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# PROTECTING THE MENTALLY INCOMPETENT CHILD'S TRUST INTEREST FROM STATE REIMBURSEMENT CLAIMS

JOHN P. MASSEY\*

## INTRODUCTION

Many mental incompetents require institutional care. A number of institutions providing such care are publicly established and supported.<sup>1</sup> Due to the increasing expenses involved in maintaining these institutions, most states have enacted reimbursement statutes which allow recovery of at least a portion of the expenses from the assets of the incompetent and specified relatives.<sup>2</sup> Such access to individual assets has prompted the affected individuals to seek protective devices for their property. This article focuses on parental testamentary attempts to secure trusts established for the benefit of their mentally incompetent children from public reimbursement claims.<sup>3</sup>

These efforts have resulted in a direct conflict between competing policies: the policy of state reimbursement for expenses incurred in supporting mental incompetents and the policy of unhampered testamentary disposition as a way to provide children with some measure of security. This conflict has not been addressed in Colorado notwithstanding the presence of the elements for conflict. Colorado has both a reimbursement statute<sup>4</sup> and, it is assumed, parents who do not want their testamentary assets consumed by the state in exchange for care that would be provided were there no available assets. Implicit in this desire to protect assets is the desire to extend benefits to their children beyond those provided by the state.<sup>5</sup> By examining the treatment of this conflict in other jurisdictions and by relying upon established trust and estate principles, a general rule may be developed which can be integrated with Colorado law.<sup>6</sup>

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1. COLO. CONST. art. VIII, § 1.

2. Annot., 92 A.L.R.2d 838, 841 (1963).

3. Wherever the word "child" appears alone in the text, it refers to the mentally incompetent child.

4. COLO. REV. STAT. §§ 27-12-101 to -109 (1973 & Supp. 1979).

5. Somewhat analogous to this modern conflict between parents and the state is the parental testamentary attempt to secure property for the benefit of the incapacitated child. In *Nicholas v. Eaton*, 91 U.S. 716 (1895), the Supreme Court said:

Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived.

*Id.* at 727.

6. Annot., 92 A.L.R.2d 838, 851 (1963), specifically rejects a solution based on a general rule. Rather, it contends that the solution must be provided on a case-by-case basis, determined by the particular circumstances involved. This note develops a general rule with application beyond Colorado.

## I. REIMBURSEMENT STATUTES

The purpose of a reimbursement statute is to relieve the public of some of the cost of caring for the mental incompetent.<sup>7</sup> This is accomplished in Colorado and in other states by imposing primary cost liability on the incompetent, secondary liability on named relatives, typically the spouse and parents, and residual liability on the state.<sup>8</sup> This individual liability is in derogation of the common law which casts sole responsibility for institutional care of mental incompetents on the state, regardless of the financial condition of the patient or his family.<sup>9</sup> Due to this variance from common law, courts have strictly construed reimbursement statutes in a light most favorable to the individual whose assets are sought.<sup>10</sup>

While this common law concept of state responsibility is evinced in state constitutions and statutes, constitutional challenges based upon this premise have been rejected.<sup>11</sup> Constitutional challenges grounded on due process<sup>12</sup> and equal protection<sup>13</sup> have also been rejected. In short, barring an inept legislative construction, reimbursement statutes have been held constitutional.<sup>14</sup>

II. PARENT LIABILITY<sup>15</sup>

Prior to addressing the public's right to a child's trust interest, a discussion of Colorado parental liability is warranted for two reasons. First, if the liability is extensive, the question of protecting assets may be mute. Second, the basic procedure used to obtain the parent's assets is nearly identical<sup>16</sup> to that required to obtain the child's assets.

Colorado requires the Department of Institutions to make a determination of the actual cost of each patient's care and an assessment of a liable

7. *In re Houghton Estate*, 114 N.H. 33, 34, 314 A.2d 674, 675 (1974); *cf.* *Schleiger v. State*, 193 Colo. 531, 534, 568 P.2d 441, 443 (1977) (when insurance proceeds are available, the insurance company should pay, not the taxpayer).

8. COLO. REV. STAT. § 27-12-101(1) (1973); *accord*, N.J. STAT. ANN. § 30:4-66 (West Supp. 1980), *construed in* *Constanza v. Verona*, 48 N.J. Super. 355, 137 A.2d 614 (1958); OHIO REV. CODE ANN. §§ 5121.01-.10 (Page Supp. 1979), *construed in* *Department of Mental Hygiene & Correction v. Kreitzer*, 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968).

