DISCRETIONARY TRUSTS: AN ESTATE PLAN TO SUPPLEMENT PUBLIC ASSISTANCE FOR DISABLED PERSONS

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I. INTRODUCTION

The parents of a disabled child hope to insure that even after their deaths the child will continue to receive love and proper physical care. They also want their estate plan to make optimum use of the financial resources they leave to their child. Although these goals are virtually identical to the goals of all parents, the opportunities and needs of the disabled child require special knowledge and attention. Most disabled persons are or will be eligible to receive state or federal benefits. In order to make the best use of the assets available for the care of the disabled child, it is essential to integrate the estate plan with the government benefits.

Assume a client of moderate means who would like to provide some continuing benefits for his disabled child,[1] but whose estate is not sufficient by itself to provide lifetime support.[2] If the surviving child meets statutory

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1. The term "child" is used only to describe the relationship between parent and child and is intended to include adult as well as minor children. The parental objectives addressed in this Article are present whenever the child's disability interferes with his capability to be self-supporting. For that reason, the term "disability" is used in this Article to refer to physical, as well as mental, disabilities that interfere with the child's earning capabilities. The term "mental disability" encompasses not only diminished mental capacity but also mental illness to the extent that the needs of the mentally ill person are likely to be long-term, and to the extent that the illness impacts upon the capability of the individual to support himself or herself.

2. The rare parent who has sufficient resources to fully provide for the needs of his surviving disabled child may choose to do so. Believing that a parent's primary concern is the well-being of his child, one may assume that a wealthy parent would prefer to take care of his child's needs privately. The income and asset levels for the public assistance programs examined in this Article are very low, and the benefits that can be provided by a trustee without adverse effect upon government assistance are quite modest. *See infra* text accompanying notes 98, 105-37, 153 & 176-91. A parent capable of providing more for his child may choose to do so, despite the financial drain. To the extent that a wealthy parent seeks to have the government supply the child's basic needs

criteria of need, his basic support may be provided by the government under various state and federal programs. It is necessary, therefore, to develop a plan which makes the estate available to the child when needed, but which takes into account the other sources from which primary support will come.

This Article explores the usefulness of trusts as superior devices for supplementing a disabled child's income from public benefits. Other alternatives do not satisfactorily provide the child with supplemental income. For example, an outright gift of property to the child is ordinarily inadvisable, even if the child is capable of its management, because property owned by the disabled child may be subject to the claims of the state for services provided to the child in the past. Also, most of the child's property may have to be consumed before he becomes eligible for government assistance programs. If an outright gift to a disabled person results in an equal loss or reduction of government benefits, the inheritance has provided no net benefit to the disabled person. Only the government has reaped the benefit.

Another alternative is to leave money to a guardian or conservator for the child. Although this alternative solves certain management problems, it will have the same adverse impact on eligibility for public assistance as an outright gift to the child since the property held by the guardian is legally the child's.[3]

Occasionally, parents will leave a portion of their estate to another child or relative with whom the parents have an informal agreement that the property will be used for the benefit of the disabled child. If the estate is very small, this may be the best alternative, but it clearly has disadvantages. The third party has no legal obligation to use the money for the benefit of the disabled child; obviously, this may be a serious problem. Even if the client has no doubt that the third party would use the property for the benefit of the disabled child, the possible death of the third party before the disabled child creates a clear danger that the money will no longer be available for the child. The arrangement may also have adverse income tax consequences for the third party, who may be taxed on all the income earned by the property but may feel an obligation to use the before tax dollars for the "beneficiary."

A trust, therefore, will usually be the best method to provide property management and financial benefit for the child. Property placed in a carefully drafted trust can be excluded from the beneficiary's "assets" in determining eligibility for need-based programs and can be insulated from government claims for reimbursement of the cost of services rendered to the trust beneficiary. Since the objective is to integrate the estate plan with government benefits, it is essential to know whether a particular trust form will protect the property from government reimbursement claims and whether the trust itself and distributions from it will have any adverse im-

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and to use his own assets only to supplement those benefits, the remarks in this Article may be applicable.

3. RESTATEMENT (SECOND) OF TRUSTS § 7 (1959).

pact upon the beneficiary's eligibility for need-based programs.[4]

An applicant's income or assets affect the availability of government benefits in varying degrees. Some benefits, such as Social Security retirement benefits, are available without regard to the recipient's wealth.[5] Some government services are available to all persons who fall within specified categories, but the services are free only to those who cannot afford to pay for them. For example, state institutional care is available in many jurisdictions to all mentally disabled persons, but the charge for that care is dependent upon the individual's income and assets.[6] Yet other programs, such as Supplemental Security Income[7] (SSI) and Medical Assistance[8] (Medicaid), are available only to the financially needy.

The scope of this Article will not permit consideration of all the existing programs which aid the disabled and all their variations found in the fifty states. This Article, therefore, will consider three programs: state residential care for the mentally diseased, SSI and Medicaid.[9] Each program will be examined in relation to estate planners' efforts to structure a trust for the benefit of the disabled person rather than the government.

II. STATE INSTITUTIONAL CARE FOR THE MENTALLY DISEASED[10]

State residential care for a mentally diseased person is available in

4. This Article focuses solely upon the question of how a trust can be structured to provide maximum financial benefit. Parents who are responsible for a disabled child are also concerned about who will take their place in helping their child make decisions and in seeing that the child is receiving the best possible care. Ordinarily, these functions are performed by the child's guardian. There are also important issues concerning the trust structure which are not addressed here. Such issues include: selection of a trustee; whether the trust should be created during the lifetime of the settlor or by his will; and if the parents of a disabled child have one or more other dependent children, whether there should be a single trust for all of the children or a separate trust for each child. For discussion of these and other issues, see Effland, *Trusts and Estate Planning*, in THE MENTALLY RETARDED CITIZEN AND THE LAW, 116 (1976); Hecht, *Reaction Comment, id.* at 132; Frolik, *Estate Planning for Parents of Mentally Disabled Children*, 40 U. PITT. L. REV. 305 (1979); Wernz, *Estate Planning for the Mentally Retarded*, in 1 NOTRE DAME EST. PLAN. INST. 265 (1976).

It will be assumed that a testamentary trust will be used because the basic purpose for the trust, supplementation of public benefits available to the child, may be accomplished by the parent during his lifetime. While there may be some advantages to setting up an *inter vivos* trust which is funded upon the death of the settlor, the result is the same. With either a testamentary trust or a nominally funded *inter vivos* trust, the trust is funded at the settlor's death at the time when his obligation, if any, to support his child ceases, and at the point when the settlor's personal ability to provide his child with supplemental assistance also ceases.

5. 42 U.S.C. § 402 (1976). It is generally true that a social security recipient's wealth and income do not affect his eligibility for benefits. Until age 70, however, Social Security benefits can be reduced because the recipient has earned income in excess of a specified amount. 42 U.S.C. § 403 (1976 & Supp. V 1981).

6. *See, e.g.*, CONN. GEN. STAT. § 17-295 (West Supp. 1982); IND. CODE §§ 16-14-18.1-7 and 8 (Supp. 1981); WIS. STAT. ANN. § 46.10 (West 1979).

7. 42 U.S.C. §§ 1381-1383 (1976 & Supp. V 1981).

8. 42 U.S.C. §§ 1396-1396n (1976 & Supp. V 1981).

9. State supplemental medical assistance programs, state training programs and any other available programs must also be considered by an attorney preparing an estate plan. These programs will differ in detail from the ones considered here, but the basic problems will be similar.

10. The question of whether trust assets may be taken to reimburse the state for institutional care given to a trust beneficiary will be examined first because this issue has produced most of the cases. *See generally* Annots., 92 A.L.R.2d 838 (1963); and 21 A.L.R. 4th 729 (1983). An examination of the case law which has developed around this question will facilitate later discussion of the SSI and Medicaid programs.

most states regardless of the person's financial status, but the institutionalized person, his estate or certain responsible relatives usually must reimburse the state to the extent of their financial ability.[11] During their lifetimes, the parents of an institutionalized individual can furnish him with benefits not provided by the state. In some states, a carefully structured trust can continue to provide "extras" even after the parents' deaths.

The great threat to the usefulness of trusts for patients in state mental institutions comes from state statutes addressing responsibility for the costs of a patient's care in such an institution. At common law it was presumed to be the state's responsibility to provide at least the basic needs of the mentally incompetent citizen. However, in the late 19th and early 20th centuries, along with enlightened notions of the type of care which ought to be provided to such persons, came statutes imposing financial responsibility for such care upon the institutionalized individual and certain of his relatives.[12] If a trust is deemed to be the property of the institutionalized beneficiary, the state may take the trust assets as reimbursement for his support. If a trust is purely discretionary with no defined right of the beneficiary to any of the trust assets, however, it has been argued that the trust is not the property of the beneficiary.[13] Absent the trustee's abuse of discretion, the beneficiary of a discretionary trust has no claim to the trust property; therefore, the government can have no claim to the property on his behalf. Unfortunately, case law on the subject is not entirely in agreement.[14] Whether the trust property is insulated from state claims is usually dependent not upon any one factor but upon a combination of factors, including the type of trust, the settlor's intention, the relationship of the settlor to the beneficiary and the state's specific statutory authority for the collection of sums to reimburse it for its expenditures.[15]

A. *Types of Trusts that Might be Considered*

The extent of the trustee's discretion is a major factor in determining

11. *See, e.g.*, CONN. GEN. STAT. § 17-295 (West Supp. 1982); IND. CODE §§ 16-14-18-1, 3, 7 (Supp. 1981); WIS. STAT. ANN. § 46.10 (West 1979). The issues examined in this section arise when residential care is provided by the state, and the patient and his prescribed relatives are responsible under state law to reimburse the state to the extent of their ability to do so. When the care provided in a state institution is not reimbursable by Medicaid, state law assigning responsibility to the patient and his relatives becomes relevant. As a general rule, Medicaid will not reimburse expenditures for services provided to inmates of public institutions. 42 C.F.R. § 435.1008 (1982). Thus, the discussion in this section would appear applicable to care provided in any state-operated institution, whether it is a medical institution, an institution for the mentally retarded or an institution for those with mental diseases. Exceptions to the general rule, however, permit Medicaid to cover services provided in state-operated medical institutions, 42 C.F.R. § 435.1009 (1982), as well as in certain institutions for the mentally retarded. 42 C.F.R. §§ 435.1009, 440.150 (1982). In contrast, Medicaid is specifically unavailable for patients under age 65 in institutions for the treatment of mental diseases (except for individuals under age 22 receiving inpatient psychiatric care). 42 C.F.R. §§ 441.13, 435.1008, 435.1009 (1982). For a discussion of the Medicaid program and the usefulness of the trust device as a supplement to Medicaid benefits, *see* text at Part IV.

12. See, e.g., statutes cited *supra* note 11.

13. *See infra* notes 70 & 75 and accompanying text.

14. *See infra* notes 70-71 and accompanying text.

15. *See infra* notes 34-80 and accompanying text. *See also* Davis, *Financial and Estate Planning for Parents of a Child with Handicaps*, 5 W. NEW ENG. L. REV. 495, 511-18 (1983).

whether trust assets are subject to state reimbursement claims. The variations in the discretionary powers of a trustee over the distribution of income and principal are limited only by the creativity of the drafter. They do, however, fall into familiar patterns.

A trust which imposes a duty on the trustee to distribute all of the income to one beneficiary is a simple mandatory trust.[16] In this type of trust, the trustee has no discretion to choose who will receive the income or the amount to be distributed.[17] The beneficiary possesses an interest in the trust which may be alienated either voluntarily[18] or involuntarily[19] and is available to creditors for the beneficiary's debts.[20]

A trust which directs the trustee to distribute only so much of the income and/or principal as is necessary for the support and maintenance of the beneficiary is commonly referred to as a support trust.[21] Because the settlor intended that the trust be used specifically for the beneficiary's support, both voluntary and involuntary alienation of the beneficiary's interest are ordinarily prohibited.[22] One recognized exception to this rule provides that the beneficiary's interest can be reached by creditors to satisfy an enforceable claim against the beneficiary for necessary services or supplies furnished to him.[23]

A trust which gives the trustee complete freedom to distribute any amount of income and/or principal or none at all is a discretionary trust.[24] A purely discretionary trust includes no standard in the trust instrument against which to evaluate the trustee's exercise of discretion.[25] A beneficiary of a discretionary trust has no realizable interest in the trust until the trustee exercises his discretion to distribute from the trust.[26] The limited nature of the beneficiary's interest in a discretionary trust has the effect of making trust assets unavailable to the beneficiary's creditors—at least as long as the trustee does not distribute any of the assets to the beneficiary. Because the beneficiary cannot compel payment of trust assets to himself or application of them for his own benefit and because the creditors' rights are derivative from the beneficiary's, the beneficiary's creditors cannot

16. RESTATEMENT, *supra* note 3, at § 182 and § 186 comment e.
17. *Id.*
18. *Id.* at § 132.
19. *Id.* at § 147.
20. *Id.*
21. *Id.* at § 154; 2 A. SCOTT, THE LAW OF TRUSTS § 154 (3d ed. 1967); G. BOGERT & G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 229 (rev. 2d ed. 1979).
22. RESTATEMENT, *supra* note 3, at § 154.
23. *Id.* § 157(b); 2 A. SCOTT, *supra* note 21, at § 157.2.
24. RESTATEMENT, *supra* note 3, at § 155.
25. The trustee's power is not completely unlimited. If the trustee is under no enforceable fiduciary obligation, no trust arises. If the trustee's discretion is not expanded by the use of such adjectives as "sole" or "absolute," the trustee must act "not only in good faith and from proper motives, but also within the bounds of reasonable judgment." 3 A. SCOTT, *supra* note 21, at § 187. Commentators disagree as to the bounds of a trustee's "absolute discretion." Professor Scott and the Restatement take the position that the trustee should be held to a standard of good faith but not to one of reasonableness. *Id.*; RESTATEMENT, *supra* note 3, at § 187 comment j. Conversely, Professor Halbach has argued that reasonableness still ought to be required. Halbach, *Problems of Discretion in Discretionary Trusts*, 61 COLUM. L. REV. 1425, 1431 (1961). *See generally* J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS 887-88 (2d ed. 1978).
26. RESTATEMENT, *supra* note 3, at § 128 comment d.

compel the trustee to pay anything to them.[27]

Unfortunately, for purposes of analysis, trusts often are neither purely support nor purely discretionary. Typical trust language may mix phrases that traditionally connote a discretionary trust with language commonly used to establish a support trust.[28]

Although not related to the trustee's discretion, spendthrift provisions have an effect upon the availability of trust assets. Spendthrift trusts expressly prohibit the voluntary and involuntary alienation of a beneficiary's interest.[29] Where recognized, spendthrift provisions will protect the trust assets from the claims of ordinary creditors.[30] Like support trusts, however, spendthrift trusts are subject to the claims of certain creditors; the beneficiary's interest may be attached by creditors who provide the beneficiary with necessaries.[31]

B. *Examining the Alternatives*

Each type of trust outlined above will now be considered in light of its ability to accomplish the basic objective: to benefit the institutionalized person and yet remain unavailable to the state—a creditor who has furnished the beneficiary with necessaries.

