Ensuring Continuity:
Proposals Relating to Estate Planning for the Handicapped
Report to the Minister of Justice
ENSURING CONTINUITY:

PROPOSALS RELATING TO ESTATE PLANNING FOR THE HANDICAPPED

Law Reform Commission of Saskatchewan
Report to the Minister of Justice
March, 1995
The Law Reform Commission of Saskatchewan was established by the Act to Establish a Law Reform Commission, proclaimed in November, 1973, and began functioning in February, 1974.

The Commissioners are:

Mr. Kenneth P. R. Hodges, B.A., LL.B., Chair
Ms. Gailmarie Anderson, B.A., B.ED.
Judge Diane Morris, B.A., LL.B.
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The Commission's offices are located at the College of Law, University of Saskatchewan, Saskatoon, Saskatchewan.

The Law Reform Commission Act:

"The Commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law."
Mr. Ned Shillington
Minister of Justice

Dear Mr. Minister:

Parents of handicapped adult children seek to ensure that the assistance they give while they live will continue after their death. The cost of maintaining a handicapped child beyond the age of majority is more than most families can bear, and a variety of public programs are available to provide assistance. Parents usually contribute financially with small gifts and funding for special needs not covered by public assistance. Their assistance often contributes substantially to the self-esteem of their child, and helps the child to realize his or her full potential as a member of the community.

Unfortunately, the present law sometimes works against the parent’s efforts to ensure continuity. The combined, and apparently unintentional, effect of The Dependants’ Relief Act and Social Assistance Plan Regulations sometimes defeats the estate planning of parents of handicapped adults. A bequest to ensure that small gifts and funding for special needs will continue after the parents are gone may be re-directed to cover the cost of ordinary maintenance. An order under The Dependant’s Relief Act may even defeat reasonable bequests to nonhandicapped children, and require that the entire estate be devoted to maintenance of their handicapped sibling.

The Commission believes that this state of affairs is unjustified and easily remedied through simple amendments to The Dependants’ Relief Act and Social Assistance Plan Regulations. The change would place no new burden on taxpayers.

The Commission is pleased to submit this, its report, Ensuring Continuity: Proposals Relating to Estate Planning for the Handicapped, for your consideration.

Mr. Kenneth P.R. Hodges, Chair

Ms. Gailmarie Anderson, Commissioner

Judge Diane Morris, Commissioner

Professor Gene Anne Smith, Commissioner
EXECUTIVE SUMMARY

Estate planning is an uncertain affair for the parents of handicapped adult children. Few families are able to meet the expense of supporting a handicapped child after he or she has reached the age of majority, and there is no legal obligation on parents of handicapped adults to contribute financially to their support. A variety of programs are available to assist handicapped adults. Parents often supplement public assistance with small gifts and by providing for special needs not covered by public assistance. However, when the parents of a handicapped adult die, The Dependents’ Relief Act may require that the bulk of their estate be made available to meet the day-to-day living expenses of the handicapped heir. Bequests to other children may be defeated, and the handicapped heir will be ineligible for social assistance until the estate is consumed. Even a bequest to the handicapped heir to provide for special needs or “extras” in addition to ordinary living expenses may be defeated.

If The Dependents’ Relief Act does not convert a bequest to a handicapped adult to ordinary maintenance purposes, the Social Assistance Plan (SAP) Regulations may. Under the regulations, any bequest or trust fund is an "asset" that must be taken into consideration in determining eligibility for assistance. Even a relatively small bequest must be consumed before assistance can be granted. It may be possible to avoid this result with a properly-worded discretionary trust clause in a will, but there is no Saskatchewan legal decision on the issue.

This report demonstrates that the present law conflicts with the contemporary philosophy of programs for assisting the handicapped. It proposes simple amendments to The Dependents’ Relief Act and SAP Regulations that would limit the liability of estates to provide for handicapped adult children, and allow small trust funds and funds created by dependants’ relief orders to used for purposes other than day-to-day maintenance without jeopardizing eligibility for social assistance.
I. INTRODUCTION

Providing for the social, educational, and financial needs of the disabled places a responsibility on both their families and the community. Families and community care-providers must both work to ensure that handicapped individuals receive appropriate care and an opportunity to develop their potential as fully as their disabilities permit. Community responsibility is met in a variety of ways, including basic social assistance and programs targeted to the needs of the handicapped. In general, the policy of these programs seeks a balance between community and family responsibility for the emotional and physical needs of handicapped citizens.

This report is concerned with one aspect of the balance between family and community responsibilities--the law and policy in regard to bequests in wills made by parents of adult handicapped persons. It is not the purpose of the Report to assess the present system of providing assistance to the handicapped. Rather, it is concerned with two closely related issues in the present system of programs and policies:

1. The extent to which the estates of parents of handicapped adults should be expected to provide for the basic needs of their handicapped adult children, and

2. The extent to which existing policies make it possible for parents of handicapped adults to ensure that financial provision they have made during their lifetimes for their children will be continued after they are gone without jeopardizing public support.

Present law and policy in regard to both these problems is unsatisfactory. A bequest to a handicapped person will ordinarily be offset against social assistance until it is consumed, even if the bequest does no more than continue to provide for small gifts or special needs from time to time, and even though such financial support was lawfully provided during the parents’ lifetimes. Moreover, an application under The Dependants’ Relief Act may be made, ostensibly on behalf of the dependant, to overturn a will that makes no provision for support of the dependant. In the result, an entire estate may end up being applied to maintenance that was provided through social assistance during the parents’ lifetimes. In the result, nothing will be left for either the special needs of the dependant or other adult children of the family.