9. *Estate of Randall v. Colorado State Hosp.*, 166 Colo. 1, 8-9, 441 P.2d 153, 156 (1968); *Department of Mental Hygiene & Correction v. Kreitzer*, 16 Ohio St. 2d 147, 149, 243 N.E.2d 83, 85 (1968); *State v. Rubion*, 158 Tex. 43, 45, 308 S.W.2d 4, 6 (1957). *But cf.* *Grames v. Norris*, 3 Ill. 2d 112, 115, 120 N.E.2d 7, 9 (1954) (at common law the incompetent's estate was liable for necessities).

10. *Estate of Randall v. Colorado State Hosp.*, 166 Colo. 1, 9, 441 P.2d 153, 156 (1968); *In re Houghton Estate*, 114 N.H. 33, 35, 314 A.2d 674, 676 (1974).

11. *Wigington v. State Home and Training School*, 175 Colo. 159, 486 P.2d 417 (1971).

12. *Id.* at 162, 486 P.2d at 419; *Estate of Randall v. Colorado State Hosp.*, 166 Colo. 1, 10, 441 P.2d 153, 157 (1968). *But see* *Miller v. State Dep't of Treasury*, 385 Mich. 296, 188 N.W.2d 795 (1971).

13. *In re Estate of Buzzelle*, 176 Colo. 554, 558, 491 P.2d 38, 40, *appeal dismissed*, 393 U.S. 13 (1968).

14. For an overview of the constitutionality of reimbursement statutes, *see* *Annot.*, 48 A.L.R. 733 (1927).

15. This section is not essential to the development of the general rule. It does provide background, however, which is useful to the attorney faced with questions concerning public reimbursement liability.

16. *See* text accompanying notes 19-20, *infra*.

person's ability to pay the cost. Based upon these findings, a judicial assessment will be issued against that person.<sup>17</sup> The determination and assessment are conditions precedent to valid state claims.<sup>18</sup>

Parental liability is specifically limited. The Colorado statute provides for payment of assessed charges for one hundred eighty months or until the child reaches twenty-one, whichever first occurs.<sup>19</sup> Additionally, the state will not demand full payment when exhaustion of parental assets would result.<sup>20</sup> The parent's liability is further limited by death. In order to subject the parent's estate to reimbursement claims, there must have been a valid debt established by the determination and assessment<sup>21</sup> made during the parent's life.<sup>22</sup> This precludes charges against the decedent's estate incurred after death.<sup>23</sup> Further, the state assumes a status no greater than other claimants against a decedent's estate. Specifically, the state must file its claim within the period provided by the non-claim statute or it will be forever barred.<sup>24</sup>

Because of these statutory limitations and because insurance coverage is often available for these expenses,<sup>25</sup> it is likely that the average parent will possess assets available for testamentary distribution to the child. The problem now becomes one of devising a testamentary instrument which will safeguard the assets from public reimbursement claims.

### III. TRUSTS

The most tried testamentary device, in the context of this issue, is the testamentary trust. The reasons for selecting the trust are basic. Trusts can shield the beneficial interest from invasion by the beneficiary's creditors. Additionally, trusts can remove the burden of managing assets from the incompetent beneficiary. Both purposes are of fundamental concern to the parent of a mentally incompetent child.<sup>26</sup>

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17. COLO. REV. STAT. §§ 27-12-102 to -104 (1973).

18. *Schleiger v. State*, 193 Colo. 531, 533, 568 P.2d 441, 443 (1977); *Estate of Randall v. Colorado State Hosp.*, 166 Colo. 1, 6, 441 P.2d 153, 155 (1968); *Ft. Logan Mental Health Center v. Harwood*, 34 Colo. App. 213, 524 P.2d 614 (1974).

19. COLO. REV. STAT. § 27-12-103(2) (1973).

20. *See* COLO. REV. STAT. § 27-12-104(2), (3) (1973) for factors the Department of Institutions considers in determining ability to pay.

21. *See* text accompanying notes 17-18, *supra*.

22. *Estate of Randall v. Colorado State Hosp.*, 166 Colo. 1, 9, 441 P.2d 153, 156 (1968); *People v. Bozaich*, 29 Colo. App. 468, 487 P.2d 597 (1971).

23. *Wigington v. State Home and Training School*, 175 Colo. 159, 165, 486 P.2d 417, 420 (1971).

24. *Sommermeier v. Price*, 603 P.2d 135 (Colo. 1979); *Estate of Randall v. Colorado State Hosp.*, 166 Colo. 1, 441 P.2d 153 (1968); *State v. Estate of Butler*, 30 Colo. App. 246, 491 P.2d 102 (1971).