1. *Mandatory Trusts*

When the settlor's purpose is to supplement the support provided to the beneficiary by the public, simple mandatory trusts are not recommended because the beneficiary's income interest in such trusts is available to creditors,[32] including the state. If all of the trust income is paid to the state, the corpus of a modest sized trust may be rapidly depleted by the trustee's discretionary use of corpus to provide the beneficiary with supplemental assistance.[33]

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27. *Id.* at § 155(1) comment b.

28. *See, e.g., In re* Estate of Lackmann, 156 Cal. App. 2d 674, 678, 320 P.2d 186, 188-189 (1958) (trustee given "complete and absolute discretion" as to how much he should expend, but the testator stated a desire that the trustee provide "for the proper care, support and maintenance" of the beneficiary); First Nat'l Bank of Md. v. Dep't of Health and Mental Hygiene, 284 Md. 720, 727, 399 A.2d 891, 894-95 (1979) (trustee given "absolute and uncontrolled discretion" to distribute trust principal but "may apply the same for maintenance, comfort and support"); Bureau of Support in Dep't of Mental Hygiene and Correction v. Kreitzer, 16 Ohio St. 2d 147, 149, 243 N.E.2d 83, 84 (1968) (trustee shall distribute in its "sole and absolute discretion" amounts "necessary for her care, comfort, maintenance and general well-being . . ."). A recent article recommends that explicit recognition be given "discretionary support trusts" and that such trusts be recognized as analytically distinct from both the discretionary trust and the support trust. Abravanel, *Discretionary Support Trusts*, 68 IOWA L. REV. 273, 277-79 (1983).

29. RESTATEMENT, *supra* note 3, at § 152; 2 A. SCOTT, *supra* note 21, at § 151. *See generally* E. GRISWOLD, SPENDTHRIFT TRUSTS (2d ed. 1947).

30. RESTATEMENT, *supra* note 3, at § 152.

31. RESTATEMENT, *supra* note 3, at § 157(b); 2 A. SCOTT, *supra* note 21, at § 157.2.

32. *See supra* note 20 and accompanying text.

33. If the income is great enough to satisfy the state's claim and to provide supplemental assistance to the beneficiary, a simple trust may be appropriate. Because all income is currently distributed and none is accumulated, the intricacies of the accumulation throw-back rules, I.R.C. §§ 661-667 (1976 & West Supp. V 1981), are avoided and the trustee can be given discretion to make distributions from corpus. Inflation, however, may cause the cost of the institutional care to equal or exceed the trust income, which in turn would force the trustee to use corpus to provide

2. *Support Trusts*

If the settlor's objective is to have the beneficiary's basic needs supplied by the government and to have the trust provide "extras," a trust for support also should be avoided. A state's claim against a trust for reimbursement of the costs of maintaining the disabled person in a state institution is more likely to succeed if the trust contains language indicating that trust assets are to be used for support.[34]

a. True support trusts

The state's right to reimbursement from the trustee for support furnished to the beneficiary may be dependent upon the beneficiary's right to compel distribution from the trust. The beneficiary of a support trust has an enforceable claim to minimal support. Support standards impose a duty on the trustee to exercise his power to distribute or apply assets, leaving to his judgment only the extent or manner of doing so. The trustee must apply at least the minimum amount necessary for the beneficiary's support, and no more than the maximum amount considered reasonably necessary.[35] Since the beneficiary can compel distribution from the trust of amounts needed for his support and the state is a creditor which has furnished necessary support, the state may reach trust assets to the same extent as the beneficiary.[36]

Trust language that gives the trustee discretion to determine the amount needed to provide support and maintenance for the beneficiary does not hamper the state's ability to successfully press a claim against the trust. One of the earliest cases to address this particular issue was *In re Walters*.[37] Frederick Walters was committed to a state hospital for the insane in 1905. His mother died in 1912. She bequeathed to another son a certain sum in trust, "the income to be used at his discretion, for the 'comfortable support and maintenance' of Frederick, with the right to use part or all of the corpus of the estate for this purpose, if necessary."[38] The trust

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the beneficiary with supplemental assistance. This creates the danger that the entire corpus may be depleted before the beneficiary's death.

34. *See, e.g., In re* Estate of Schmitz, 26 Ariz. App. 575, 577, 550 P.2d 243, 245 (1976); *In re* Gruber's Will, 122 N.Y.S.2d 654, 656 (Sur. Ct. 1953); *In re* Walters, 278 Pa. 421, 424, 123 A. 408, 409 (1924); State v. Rubion, 158 Tex. 43, 50, 308 S.W.2d 4, 8 (1957).

35. RESTATEMENT, *supra* note 3, at § 187 comment i.

36. *See, e.g., In re* Estate of Schmitz, 26 Ariz. App. at 577, 550 P.2d at 245; State v. Rubion, 158 Tex. at 50-51, 308 S.W.2d at 7-8. A creditor who furnishes necessaries may not automatically take the entire trust res in satisfaction of its claim, even though the charges are reasonable. Because a creditor's right to trust property is derivative from the beneficiary's right, the creditor may reach only the interest of the beneficiary. The beneficiary's interest is that portion of the trust which the trustee, in the exercise of reasonable discretion, should make available for the support of the beneficiary. *Rubion*, 158 Tex. at 53, 308 S.W.2d at 10; 2 A. SCOTT, *supra* note 21, at § 128. Because the state's charges for supporting the beneficiary are reasonable, it does not follow that the trustee of a support trust should make that amount available to the state. This is especially true if the state's charges would exhaust the trust estate. Reasonable discretion may require the trustee to reserve some portion of the trust res for the beneficiary's future needs. *See In re* Gruber's Will, 122 N.Y.S.2d at 657.

37. 278 Pa. 421, 123 A. 408 (1924).

38. *Id.* at 423, 123 A. at 408.

also contained spendthrift language.[39] The brother, as trustee, denied liability to reimburse the state for support furnished to Frederick on the dual grounds that the trust contained a spendthrift provision and that expenditure of income and principal was discretionary. The court, however, directed reimbursement of the state's expenditures, stating:

> The trust, in the present instance, was intended to secure the comfort of the insane person; and the devotion of the income, or a part of the principal to the satisfaction of obligations incurred in his behalf is the mere carrying out of the testatrix's directions . . . . It is true that a certain discretion was lodged in the trustee, but . . . power must be legally exercised, and his unwarranted refusal to apply the funds for support will not prevent a recovery.[40]

Similarly, some courts have held that the state may reach trust assets even when the trustee is given "absolute" or "sole" discretion over distributions for the support and maintenance of the beneficiary.[41]

Support trusts sometimes instruct the trustee to take into consideration other resources available to the beneficiary. The beneficiary of such a trust has the right to trust distributions only to the extent that they are needed to supplement other resources available to him, so that outside resources and the trust distributions together provide at least minimal support. The use of this type of support trust to supplement state institutional care is not recommended.

In a New York case,[42] the testator established a trust for the support of his incompetent daughter. The trustee was given discretion to use the income and any portion of the principal reasonably necessary for the support of the testator's daughter. The testator further provided that if his daughter received support from outside his estate, then the trustee should consider that outside support when determining the amount to be ex-

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39. *Id.*

40. *Id.* at 424-25, 123 A. at 409. *See also Rubion,* 158 Tex. at 51, 308 S.W.2d at 9 (trustee of a support trust does not possess unbridled discretion to determine the amount to be expended for the support of the beneficiary).

In City of Bridgeport v. Reilly, 133 Conn. 31, 47 A.2d 865 (Ct. Err. 1946), however, despite the trustee's discretion to use trust property for the "comfortable support" of the beneficiary, the trustee's witholding of all payments for the beneficiary's support was held not to be an abuse of discretion. In *Bridgeport*, an unrelated benefactor established a testamentary trust for the benefit of an inmate of a state hospital for the insane. The trust provided: "Said trustee may in her discretion expend or appropriate any or all of the income or principal . . . for the comfortable support" of the beneficiary. *Id.* at 33, 47 A.2d at 866. The Connecticut court disallowed the state's claim because at the time the will was drafted the testator knew that the beneficiary was in a state institution and the state was furnishing suitable support. The court felt that if the testator had intended the fund to be used for the beneficiary's support in the hospital, "it would have been natural for him to have so directed, rather than to give to the trustee a broad discretion to use it for Coughlin's comfortable support." *Id.* at 38-39, 47 A.2d at 868. *Accord* Hanford v. Clancy, 87 N.H. 458, 460, 183 A. 271, 272 (1936).

41. *Kreitzer*, 16 Ohio St. 2d at 150, 243 N.E.2d at 85; *Lackman's Estate*, 156 Cal. App. 2d at 677, 320 P.2d at 187-88 (1958). *Contra In re* Johnson's Estate, 198 Cal. App. 2d 503, 509-11, 17 Cal. Rptr. 909, 913 (1962); Town of Randolph v. Roberts, 346 Mass. 578, 579-80, 195 N.E.2d 72, 73-74 (1964). Such a trust is neither a purely discretionary trust nor a purely support trust, RESTATEMENT, *supra* note 3, at §§ 154, 155; *Kreitzer*, 16 Ohio St. 2d at 150, 243 N.E.2d at 85, because even though the fiduciary's discretion is "sole" or "absolute" it must be exercised with reference to the beneficiary's needs and may be reviewed by a court. 3 A. SCOTT, *supra* note 21, at § 187; RESTATEMENT, *supra* note 3, at § 187.

42. *In re* Gruber's Will, 122 N.Y.S.2d 654 (1953).

pended for the beneficiary. The court concluded that the phrase support "received outside my estate" did not include support at public expense. The court said that such a reading would render a provision for support from the trust meaningless.[43]

Even trust language that gives the trustee of a support trust discretion, or that instructs him to take into consideration other resources available to the beneficiary, does not sufficiently attenuate the beneficiary's interest. The state still may successfully seek reimbursement from such a trust for the cost of institutional care given to the beneficiary.

b. Support needs occasioned by illness, accident or emergency

A trust which authorizes the trustee to make distributions for the cost of a beneficiary's maintenance and support made necessary by illness, accident or emergency ostensibly gives the trustee narrower distribution authority than a true support trust. Nevertheless, courts have treated such trusts like support trusts; that is, when the issue is reimbursement for care given in a state institution, the trust assets are deemed to be the beneficiary's and available for his basic maintenance.[44]

When an incompetent beneficiary is institutionalized at the time the trust instrument is drawn up, the authority to distribute trust property to cover the cost of serious illness or accident presumably is not meant to include distribution for the ordinary expenses of residence in a public institution. Nonetheless, confronted with such facts, at least one court has found the trustee obligated to pay the amount requested by the state.[45]

A recent New York case[46] reached the opposite conclusion. A testamentary trust had been established by a Mr. Escher for his incompetent daughter. The trust provided that all income be paid to the beneficiary, with invasion of corpus permitted to meet the expenses of illness, accident or other emergency circumstances. The court denied the state's claim to the trust principal, apparently concluding that the costs of the beneficiary's institutionalization were not occasioned by an "emergency."[47] The court noted that the testamentary instrument was executed during the depression economy of 1932, and that it was unlikely that the testator envisioned that the trust income would ever be insufficient to meet the beneficiary's usual needs.[48] This opinion is only one of many[49] which cites the settlor's intent, or presumed intent, as persuasive.

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43. *Id.* at 656-57. The court reasoned that the state will not sit by and permit a destitute person to starve and die from want and lack of care. If a beneficiary has no right to support from the trust because support will be provided at public expense, no need for support and maintenance from the trust will ever arise, since the state will always step in to aid a destitute person. *Id.*

44. *See* Dep't of Mental Health v. First Nat'l Bank of Chicago, 104 Ill. App. 3d 461, 432 N.E.2d 1086 (1982); *In re* Schram's Will, 49 Misc. 2d 1025, 268 N.Y.S.2d 814 (Sur. Ct. 1966).

45. *See In re* Schram's Will, 49 Misc. 2d 1025, 268 N.Y.S.2d 814. *But cf.* City of Bridgeport v. Reilly, 133 Conn. 31, 47 A.2d 865 (1946) (trust drafted during beneficiary's institutionalization gave discretion to provide for the beneficiary's "comfortable support"; funds were held unavailable to the state because they were intended to supplement care provided by the state).

46. *In re* Estate of Escher, 94 Misc. 2d 952, 407 N.Y.S.2d 106 (Sur. Ct. 1978).

47. *Id.* at 958, 407 N.Y.S.2d at 110.

48. *Id.*

49. *See* cases cited *infra* notes 50-62 and accompanying text.

c. Intent to provide support

The intent of the settlor, gleaned from the language of the trust and the circumstances surrounding its establishment, is ordinarily a factor in the cases considered. Where it appears that the settlor intended to provide for the general benefit and support of the incompetent, the trust is usually vulnerable to the state's claim, whether or not the trust is a true support trust.[50] Even if the trust provides simply that the trustee use the income and principal for the benefit of the beneficiary in the trustee's discretion, the state's claim may be allowed. One court stated that although "benefit" may be a broader term than "support," the greater includes the lesser and the beneficiary of a trust created for the beneficiary's benefit has a right to support.[51]

Conversely, an intent to limit the availability of funds for the support of the beneficiary has been instrumental in limiting the state's access to the funds. In one case,[52] a trust was created for the settlor's incompetent sister and the trustee was given sole discretion to pay income and principal amounts necessary for the support and benefit of the incompetent. The trust further provided: "In determining the amounts to be paid, the Trustee shall take into consideration the fact that any payments during my lifetime have been in the neighborhood of Twenty-five Dollars a month together with clothing."[53] The state was not allowed to recover the entire cost of the beneficiary's care from the trust since the beneficiary's interest therein was expressly limited.[54]

Indeed, reliance upon the settlor's presumed intention has led some courts to deny state access to "support" trusts. For example, the town of Randolph, Massachusetts sought reimbursement for disability payments made to the beneficiary of a trust.[55] The trustee was instructed to pay the trust income to the disabled beneficiary and, in the event that the income

50. *See, e.g., Lackman*, 156 Cal. App. 2d at 678, 320 P.2d at 188; *Gruber*, 122 N.Y.S.2d at 657. *Cf. Rubion*, 158 Tex. at 50, 308 S.W.2d at 8 (language of the will created a support trust, but extrinsic evidence indicated that the settlor had a contrary intention; extrinsic evidence was ruled inadmissible and the state's claim against the trust was allowed).