The harsh results outlined above do not always occur. It may be possible to protect a fund established to provide for small gifts and special needs by setting up a properly-drafted discretionary trust, though there is no clear authority from the courts in Saskatchewan authorizing this mechanism. The Dependants’ Relief Act is not consistently invoked to attack wills, but the circumstances in which an application may be made are not clear.

Perhaps more than anything else, it is the uncertainty created by the current law that is most
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unacceptable to many parents who face the grim task of planning for the future of a handicapped adult child. In discussions with parents of mentally handicapped parents, the Commission consistently encountered deep anxiety about estate planning and the future of their children. Most parents want to do what is right for their children—handicapped and non-handicapped. They are frustrated by legal advice that tells them, in effect, that nothing is certain.

The problem of ensuring continuity in an estate plan has been most acute for the parents of mentally handicapped individuals, whose needs are often greater than those of other handicapped citizens. Organizations representing the mentally handicapped such as the Community Living Association and Autism Society have brought the inadequacies of present law and policy to the public's attention. For that reason, this report will focus primarily on the present law as it affects the mentally handicapped and their families. However, the problems recognized by advocates for the mentally handicapped exist, at least potentially, for all handicapped people. The recommendations made in this report apply equally to all handicapped adults and their families.

II. BACKGROUND: VALUES AND POLICIES

Too often in past, the mentally handicapped were swept into the corners of society—left to be a burden on their families, or consigned to institutions equipped to provide no more than minimal physical necessities. The contemporary approach, shared by both the Saskatchewan Department of Social Services and nongovernmental agencies representing the handicapped and their families, is aptly stated in a policy statement of the Community Living Division of the Department of Social Services:

...[P]eople with a range of mental and physical disabilities [should be assisted] to live and work as independently as possible within their own communities.... All services should be provided as close to home as possible and not pull family members apart.

This goal requires cooperation between the community and families. The CLD policy statement recognises that while "families have the primary responsibility to care for their members", community support is required to help families create a comfortable, meaningful life for the handicapped. According to the policy statement,

Vulnerable individuals, particularly the handicapped and those who care for them, must be surrounded by supportive communities....[S]ervices such as education, housing, or employment must be available and accessible to all... and these services
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must not be segregated, but, inclusive of those with disabilities.¹

The costs of providing adequately for the mentally handicapped in accordance with the philosophy outlined above must be borne in large part by the community. Without financial assistance, few families could cope. While families can be expected to provide materially and emotionally for their handicapped members, the community must bear much of the continuing financial burden. Most adult mentally handicapped people receive social assistance in some manner. Mildly handicapped individuals often qualify for social assistance under general criteria. Some 3,000 individuals and 220 families receive direct assistance through the Community Living Division. Others receive benefits from community boards, sheltered workshops, grant-funded group homes and other programs funded in whole or in part by the CLD. 490 people too severely handicapped to be cared for at home or in the community reside at Valley View Centre.

Institutional care of an individual in Valley View costs some $38,000 per annum. Care in a group home averages $28,000 per annum. Mentally handicapped individuals living on their own in the community usually require financial assistance to supplement income from sheltered workshops or other employment income. Families with handicapped members living at home bear a significant financial burden. A substantial part of these costs is assumed by the Province. Without public support, the needs of the handicapped would not be adequately met. Moreover, the ability of families to provide a stable, caring environment would be compromised if the need of a handicapped member was forced to compete with responsibilities to other family members.

The criteria for receipt of public assistance vary from program to program. For example, the cost of care of severely handicapped individuals living in institutions is covered by the Saskatchewan hospitalization program. A majority of Valley View residents fall into this category. Handicapped individuals living in grant-funded group homes receive assistance indirectly through the home. In these cases, neither they nor their families are ordinarily expected to contribute to maintenance costs in the home. However, mentally and physically handicapped persons are eligible for social assistance, calculated according to the SAP Regulations on the basis of need, and many receive support from this source.²

The programs presently in place in Saskatchewan to assist families in carrying out their

¹"Community Living Division", Saskatchewan Department of Social Services, n.d.

²SAP is the program of most direct interest in this report. A complete survey of programs providing direct or indirect financial support is unnecessary for present purposes.
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obligations to their handicapped members are far from perfect. New approaches, such as guaranteed minimum income for the disabled, deserve serious study and consideration. However, to the extent that existing programs seek to strike a balance between community and family responsibility and foster independence within a supportive environment, they are clearly aimed in the right direction.

Unfortunately, the law governing wills and estates has not kept up with changing public policy. Both *The Dependant's Relief Act* and *SAP Regulations* relating to bequests and trusts were adopted before the principles that now guide the policy of programs for the handicapped were shaped. In the Commission's opinion, the regime presently governing the estates of families with handicapped members is in conflict with the basic principles accepted by both care-givers and government agencies. Programs that attempt to equitably allocate responsibility while the parents live do not carry through when the parents are gone.

While it is likely that both *The Dependants' Relief Act* and *SAP Regulations* were intended in part to husband public funds by placing a financial responsibility on the estates of parents of handicapped individuals, there is no evidence that it actually achieves that goal. *SAP Regulations* serve in practise only to discourage bequests to handicapped individuals. In fact, if a reliable trust mechanism were available, some expenditures for special needs that are now borne by the public might more often be met from private funds. *The Dependant's Relief Act* generates only modest revenue for the public purse, which must be offset against the costs of investigating estates and funding applications. A more aggressive policy would likely not pass a cost-benefit test, even if it were ethically defensible.