25. *Schleiger v. State*, 193 Colo. 531, 533, 568 P.2d 441, 443 (1977); *Estate of Randall v. Colorado State Hosp.*, 166 Colo. 1, 6, 441 P.2d 153, 155 (1968); *Ft. Logan Mental Health Center v. Harwood*, 34 Colo. App. 213, 524 P.2d 614 (1974).

26. For other advantages of trusts, *see* S. SCOTT & S. SIUTA, *LEGAL RIGHTS OF DEVELOPMENTALLY DISABLED PERSONS* 226 (1979), where attention is given to the advantages of a trust as compared to a guardianship. What is not explained is that a guardianship may not be terminated until all debts owed the state are satisfied. Whereas an incompetent trust beneficiary receives legal title to trust assets upon return to competency, the state is able to collect through the guardianship. No statute of limitations exists to block collection. *See* *State v. Estate of*

A trust is not a guaranty of asset security, however.<sup>27</sup> The state has several means by which it may pursue reimbursement. When the child has a beneficial interest in a trust and the trustee refuses to release that interest to the state, the state may proceed against the interest in its capacity as a custodial guardian. In this procedure, the state asserts that it is safeguarding the child's welfare, in response to the trustee's failure to do so. Therefore, a judicial order compelling the trustee to release trust assets for the child's welfare is proper and necessary.<sup>28</sup> Similarly, the state may proceed as a surety, subrogating any legal right to maintenance that the child might have arising out of a beneficial trust interest.<sup>29</sup> Both of these procedures require the state to employ the fiction of acting in the child's stead.

A more direct method is for the state to proceed as a support creditor.<sup>30</sup> In that capacity the state acts in its own behalf without resorting to the fiction of acting for the child. Additionally, the state, as a governmental entity, may be able to claim a preferential status in relation to other support creditors.<sup>31</sup>

Whichever option the state pursues, the basis of its action is the reimbursement statute. The Colorado statute provides that *all property* of liable persons shall be subject to state claims, *irrespective of its origin, composition, or source*.<sup>32</sup> By resorting to a testamentary trust, the parent attempts to withdraw the assets from this property classification. The basic test becomes: Does the mentally incompetent beneficiary have an interest in the trust estate which he can compel the trustee to apply for his benefit? If he has such an interest, the state can reach that interest,<sup>33</sup> but only to the extent of the beneficiary's reach.<sup>34</sup> The extent of the beneficiary's interest depends, in

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Petzoldt, 126 Colo. 76, 246 P.2d 909 (1952); *Joyce v. People*, 81 Colo. 306, 255 P. 622 (1927). The lesson is simple: Avoid guardianships or do not pass title to the child upon trust termination.

27. *See Lackmann v. Department of Mental Hygiene*, 156 Cal. App. 2d 674, 678, 320 P.2d 186, 188 (1958) (mentally ill person's estate includes beneficial interest in trust); *Department of Pub. Welfare v. Meek*, 264 Ky. 771, 773, 95 S.W.2d 599, 600-01 (1936) (trust estates are subject to the charges of the beneficiary).

28. *See Lackmann v. Department of Mental Hygiene*, 156 Cal. App. 2d 674, 320 P.2d 186 (1958).

29. *See Department of Mental Hygiene & Correction v. Kreitzer*, 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968).

30. *See State v. Rubion*, 158 Tex. 43, 308 S.W.2d 4 (1957).

31. 60 HARV. L. REV. 312, 313 (1946). *But cf. Sommermeyer v. Price*, 603 P.2d 135, 137 (Colo. 1979) (the state of Colorado obtained no special creditor status when filing against a decedent's estate).

32. COLO. REV. STAT. § 27-12-109(2)(1973). It should be remembered that the statute will be strictly construed in favor of the individual. This may aid in the judicial determination that a particular trust interest is not the beneficiary's property in the context of the reimbursement statute.

33. *Department of Pub. Welfare v. Meek*, 264 Ky. 771, 773, 95 S.W.2d 599, 601 (1936); *cf. In re Wright's Will*, 12 Wis. 2d 375, 381, 107 N.W.2d 146, 150 (1961) (the beneficiary must have an absolute and uncontingent interest in the trust estate). *See also Reilly v. State*, 119 Conn. 508, 510, 177 A. 528, 530 (1935).