51. *In re* Emmons Will, 59 N.Y.S.2d 264, 268 (Sur. Ct. 1946). The court's opinion came at the time of the trustee's final accounting, and the trustee had never made any expenditures for luxuries. Thus, the court looked not only at the language of the will but also at what had transpired in the administration of the trust. The court indicated that the state's claim would not have prevailed had the instrument clearly limited distributions to luxuries. *Id.* at 269.

52. Estate of Johnson v. Dep't of Mental Hygiene, 198 Cal. App. 2d 503, 17 Cal. Rptr. 909 (1962).

53. *Id.* at 506, 17 Cal. Rptr. at 911.

54. *Id.* at 509, 17 Cal. Rptr. at 913. *See also* Estate of Hinkley v. Blackstock, 195 Cal. App. 2d 164, 15 Cal. Rptr. 570 (1961). *But see Lackman*, 156 Cal. App. 2d at 674, 320 P.2d at 186 (trustee given "complete and absolute discretion as to how much he should expend . . . for the proper care, support and maintenance of my said son; but as nearly as is practicable under the circumstances, the amount thus expended shall not exceed one-third of the net income . . . ."; court allowed state to recover all expenses; since cost exceeded the ⅓ of the net income, the ⅓ limitation was not "practicable under the circumstances"); Constanza v. Verona, 48 N.J. Super. 355, 137 A.2d 614 (1958) (spendthrift thrust established under will for discretionary payment of a maximum of $6 per week to testator's daughter for her "pleasure or comfort"; despite discretion given to trustee to withhold such payment should the income "become . . . payable to some other person," trustee was directed to reimburse county for care of indigent, incompetent beneficiary in county hospital).

55. Town of Randolph v. Roberts, 346 Mass. 578, 195 N.E.2d 72 (1964).

was insufficient to support her, the trustee was given exclusive discretion to determine if principal ought to be invaded for the beneficiary's support. The trustee paid $30 each month toward the beneficiary's total support needs of $205 per month.[56] The town's claim against the trust was not enforced because "the testatrix might have had a purpose to supplement public assistance of her niece or to provide for support should such assistance be discontinued."[57] This supposition was supported by the fact that the size of the trust was such that the income could not be expected to provide the beneficiary's sole support for very long.

A Connecticut court also denied the state's claim against a trust which gave the trustee discretion to use the income and principal for the support of an incompetent.[58] The state was not entitled to reimbursement from the trust because the testator intended the fund only to supplement the care and support which the state was furnishing. The court determined the testator's intention from the fact that at the time the will was executed, the testator knew that the state was furnishing the beneficiary's support. The court reasoned that if the testator had intended that the trust assets be used to provide the beneficiary's support, it would have been natural for the testator to have so directed rather than to give the trustee broad discretion.[59]

The *Escher*[60] case is yet another example of a court's reliance upon the testator's intention; the case is especially significant because the court explicitly relied upon its understanding of social attitudes to aid in ascertaining the testator's intention. As the opinion points out, in most earlier cases where a trust beneficiary had a life income interest, invasion of the trust corpus was ordered to prevent the needs of the life beneficiary from being met by public funds. Generally the earlier cases rested on a combination of two presumptions: first, the public policy that a trust not be left intact when the corpus could prevent the beneficiary's needs from being shouldered by the public, and second, the testator's presumed intent, on conferring a life interest, that the needs of the beneficiary would under no circumstances become a burden on a publicly funded program.[61] The *Escher* case recognizes that a change in the public attitude toward welfare has occurred, especially toward programs which pay for medical and institutional care. The average citizen no longer views such programs as charity, nor does he feel that he must swallow his pride in order to accept such benefits. Rather, the court observes, such programs are viewed more as insurance and

> [i]t is divorced from realities of life to presume that if the testator were aware of the facts as they now exist, he would desire to pay the immense cost for his daughter's care in preference to having society share this burden. To apply to these facts a conclusion that the testa-

56. *Id.* at 579, 195 N.E.2d at 73. There was no evidence that $30 monthly was not the entire trust income. *Id.* at 580, 195 N.E.2d at 74.

57. *Id.* at 580, 195 N.E.2d at 74.

58. City of Bridgeport v. Reilly, 133 Conn. 31, 47 A.2d 865 (1946).

59. *Id.* at 38-39, 47 A.2d at 868.

60. *Escher*, 94 Misc. 2d 952, 407 N.Y.S.2d 106; *see supra* text accompanying notes 46-48.

61. *Escher*, 94 Misc. 2d at 958, 407 N.Y.S.2d at 110.

tor would find accepting benefits to be a repugnant humiliation at becoming the object of charity is an anachronism.[62]

All of the preceding might suggest that the drafter of a trust should explicitly state that the trust assets are to be used only for the support, comforts and luxuries not provided by the state. The Wisconsin Supreme Court has held such language to be effective in a reimbursement case.[63] However, a recent Missouri case,[64] which involved a similarly structured trust used to supplement Medicaid payments, held that the trust property was a resource available to the beneficiary.[65] Although the decision was rendered in the context of a Medicaid statute, it would not be surprising to hear the Missouri approach echoed in the context of reimbursement for institutional care and by other states whose budgets are being stretched to their limits.

All support trusts—not only "pure" support trusts, but also discretionary support trusts and trusts revealing an intent to provide support, even supplemental support, for the beneficiary—risk being taken by the state to reimburse it for institutional care provided to the beneficiary. The alternative, which has some obvious risks, is to establish a discretionary trust and omit all support language.

3. *Discretionary Trusts*

Placing assets in a purely discretionary trust will not necessarily insulate them from a state's reimbursement claim for support furnished to the trust beneficiary. If the distribution powers given to the trustee are not limited by any standard against which the reasonableness of his conduct can be judged, the beneficiary has no enforceable claim to the trust assets unless the trustee's failure to distribute property was occasioned by dishonesty or an improper motive.[66] In the absence of such improper behavior, to the extent that a state's right to recovery is derivative from the beneficiary's claim to the assets, the state cannot assert a right to trust assets. It is reasoned, therefore, that assets in a purely discretionary trust are not available to the state.

Despite the general rule that the assets of a discretionary trust are beyond the reach of the beneficiary's creditors, even those who have furnished necessaries, a state's financial responsibility statute may make the trust assets available to defray the state's expenses. The statute may make not only the institutionalized individual responsible for his care, but also trustees who hold assets for the benefit of the institutionalized person.[67]

62. *Id.* at 959, 407 N.Y.S.2d at 111. *Accord* Maul v. Fitzgerald, 78 A.D.2d 706, 432 N.Y.S.2d 282 (1980).

63. *In re* Will of Wright, 12 Wis. 2d 375, 379, 107 N.W.2d 146, 148 (1961).

64. Estate of Wallace v. Missouri State Div. of Family Serv., 628 S.W.2d 388 (1982). *See infra* notes 162-65 and accompanying text.

65. *Wallace*, 628 S.W.2d at 389-90. The Missouri Medicaid statute differs from a typical reimbursement statute, but perhaps not enough to make a difference in result. *See* MO. REV. STAT. § 208.010.1 (1983).

66. RESTATEMENT, *supra* note 3, at § 187.

67. *See, e.g.*, N.Y. MENTAL HYG. LAW § 43.03(a) (McKinney 1978) (making "the patient, his estate . . . and any fiduciary or representative payee holding assets for him or on his behalf . . .

Presumably such statutes are based upon a strong policy that any resources available to a public welfare recipient ought to be available to reimburse the state for its expenditures on behalf of that person. Some state statutes, however, evidence an equally strong policy: a trust created to provide the "extras" that lend dignity to the lives of disabled, institutionalized persons ought to be allowed to continue.[68] Clearly, individual state statutes must be consulted to determine whether or not a discretionary trust may evade the grasp of the state.

Unfortunately, some statutes do not address the issue at all; they simply state that the patient and certain other relatives are held financially responsible for the care given to the patient.[69] In the absence of an explicit statutory directive, several courts have held that a state, like any other creditor, cannot compel a discretionary trust to bear the cost of the institutionalized individual's care.[70] Others have enunciated a policy that trust

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liable for the fees for services rendered to the patient"). *But see* Maul v. Fitzgerald, 78 A.D.2d 706, 432 N.Y.S.2d 282 (1980) (holding that since the trustees refused to exercise their discretionary powers of invasion, the trust monies are not assets of the beneficiary).

68. For example, a Wisconsin statute provides generally that if a person is legally obligated to reimburse the state for the support it provides him, and that person is the beneficiary of a spendthrift trust, the state may order the trustee to satisfy the liability out of payments to which the beneficiary is entitled or out of future payments made pursuant to the trustee's discretion. WIS. STAT. ANN. § 701.06(5)(a), (b) (West 1981). More specifically, the statute provides that if the beneficiary of a discretionary trust is the settlor, or a spouse or minor child of the settlor, the trustee may be ordered to satisfy the liability without regard to whether the trustee has exercised his discretion in favor of the beneficiary. *Id.* at § 701.06(5)(c). However, for individuals with indefinitely continuing disabilities, which substantially impair the individual from adequately providing for himself, a recent amendment to the statute makes the foregoing provisions inapplicable if the trust does not otherwise cause ineligibility for public assistance. *Id.* at § 701.06(5m).

An Indiana statute, IND. CODE §§ 16-14-18.1-1 to 16-14-18.1-3(a) (Supp. 1981), makes the patient, his legal guardian and a trustee of a patient (among other persons) responsible for the cost of treatment and maintenance of the patient in a state psychiatric hospital. The trustee is responsible "provided the terms of the trust authorize payment for the care, treatment, maintenance or support of the patient." IND. CODE § 16-14-18.1-1 (Supp. 1981). Since the statute is newly enacted, no cases elucidate the breadth of the qualifying provision. It is clear that trust assets may be reached if the trust instrument explicitly gives the trustee authority to use the property for the beneficiary's support. It is unclear whether the assets also may be reached if the trustee simply has discretion to use the assets for the benefit of the *cestui que* trust. In that instance, any disbursements from the trust for the support of the beneficiary can hardly be said to be unauthorized, since they clearly benefit the beneficiary. *See In re* Emmons' Will, 59 N.Y.S.2d 264, 268 (Sur. Ct. 1946).

69. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-545 (1974); ME. REV. STAT. ANN. tit. 34, § 2512 (1978); S.D. CODIFIED LAWS ANN. § 27A-13-4 (1977).

70. *See, e.g.*, First Nat'l Bank of Md. v. Dep't of Health & Mental Hygiene, 284 Md. 720, 730, 399 A.2d 891, 896 (1979) ("our determination that the testatrix created a discretionary trust of course, precludes any argument that the trustee can be compelled to pay the principal of the trust for [the beneficiary's] care at [state institution] unless it can be shown that they acted dishonestly or arbitrarily or from an improper motive."); *In re* Hinckley's Estate, 195 Cal. App. 2d 164, 171, 15 Cal. Rptr. 570, 575 (1961) (Trust authorized trustee to pay $40 per month to beneficiary and as much of the principal as the trustee, in its uncontrolled discretion, deemed necessary. Trustee paid in excess of $40 monthly for beneficiary's support to state, but refused to pay entire amount requested by state. Court found trustee's distribution a reasonable exercise of the discretion given to him.). *Cf. In re* Emmons Will, 59 N.Y.S.2d at 268-69 (testamentary trust directed that the income and principal be used in trustee's discretion for the benefit of an incompetent; court read "benefit" to include support and maintenance, and thus what appeared to be a purely discretionary trust was treated like a support trust and state recovery was allowed). *But see* Constanza v. Verona, 48 N.J. Super. 355, 360-61, 137 A.2d 614, 616-17 (1958) (discretionary payment of maximum of $6/week for the beneficiary's "pleasure or comfort" with discretion to withhold payments should the income become "payable to some other person"; trustee ordered to reimburse county out of the income of the trust for care of indigent, incompetent beneficiary in county hospital).

assets not be allowed to remain intact when the trust beneficiary is being supported at public expense.[71] Many of the latter cases involve support trusts or trusts where the settlor's general intent appears to be to provide for the beneficiary's basic needs.[72] The policy, however, is not expressly limited to any particular type of trust.

Some statutes state that the patient and his estate must reimburse the state for the cost of his care.[73] The question then arises whether a patient's "estate" includes a beneficial interest in a discretionary trust. In *City of Bridgeport v. Reilly*,[74] Connecticut answered the question in the negative. The court held that despite the statutory reference to the "estate" of an institutionalized patient, assets held in a spendthrift trust are not available to reimburse the state because the beneficiary holds no title in the property unless and until it is appropriated to him by the trustee.[75]

When a statute does not make it clear whether trust assets are available to the state, another factor considered by courts is whether the settlor of the trust is statutorily responsible for the care of the beneficiary.[76] This consideration appears to be used to bolster a court's conclusion, rather than being itself determinative. Still, it should not be ignored. The persuasiveness of this consideration ought to be greatly diminished when the

71. *See, e.g., In re* Estate of Lackman, 156 Cal. App. 2d 674, 320 P.2d 186 (1958); Dep't of Mental Health & Dev. Disabilities v. First Nat'l Bank of Chicago, 104 Ill. App. 3d 461, 432 N.E.2d 1086 (1982); Constanza v. Verona, 48 N.J. Super. 355, 137 A.2d 614 (1958). *Cf. In re* Marafioti's Will, 80 Misc. 2d 206, 362 N.Y.S.2d 807 (Sur. Ct. 1974) (income beneficiary had right to receive one-third of corpus at age 45; invasion for her benefit directed at age 40 to prevent her from being added to welfare roles); *In re* Estate of Browning, 76 Misc. 2d 1041, 352 N.Y.S.2d 769 (Sur. Ct. 1974) (medical assistance reimbursement issue); *In re* Crow's Will, 56 Misc. 2d 398, 288 N.Y.S.2d 965 (Sur. Ct. 1968) (medical assistance eligibility case).