This state of affairs probably arose by accident rather than design. *The Dependants' Relief Act* and *SAP Regulations* were not conceived as complementary parts of an over-all policy, nor has either been revised to reflect new policies toward the handicapped. The law all too often lags behind social policy. The general law of wills and trusts has not been integrated with the care-giving philosophy reflected in contemporary practise. *SAP Regulations* are concerned with all classes of applicants for assistance, and do not always adequately focus on the special needs of the handicapped.

The Saskatchewan Association for Community Living, the Autism Society, and other nongovernmental organizations have been concerned with these problems for more than a decade. The Association for Community Living has recently made a submission to the Government of Saskatchewan containing proposals for reform of the law in this area, and a committee with

3see, for example, "Estate Planning For Parents of Persons Who are Mentally Handicapped: Comments for Lawyers", Saskatchewan Association for Community Living, 1988.
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representatives from Justice, Social Services, and nongovernmental organizations has looked at the problem. Reform has also been proposed in other jurisdictions, most recently in a study commissioned by the Ontario Department of Social Services. This Report is intended to assist in the ongoing process of review. It attempts to clarify the issues, and presents a possible avenue for reform. The Report concludes that the problem can be resolved within the context of existing programs and policies through simple amendments to legislation and regulations. In the Commission's view, the time has come for concrete action.

III. THE PROBLEM

1. Ensuring Continuity of the Family Contribution

Parents of handicapped children naturally wish to ensure adequate financial provision for their disabled children after their own deaths. In most cases, adult handicapped individuals receive social assistance or other public support that will continue after their parents' death. As one commentator has put it,

Parents desire that the lifestyle and "community living" arrangements that are in place during their lifetime have little, if any disruption after they have died. In brief, they desire continuity and thus stability for their son/daughter.

Even when the financial burden of providing for a handicapped person has largely been assumed by the community, continuity in the handicapped child's life will involve a contribution from the parents, who will desire to make provision in their wills to ensure that it continues:

Realistically, parents of a mentally handicapped child must recognize that the state, through social assistance programs, will often take primary responsibility for maintenance of their child. What the parent can hope to do is to provide the person

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4Transitions, Ontario Department of Social Services, 1991.

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with some "extras"---a bit of discretionary income if the person is capable of making use of it, an occasional luxury, or money to pay for some special treatment or device that would not be covered by social assistance.6

This kind of assistance is routinely provided by parents during their lifetime, and is authorized by Social Service regulations.7 Though often small in value, a contribution that makes it possible for a handicapped person to buy a Christmas gift, visit a sibling in another province, or get a coveted pair of Air Jordan athletic shoes can make a real difference, and help build the self-esteem necessary for independent living.

The problem facing parents who seek to set aside a fund for this purpose by will is that the fund may jeopardize continued eligibility for social assistance until it is exhausted. In the result, the beneficiary will receive no direct benefit from the fund. A bequest to the handicapped individual, whether made directly to him or her, administered by the Public Trustee, or held in trust by the executor of the estate, will ordinarily be classified under social service regulations as an asset of the beneficiary. Section 29B(1) of the Saskatchewan Assistance Regulations provides that

Except as provided in Section 28(2), all assets such as cash on hand, in the bank or other institutions, the immediate realizable value of stocks, bonds or other securities, mortgages, agreements for sale, life insurance or wills and other settlements shall be considered a resource ... provided further ...[that any] asset need not be considered as a resource if in the opinion of a [Social Services] director the recipient has a bona fide and sound social or economic reason for delaying or refraining from converting such asset into cash.8

Section 29A6 further provides that

Subject to clause 28(2)(cc1), monies received under the terms of ....court orders... other types of settlements or agreements or pursuant to bequests or devises shall be considered income.

A general exemption of assets up to $1500 in value is allowed to a single person who applies for

6SACL, 1988, note 2.
7see below.
8Social Assistance Plan Regulations, Office Consolidation, August, 1992.
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social assistance, and there are some other relevant exceptions that will be discussed below. In general, however, the regulations classify any asset of a handicapped person, including a bequest under a will or a trust fund, as a "resource" that must be expended before assistance is granted, or used to defray the cost maintenance if the handicapped person is already in receipt of assistance.

It should be noted in particular that the language of the regulations is broad enough on its face to include the entire capital and income of a trust fund. If the trustee is empowered to apply the trust funds to maintenance of the beneficiary, the social assistance payable to the beneficiary could be reduced under the regulations by the amount available from the trust. This interpretation of the regulations and their counterparts in other provinces has encouraged the practice of setting up so-called discretionary trusts in an effort to protect trust funds. 9

A discretionary trust is a trust so worded that the trustee is under no obligation to pay out any sum of money to the beneficiary. The trustee has an unfettered discretion to determine when, if ever, to make a payment from the trust fund. Usually the trust will also make provision for a "gift over" to another named person or charity in the event that the fund is not used up during the primary beneficiary's life time.

A discretionary trust was upheld by the Manitoba Court of Appeal as a means to avoid social assistance regulations in *Quinn v. Executive Director and Director (Westmont Region) of Social Services*. It was held that a discretionary trust, since it guarantees no benefit to the beneficiary, cannot be said to be an asset "owned" by the beneficiary. In the result, the fund cannot be treated as a financial resource of the beneficiary in determining eligibility for social assistance. 10 Discretionary trusts have been upheld by the courts in Alberta and Ontario as well.

