial and municipal legislation providing assistance for primary care needs of the mentally handicapped have disentitlement provisions in the legislation if the handicapped's estate is in excess of a certain amount (for example, $3,000.00), or the handicapped earns or is entitled to an income in excess of a certain minimal amount (for example $50.00 per week).

One of the major difficulties in establishing a discretionary trust such as that found in Appendix "A" is in choosing an appropriate trustee to whom one would wish to grant such discretion. The traditional choices such as a relative or a trust company may not be appropriate. And, if the estate is small a trust company may not be prepared to act in any event. C.A.C.L. has recognized this problem and has explored the possibility of seeking special legislation to allow it to act as trustee or co-trustee when requested and when circumstances warrant it. To date this is still under study.
Understandably the courts have been reluctant to find and uphold a discretionary trust unless the language in the will establishing the discretionary trust is clear and precise. The question addressed by the courts is whether the language establishing the trust show an intention to vest the capital or income, or both, in the handicapped beneficiary.

In Re Barrow, 113 D.L.R. (3d) 184, the Ontario High Court held, strictly construing the language of the will, that the gift to the handicapped daughter was not contingent but rather vested the income in the daughter. The trust clause under review read as follows:

6.(a) To permit my wife, CAROLINE ROSA BARROW, and my Daughter June, and also my daughter Rosalynd so long as she remains unmarried and desires to reside at home, the use and occupancy of any winter residential property owned and occupied by me at the date of my death...I also authorize my Trustees after the death of my Wife and when and so long as my daughter ROSALYND is taking care of my daughter JUNE to hold in my estate a residential property which shall be the winter residential property owned by me at the date of my death, or one purchased from the proceeds of the sale of the one owned by me at the date of my death and to permit my two daughters while my daughter ROSALYND is taking care of my daughter JUNE to occupy such residence, and upon the death of my Wife and my Daughter ROSALYND, or at any time when my Daughter ROSALYND ceases to take care of my daughter JUNE, any residential property so held in my estate shall be sold and the net proceeds thereof shall be and form part part of the residue of my estate.

(b) To hold the rest, residue and remainder of my estate, and

(1) As soon as conveniently after my decease to purchase a Dominion Government Annuity for my Daughter JUNE, such Annuity to provide payment of Eight-five Dollars ($85.00) per month to her during the remainder of her life, with payments guaranteed for twenty (20) years...

(2) Until the purchase of the said Annuity to pay two-thirds of the net income from my residuary estate to my Wife, CAROLINE ROSA BARROW, and to pay the remaining one-third of the net income from my residuary estate to my said daughter, JUNE for her own use and benefit. After the purchase of the said Annuity to pay the entire net income from the residue of my estate to my said Wife during the remainder of her life, or until the death of my daughter, JUNE, whichever shall be the shorter period.
I hereby direct that the income for my daughter JUNE shall during the lifetime of my said Wife be paid to my Wife for the benefit of my daughter, JUNE, and that the receipt of my Wife for such income shall be a good and sufficient discharge to my Trustees without it being necessary for them to look to the application thereof, and my said Wife shall not be accountable to anyone for the manner in which the said income is expended on behalf of my said daughter, JUNE.

Should my said Wife survive my daughter, JUNE, thereafter to pay to my wife two-thirds of the net income from my estate, and to pay to my daughter, ROSALYND, one-third of the net income from my estate during the remainder of my wife's life.

Should my said Wife predecease my daughter, JUNE, to thereafter pay one-half the net income to or for the benefit of my daughter, JUNE, during the remainder of her life, and to pay the remaining one-half of the income from my estate to my daughter, ROSALYND, until the death of my daughter, JUNE.

Upon the death of the survivor of my said Wife and my daughter, JUNE, to transfer all that part of my estate then remaining unto my daughter, ROSALYND, if she be then living, or should she have predeceased the survivor of my Wife and my daughter, JUNE, unto her issue per stirpes...

Having found that the income vested in the daughter, the court found it unnecessary to address the issue of whether the trustee improperly exercised her discretion to the detriment of the handicapped daughter in favour of the other daughter, the remainderman of the trust.

Similarly, in Halifax County v. Purcell and Purcell Estate, 72 N.S.R.(2d) 157, the Nova Scotia Supreme Court, Trial Division, upon application by the County to recover social assistance payments paid on behalf of the handicapped beneficiary, held that the interest of the handicapped beneficiary in the trust was vested, and accordingly, the county had a right to recover the payments made in error. The trust clause in the will under review stated simply:
"THIRD: I give, devise and bequeath all my real and personal property to my son JOSEPH HOWARD PURCELL IN TRUST to use the same for the maintenance and support of my son SAMUEL PURCELL. My said son Joseph Howard Purcell may sell the land either in lots or as one piece, and all monies received from the same shall be held in trust by my said son Joseph Howard Purcell for the maintenance and support of my said son, SAMUEL PURCELL."