72. *See, e.g.*, Estate of Lackman, 156 Cal. App. 2d at 674, 320 P.2d at 186; *In re* Estate of Browning, 76 Misc. 2d at 1041, 352 N.Y.S.2d at 769. *See also In re* Crow's Will, 56 Misc. 2d at 398, 288 N.Y.S.2d at 965 (language authorizing expenditure of principal for welfare and best interest of beneficiary interpreted as intending support). Indeed, some cases presume that a settlor would prefer that principal be invaded rather than have the cost of the beneficiary's care fall upon the public. *See, e.g.*, Estate of Harold, 87 Misc. 2d 1001, 1003, 386 N.Y.S.2d 972, 973 (Sur. Ct. 1976).

73. *See, e.g.*, CAL. WELFARE & INST. CODE § 7275 (West Supp. 1983); CONN. GEN. STAT. ANN. § 17-295 (West Supp. 1983); ILL. ANN. STAT. ch. 91½, § 5-105 (Smith-Hurd Supp. 1983).

74. 133 Conn. 31, 47 A.2d 865 (1946).

75. *Id.* at 39-40, 47 A.2d at 867-68 (since the trustee's failure to make distributions was not an abuse of discretion, the state could not recover). *See also In re* Hinckley's Estate, 195 Cal. App. 2d 164, 15 Cal. Rptr. 570 (1961) ("estate" of a mentally ill person liable for his maintenance in a state institution—trustee exercised his discretion properly, no additional recovery permitted); *In re* Johnson's Estate, 198 Cal. App. 2d 503, 17 Cal. Rptr. 909 (1962) ("estate" of a mentally ill person liable for his maintenance in a state institution—discretionary trust created for beneficiary's "care" is not liable for her support in state hospital beyond limited amount creator intended to be expended for such purposes).

The beneficiary of a mandatory income or support trust has an enforceable interest in the trust; that interest is included in the beneficiary's "estate" and the trust may be liable, under such a statute, for services rendered to him. *See, e.g., In re* Estate of Schmitz, 26 Ariz. App. 575, 550 P.2d 243 (1976); *In re* Lackman's Estate, 156 Cal. App. 2d 674, 320 P.2d 186 (Cal. App. 1958); Dep't of Mental Health & Dev. Disabilities v. First Nat'l Bank of Chicago, 104 Ill. App. 3d 461, 432 N.E.2d 1086 (1982).

76. *See, e.g., In re* Johnson's Estate, 198 Cal. App. 2d 503, 508-09, 17 Cal. Rptr. 909, 913 (1962); *In re* Hinkley's Estate, 195 Cal. App. 2d 164, 168, 15 Cal. Rptr. 570, 575 (1961); Maul v. Fitzgerald, 78 A.D.2d 706, 708, 432 N.Y.S.2d 282, 284 (1980); Estate of Escher, 94 Misc. 2d 952, 960, 407 N.Y.S.2d 106, 111 (Sur. Ct. 1978), *aff'd*, 75 A.D.2d 531, 426 N.Y.S.2d 1008 (1980); *In re* Will of Wright, 12 Wis. 2d 375, 382, 107 N.W.2d 146, 150 (1961).

trust is established by the responsible relative's will, since responsibility ceases with death.[77] If a trust is established during the lifetime of a responsible relative, however, a strong policy argument exists for allowing the state to reach the trust assets. A person charged with a duty to provide support for a disabled relative should not be able to place his assets beyond the reach of the state by the establishment of a trust.[78]

Trusts may be vulnerable to state claims under other statutes which authorize a court to invade the principal of a trust for an income beneficiary whose support needs are not adequately covered by the trust income. Even when it is the settlor's intention that a trust provide basic support for the income beneficiary, the instrument may fail to give the trustee power to invade principal if the income should prove insufficient for that purpose. This "oversight" occurs most often when, at the time of drafting the instrument, the corpus is so large that it is assumed the income will always be sufficient to provide adequate support. Unfortunately, this assumption often proves erroneous. In order to carry out the settlor's presumed intention, some statutes permit a court, absent a contrary provision in the disposing instrument, to make an allowance from principal for an income beneficiary.[79] Beneficiaries of discretionary trusts are not entitled to income, and therefore discretionary trusts should not come under such statutes.[80]

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77. Typically the relative, for example the parent of a minor patient, and that relative's estate are made liable for the support furnished to the handicapped patient. If the parent has not paid the full cost of his child's care up until the date of the parent's death, the state can recover its unreimbursed costs from the parent's estate. At that point, however, the parent's liability for payment ceases and any assets remaining in the estate can be distributed in accordance with the deceased parent's will. If the assets are placed in trust for the incapacitated child, they should not be subject to state claims to any greater extent than if the trust were established by an unrelated friend of the patient. *In re* Estate of Escher, 94 Misc. 2d 952, 960, 407 N.Y.S.2d 106, 111 (Sur. Ct. 1978), *aff'd*, 75 A.D.2d 531, 426 N.Y.S.2d 1008 (1980); *In re* Falsey's Estate, 56 N.Y.S.2d 556, 560 (1945).

78. Conversely, it can be argued that if the responsible relative has gone so far as to give up his right to the trust assets, *e.g.*, he is neither a beneficiary nor a trustee with dispositive power, then the assets are no longer his and should not be subject to state claims any more than if he had established a trust for a purpose unrelated to the institutionalized person.

79. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 7-1.6 (McKinney 1967); WIS. STAT. ANN. § 701.13(2) (West 1981). Although the state successfully used the New York statute in one case *In re* Marafioti's Will, 80 Misc. 2d 206, 208-10, 362 N.Y.S.2d 807, 809-10 (Sur. Ct. 1974), the state's attempt to compel invasion of trust corpus was denied in several other cases. *See* Maul v. Fitzgerald, 78 A.D.2d 706, 707-08, 432 N.Y.S.2d 282, 283-84 (1980) (invasion determined to be contrary to the intent of the creator of the trust); *In re* Damon, 71 A.D.2d 916, 916-17, 419 N.Y.S.2d 742, 743 (1979) (for trusts created before enactment of the statute, invasion is allowed only with the consent of all beneficially interested persons; all such persons had not consented); *In re* Estate of Escher, 94 Misc. 2d 952, 961, 407 N.Y.S.2d 106, 112 (Sur. Ct. 1978), *aff'd*, 75 A.D.2d 531, 426 N.Y.S.2d 1008 (1980) (remainderman refused to consent to invasion); Estate of Harold, 87 Misc. 2d 1001, 1003, 386 N.Y.S.2d 972, 973 (Sur. Ct. 1976) (all necessary persons had not consented). *See also In re* Estate of Ross, 96 Misc. 2d 463, 467-68, 409 N.Y.S.2d 201, 203 (Sur. Ct. 1978) (creator of trust did not intend beneficiary to be supported by trust; no invasion of principal allowed); Steinberg v. New York Dep't of Social Serv., 90 Misc. 2d 547, 549, 394 N.Y.S.2d 763, 765 (Sup. Ct. 1977) (trust beneficiary must request invasion of corpus before establishing eligibility for medical assistance).

80. As a safeguard, one might insert a provision prohibiting a court from ordering such an invasion. In an era when the continuation of government programs is uncertain, it is not advisable to totally bar access to the trust corpus, even when it is clear that the trust assets could provide basic support for only a short time. Another possibility would be to condition invasions pursuant to statute upon the written consent of the trustee or third parties.

C. *Planning Recommendations*

A discretionary trust created by a parent's will offers the best possibility of achieving the parent's dual objectives of having the state provide the institutional care needed by the child and having the trust continue to provide the child with supplemental benefits of the type the parents provided while living. Neither a mandatory income trust nor a support trust is likely to be as successful in achieving these goals.

By statute or judicial decision, some states make the assets of even a discretionary trust available to the state to reimburse it for the cost of maintaining the trust beneficiary. In those states the cost of institutional care would soon deplete the corpus of all but very large trusts. The parents' assets placed in trust will afford their child little, if any, benefit. Faced with this reality, many parents will choose to disinherit their disabled child, the child who needs them most and for whom the parents ordinarily feel the greatest responsibility. Many parents will leave their estates entirely to their other children or other family members with the hope that the others will provide for the disabled child.[81]

In states which have either enunciated a policy that permits the discretionary trust to remain untouched by the state or which have not addressed the question, the discretionary trust must be very carefully structured. A Missouri case[82] indicates that it is unwise to state that the trust is intended to provide the support and luxuries not available to the beneficiary under any public assistance program. Indeed, there are some indications that giving the trustee discretion to use the trust assets for the beneficiary's "benefit," without any qualification, may endanger the success of the dispositive scheme because "benefit" may be read to include support.[83] Unless a state has a policy which protects purely discretionary trusts from state reimbursement claims, the creator of the trust must be willing to give up the possibility that the trust may serve as a safety net to provide the beneficiary's support in the event that the state support ceases. The trustee should be given discretion to use the trust income and principal for the "benefit" of the disabled person, but the instrument should state that it is not the settlor's (or testator's) intention that the trust assets be used to provide "support" for the beneficiary.

III. SUPPLEMENTAL SECURITY INCOME

Supplemental Security Income (SSI) is a Federal program that pro-

81. A policy which makes assets of discretionary trusts available to reimburse the state for expenditures it makes on behalf of disabled trust beneficiaries will not significantly reduce the state's financial burden. Rather, the policy will simply discourage the use of the trust device to achieve the parents' objective. Parents will structure their property disposition so that the funds will not be available to the state. At the same time, the parents will not be able to structure the disposition so that there is any assurance that the funds will be available to their disabled child. This creates emotional stress for the parents, which is especially unfortunate since the policy will result in little actual benefit to the state.

82. Estate of Wallace v. Missouri State Div. of Family Serv., 628 S.W.2d 388 (Mo. Ct. App. 1982). For a complete discussion of *Wallace, see infra* note 162 and accompanying text.

83. *See supra* note 51 and accompanying text; *see also* discussion of IND. CODE §§ 16-14-18.1-1, 16-14-18.1-3(a) (Supp. 1981), *supra* note 68.

vides financial assistance based on need to the elderly (65 or over), the blind and the disabled. Effective January 1, 1974, SSI replaced a system of state-administered assistance programs that were partially funded by the federal government.[84] The basic purpose of the new program is to assure a minimum income for financially needy aged, blind or disabled persons.[85]

Although the program is administered by the Social Security Administration, it is financed from the general funds of the United States Treasury and it is a need-based program rather than an entitlement program. A person may be eligible for SSI even if he has never worked. Eligibility is based upon a showing that the claimant is either 65 years of age or older, blind[86] or disabled,[87] and that the claimant is financially needy. Financial need is demonstrated if the claimant's resources and income fall below specified levels.

For SSI purposes, a person's resources include cash or any other assets he owns which he can use to provide his support and maintenance;[88] income is anything a person receives which he can use to meet those needs.[89] A gift of cash is income in the month in which it is received.[90] If the cash is not spent and is on hand the following month, it is then a resource.[91] If trust assets are included among the beneficiary's resources, he may be ineligible for SSI. Even if his resources are below the limit, if trust distributions count as income, the beneficiary may be ineligible for SSI benefits or may have his benefits reduced. The usefulness of the trust device for SSI recipients is therefore dependent upon the trust assets not be-

84. Social Security Act Amendment of 1972, Pub. L. No. 92-603, 86 Stat. 1465 (codified as amended at 42 U.S.C. §§ 1381-1383 (1976 & Supp. V 1981)).

85. 20 C.F.R. § 416.110 (1983).

86. "An individual shall be considered to be blind for purposes of this subchapter if he has central visual acuity of 20/200 or less in the better eye with the use of a correcting lens . . . ." 42 U.S.C. § 1382c(a)(2) (1976).

87. "An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any individually determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months (or in the case of a child under the age of 18, if he suffers from any individually determinable physical or mental impairment of comparable severity)." 42 U.S.C. § 1382c(a)(3)(A) (1976).

The program is of limited importance to those disabled persons residing in a state institution. SSI payments to inmates of public institutions are generally prohibited. 42 U.S.C.A. § 1382(e)(1)(A) (West 1983); 20 C.F.R. § 416.211(a) (1983). Therefore, patients in state mental institutions, as well as people incarcerated in penal institutions, are ineligible for SSI benefits, presumably because the public has assumed responsibility for meeting all of their needs. The rule apparently ignores state financial responsibility statutes which may impose liability for the support of a patient in a state institution upon his family. In some instances, the income or resources of those family members would be irrelevant in determining the patient's SSI eligibility if he were not residing in a public institution. The result, is a shift of responsibility not from the federal government to the state government, but from the federal government to family members whom the federal government ordinarily considers nonresponsible.

If a person resides in a medical facility throughout any month and more than one-half the cost of his care is covered by Medicaid, he can receive no more than $25 per month from the SSI program. 42 U.S.C. § 1382(e)(1)(B) (1976); 20 C.F.R. §§ 416.414(a), (b)(1) (1983).

88. 20 C.F.R. § 416.1201(a) (1983).

89. *Id.* at 416.1102.

90. *Id.* at §§ 416.1121(g), .1123(a).

91. *Id.* at § 416.1201(a), (b).

ing counted as resources and upon the trust distributions not resulting in a dollar-for-dollar reduction of SSI monthly benefits.

A. *Resources*

A resource is defined as "cash or other liquid assets or any real or personal property that an individual owns and could convert to cash to be used for his support and maintenance";[92] however, certain items are excluded in determining the resources of an individual.

Provisions for exclusion include:

1. a home owned and used as the claimant's principal place of residence, regardless of the value of the home;[93]
2. household goods and personal effects, to the extent that the individual's equity value in those goods does not exceed $2,000; if the claimant's total equity value in the household goods and personal effects exceeds $2,000, the excess is counted against the $1500 resource limitation;[94]
3. one automobile, regardless of its value, if it is necessary for the claimant or a member of the claimant's household for employment or medical treatment of a special or regular medical problem, or if the automobile is modified for operation by or transportation of a handicapped person;[95]
4. property essential to a claimant's means of self-support;[96]
5. other excluded assets include life insurance, if the total face value of all policies owned by the claimant and his spouse on any person does not exceed $1,500 if the total face value of all such policies exceeds $1,500, the total cash surrender value of the policies will be counted; term insurance and burial insurance are not taken into account in determining the face value of life insurance.[97]

An otherwise eligible individual cannot have more than $1,500 of nonexcludable resources; a married couple living together may have up to $2,250 of nonexcludable resources.[98] Possession of nonexcluded property in excess of the allowance will result in denial of SSI payments. While exclusions thus may be of obvious utility in planning the type of property to be given to an SSI (or potential SSI) claimant, they do not directly address the trust question.