34. *See Department of Mental Hygiene & Correction v. Kreitzer*, 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968) (subrogation action allows the surety to claim whatever right the beneficiary has); *State v. Rubion*, 158 Tex. 43, 308 S.W.2d 4 (1957) (support creditor can reach the trust res only to the extent that the beneficiary can).

turn, on the intent of the testator.<sup>35</sup>

Parent-testators have used three basic trusts in their attempts to remove assets from the property classification and, thus, from the state's reach: the support trust, the spendthrift trust, and the discretionary trust. These trusts will be treated separately, implying elements unique to each. Settlers, however, are creative and the separate trust elements are often commingled, resulting in hybrid trusts<sup>36</sup> and judicial confusion.<sup>37</sup>

#### A. Support Trust

A support trust restricts the beneficial interest to that necessary for education or support.<sup>38</sup> A clear manifestation of the settlor's intent to restrict the trust's use solely for support is essential to its validity. A mere testamentary classification of the trust as one for support, without further evidence of the testator's intent, may cast it into a general trust category.<sup>39</sup> Similarly, a manifestation of intent which goes beyond the "support only" restriction may cost the trust its support trust classification.<sup>40</sup>

The support trust classification has the advantage of shielding the beneficial interest from most creditors.<sup>41</sup> It is this aspect which makes the support trust appealing to parents who want to preserve assets for their children's use. The disadvantage of such a trust, however, lies in the exception to the "no creditors" rule. That exception allows support creditors to obtain claim relief from a support trust.<sup>42</sup> Thus, a state which provides institutional care and maintenance is clearly entitled to reimbursement from the trust assets as a support creditor.<sup>43</sup>

35. *State v. Rubion*, 158 Tex. 43, 49, 308 S.W.2d 4, 10 (1957); RESTATEMENT (SECOND) OF TRUSTS § 128 (1957).

36. *See, e.g.*, *Estate of Hinckley v. Blackstock*, 195 Cal. App. 2d 808, 15 Cal. Rptr. 570 (1961)(support trust with discretionary power); *Constanza v. Verona*, 48 N.J. Super. 355, 137 A.2d 614 (1958)(spendthrift trust with discretionary power); Department of Mental Hygiene & Correction v. Kreitzer, 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968)("absolute and sole discretion" within support guidelines held neither purely discretionary nor a strict support trust). Compare *City of Bridgeport v. Reilly*, 133 Conn. 31, 47 A.2d 865 (1946), and *Reilly v. State*, 119 Conn. 508, 177 A. 528 (1935)(separate cases construing the same trust where the first court termed the trust discretionary and the second court termed it spendthrift) with 2 S. SCOTT, LAW OF TRUSTS § 154, at 1176 n.2 (3d ed. 1967)(trust in *Reilly* categorized as a support trust).

37. It has been stated that "[c]ourts do not always clearly appreciate the distinction between spendthrift trusts and trusts for support and discretionary trusts . . ." 2 S. SCOTT, LAW OF TRUSTS § 154 (3d ed. 1967).

38. *Id.*; RESTATEMENT (SECOND) OF TRUSTS §§ 128, Comment c: 154 (1957); *cf.* *State v. Rubion*, 158 Tex. 43, 47, 308 S.W.2d 4, 8 (1957)(the words "support and maintenance" indicate a support trust).

39. 2 S. SCOTT, *supra* note 37. A general trust, with no restrictions on the beneficial interest, is alienable by the beneficiary and subject to creditor claims.

40. *See City of Bridgeport v. Reilly*, 133 Conn. 31, 47 A.2d 865 (1946)("comfortable trust" distinguished from support trust).

41. 2 S. SCOTT, *supra* note 37; RESTATEMENT (SECOND) OF TRUSTS § 128, Comment c (1957).

42. *State v. Rubion*, 158 Tex. 43, 49, 308 S.W.2d 4, 10 (1957). 2 S. SCOTT, *supra* note 37, § 157.2; 60 HARV. L. REV. 312, 313 (1946).

43. *See State v. Rubion*, 158 Tex. 43, 308 S.W.2d 4 (1957); 60 HARV. L. REV. 312 (1946).

### B. *Spendthrift Trust*<sup>44</sup>

Parents have also resorted to the spendthrift trust, a device similar to the support trust. One similarity is that, like a support trust, the spendthrift trust is designed to provide assets for support and maintenance of the beneficiary, secure from creditor claims.<sup>45</sup> A spendthrift trust is distinguished from a support trust in that the former protects the assets from creditor claims through specific provisions which preclude alienation of a present interest, while the latter creates a future contingent interest, from which neither beneficiary nor creditors can demand payment.<sup>46</sup>

As with a support trust, the fatal flaw of a spendthrift trust is that support creditors can obtain satisfaction from the trust fund.<sup>47</sup> The logic in allowing support creditors this access is that the testator's primary intent of providing support and maintenance is not subverted.<sup>48</sup> State support creditors may take additional comfort in the public policy sustaining spendthrift trusts; that is, spendthrift trusts provide a method for preventing "impecunious beneficiaries" from becoming "public charges."<sup>49</sup> If the state is not allowed to recover the public expenses of supporting a mental incompetent, the incompetent becomes, by definition, a "public charge."