There is no Saskatchewan authority confirming that a discretionary trust will avoid the social assistance regulations of this province. The Department of social services has, however, adopted a policy that gives recognition to discretionary trusts and similar arrangements. The departmental policy manual currently states that

9 The discretionary trust idea appears to have been pioneered in Canada by Paul McLaughlin in a pamphlet for the Canadian Association for the Mentally Retarded, "Estate Planning for the Parents of Mentally Retarded Persons" (Law and Mental Retardation Monograph Series), 1977. The article was republished in the C.C.H. *Estate Planning Service*, and gained wide currency among estate planners.

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Trust funds that are not available for distribution are not assessed in calculating entitlement. Verification must be obtained that the trustee is prohibited by law or the terms of the trust from releasing the money.\(^{11}\)

At one time, the general policy of the Department was to treat all trust funds for adult beneficiaries as assets in determining eligibility for assistance. The change in policy is a progressive step, but since it is not supported by either statute or the regulations, estate planners are reluctant to rely on it when planning for the long-term future of their clients. In practice, most wills for the parents of handicapped adults continue to include a narrowly drafted discretionary trust clause, included in the hope that it will survive judicial scrutiny if challenged.

If a discretionary trust operates to exclude the capital of trust fund from calculation of resources when social assistance is granted, it may be possible for the trustee to make periodic payments out of the trust fund to meet special needs or provide "extras" for the beneficiary. Here, however, a second problem is encountered. Even if the capital of a trust is not classified as an asset for purposes of determining eligibility for assistance, income paid out of the trust may well be. The general policy of the department is stated in the policy manual: "Where payments are made from a trust fund, the payment is assessed as income". This merely applies the rule contained in Section 29B1(1) of the regulations to cases in which the fund itself is not treated as an asset. In the result, it may be necessary to apply payments out of a trust fund to ordinary maintenance, reducing the entitlement to social assistance. The beneficiary, of course, receives no tangible benefit from the trust fund in this case.

There are, however, some exceptions to the general rule that often make it possible to use trust money for the direct benefit of a handicapped beneficiary. Section 28(2) of the regulations provides that

\[\begin{align*}
&\text{[T]he following shall not be included in calculation of financial resources...} \\
&\text{(b) casual gifts of up to $200 in value;} \\
&\text{(c) contributions other than for ordinary maintenance to recipients or members of his family who require special care...} \\
&\text{(ee) any income, allowance, pension, revenue, gift or gratuity in addition to those described in clauses (a) to (dd) that in the Minister's opinion should not be included in the calculation of financial resources.}
\end{align*}\]

\(^{11}\)Social Assistance Plan Manual, CH 18 SC 2 P3.
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Section 29A7 of the regulations provides that

Income from individuals, Benevolent Organizations and other Agencies ...
(b) when the requirement met is not considered a basic need, such as funds to purchase a wheelchair, artificial limb, small gift etc., the amount is not to be considered income in determining an entitlement to assistance.
Notwithstanding the foregoing, the value of contributions and gratuities shall be considered income only if they are made regularly and in excess of $25.

Most of these exemptions are particularly applicable to handicapped recipients of social assistance. However, a more general exemption that would facilitate to use of trust funds to provide small amounts of income to handicapped individuals is not available for that purpose as a result of what appears to be an unintentional effect of the wording of the regulations. In some provinces, a general income exemption under social assistance regulations will permit small payments out of trust funds. In Saskatchewan, Section 28(2) of the regulations provides a general exemption of $150 per month for a single nonhandicapped recipient, and $200 per month for a handicapped recipient. But the Saskatchewan exemption, unlike that in some provinces, applies only to "earned income". It is therefore presumably not available to protect income from a trust fund.

The policy underlying the exemptions outlined above is not clear, and the practical application of them to trust funds is equally uncertain. They obviously depend on exercise of discretion to give them effect, but neither the regulations nor stated Departmental policy provide much direction. While the exemptions can be, and are, used to permit small flows of money from trust funds without jeopardizing assistance, the present state of affairs is not satisfactory.

The estate planning problems outlined above only affect a handicapped beneficiary who is in receipt of social assistance, or who is likely to require social assistance in the future. At present, most institutionalized individuals and handicapped persons living in grant-funded group homes are under no restriction in regard to receipt of income from their parent's estates or other private sources. Although this substantially ameliorates the problem, it creates an inequality of treatment according to the way in which support is provided by the state. Moreover, programs and delivery mechanisms change over time. This compounds the problem of estate planning for conscientious parents. An estate plan that achieves its purposes under the present regime might prove to be self-defeating if the delivery mechanism changes after the death of the parents.

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2. The Dependants' Relief Act

The Dependants' Relief Act is intended to prevent a testator from writing dependants out of his or her will. Upon application to the court by or on behalf of a dependant, the court is empowered to rewrite the will to make provision for the support of the testator's dependants. An application may also be made when the deceased left no will and the dependant's share of the estate under intestacy legislation is inadequate. All provinces have dependant's relief legislation, and all of them include spouses and minor children within the definition of dependant. In most provinces, dependant is given a wider meaning. The Saskatchewan Act includes in the definition of dependant a child over the age of eighteen who "suffers from mental or physical disability [and]... is unable to earn a livelihood". A will that makes no provision for a handicapped adult child, or which makes inadequate provision for the maintenance of the handicapped child, can be challenged under the Act. If the challenge succeeds, the court can order that the estate be used to pay the cost of supporting the child.

The effect of an application under the Act has been clearly established by the Saskatchewan Court of Appeal. Although the Court of Queen's Bench in Dies v. Dies held that an adult handicapped child in receipt of social assistance is not in need of support, the decision was overturned on appeal. The Court of Appeal adopted the logic of an earlier Queen's Bench decision:

The Dependants' Relief Act recognises that it is a moral duty of the testator to make adequate provision for the proper maintenance and support of a dependent child of whatever age who, by reason of mental infirmity, is unable to maintain and support himself, even though his needs have to be provided by the state or he is a patient in a provincial institution maintained by the province.