The SSI regulations, promulgated by the Social Security Administration, Department of Health and Human Services, state that property is

92. 20 C.F.R. § 416.1201(a) (1983).
93. 42 U.S.C. § 1382b(a)(1) (1976); 20 C.F.R. §§ 416.1210(a), .1212 (1983).
94. 42 U.S.C. § 1382b(a)(2) (1976); 20 C.F.R. §§ 416.1210(b), .1216 (1983).
95. 42 U.S.C. § 1382b(a)(2) (1976); 20 C.F.R. §§ 416.1218(b)(1) (1983). If no automobile is excluded under the foregoing provision, one automobile is excluded to the extent that its value does not exceed $4500 (regardless of the owner's equity in the automobile). 20 C.F.R. § 416.1210(c), .1218(b)(2) (1983).
96. 42 U.S.C. § 1382b(a)(3) (1976); 20 C.F.R. § 416.1210(d), (e) (1983). Resources of a blind or disabled individual that are necessary to fulfill an approved plan for achieving self-support are also excluded. 42 U.S.C. § 1382b(a)(4) (Supp. V 1981); 20 C.F.R. § 416.1210(f) (1982).
97. 42 U.S.C. § 1382b(a) (Supp. V 1981); 20 C.F.R. §§ 416.1210(h), .1230(a) (1983).
98. 42 U.S.C. § 1382(a)(1)(B) (1976); 20 C.F.R. § 416.1205(a), (b) (1983).

considered a resource if the claimant has the right, authority or power to liquidate the property.[99] The Social Security Administration's Program Operations Manual is more specific. It states that the principal of a trust does not count as a resource to a claimant who is a beneficiary of the trust if his "access to the trust principal is restricted (e.g., only the trustee or court, etc., can invade the principal)."[100] The trust principal is not considered a resource even if the trust provides a regular specified payment from the principal to the beneficiary;[101] however, "[i]f the beneficiary has unrestricted access to the principal of the trust, it is counted as a resource."[102]

Clearly, a beneficial interest in a purely discretionary trust will not be counted as a resource since the beneficiary's access to the principal is restricted. The beneficiary has no right to the principal of a discretionary trust until the trustee exercises his discretion to make a distribution or a court orders distribution because the trustee has abused his discretion.[103] Even assets held in support trusts or trusts authorizing discretionary distribution of principal for support and maintenance of the beneficiary apparently will not be counted as a resource of a claimant/beneficiary. The Program Operations Manual states that a trustee's discretionary authority to invade principal, "including invasion of the principal for support and maintenance of the beneficiary, does not mean that the principal is available to the claimant/beneficiary and, as such, should not be counted as a resource."[104] Property held in trust for an SSI recipient or applicant will not be counted as a resource regardless of the type of trust, unless the beneficiary has unrestricted access to the trust.

B. *Income*

Even though a trust is not counted as a resource for determining SSI eligibility, payments made by the trustee to or on behalf of an SSI recipient or applicant may be counted as income when determining the beneficiary's financial eligibility.[105] This is significant because an SSI recipient is allowed a small amount of earned and unearned income; income exceeding the allowances will result in a dollar-for-dollar reduction of payments. As of January 1984, the basic SSI payment to an eligible individual is $314 per month. Any individual whose countable income equals or exceeds $314 is not eligible for SSI benefits. A person whose countable income is $100 will receive $214 from SSI.[106]

Obviously, the income exclusions and allowances are crucial to the usefulness of the trust device for an SSI recipient. If any distributions from a trust result in an equal reduction in the amount of the SSI payment,

99. 20 C.F.R. § 416.1201(a) (1983).

100. SOCIAL SECURITY ADMIN., DEP'T OF HEALTH AND HUMAN SERVICES, PROGRAM OPERATIONS MANUAL SYSTEM [hereinafter cited as POMS], SI 01120.105 A. 2. (Oct. 1981).

101. *Id.* Note, however, that such payments must be considered when determining if the applicant meets the income test.

102. *Id.*

103. *See supra* note 26 and accompanying text.

104. POMS, *supra* note 100, at SI 01120.105 A. 2. (Oct. 1981).

105. *Id.* at SI 01120.105 B. 2. (Oct. 1981).

106. 48 Fed. Reg. 27,151 (1983).

the trustee cannot improve the beneficiary's standard of living unless the trust is large enough to make monthly distributions which exceed the maximum SSI benefits.

For purposes of determining SSI eligibility, income is defined as "anything you receive in cash or in-kind that you can use to meet your needs for food, clothing or shelter."[107] This is a very broad definition; in fact, SSI income includes receipts which are disregarded for federal income tax purposes. For example, property received by inheritance or gift is not included in gross income for federal income tax purposes,[108] yet SSI rules specifically include inheritances and gifts in income[109] since they can be used to provide food, clothing or shelter. Cash distributions made directly to a beneficiary from a trust, even from a trust which is not counted as a resource, are income for SSI purposes.

1. *Receipts Which are not Considered Income*

The trustee may make some expenditures for a trust beneficiary which are not counted as income because they do not result in receipt by the beneficiary of food, clothing or shelter, or of anything which he could use to obtain these items. For example, payment of a beneficiary's bills by a trustee does not result in income to the beneficiary for SSI purposes. If, however, the beneficiary receives food, clothing or shelter as a result of the payment, he has received in-kind income.[110] For example, if a trustee pays a grocer to provide an SSI claimant with food, the payment itself is not income because the SSI claimant does not receive it; however, the food is in-kind income.[111] If a trustee pays a claimant's telephone bill or his health insurance premium, the SSI claimant does not receive income because the payment does not result in his receiving food, clothing or shelter.[112]

The actual receipt of items other than food, clothing or shelter ordinarily is treated as the receipt of income because the items may be sold and

107. 20 C.F.R. § 416.1102 (1983).

108. I.R.C. § 102(a) (1976).

109. 42 U.S.C. § 1382a(a)(2)(E) (1976); 20 C.F.R. § 416.1121(g) (1983).

110. 20 C.F.R. § 416.1103(g) (1983). The regulation states that the value of anything received due to a third-party payment to a vendor is counted if it is in-kind income as defined in § 416.1102. That subsection states that in-kind income is "food, clothing or shelter, or something you can use to get one of these." *Id.* According to the language in the regulations, third-party vendor payments result in income even if the claimant receives something which can be sold or converted to food, clothing or shelter, rather than actually receiving food, clothing or shelter. For example, if a third party made an installment payment on an SSI claimant's stereo, the regulations appear to indicate that the claimant would have in-kind income equal to the increase in his equity in the stereo, because he could sell the stereo and use the proceeds for his own support. The Program Operations Manual System states that after February 1, 1982, a claimant does not receive unearned in-kind income as a result of someone else's payment to a vendor, unless the payment results in receipt of in-kind maintenance and support. According to the Program Operations Manual System, the increase in the equity value of the stereo is not in-kind income, but the equity value is considered in the determination of the claimant's resources. POMS, *supra* note 100, at SI 00830.640 C. 3. (Sept. 1982).

111. 20 C.F.R. § 416.1103(g) (1983). Because the payment results in the receipt of food, the claimant receives in-kind support and maintenance which is subject to the presumed maximum value rule. 20 C.F.R. § 416.1130(c). *See infra* notes 133-34 and accompanying text.

112. POMS, *supra* note 100, at SI 00810.080 C. (Feb. 1982). This POMS section does not

the proceeds used to purchase basic maintenance needs. Generally, in-kind items which are convertible to cash are valued at their current market value.[113] If an SSI claimant is given a painting with a current market value of $300, he has $300 of unearned income. However, the right to use a consumer item cannot be converted to cash and thus is not income. If a trust owns an automobile and allows the SSI claimant/beneficiary to use it, the usage is not income.[114]

Personal services performed for an SSI claimant do not count as income since the services cannot be used to obtain food, clothing or shelter.[115] A trustee can pay for services, such as lawn care, housekeeping, meal preparation or grocery shopping, without reducing the trust beneficiary's SSI payments. The availability of such services might enable a trust beneficiary to continue to reside in his own home, rather than being institutionalized.

In addition to receipts which are not considered income because they cannot be applied to meeting the individual's requirement for food, clothing and shelter, certain types of income are specifically excluded from consideration.[116] Of these exclusions, the one which may be of the most

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specifically speak about a trustee paying a claimant's telephone bill, but it does speak about a third party such as a claimant's child who might pay that bill.

The section specifically dealing with trust income could lead one to conclude that a trustee's payment of a claimant/beneficiary's telephone bill constitutes income. That section says:

> . . . Only the trust payments count as income. A trustee may exercise authority over use of the payments by issuing payments to a beneficiary directly, or to the representative payee or legal guardian, or to a vendor on the claimant's behalf. In these situations, *it is immaterial whether the payments are received directly by the beneficiary, or in-kind; the payments constitute income to the beneficiary.*

Id. at SI 01120.105 B. 2. (Oct. 1981) (emphasis added). If this language means that any payment by a trustee, on behalf of an SSI claimant/beneficiary, constitutes income to the beneficiary, the POMS section is in conflict with the regulations. The regulations state that income is "anything you receive in cash or in-kind that you can use to meet your needs for food, clothing, or shelter." 20 C.F.R. § 416.1102 (1983). If a trustee pays a claimant/beneficiary's telephone bill, the beneficiary does not receive cash or anything he can use to meet his basic support needs; therefore, according to the regulations, the payment does not constitute income. The Program Operations Manual System is an interpretation of statutes and regulations administered by the Social Security Administration. The Manual is not subject to the procedural protections inherent in the drafting of regulations. *See* Whaley v. Schweiker, 663 F.2d 871 (9th Cir. 1981). In the event of a conflict between the regulations and the Manual, therefore, the regulations should prevail.

113. 20 C.F.R. §§ 416.1111(c), .1123(c) (1982). The receipt of food, clothing or shelter, *i.e.*, of in-kind maintenance and support, is valued according to special rules which will be discussed below.

114. According to the Program Operations Manual System, a third party, arguably including a trustee, can make a claimant's car payment which will not be treated as a receipt of unearned income because the payment does not result in the receipt of in-kind maintenance and support. POMS, *supra* note 100, at SI 00830.640 C. 3. (Sept. 1982). As discussed in the POMS, the regulations indicate that such a third-party vendor payment constitutes income, at least to the extent of the increased equity value. *Supra* note 110.

115. *Id.* at SI 00810.080 C. (Feb. 1982).

116. The exclusions include: 1) any refund of taxes paid on real property or on food purchased by such individual, 42 U.S.C. § 1382a(b)(5) (1976); 2) state or local benefits based on need, 42 U.S.C. § 1382a(b)(6) (1976); 3) grants, scholarships or fellowships received for use in paying educational tuition and fees, 42 U.S.C. § 1382a(b)(7) (1976); 4) home produce utilized by the household for its own consumption, 42 U.S.C. § 1382a(b)(8) (1976); 5) if the claimant is a child, one-third of the child support payments received from an absent parent, 42 U.S.C. § 1382a(b)(9) (1976); 6) foster care payments for an ineligible child living in the home of a claimant, 42 U.S.C. § 1382a(b)(10) (Supp. V 1981); 7) disaster relief assistance, 42 U.S.C. § 1382a(b)(11), (12) (Supp. V 1981); 8) medical care and services paid for directly to the provider

general utility is the exclusion of medical care and services, and support and maintenance furnished during a medical confinement.[117] If an SSI recipient is not eligible for medical assistance,[118] a trustee can pay for his medical care and for his medical insurance premiums without resulting in any reduction in his SSI benefits.[119]

2. *Allowances*

Even though receipt of a benefit may be considered income, small amounts of earned and unearned income are not counted. The first income allowance is for irregularly or infrequently received earned or unearned income. Irregularly or infrequently received *unearned* income is disregarded if it does not exceed twenty dollars a month.[120] If such unearned income exceeds twenty dollars a month, none of it is disregarded.[121] Irregularly or infrequently received *earned* income is disregarded if it does not exceed ten dollars a month.[122] Again, if the amount so received exceeds ten dollars, none of that income is disregarded[123] unless it can be covered by other allowances.

In addition to the allowance for infrequently received income, a general allowance of twenty dollars per month of countable earned or unearned income is permitted before any reduction of assistance occurs.[124] This general allowance is first applied toward unearned income and then toward earned income.[125] If a claimant regularly receives fifty dollars per month of unearned income, the first twenty dollars is disregarded and the remainder causes a thirty dollar reduction in his SSI benefits.

Over and above the twenty dollar general allowance, sixty-five dollars per month of earned income, plus one-half of the remaining income earned in each month, is not counted.[126] Thus, if an SSI recipient has an

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by someone else, and the value of any support and maintenance furnished during a medical confinement, 20 C.F.R. § 416.1103(a) (1983); 9) income necessary for fulfillment of a plan of self-support for a blind or disabled recipient, 42 U.S.C. § 1382a(b)(4)(A) (1976), § 1382a(b)(4)(B) (Supp. V 1981); 10) state benefits paid under a program established prior to July 1, 1973, if eligibility is based solely on attainment of age 65 and duration of residence in the state, and not on need, 42 U.S.C. § 1382a(b)(2)(B) (Supp. V 1981); and 11) certain assistance based on need received to assist in meeting the costs of home energy, 42 U.S.C.A. § 1382a(b)(13) (West 1983).

117. *See* 20 C.F.R. § 416.1103(a) (1983).

118. *See infra* notes 141-91 and accompanying text.

119. *See* 20 C.F.R. § 416.1103(a) (1983).

120. 42 U.S.C. § 1382a(b)(3)(A) (Supp. V 1981). This allowance enables an individual to accept an unexpected occasional gift or contribution without losing SSI benefits. "Irregularly" or "infrequently" received is defined in the regulations in terms of quarterly budgeting. 20 C.F.R. § 416.1124(c)(6) (1983). The regulations have not been amended since the enactment of Pub. L. No. 97-35, 95 Stat. 865 (1981), which generally changed the quarterly method of accounting to a monthly system.

121. 20 C.F.R. § 416.1124(c)(6) (1983).

122. 42 U.S.C. § 1382a(b)(3)(B) (Supp. V 1981). This provision permits a person to accept an odd job without reduction of SSI payments.