The court rejected the defendant's argument that a "discretionary trust" was created.

On the other hand, in Quinn and Executive Director of Social Services 124 D.L.R. (3d) 715 the Manitoba Court of Appeal held that the handicapped beneficiary's interest in the estate under review was "contingent" and further found the trust established was "discretionary". The trust clause read as follows:

I GIVE, DEVISE AND BEQUEATH all of my estate, both real and personal and wheresoever situate to my Trustee upon the following trusts:

1. To call in and convert into cash such of my estate as shall not consist of cash at the date of my death at such time or times and on such terms as my trustee in her sole discretion deems advisable and I specifically authorize my trustee to postpone such conversion for such length of time or times as she in her absolute discretion deems advisable.

2. To invest and keep invested my estate and 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, OF MY daughter SHELAGH QUINN for her lifetime.

3. Upon the death of my daughter SHELAGH QUINN to divide the balance of my estate, if any, equally between my children, JOHN JOSEPH QUINN, MARY MAUREEN LEE, JAMES HERBERT QUINN and MICHAEL QUINN, provided that in the event that any of my four mentioned children shall then be dead, I direct that the share to which he or she would have been entitled be divided equally, share and share alike, between such of his or her children as shall then be living.

Having reviewed similar cases and texts on the Law of Trusts, Hall J.A. finds: "On the state of the authorities, it is my opinion that the contingent beneficial rights of the applicant in the discretionary trust are not a financial resource adversely affecting her eligibility to receive social allowance."
I understand from a discussion with Paul McLaughlin that the clause as outlined in Appendix "A" has been upheld in the Ontario Supreme Court in the case of The Director of Income Maintenance Branch and Social Services v. Audrey Henson. Action No. 591/86, Supreme Court of Ontario, 1986 (unreported). This case is presently under appeal by the Director of Income Maintenance Branch, and the appeal is scheduled to be heard in September of this year.

In summation, it appears based on the Quinn case and the unreported Henson case that a discretionary trust, clearly and explicitly established, may preserve and protect both capital and income for use for extra amenities for the handicapped beneficiary while at the same time not disentitling the handicapped beneficiary from provincial and/or municipal assistance to which he or she would normally be entitled had not the discretionary trust existed. As the Barrow and Purcell cases show, care must be taken in drafting the discretionary trust clause. And, considering there is little precedent in Nova Scotia, it is wise to expect resistance from social assistance authorities with court action likely to follow. There has been sufficient use of the discretionary trust over the past five to ten years that it is only a matter of time before it will be litigated.
TRUST FOR CHILDREN:

(i) to invest or keep invested all the rest and residue of my estate, including the net income arising therefrom for the maintenance, care, medical attention, education, or other needs of my children until my youngest child attains the age of 19 years;

(ii) to pay to the Guardian of my children on a monthly basis or otherwise such amounts, being part of the income arising from my estate, or if necessary the capital of my estate, as are decided by my Trustee, after consultation with the Guardian, to be necessary to reasonably meet the expenses incurred by the Guardian or the children in the provision of maintenance, medical attention, education, or other needs of my children, as their individual needs and circumstance may develop;

(iii) upon my youngest child attaining the age of 19 years to distribute fifty per cent (50%) of the remaining capital and accumulated income if any of my estate to my children, except my daughter ___________, in equal portions each;

(iv) in the event of the death of any of my children before the final distribution is made, such child of mine leaving issue, then I direct that that child's share be paid to his or her children;

(v) TRUST FOR

If my daughter ____________ survives me I authorize my Trustee to pay to her or spend on her behalf from time to time so much of the income or capital or both of her one-half (½) share of the rest and residue of my estate as my Trustee in the exercise of an absolute and unfettered discretion deems it to be advisable. Neither this share nor any portion remaining from time to time or the income therefrom shall vest in my said daughter and the only interest she shall have shall be in the payments actually made to her and received by her or in the 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 recommendation of the Guardian designated in this Will. Without in any way binding the discretion of my Trustee, it is also my wish that
in exercising its 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 government 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 its 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 its 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. Upon the death of my said daughter, the amount remaining of her share together with any income accumulated thereon shall be divided equally between my other children, then alive, share and share alike. 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.
References

Articles and Texts:


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Cases:

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