As a matter of statutory interpretation, it is difficult to fault the conclusion reached by the Court of Appeal. Social assistance is intended to provide aide to those who lack the financial resources necessary to meet basic needs. It is a means-tested program, and the SAP Regulations provide reasonably clear definitions of "needs" and "resources". A person who has access to the

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means to support himself or herself is not eligible for assistance. The Dependants' Relief Act creates a clear right to share in an estate, and thus obtain all or part of the financial resources necessary to support the applicant.

It is not, of course, the business of the courts to second guess the policy behind legislation unless it is necessary to do so in order to interpret the provisions of a statute. It is worth noting, however, that the Court of Appeal, adopting the language used in decisions in other jurisdictions, characterized the policy of the Act as recognising a "moral duty". This justification likely was suggested because it is difficult to rationalize the policy in terms of the legal principles reflected in the general law relating to parental responsibility. A parent is obligated to support a minor child. There is no general duty in law to support a child over the age of majority, whether the child is capable of self-support or not.15 The Dependants' Relief Act creates an obligation that does not exist while the parent lives. Why a duty should be recognized in one case and not in others is by no means obvious. Moreover, the "moral duty" to provide support must be assessed in the light of contemporary policy.

If the expanded definition is inconsistent with legal principles, the courts have assumed that the legislature must have adopted it to achieve some broader ethical principle. Just what that principle may be is unclear. The court in Dies v. Dies did not attempt to explicate the nature of the duty or place it in the context contemporary policy in regard to public and private responsibilities for mentally handicapped members of the community. It is easy, of course, to set up the abstract principle that "parents ought to care for their children, even after they have reached legal age, and especially if they are handicapped". But unless this idea is significantly qualified, it is too simplistic to adequately guide policy. The general philosophy of shared public and private responsibilities reflected in the mandate of the Community Living Division provides a more sophisticated policy foundation. It must be recognized that it is not in the interests of families, handicapped persons, or the community to insist that family resources be drained to support a handicapped family member. Such a policy undermines the family unit. The Dependants' Relief Act is out of step with the thrust of contemporary

15The only other significant exception to this rule is contained in the federal Divorce Act. While provincial maintenance law does not impose an obligation to support a child over the age of majority, a order may be made under the Divorce Act requiring a noncustodial parent to provide support for a dependant child over the age of majority. The Divorce Act provision has most often been applied to require support payments for a child who is a full-time student. It appears to be based on the notion that a divorce and loss of custodial rights might induce a parent to withdraw support that would otherwise have been provided, even in the absence of legal duty. Thus, the realities of divorce justify a special rule.
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policy.

As a matter of policy (if not of statutory interpretation), the position adopted by Judge Cameron in the Queen's Bench decision in *Dies v. Dies* is more compelling than the rationale for the Act's policy in regard to handicapped adults identified by the Court of Appeal. Cameron identified social assistance for adults in need as a reflection of community responsibility for its members. In Cameron's opinion, social assistance is intended to provide for members of the community who cannot provide for themselves. It is, in effect, insurance against loss of the ability to support oneself to which all who are able contribute. The burden is born by the community. The testator, as a taxpayer, had contributed to the cost of the program, and ought to be able to rely on it to provide for his adult handicapped child.

A successful dependants' relief application can have far-reaching effects on the plans made by the testator. Although a widow is given preferential treatment under the Act, bequests made to nonhandicapped children can be defeated. A discretionary trust set up for the handicapped child will also be defeated. Since maintenance costs are apt to be more than a small or medium sized estate can bear, there will often be nothing left for any of the adult children. The bulk of the estate will became an "asset" of the handicapped child that must be expended on maintenance before the handicapped child will be eligible for social assistance.

The introduction noted that *The Dependant's Relief Act* is not consistently invoked when there is an adult handicapped child. At the time *Dies v. Dies* was decided, the Department of Social Services and Official Guardian (now Public Trustee) appear to have had no established policy in this regard. The case came to the attention of the authorities only because the deceased's wife brought an application under the Act on her own behalf. The Official Guardian joined the proceedings on behalf of the handicapped son. During the 1980's, a more aggressive policy of intervention on behalf of handicapped adults was adopted. However, there were, no doubt, many cases in which an application might have been made that did not come to the attention of the Department or Public Trustee. At present, a less aggressive stance appears to have been adopted once again. It is now usual for an application to be made only if the testator has not equally benefited handicapped and nonhandicapped adult children.
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III. Recommendations

The Commission is of the opinion that the Social Assistance Plan Regulations should expressly permit trusts to be established for mentally handicapped beneficiaries to provide for special needs, modest gifts, and small amounts of discretionary income without jeopardizing eligibility for social assistance. In addition, The Dependents' Relief Act should be amended to limit the obligation on estates of the parents of handicapped adults.

(a) Trusts

Recommendation 1

The Social Assistance Plan Regulations should be amended to provide that a trust created by will or otherwise or a fund created by an order under The Dependant's Relief Act is not an asset for the purpose of determining eligibility for assistance if it is established for the purpose of enhancing a handicapped recipient's ability to achieve maximum independence in the community or for a legitimate social purpose of the handicapped recipient.