123. 20 C.F.R. § 416.1112(c)(1) (1983).

124. 42 U.S.C. § 1382a(b)(2)(A) (1976).

125. 20 C.F.R. §§ 416.1112(c)(3), .1124(c)(10) (1983). The order is advantageous to the individual since unearned income reduces SSI payments dollar-for-dollar, whereas earned income reduces SSI payments by only one-half after an exclusion of $65 per month. *See infra* note 126 and accompanying text.

126. 42 U.S.C. § 1382a(b)(4)(A), (B) and (C) (1976 & Supp. V 1981). Severely disabled per-

annuity which pays him fifty dollars per month and he earns one hundred dollars per month, he has only $47.50 of countable income for SSI purposes: $30.00 of countable unearned income and $17.50 of countable earned income.[127] Of these three allowances, the only one which ordinarily will permit a trustee to make a cash distribution to an SSI claimant/trust beneficiary, without causing a dollar-for-dollar reduction of SSI benefits, is the general income allowance of twenty dollars per month.

3. *In-kind Maintenance and Support*

Rather than distributing cash to a beneficiary, a trustee can purchase items which the beneficiary needs and give the items themselves to the beneficiary—in-kind distributions. As previously noted, in-kind items convertible to cash are generally valued at their current market value.[128]

In-kind support and maintenance is valued according to two special rules: (1) the "one-third reduction" rule, and (2) the "presumed value" rule.

The "one-third reduction" rule applies if the SSI claimant resides in the household of a person who provides the claimant with both food and shelter.[129] This rule automatically reduces the SSI benefits by one-third rather than reducing them by an amount based on a determination of the actual dollar value of the in-kind support and maintenance provided to the SSI claimant by the head of the household.[130]

If an SSI claimant's family members or other persons are willing to provide him with food and shelter in their own home but are without the financial ability to do so, a trustee could reimburse these persons for their expenditures. The trust distribution would be within the authority of a trustee who has discretion to use trust funds for the general benefit of the trust beneficiary. The unresolved question under such a plan is whether the Social Security Administration would accept the contention that the family members, and not the trustee, are providing the food and shelter. If the family members are considered to be providing the claimant's needs, the one-third reduction rule applies, and even if the cost of the claimant's share of the monthly expenses is $350 per month, his SSI payments are only reduced by one-third.

It may be that the SSI claimant's share of the household expenses would be less than one-third of the SSI federal benefits normally allowed. In that instance, it would be advantageous for the trustee to distribute cash

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sons may exclude: first, $65 per month; second, impairment-related work expenses; and last, one-half of the remaining earned income for the month. 42 U.S.C. § 1382a(b)(4)(B) (Supp. V 1981).

127. $100 less the $65 allowance leaves $35, only one-half of which is counted. One-half of $35 is $17.50.

128. 20 C.F.R. § 416.1123(c) (1983).

129. 42 U.S.C. § 1382a(a)(2)(A)(i) (1976); 20 C.F.R. § 416.1131(a) (1983).

130. *Id.* The rule has been criticized. *See* Note, *SSI Treatment of In-Kind Income—The One-Third Reduction Rule*, 65 CORNELL L. REV. 909 (1980). This rule is criticized for, among other reasons: 1) penalizing SSI beneficiaries who receive in-kind support and maintenance that is worth less than its presumed value; 2) discouraging families from aiding SSI recipients unless the value of the assistance the family can provide is at least equal to one-third of the recipient's benefits, and 3) disregarding in-kind income worth more than one-third the benefit level.

to the claimant and allow him to pay his share of the expenses. The one-third reduction rule would be inapplicable because the regulations state that an individual is not "living in another person's household" if the individual is paying a pro rata share of the household and operating expenses.[131] If an SSI claimant's pro rata share of those expenses is only $75 per month, the trustee could distribute that amount directly to the beneficiary, who could then contribute to the household budget. The beneficiary's SSI payments would not be reduced by one-third but only by seventy-five dollars.[132]

The alternate rule of "presumed value" applies in all other situations where an SSI claimant receives in-kind support and maintenance.[133] For example, the rule applies if a claimant resides in his own home and another person provides him with food. It may also apply if a claimant lives in another's household and a trustee pays the claimant's pro rata share of household expenses. The presumed value rule would apply if the trustee's payment is considered to result in the receipt of in-kind maintenance and support from the trustee rather than from the head of the household in which the claimant resides, as suggested above.

Under the presumed value rule, the actual dollar value of any food, clothing or shelter provided to the claimant is disregarded. Such support and maintenance is presumed to be worth a maximum value, which is one-third of the federal benefit rate[134] plus twenty dollars per month.[135] If an SSI recipient lives in his own household, the trustee can pay the rent[136]

131. 20 C.F.R. § 416.1132(c)(4) (1983). The trustee's direct payment of the claimant's pro rata share of expenses should not be considered payment by the claimant. The trustee's payment is more aptly viewed as a third-party vendor payment not unlike payment of a claimant's grocery bill. In that instance the receipt of the groceries is considered in-kind income; the claimant is not treated as having received the cash and then paying the bill himself. *See supra* note 111 and accompanying text. When the trustee pays a claimant's share of household expenses, the question is not whether the claimant is living in another person's household, but whether that other person or the trustee is providing the claimant's support and maintenance.

132. If the $20 per month general income exclusion is not otherwise used, the actual reduction would be only $55. 20 C.F.R. § 416.1124(c)(10) (1983).

133. *Id.* at § 416.1130(c).

134. *Id.* at § 416.1140. The federal benefit rate is the amount of monthly benefits payable to an eligible individual or couple before any reduction for nonexcluded income.

135. 20 C.F.R. § 416.1140 (1983). If an individual has no other income, application of the presumed value rule will result in the same federal benefit he would receive under the one-third reduction rule. The $20 per month general income allowance is applied, then the remainder of the presumed value (one-third of the federal benefit) reduces the payment. The presumed value rule allows an individual to show that the value of the in-kind support and maintenance he receives is not equal to the presumed value. *Id.* If he successfully demonstrates that, only the lower value is counted as income. *Id.*

136. Monthly payment by a trustee of an SSI claimant's mortgage may not be advisable, but complete discharge of the mortgage by a single payment may be advantageous. If a trustee makes monthly mortgage payments on behalf of an SSI recipient, he will have unearned income each month. Gifts, even of items which are excludable as resources (e.g., a residence), may result in unearned income.

If a gift is not cash and is not food, clothing or shelter (governed by the presumed value rule), it must be determined if it can be sold or converted. If it can be sold or converted, the current market value is charged as unearned income. For example, if an SSI claimant is given a car with a current market value of $2,000, the claimant is charged with $2,000 of unearned income. POMS, *supra* note 100, at SI 00830.210 (Feb. 1982).

If a gift is food, clothing or shelter, or payment to a vendor which results in the receipt of food, clothing or shelter, the presumed maximum value rule applies. If a third party makes an SSI

and utilities and provide food and clothing for the recipient. Although these costs might equal $350 per month, the recipient's SSI payments are reduced by only one-third of the federal benefit rate.[137] If the trustee paid cash to the recipient to purchase or rent shelter or to purchase food and clothing, the full amount of the cash transfer would be income.

C. *Recommendations for Creating a Trust to Supplement SSI Payments*

The trust device may prove quite useful for the SSI claimant. The trust principal will not be counted among the beneficiary's resources if his access to it is restricted. A purely discretionary trust will not be counted as a resource and will give the trustee the flexibility to help the beneficiary as needed. Since discretion to provide the beneficiary's support does not cause the trust assets to be counted as a resource, it is unnecessary to state that the trust is not intended to provide general support.[138] Indeed, such a restriction would preclude the trustee from furnishing in-kind support which may enable the beneficiary to live independently or with family members. It is recommended, however, that the trust not include language expressly authorizing distributions for the beneficiary's support; it should be a purely discretionary trust. Support language may raise an inference that the beneficiary is entitled to support out of the trust fund even though he has other resources.[139] Distributions made pursuant to such a support obligation may result in receipt by the beneficiary of unneeded countable income and reduction of SSI payments or ineligibility to receive them.

Sizeable distributions from a trust may not be treated as countable income. Twenty dollars per month is not counted and payments to third parties for personal services rendered to an SSI claimant also are not counted. The receipt of in-kind support and maintenance results in the application of the one-third reduction rule or presumed maximum value rule,[140] both of which cause reductions of only one-third in the SSI benefits, even if the actual value of the support and maintenance received far

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claimant's mortgage payment, the claimant receives in-kind support and maintenance subject to the presumed maximum value rule. *Id.* at SI 00830.210 (Feb. 1982), 00830.640 C. 2. (Sept. 1982). If a trustee has sufficient resources to completely discharge the claimant beneficiary's mortgage at one time, and the trustee does not intend to provide the claimant with food and clothing on a continuing basis, the trustee ought to pay the balance of the mortgage at one time rather than make monthly payments. The beneficiary's SSI payments would be reduced by one-third only in the month the mortgage is discharged, rather than each month.

137. The $20 per month unearned income exclusion is applied, then the remainder of the presumed value (one-third of the federal benefit) reduces the payment. 20 C.F.R. § 416.1140 (1983).

138. *See supra* notes 51 & 100 and accompanying text.

139. RESTATEMENT, *supra* note 3, at § 128 comment e. The inference ought to arise, if at all, only from a true support trust, that is, only from a trust which obliges the trustee to provide the beneficiary with support, and not from a trust giving the trustee discretion to use the assets for the beneficiary's support. However, courts do not always distinguish between the two. *See* text at Section II.

140. Presumably, an SSI claimant is receiving in-kind support and maintenance when he lives in the household of another who is reimbursed by a trustee for the claimant's pro rata share of household expenses. As suggested, the one-third reduction rule will not apply if it is determined that the food and shelter are provided by the trustee rather than the person with whom the claimant lives. Since the claimant is receiving in-kind support and maintenance, however, the presumed maximum value rule should apply.

exceeds one-third of the SSI federal benefit rate. Trust distributions thus may significantly improve an SSI recipient's standard of living.

IV. MEDICAID

Many SSI recipients are also eligible for Medicaid, a program which provides medical assistance to needy persons who are aged, blind or disabled, or who are members of families receiving Aid to Families with Dependent Children (AFDC).[141] The Medicaid program is administered by the individual states, but it is funded jointly by the federal government and the states.[142] All states, except Arizona,[143] operate Medicaid programs according to state rules. The state rules vary widely within bounds set by federal statutes and regulations.

In order for the federal government to participate financially in a state's Medicaid program, the state program must comply with federal guidelines. These guidelines mandate state coverage of the following groups:

1. families and children who receive assistance under the state's AFDC program and children who receive adoption assistance or foster care maintenance payments;[144]
2. either all persons receiving SSI,[145] or aged, blind or disabled individuals who meet more restrictive state eligibility requirements;[146] and
3. certain persons receiving Medicaid in December 1973, before SSI became effective.[147]

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141. 42 U.S.C.A. §§ 1396 to 1396p (West 1974 & Supp. 1983). When originally implemented, Medicaid was a simple welfare-oriented medical assistance program which provided mandatory coverage for all individuals who received cash payments under one of four welfare programs established elsewhere in the Social Security Act (Aid to Families with Dependent Children, Aid to the Blind, Aid to the Disabled and Old Age Assistance), and provided optional coverage for people in those four categories with income and/or assets slightly above the qualifying levels. Changes in the federal welfare system have changed the original eligibility criteria. *See* Butler, *The Medicaid Program: Current Statutory Requirements and Judicial Interpretation*, 8 CLEARINGHOUSE REV. 7, 8 (1974).

142. 42 U.S.C. § 1396a(a)(2), (5) (1976).

143. Arizona has never had a conventional Medicaid program; it now has an alternative system. *See* ARIZ. REV. STAT. ANN. §§ 36-2901 to 2913 (Supp. 1983).

144. 42 U.S.C.A. § 1396a(a)(10)(A)(i) (West 1983). The AFDC program is established by Title IV, Part A of the Social Security Act; the adoption assistance and foster care maintenance programs are covered in Title IV, Part E. Because the focus of this Article is upon planning for the disabled, the Article will not consider AFDC recipients or children who receive adoption assistance or foster care payments.

145. 42 U.S.C.A. § 1396(a)(10)(A)(i) (West 1983).

146. 42 U.S.C. § 1396a(f) (1976) (§ 1902(f) of the Social Security Act). The requirements can be no more restrictive than those in effect under the state's Medicaid program on January 1, 1972. *Id.* In determining whether an individual meets the financial eligibility tests of the 1972 plan, the state must subtract from the individual's income any SSI and state supplementary payments he receives and any incurred medical expenses. *Id.* The option given to the states to apply their January 1, 1972 eligibility criteria rather than the more liberal SSI criteria was provided to ease the burden on state Medicaid plans. Even in those states which retained their old eligibility criteria, however, some people became eligible for Medicaid for the first time following the addition of subsection (f) because of the provision requiring the subtraction of expenses incurred for medical care. Medical expenses were not deductible for determining eligibility under the old programs; people with high medical expenses are now allowed to deduct them. This allowance can reduce their income below the January 1972 eligibility level.

147. Three groups are covered. First, Medicaid is available to those individuals receiving a

Because the persons included in these groups are categorically related (that is, they are eligible as aged, blind or disabled persons or as members of families with children deprived of the support of at least one parent) as well as being financially needy, they are termed "categorically needy."

In addition to the mandatory coverage of the categorically needy, states have the option of extending coverage to certain persons as if they were categorically needy, but who, for specified reasons, do not fall within the mandatory coverage groups.[148] For example, a state may provide coverage to individuals who are eligible for AFDC, SSI or an optional state supplement, but who are not receiving those benefits because they choose not to apply for them.[149] States may also provide coverage to the medically needy—individuals whose income or resources may be too high for them to qualify as categorically needy but who cannot afford to pay their medical bills.[150]

This Article will focus only upon the mandatory coverage of the categorically needy who are aged, blind and disabled.[151] The income and resources of those persons who receive Medicaid at the state's option are determined in accordance with the financial eligibility requirements of SSI or the more restrictive state standards permitted under § 1902(f) of the Act.[152] Since the same financial rules (although not necessarily the same dollar amounts) are used to determine the eligibility of those persons provided Medicaid at a state's option and of those mandatorily covered, a consideration of the financial eligibility criteria for the mandatory coverage of the categorically needy provides a convenient focus for the question of the utility of the discretionary trust.