Commentary

Although the Department of Social Services currently does not treat the capital in a trust that cannot be immediately realised for maintenance purposes as an asset in determining eligibility, the SAP Regulations do not give formal recognition to this principle. In the Commission's opinion, it is vital that greater legal protection be afforded to parents of mentally handicapped adults when they make plans for the future of their child.

The exemption for trust funds proposed in this report is recommended as a means to an end. Contemporary care-giving philosophy places emphasis on enhancing the potential of mentally handicapped persons and integration into the community. Most parents of handicapped persons want to ensure that their children will be able to achieve some degree of independence and enhance their social life. Trust funds are seen as a way to supplement social assistance to provide opportunities for self expression and independence that may not be available in maintenance-orientated public programs. The Transitions report prepared for the Ontario Department of Social Services recommended that trusts established for "the purpose of enhancing the handicapped person's ability to achieve maximum independence in the community" should be permitted without jeopardizing social
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assistance. The Commission has concluded that this principle should be incorporated into Saskatchewan social assistance regulations, but would add, in the interests of clarity and comprehensiveness a reference to "social purposes". This phase is currently used in the SAP Regulations.

The proposed description of the purposes of the trust is not intended to be restrictive. It might, in unusual circumstances, provide grounds for rejecting exempt status for an inappropriate trust fund. The language proposed in broad enough, however, that no critical assessment of the purposes of a fund will be required in most cases. The description is designed primarily to make the policy of the proposed amendment clear, and to provide a tie-in with the language of proposed amendments to The Dependants' Relief Act.

Recommendation 2

There should be no limitation on the form of trust qualifying for the exemption referred to in recommendation 1. In particular, the trust should not be required to be discretionary, or required to include a gift over to a contingent beneficiary on the handicapped beneficiary's death.

Commentary

The Commission does not believe it is necessary or desirable to place any limitation on the form of trust that qualifies for the exemption. Discretionary trusts have been used for this purpose, but only because they have been upheld in other jurisdictions as a means of protecting trust funds. The Community Living Association objects to discretionary trusts in principle because they must be drafted in such a way that they do not guarantee any benefit to the beneficiary. The Commission agrees. It would be desirable to permit a testator to set out the purposes for which the trust funds are to be used in as much detail as he or she wishes.

Recommendation 3

Funds from a trust referred to in Recommendation 1

(a) received by a handicapped recipient of social assistance as income; or
(b) expended on behalf of a handicapped recipient of social assistance
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should not be included as an asset or income of the recipient for the purpose of determining eligibility for assistance if the amount of the income or expenditure does not exceed the general exemption for "earned income" presently contained in the SAP Regulations.

Commentary

Parents of handicapped adults usually see trusts as a way of providing small gifts, funding for special needs, and limited income for discretionary expenditures. In effect, they seek no more nor less than to ensure that the financial role they have played during their lifetimes will continue after their deaths. It should be possible for money to be expended from trust funds for these purposes without jeopardizing social assistance. The SAP Regulations currently provide several mechanisms that can be used to bring money out of trust funds, but they were not designed for that purpose.

To ensure that trust funds cannot become a vehicle for evading SAP Regulations, some restriction on either the size of trust funds, the use of trust funds, or the amount of trust income paid out to a beneficiary is necessary. These proposals are not intended to compromise the means-tested character of eligibility for assistance. If a handicapped person has sufficient income to meet his or her needs, social assistance is neither necessary nor appropriate, whether the income is from employment, investment of previous earnings, or inheritance. Whether income-producing capital is held in trust should not in itself affect eligibility for assistance. In principle, assistance should continue to be available only to the extent that income from the trust fund is used to provide limited discretionary income and funds to meet special needs rather than to provide for day-to-day living expenses.

In principle, appropriate regulation could be provided in any of several ways.

First, a cap could be placed on the size of trust funds qualifying for an exemption under SAP Regulations. This would be consistent with the existing regulatory regime. At present, trust funds are classified as assets for the purpose of determining eligibility. Exemption of small trust funds would operate as an exception to the general rule. However, the SAP Regulations are concerned with capital assets, whether held in trust or otherwise, only because they are potential sources of income. As a matter of policy, it is income rather than capital that is relevant to determination of need.

In the Commission's opinion, there are good practical reasons why the regulations should focus directly on income rather than on capital in trust funds. The size of a trust fund is usually based on an estimate of the capital required to produce the income needed for the purposes of the trust. However, because interest rates fluctuate, such a calculation is always imprecise. Trust funds for handicapped adults are usually intended to provide income for the life of beneficiary. Therefore,
estimates of rates of return over 25 years or more must be made when determining the size of the fund. Because of the uncertainty involved, good estate planning dictates erring on the side of caution if it is possible to do so. For example, a fund that is likely larger than will be required to produce required income could be established to provide a cushion in the event that interest rates fall. Any excess income would be accumulated, and paid out to a contingent beneficiary if it is not required during the handicapped beneficiary's lifetime. Placing a cap on the size of exempt funds would impede good estate planning. Moreover, in order to produce even a rough approximation of fairness, the amount of the exemption would have to be reviewed periodically to reflect changing interest rates.

Alternatively, expenditure of trust funds could be regulated by stipulating the purposes for which trust funds can be expended without losing the exemption. Present policy permits small gifts or expenditures for special needs. While this formula identifies some of the legitimate purposes of expenditures from trust funds, it is neither broad enough nor certain enough, and would require frequent exercise of defacto discretion by officials of the Department of Social Services.

Special needs are at least partly defined by implication in the SAP Regulations, but some types of expenditure that might reasonably be made cannot clearly be classified as either a small gift or special need. For example, the cost of transportation to visit siblings in another province is not a clear example of meeting a special need, and may be too large to be easily regarded as a small gift. It is nevertheless a legitimate expenditure to enhance the social life of a mentally handicapped person. The Department of social services possesses discretion to exempt such an expenditure from calculation of income. This discretion might be expanded and clarified. However, heavy reliance on departmental discretion in this respect is not desirable from either the Department's or the beneficiary's point of view. There should ordinarily be no question about what a trustee can and cannot do without the need to obtain approval. Responsible estate planning requires a degree of certainty and predictability. Departmental resources could be better used than in assessing requests to expend trust funds.

The Commission does not suggest that the regulatory framework should ignore the purposes for which trust funds are expended. Recommendation 1 extends the proposed exemption only to trust funds "for the purpose of enhancing a handicapped recipient's ability to achieve maximum independence in the community or for a legitimate social purpose of the recipient". However, as suggested above, such a formula should operate primarily as a statement of the purpose of the regulations. The general language of the formula should not be the principal mechanism for regulating expenditure from trust funds.

The Commission had concluded that appropriate regulation of trust funds would best be provided by recognizing a fixed annual or monthly exemption of income actually received by a beneficiary or expended on the beneficiary's behalf. No approval should be required for expenditures
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within the limit.

The quantum of the trust income exemption will obviously have important consequences for
the way in which the proposed regime will function in practice. It should not be set so low as to
defeat the legitimate purposes for which trust funds are established, nor should it be so high that it
significantly supplements maintenance income. Although a more thorough assessment of the non-
maintenance needs of handicapped persons than has been attempted here might provide some
additional insight, the Commission believes that the present earned income exemption available to all
recipients of social assistance could be modified to provide a workable threshold. For purposes of
determining whether an expenditure is exempt without approval, benefits received from a trust fund
should be treated as "earned income".

Such an approach has simplicity and certainty to recommend it. Moreover, the distinction
between earned income and income from a trust fund is artificial and unfair in the case of handicapped
persons. The earned income exemption was created in part to encourage recipients to reenter the
work force and move toward greater self-sufficiency. The purpose of trusts established for the
handicapped is primarily to enhance their potential and facilitate integration into the community.
Finally, it should be noted that the earned income exemption has been periodically reviewed to take
inflation into account. Linking the trust income exemption to the earned income exemption would
help ensure that it remains realistic.

If there is a drawback in establishing a fixed trust income exemption, it is inflexibility. To
some extent, that is the cost of certainty. An appropriate fixed exemption reduces the cost of
inflexibility, but it would be desirable to include some mechanism for approving expenditures on
behalf of the beneficiary of a trust fund in excess of the ordinary limit. For example, a handicapped
person might benefit from an appliance not provided by Medicare or other publicly-funded programs.
If there is sufficient accumulated trust income, a one-time expenditure to obtain the appliance should
be possible without jeopardizing social assistance. While discretionary approval of expenditure of
trust funds should not ordinarily be required, a residual discretion should be retained to deal with
unusual circumstances. Regulation 28(2)(dd) of the SAP Regulations presently creates a general
discretion in calculating the resources of recipients, whether handicapped or not, to exclude assets
"that in the Minister's opinion should not be included in the calculation of financial resources." This
should be sufficient to temper the inflexibility of the fixed trust income exemption.
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(b) Dependants' Relief

Recommendation 4.

The Dependants' Relief Act should be amended to provide that
(1) In determining any allowance that may be made for a dependant adult child, the court shall take into consideration provision for maintenance and other needs through social assistance and other public sources; and
(2) The court may order that a fund be established for an adult dependant child
   (a) for the purpose of enhancing the dependant's ability to achieve maximum independence in the community or for a legitimate social purpose of the dependant;
   (b) to meet a special need of the dependant; or
   (c) to provide an occasional small gift to the dependant.

Commentary

In the Commission's opinion, the present provisions of The Dependants' Relief Act in regard to handicapped adult children are unsatisfactory. The most unacceptable aspect of the present regime is the uncertainty it creates. Under the existing law, an order can be made requiring an estate to provide as fully as possible for the maintenance of a handicapped adult child. Such an order will leave little or nothing for any other purpose in a small to medium sized estate. In fact, even a trust fund to provide a benefit other than ordinary maintenance to a handicapped person may be overturned by the dependant's relief order.

The current policy of the Public Trustee is more acceptable. An application will be made by the Public Trustee on behalf of a mentally handicapped person only to realize a benefit equal to that received by his or her siblings. Policy, however, changes. It has changed at least twice in the last decade. Responsible estate planning requires more certainty than this. At present, estate planning is a lottery. Wills are drafted in the hope that no dependants' relief application will be made, but with the knowledge that the best laid plans may come to nothing.

Clearly, The Dependant's Relief Act should be amended. The more difficult problem is to determine how it should be changed. In the Commission's opinion, placing the full burden of maintaining a handicapped adult on an estate is contrary to both the contemporary philosophy of community responsibility and inconsistent with the general law relating to parental responsibility. This leaves several alternatives open for consideration.
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The simplest alternative would be to delete the expanded definition of "dependant" from the Act. In the result, there would be no obligation on an estate to provide a benefit for a mentally handicapped adult child. This approach has much to recommend it. It would remove the uncertainty in the present law and protect estates from claims that provide no direct benefit to handicapped persons. As has been noted above, no substantial new burden would be placed on taxpayers.