As previously noted, a state plan must provide coverage to all SSI recipients (an "SSI state") or to all persons who meet state standards, which may be more restrictive than SSI criteria, but which cannot be more restrictive than the standards in effect under the state's Medicaid program on January 1, 1972 (a "§ 209(b) state").[153] In either type of state, claim-

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mandatory state supplementation payment (required by Pub. L. No. 93-66 § 212, 87 Stat. 152, 155 (1973)) because their SSI benefits plus other income are less than their December 1973 income under the old categorical assistance programs. Pub. L. No. 93-233 § 13(c)(1), 87 Stat. 947, 965 (1973); 42 C.F.R. § 435.130 (1982). Second, medical assistance must be provided to each person who was eligible for medical assistance in December 1973 as an essential spouse, as long as that person continues to meet the criteria in effect in December 1973. Pub. L. No. 93-66 § 230, 87 Stat. 152, 159 (1973); 42 C.F.R. § 435.131 (1982). Third, coverage is mandatory for persons residing in nursing homes in December 1973 who would have been eligible for categorical assistance if they had not resided in such an institution, and on that basis were eligible for Medicaid, as long as those persons continue to be institutionalized and continue to meet the December 1973 criteria, except for their institutionalization. Pub. L. No. 93-66 § 231, 87 Stat. 152, 159 (1973); 42 C.F.R. § 435.132 (1982).

148. 42 U.S.C.A. § 1396a(a)(10)(A)(ii) (West 1983); 42 C.F.R. §§ 435.200-435.231 (1982).

149. 42 C.F.R. § 435.210 (1982).

150. 42 U.S.C.A. § 1396a(a)(10)(C) (West 1983); 42 C.F.R. §§ 435.300-435.340 (1982).

151. Consideration of the dwindling number of individuals whose coverage is "grandfathered" because they were receiving Medicaid in December 1973 is beyond the scope of this Article.

152. 42 U.S.C.A. § 1396a(a) 10(C)(i), (17)(B) (West 1983); 42 C.F.R. §§ 435.721, .722, .732, .831 (1982).

153. Section 209(b) of Pub. L. No. 92-603, 86 Stat. 1329, 1381 (1972), added Section 1902(f) to the Medicaid Act. Section 1902(f) permits states to use more restrictive eligibility criteria than the SSI criteria; thus, states which use that option are commonly called § 209(b) states.

ants must meet both resource and income tests and must fall within one of the protected categories.

A. *Resources*

In SSI states,[154] all recipients of SSI are eligible for medical assistance. In those states, possession of a beneficial interest in a trust has the identical effect upon Medicaid eligibility as it has upon SSI eligibility.[155]

Among § 209(b) states, the usefulness of the trust device as a supplement to Medicaid benefits varies. States are permitted to use eligibility requirements as restrictive as, but no more restrictive than, their January 1, 1972 Medicaid eligibility criteria. Since the 1972 criteria had to comply with federal Medicaid law, the standards for Medicaid eligibility in a § 209(b) state may be more liberal than the standards which determine eligibility for free care in a public institution for the mentally ill in the same state. For example, when determining a claimant's Medicaid eligibility, a state may not consider the income or resources of any person, other than a claimant's spouse or parent.[156] The income and resources of a Medicaid claimant's children cannot render the claimant ineligible for medical assistance. In contrast, state law may provide that adult children of a person confined to a state hospital are financially responsible for the care furnished to their parent.[157]

The federal law states that only assets and income available to a Medicaid claimant may be considered in determining eligibility for Medi-

154. Thirty-five states and the District of Columbia provide Medicaid to all aged, blind and disabled SSI recipients. The states are: Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin and Wyoming. 3 MEDICARE & MEDICAID GUIDE (CCH) ¶ 15,550-15,660.

Arizona never adopted a conventional Medicaid program, but has implemented an alternative system which became effective on October 1, 1982. All SSI recipients are eligible for the benefits provided under Arizona's program. *Id.* at ¶ 15,554 (Nov. 1982).

155. *But cf.* Stoudt v. Commonwealth, — Pa. Commw. —, 464 A.2d 665 (1983). (Trustee had sole discretion to make distributions necessary for maintenance and support of a beneficiary who was confined to a nursing home. Since the beneficiary could compel the trustee to make distributions for her support, the trust assets constituted an "available resource" and Medicaid was denied. The opinion does not address the fact that Pennsylvania is an SSI state, that the trust would not be considered a resource for SSI eligibility, or that the state must use the same methodology to determine income and resource eligibility of aged, blind or disabled Medicaid applicants as would be employed under the SSI program.)

156. 42 U.S.C. § 1396a(a)(17)(D) (1976); 42 C.F.R. § 435.602 (1982). A recent interpretation of § 1396a(a)(17)(D) issued by the Health Care Financing Administration (HCFA) states that the law would not be violated by a state statute of general applicability which requires an adult family member, other than a spouse or parent, to support adult relatives—the law forbids such support requirements in a state plan applicable only to Medicaid recipients. The HCFA explains, however, that a state cannot assume that relative contributions which are required by a general support statute are available to a Medicaid applicant, nor can a state reduce its payments in anticipation of receipt of such funds. When determining eligibility, the state may simply count the money actually received by the applicant as a result of the support statute. STATE MEDICAID MANUAL, HCFA Pub. 45-3, § 3812, Feb. 1983, reprinted in [1982-1983 New Development Transfer Binder] MEDICARE & MEDICAID GUIDE (CCH) ¶ 32,457 (March 1983).

157. *See, e.g.*, CAL. WELF. & INST. CODE § 7275 (West Supp. 1983); ME. REV. STAT. ANN. tit. 34, § 2512 (1978).

caid.[158] Of the fourteen § 209(b) states, only four have reported decisions which consider the "availability" of trust assets and their effect upon a beneficiary's eligibility for Medicaid.[159] These cases reach conclusions similar to those in the cases examined in the context of state institutional care. If the beneficiary can demand distribution of trust assets, or if the trust is a support trust or a discretionary trust which evidences an intent of the settlor to provide basic support and maintenance, the trust assets are apt to be counted as available resources.[160] Conversely, purely discretionary trusts or trusts which reveal an intent to provide only supplemental assistance to the beneficiary are less likely to be counted as a resource.[161]

158. 42 U.S.C. § 1396a(a)(17)(B) (1976). The "availability" requirement has been closely examined in connection with the practice of "deeming" income or resources of a spouse or parent to be "available" to a spouse or child who applies for medical assistance. In order to efficiently administer their programs, some states adopt flat allowances for the needs of the non-applicant spouse or parent and deem any income of the non-applicant that exceeds these allowances "available" to the applicant whether or not the amounts are actually contributed to the applicant. Because the non-applicant's actual expenses may exceed the allowance, the state may deem the applicant to have assets which, in fact, are not available to him. The United States Supreme Court, in Schweiker v. Gray Panthers, 453 U.S. 34 (1981), held that the practice of "deeming" income and resources between spouses is consistent with the statutory requirement that Medicaid eligibility be based solely on resources "available" to the applicant. *Id.* at 43-44. The decision clearly rejects the argument that a state may only consider resources actually paid by a spouse to the applicant. Even if no resources are actually contributed to an applicant by his spouse, a state is permitted to deem the spouse's income to be available to the applicant; the court stated: "the use of a formula is not inherently arbitrary . . . . There are limited resources to spend on welfare. To require individual determinations of need would mandate costly factfinding procedures that would dissipate resources that could have been spent on the needy." *Id.* at 48. The court specifically stated, however, that it did not decide whether state plans which set aside inadequate sums for the contributing spouse are permissible. *Id.* at 49 n.21.

159. The four states are: Connecticut, Minnesota, Missouri and New York. *See, e.g.*, Zeoli v. Comm'r of Social Serv., 179 Conn. 83, 425 A.2d 553 (1979); McNiff v. Dep't of Pub. Welfare, 287 Minn. 40, 176 N.W.2d 888 (1970); Wallace v. Missouri State Div. of Family Serv., 628 S.W.2d 388 (Mo. Ct. App. 1982); Steinberg v. New York Dep't of Social Serv., 90 Misc. 2d 547, 394 N.Y.S.2d 763 (Sup. Ct. 1977).

New York is listed in note 154, *supra*, as an SSI state; however, New York has been a § 209(b) state. In 1982 New York decided to become an SSI state and, as of January 1983, was awaiting approval of the change from Health and Human Services. 3 MEDICARE & MEDICAID GUIDE (CCH) ¶ 15,620 (Jan. 1983).

Reported decisions may be few in number because the question is often resolved by administrative regulation. *See, e.g.*, 470 IND. ADMIN. CODE § 9-3-2 (Supp. 1983), which states generally that "[r]esources are those assets . . . that are available for the support or maintenance of an individual's physical needs or medical care." More specifically, it states that "Trusts, pre-paid burial agreements, or any other contractual agreements wherein an applicant or recipient has resources over and above the allowable Standard Resource Allowance must be fully explored . . . in order to determine whether or not the completed arrangements can legally be revoked or modified. . . ." *Id.* at § 9-3-2(21.6). "In some instances (i.e., a trust in the amount of $1200 ordered and decreed by the Court in accordance with the last will and testament of a deceased relative) the County Department attorney may advise that the trust is irrevocable. In such cases the excess resources being held in trust will not affect the applicant's or recipient's eligibility for MA. However, the applicant or recipient can have no other intangible personal property, as the trust would be his/her Standard Resource Allowance." *Id.* at § 9-3-2 (21.61).

160. *See* McNiff v. Dep't of Pub. Welfare, 287 Minn. 40, 45, 176 N.W.2d 888, 892 (1970); Wallace v. Missouri State Div. of Family Serv., 628 S.W.2d 388, 390 (Mo. Ct. App. 1982); Harrington v. Blum, 117 Misc. 2d 623, 624-25, 458 N.Y.S.2d 864, 866 (Sup. Ct. 1983); *In re* Estate of Browning, 76 Misc. 2d 1041, 1042-43, 352 N.Y.S.2d 769, 770 (Sur. Ct. 1974); *In re* Will of Cooper, 76 Misc. 2d 166, 170, 349 N.Y.S.2d 613, 618 (Sur. Ct. 1973); *In re* Crow's Will, 56 Misc. 2d 398, 402, 288 N.Y.S.2d 965, 969-70 (Sur. Ct. 1968).

161. *See* Zeoli v. Commissioner of Social Serv., 179 Conn. 83, 425 A.2d 553 (1979); Hoelzer v. Blum, 462 N.Y.S.2d 684, 93 A.D.2d 605 (1983); Oddo v. Blum, 83 A.D.2d 868, 442 N.Y.S.2d 23 (1981); *In re* Estate of Ross, 96 Misc. 2d 463, 409 N.Y.S.2d 201 (Sur. Ct. 1978). *Cf.* Wallace v.

A recent case from Missouri held that a trust, the assets of which could be used for support not provided by the state, was a resource available to the beneficiary who was seeking Medicaid.[162] The trustee was authorized to use trust assets for the beneficiary's support and medical care, but the trustee was also given discretion to treat the trust benefits as supplemental to benefits available under any public law. The trustee, therefore, was given authority to withhold trust benefits to the extent that public benefits were available to support the beneficiary.[163] The case held that when the issue is eligibility for public assistance, and it must be determined whether trust property is a resource available to the beneficiary, one must focus on what the beneficiary's situation would be if he were not eligible for government assistance.[164] The grantor of the trust in question intended it to provide general support for the beneficiary after she became incompetent, and the trust would be relieved of this burden only to the extent that the beneficiary qualified for public assistance. The court reasoned that since the beneficiary had a source of general support (the trust) without public assistance, Medicaid was properly denied.[165] The decision indicates the importance of avoiding a support trust, even one which is intended to provide only such support as is not provided by the state.

To preserve Medicaid eligibility, a mandatory income trust, with or without discretionary authority over principal, should not be used. Even if such a trust would not cause ineligibility under the income test, it may result in the beneficiary being deemed the owner of excessive resources. In some states, courts having jurisdiction over an express trust are given statutory authority to make distributions from the principal of a trust to an income beneficiary who is not adequately supported by the income.[166] If an invasion of principal is possible under such a statute, the trust assets may be considered available to the beneficiary, and thus may be counted

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Missouri State Div. of Family Serv., 628 S.W.2d 388 (Mo. Ct. App. 1982) (even though the trust instrument stated trust distributions should be supplemental to public benefits, Medicaid was denied because the purpose of the trust was to provide general support for the beneficiary unless she qualified for public assistance).

162. Estate of Wallace v. Missouri State Div. of Family Serv., 628 S.W.2d 388 (Mo. Ct. App. 1982).

163. *Id.* at 389.

164. *Id.* at 390.

165. *Id.* A factor which may have strongly influenced the court's decision is that the beneficiary/claimant was also the grantor of the trust. Thus, when claiming eligibility for public assistance, the claimant was asking the court to ignore assets that she had placed in the trust less than two years previously. Although divestment of assets was permitted at that time (1976) for the purpose of creating eligibility for SSI, and thus for Medicaid eligibility in the SSI states, it was a practice which many people, including members of Congress, found distasteful.

Congress, therefore, amended the Social Security Act so that the uncompensated value of any resources given away or sold for less than fair market value within twenty-four months prior to application for SSI benefits would be included in the applicant's resources if the transfer was for the purpose of establishing eligibility. Pub. L. No. 96-611 § 5a, 42 U.S.C. § 1382b (Supp. V 1981). States may deny Medicaid for longer than twenty-four months if the uncompensated value of the resources transferred exceeds $12,000. Pub. L. No. 97-248, 42 U.S.C.A. § 1396p(c) (West. 1983).

In *Wallace*, the Medicaid applicant had not only divested herself of assets prior to making her application, but the divested assets were given to a trust established for the benefit of the divestor. In light of these facts, it is not surprising that the court found the trust assets were available resources that rendered her ineligible for Medicaid.

166. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 7-1.6 (McKinney 1967).

as a resource, at least until a petition for such a distribution is filed and denied.[167] Therefore, at least in § 209(b) jurisdictions that have similar statutes, the beneficiary should not be given a right to income.[168]

A discretionary trust is recommended because, in comparison with support trusts and mandatory income trusts, it is least likely to be considered an available resource. In § 209(b) states, as in those states which allow a discretionary trust to remain untouched even when the beneficiary is receiving care in a public institution, the discretionary trust must be cautiously drafted. If the trustee is given discretion to use the trust assets for the "benefit" of the beneficiary and no other language qualifies the trustee's discretion, the trustee may provide supplemental support and "luxuries" for the beneficiary.[169] The trustee of such a trust also may provide the beneficiary with basic support in the event that public assistance ceases; such support would be within his broad discretion. As previously discussed, however, it is possible to read the general term "benefit" as necessarily including the more limited term "support."[170] If such a reading causes the trust to be treated like a support trust, a § 209(b) jurisdiction may consider the trust assets "available" to a beneficiary seeking public support, and Medicaid eligibility will be lost. Unless the question of whether trust assets are to be considered available resources of the beneficiary is clearly resolved in a § 209(b) state, caution indicates the discretionary trust should state explicitly that the settlor does not intend that the trust assets be used to provide support for the beneficiary.

B. *Income*

Distributions from a trust may count as income to the beneficiary and render him ineligible for assistance. In SSI states, all SSI recipients are eligible for Medicaid. Therefore, the benefits which may be provided by a trustee to an SSI claimant without affecting his SSI eligibility do not affect Medicaid eligibility. In addition, if the trust beneficiary/SSI recipient resides in a nursing home, the trustee may be able to make that stay more comfortable without any adverse impact upon the availability of medical assistance to the beneficiary. A federal regulation requires that any medical care providers who participate in the Medicaid program must accept the amounts paid by Medicaid as payment in full.[171] This regulation has

167. *See* Steinberg v. New York State Dep't of Social Serv., 90 Misc. 2d 547, 394 N.Y.S.2d 763 (Sup. Ct. 1977).

168. The existence of such a statute in an SSI jurisdiction does not pose the same problem. Eligibility for SSI, and for Medicaid in SSI jurisdictions, is unaffected by the existence of a trust unless the beneficiary/claimant has unrestricted access to the trust principal. If only the trustee or court can invade the principal, it is not considered a resource of the beneficiary. *See supra* note 100 and accompanying text.

169. Although the assets of such a discretionary trust may not be considered resources of the beneficiary, caution must be exercised that trust distributions do not constitute countable income which causes ineligibility. *See infra* text accompanying notes 171-191.

170. *See supra* note 51 and accompanying text. *See also In re* Crow's Will, 56 Misc. 2d 398, 288 N.Y.S.2d 965 (Sur. Ct. 1968) (trustee's discretion to distribute principal for the welfare and best interest of the beneficiary read to mean that creator of trust intended the trust to provide support for the beneficiary; thus, trust assets were considered a resource when determining the beneficiary's Medicaid eligibility).

171. 42 C.F.R. § 447.15 (1982).

been recently interpreted by the Minnesota Supreme Court to apply only to payments for items or services covered by Medicaid.[172] The Minnesota case holds that the regulation does not preclude additional payments by third parties for such non-standard nursing home services and facilities as a private room, telephone or television service and electric wheelchairs.[173] The decision also holds that the payment by a third party of the extra charge for a private room does not constitute countable income, since for SSI purposes, income does not include room and board received from any source during a medical confinement.[174] Similarly, expenditures for services (telephone, etc.) do not result in countable income to an SSI recipient and, therefore, would not have an impact on Medicaid eligibility.[175]

In § 209(b) states which have not adopted the SSI income disregards and exclusions, the usefulness of the trust varies. Each state's case law and statutory and regulatory materials must be carefully examined. For example, in Indiana a trustee can make substantial expenditures for a beneficiary without affecting his Medicaid eligibility because an Indiana Medicaid claimant is allowed to receive income equal to a standard or flat allowance each month. Receipt of income up to the amount of this standard allowance has no effect on Medicaid benefits. The amount of the allowance is dependent upon the claimant's living arrangements.[176] An unmarried claimant with private living arrangements has $264.70 of exempt net income per month.[177] It is assumed that monthly income in the amount of the standard allowance is sufficient to meet the applicant's maintenance and sustenance needs. Any countable income in excess of the standard monthly allowance is considered available to apply toward the cost of medical care.[178] Thus, a person having countable income in excess of the standard allowance is eligible for medical assistance only if his medical expenses exceed his "surplus" income. A trustee may supplement the beneficiary's care by making expenditures which are not counted as income or, if they are counted, do not cause the beneficiary's countable income to exceed the standard allowance.

As with SSI, all contributions which provide an Indiana Medicaid applicant with food, clothing or shelter, or the means to procure these items, are considered income.[179] The regulations state that income includes earned and unearned income.[180] Unearned income is defined as "all in-

172. Resident v. Noot, 305 N.W.2d 311 (Minn. 1981).
173. *Id.* at 314.
174. *Id.* at 315. Although Minnesota is a § 209(b) state, its state Medicaid plan applies the SSI income disregards and exclusions when determining the countable income of an aged Medicaid applicant. SSI regulations state that income does not include room and board received during a medical confinement. 20 C.F.R. § 416.1103(a) (1983). If the confinement is for custodial care rather than medical care, any expenditures for the beneficiary's support and maintenance will be subject to the presumed maximum value rule and will result in reduction of, and perhaps ineligibility for, SSI and Medicaid benefits. *See, e.g.*, Slavin v. Secretary of Dep't of H.E.W., 486 F. Supp. 204 (S.D.N.Y. 1980).
175. *See supra* note 115 and accompanying text.
176. 470 IND. ADMIN. CODE § 9-3-4(30) (Supp. 1983).
177. *Id.* at § 9-3-4(31)(a).
178. *Id.* at § 9-3-4(30).
179. *Id.* at § 9-3-3(14) (1979).
180. *Id.* at § 9-3-3(10), (20).

come in cash or in kind that is not earned income . . . . Unearned income includes, but is not limited to, benefits, compensation, pensions, dividends and interest, and *contributions from relatives and other persons*."[181] The regulations further state that regular contributions from non-responsible relatives either in cash or in kind "which assist in meeting an individual's maintenance or sustenance needs (shelter, food, clothing, and/or personal/incidental) . . . shall be considered as available income to the applicant or recipient."[182] From the structure of the regulations, it seems probable that regular contributions from non-relatives, including trusts, are intended to be treated in a like manner.[183]

The Indiana Medicaid regulations state that income includes cash or in-kind contributions which assist in meeting a person's "personal/incidental" needs, as well as his need for food, clothing and shelter.[184] If "personal/incidental" needs include only such things as personal care items, haircuts and haircare, reading materials, stamps and writing supplies,[185] it is relatively unimportant that the receipt of these items is considered income. If, however, the term "personal/incidental" includes the services which are not considered in-kind income for SSI purposes (housekeeping, telephone service, lawn care, etc.), the utility of a trust may be restricted. For example, assume a trustee pays $150 per month for housekeeping services rendered to an elderly trust beneficiary who is an SSI recipient. The SSI benefits are not reduced because of the receipt of housekeeping services.[186] If, however, the value of the services is considered available income for Medicaid purposes because the services meet the beneficiary's "personal/incidental" needs, the beneficiary may be ineligible for medical assistance.

Even if the receipt of a given item or benefit is considered income, the Indiana regulations disregard certain amounts of income; that income is not counted when computing income for the determination of Medicaid eligibility.[187] Of the several income disregards provided by the regula-

181. *Id.* at § 9-3-3(10) (emphasis added).

182. *Id.* at § 9-3-3(14).

183. The general definition of unearned income includes "contributions from relatives *and other persons*." *Id.* at § 9-3-3(10) (emphasis added). The paragraphs following the general definition further elaborate upon the examples of unearned income listed in the definitional section. Since the federal Medicaid law only allows a state plan to consider the financial resources of the claimant and his spouse or partents, the Indiana regulations onunearned income include a paragraph entitled "Income from Legally Responsible Relatives." *Id.* at § 9-3-3(13). The next paragraph is entitled "Contributions from Non-Responsible Relatives," *id.*, § 9-3-3(14), and it contains the language cited in the text. No paragraphs specifically deal with contributions from non-relatives. Since the paragraph which includes the general definition of unearned income includes "contributions from relatives *and other persons*," *id.* at § 9-3-3(10), it seems probable that the provisions in § 9-3-3(14), dealing with contributions from non-responsible relatives, would apply to contributions from all non-responsible persons, including trustees.

184. *Id.* at § 9-3-3(14).

185. The items are listed as examples of personal needs in that portion of the regulation which discusses the personal needs allowance for nursing home residents. *Id.* at § 9-3-3(14).

186. *See supra* note 115 and accompanying text.

187. In addition to the state disregards, federal law requires that the value of food stamps must be disregarded for all welfare purposes. 7 U.S.C. § 2017(b) (Supp. V 1981).

When determining Medicaid eligibility, Indiana also disregards:

1. the first $7.50 of gross unearned and earned income per month, 470 IND. ADMIN. CODE § 9-3-3(30)(a) (1979);

tions, only two are generally relevant to the usefulness of a trust for a Medicaid claimant/beneficiary: 1) the first $7.50 per month of gross unearned and earned income is disregarded,[188] and 2) Supplemental Security Income benefits are disregarded.[189] A trustee can give an SSI claimant/beneficiary $20 in cash per month, pay certain bills and contract for personal services all without impact upon SSI eligibility or reduction of SSI benefits.[190] The SSI benefits are disregarded, and in addition each medical assistance applicant has a standard monthly allowance. The value of the benefits provided to the beneficiary by the trustee, therefore, will not result in any reduction of medical assistance, until the value of the trust benefits together with the beneficiary's other countable income exceeds the monthly standard allowance.[191] Even if an Indiana Medicaid claimant is considered to receive income when a trustee pays the claimant's telephone bill or provides personal services for him, the claimant can receive his SSI check and the trust benefits without any loss of Medicaid benefits, as long as the value of the trust benefits together with the beneficiary's other countable income is within the standard allowance.

C. *Recommendations for Drafting a Trust to Supplement Medicaid*

In SSI states, a discretionary trust authorizing distributions for the general "benefit" of the beneficiary is recommended. As long as the actual trust distributions do not result in ineligibility for SSI, the beneficiary will be eligible for Medicaid.

Careful examination of a state's case law and statutory and regulatory authority is necessary any time the use of a trust is contemplated for an aged or disabled person who resides in a § 209(b) state. The trust assets might be counted among the beneficiary's resources if they are considered "actually available" to him. A discretionary trust is recommended because it is least likely to be considered "available" to the beneficiary.

In § 209(b) jurisdictions, unless it can be determined that the particular jurisdiction will not treat a purely discretionary trust as a resource for Medicaid purposes, the trust should include language stating that the settlor does not intend the trust assets to be used for the beneficiary's basic support. A failure to rule out the possible use of the assets for support may leave room for the conclusion that the general term "benefit" necessarily includes the more limited term "support" and that the assets are "avail-

2. Supplemental Security Income benefits, *id.* at § 9-3-3(30)(d);
3. occasional small gifts of cash, *id.* at § 9-3-3(30)(i);
4. certain amounts of income earned by blind applicants, *id.* at § 9-3-3(30)(c);
5. certain increases in Social Security benefits, *id.* at § 9-3-3(30)(b),(e),(f), and
6. earned income of a child under fourteen, *id.* at § 9-3-3(30)(h).

188. *See supra* note 187.

189. *Id.*

190. *See supra* notes 112, 115 and 124 and accompanying text.

191. This result is somewhat anomalous. Ordinarily, benefits which count as income for purposes of determining Medicaid eligibility in Indiana also count as income for SSI and would reduce the SSI payment to the beneficiary. Thus, a Medicaid applicant would receive reduced SSI benefits and the trust income, the total value of which would equal the maximum SSI payment for a person with comparable living arrangements.

able" to the beneficiary.[192] If the trust assets are considered "available" to the beneficiary, a § 209(b) jurisdiction may treat the assets as resources of the beneficiary, which could lead to his ineligibility for Medicaid.

Restricting the use of trust funds for the beneficiary's support not only precludes the trust from acting as a safety net in the event that government benefits are withdrawn, but prevents the trustee from providing in-kind support and maintenance on a continuing basis. Most trust beneficiaries who seek Medicaid will be eligible for SSI. If only SSI benefits are at issue, it is desirable to give the trustee discretion which is broad enough to permit him to provide support for the beneficiary.[193] In-kind support and maintenance furnished to an SSI claimant will reduce SSI payments only by one-third.[194] In § 209(b) jurisdictions, however, trust distributions which do not constitute income for SSI purposes, or which do not result in a dollar-for-dollar reduction of SSI benefits (such as in-kind support and maintenance), may be counted as ordinary income for Medicaid purposes and thus may result in ineligibility for Medicaid benefits. Even if the possibility of furnishing support for the beneficiary does not cause the trust to be treated for Medicaid purposes as the beneficiary's resource, the actual distribution of support may be counted as income, and may have an adverse effect upon the beneficiary's Medicaid benefits.

If the trust instrument prohibits the use of trust assets for the basic support of the trust beneficiary, the trustee cannot provide in-kind support and maintenance for the beneficiary, who quite often will be an SSI claimant. Given the astronomical cost of medical care, the boost to a beneficiary's standard of living from the provision of in-kind maintenance and support (which results in only a one-third reduction of SSI benefits) is not worth the risk of ineligibility for Medicaid. If a trustee's unfettered discretion causes ineligibility for Medicaid, the trust assets will be rapidly consumed by a conscientious trustee's expenditure to provide the beneficiary with medical care. The beneficiary will then be left with no trust to provide continuing supplemental aid. Therefore, a purely discretionary trust is recommended in SSI states and in § 209(b) states which do not consider such trusts to be "available" resources. In all other § 209(b) jurisdictions, the trust should state that the trust assets are not to be used for the beneficiary's basic support.

V. CONCLUSION

Government assistance will barely provide a disabled person with basic necessities. Parents of a disabled child seldom have sufficient resources to provide full support for that child following their deaths. The discretionary trust provides a mechanism for the parents to make a meaningful testamentary gift to the disabled child.

A carefully drafted discretionary trust will not be counted among the trust beneficiary's resources and, in most jurisdictions, will allow a dis-

192. *See supra* notes 51 & 170 and accompanying text.
193. *See supra* notes 104 & 138 and accompanying text.
194. *See supra* notes 129-137 and accompanying text.

abled trust beneficiary to quality for public assistance and to receive supplemental aid from the trust. The supplemental aid provided by the trust will necessarily be limited because the receipt of income in excess of established maximum amounts will cause ineligibility for public benefits. In spite of the income limits, the trustee may assist the beneficiary by making contributions which fall under specified income disregards or exclusions or which do not result in dollar-for-dollar reduction of public benefits.