In the Commission's view, this approach would be a practical solution to the problem. However, the core of current public policy is recognition of joint public and family responsibility for handicapped persons. While the costs of maintenance and many special programs have largely been assumed by the community, parents are expected--and ordinarily expect--to make a contribution toward providing a fuller life for their children than public programs can guarantee. The recommendations in this report in respect to trust funds were made in recognition of that fact. Repeal of the extended definition of dependant is acceptable only if it is assumed that parents will continue to recognize a moral obligation to supplement public support even if there is no legal obligation to do so. Some interested groups, such as the Provincial autism society, are satisfied that no legal obligation is necessary. The Community Living Association, on the other hand, is concerned that repeal of the legal obligation would signal a retreat from the policy of shared responsibility and compromise the role of the family.

The Community Living Association has suggested that an estate should be responsible only for continuation of financial support that was actually provided to the handicapped adult by his parents during their lifetimes. In the result, a handicapped person who has been on social assistance and received small gifts and funding for special needs could claim a portion of his or her parents' estate to continue the established pattern of family support. Basic needs would continue to be provided through social assistance rather than from the estate.

In most cases, the limitation on the obligation of estates suggested by the Community Living Association would achieve acceptable results. The Commission is concerned, however, that it might have unfair consequences in some cases. It may encourage some individuals to reduce their contributions to their adult handicapped children to protect their estates from claims. Most importantly, in a case in which a handicapped adult has lived at home without receiving social assistance, the entire maintenance burden would be transferred to the estate on the parents' death.

Another approach would be to enshrine the present policy of the Public Trustee in regard to dependant's relief applications in law. The size of a claim under the Act would be limited to an equal share of the estate with siblings. Once again, the results of such a change in the law would probably be acceptable in many cases. However, the Commission does not believe that this approach correctly identifies the policy considerations that ought to govern dependants' relief applications. Equal
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treatment of individuals with different needs is not true equality. The net effect of a successful application if this approach were adopted would still be to transfer a financial burden from the community to an estate in many cases. Such a result is no more or less justified because it can be described as a consequence of equal treatment.

The Ontario Transitions report recommends exempting small to medium sized estates from an obligation to provide maintenance for a handicapped adult beneficiary. This approach is attractive in some respects. However, like the equal treatment alternative, it fails to fully reflect the contemporary philosophy of shared responsibility. During the lifetime of his or her parents, basic maintenance is available through social assistance for an adult mentally handicapped person, regardless of the financial resources of the parents. Parents are expected in practice to contribute, to the extent they are able to, to providing for other needs. There is no good policy reason for changing the rules when the parents die.

In the Commission's opinion, The Dependents' Relief Act should recognize a legal obligation on estates that reflects the contemporary philosophy of shared responsibility. Estates should not be obliged to provide the maintenance costs of handicapped adult dependants that would otherwise be provided through social assistance and other public programs. On the other hand, the Act should permit an application to be made to set aside funds for purposes other than basic needs. Such an approach would create enough certainty to permit responsible estate planning, and protect estates from onerous maintenance obligations. At the same time, it would give legal recognition to the obligations ordinarily assumed by parents of mentally handicapped adults during their lifetimes. The language recommended above to characterize the purposes of exempt trust funds permitted by the SAP Regulations would be appropriate to identify the purposes for which a fund might be created on a dependant's relief application. However, the courts are not as familiar with the needs of the handicapped as social workers. Some additional specificity would be useful to provide guidance to the courts. Clauses (b) and (c) of Recommendation 4(2) therefore make reference to small gifts and

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16 This approach will entail retention of a definition of dependant in the legislation. While the current definition would not be unsuitable, it would probably be desirable to adopt a uniform definition of dependant in both The Dependents' Relief Act and The Family Maintenance Act (c.F-6.1). The latter Act defines a dependant to include a child over 18 years of age who is "unable, by reason of illness, disability or otherwise" to withdraw from the "charge" of a parent who make a claim under the Act or to obtain the "necessaries of life." "Parent" means "(a) the father or mother of the person, whether the person was born within or outside marriage; or (b) the father or mother of the person by adoption" (s. 3.1). With neccessary contextual changes, these definitions could be adopted in The Dependents' Relief Act.
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special needs as legitimate purposes for which a fund might be established.

SUMMARY OF RECOMMENDATIONS

Recommendation 1

The Social Assistance Plan Regulations should be amended to provide that a trust created by will or otherwise or a fund created by an order under The Dependant's Relief Act is not an asset for the purpose of determining eligibility for assistance if it is established for the purpose of enhancing a handicapped recipient's ability to achieve maximum independence in the community or for a legitimate social purpose of the handicapped recipient.

Recommendation 2

There should be no limitation on the form of trust qualifying for the exemption referred to in recommendation 1. In particular, the trust should not be required to be discretionary, or required to include a gift over to a contingent beneficiary on the handicapped beneficiary's death.

Recommendation 3

Funds from a trust referred to in Recommendation 1
(a) received by a handicapped recipient of social assistance as income; or
(b) expended on behalf of a handicapped recipient of social should not be included as an asset or income of the recipient for the purpose of determining eligibility for assistance if the amount of the income or expenditure does not exceed the general exemption for "earned income" presently contained in the SAP Regulations.

Recommendation 4.

The Dependents' Relief Act should be amended to provide that
(1) In determining any allowance that may be made for a dependant adult child, the court shall take into consideration provision for maintenance and other needs though social assistance and
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other public sources; and

(2) The court may order that a fund be established for an adult dependant child
   (a) for the purpose of enhancing the dependant's ability to achieve maximum
       independence in the community or for a legitimate social purpose of the dependant;
   (b) to meet a special need of the dependant; or
   (c) to provide an occasional small gift to the dependant.