### C. *Discretionary Trust*

A discretionary trust provides the beneficiary with only so much of the trust assets as the trustee, in his discretion, decides to release.<sup>50</sup> The extent of the beneficiary's interest is, therefore, dependent on the trustee's discretion. This indefinite nature of the beneficiary's interest is the key to frustrating creditor claims.<sup>51</sup> Basically, a beneficiary cannot compel the trustee to exercise his discretion. Since the creditor has no greater right in the beneficiary's interest than the beneficiary has, the creditor cannot compel the trustee to release trust funds for the creditor's claims.<sup>52</sup>

There is an important qualification to the trustee's discretionary power. Since the power is granted or created by the testator, he may limit it in any manner, and the trustee must act in accordance with the limited power. If

44. Spendthrift trusts have not been granted universal approval, because they interfere with the policy of free alienation of property. See GRISWOLD, SPENDTHRIFT TRUSTS (2d ed. 1947), for state decisions on the validity of spendthrift trusts. They are valid in Colorado. *E.g.*, Snyder v. O'Connor, 102 Colo. 567, 81 P.2d 773 (1938). See also *In re Delano's Estate*, 62 Cal. App. 2d 808, 145 P.2d 672 (1944); *City of Bridgeport v. Reilly*, 133 Conn. 31, 47 A.2d 865 (1946); *Constanza v. Verona*, 48 N.J. Super. 355, 137 A.2d 614 (1958).

45. *E.g.*, *In re Delano's Estate*, 62 Cal. App. 2d 808, 145 P.2d 672 (1944); *Newell v. Tubbs*, 103 Colo. 224, 84 P.2d 820 (1938); *Reilly v. State*, 119 Conn. 508, 177 A. 528 (1935); 2 S. SCOTT, *supra* note 37; RESTATEMENT (SECOND) OF TRUSTS §§ 152(2), 154 (1957).

46. 2 S. SCOTT, *supra* note 37, § 157.2.

47. RESTATEMENT (SECOND) OF TRUSTS § 157 (1957). See also *Lackmann v. Department of Mental Hygiene*, 156 Cal. App. 2d 674, 320 P.2d 186 (1958); *State v. Parrot*, 4 Conn. Cir. Ct. 400 (1967). But see *Reilly v. State*, 119 Conn. 508, 177 A. 528 (1935).

48. 2 S. SCOTT, *supra* note 37, § 157.2.

49. *In re Delano's Estate*, 62 Cal. App. 2d 808, 814, 145 P.2d 672, 675 (1944).

50. 2 S. SCOTT, *supra* note 37, § 128.3; RESTATEMENT (SECOND) OF TRUSTS § 155 (1957).

51. 60 HARV. L. REV. 312 (1946).

52. *State v. Rubion*, 158 Tex. 43, 49, 308 S.W.2d 4, 10 (1957); see text accompanying note 33, *supra*.

the trustee acts beyond the testator's limitations, he has abused his discretion and a court can compel him to act correctly.<sup>53</sup>

It is common for testators to limit the discretionary power. Also, courts may find that the testator intended limited discretionary power, even in cases where words such as "absolute" or "sole" are used to describe the power.<sup>54</sup> Court-inferred limits on intent will be given effect. Should an intent to provide for the beneficiary's care, support, maintenance, benefit, or words to that effect, be discovered, the discretionary power becomes subject to that testamentary intent, and the beneficiary, through the court, can compel the trustee to act accordingly.<sup>55</sup> This implies an interest which, because of the beneficiary's right to compel support, will allow a support creditor to compel release of the trust interest to satisfy support claims. As with support and spendthrift trusts, release of discretionary trust assets to support creditors does not undermine the testator's intent if that intent manifests a support purpose. On the contrary, the release of the assets under such circumstances implements the testator's intentions.

#### IV. GENERAL RULE

Support trusts, spendthrift trusts, and discretionary trusts are designed to protect the beneficiary. When ordinary creditor claims are involved these trusts will provide successful protections. When support creditor claims are involved, however, such as a state's claim for reimbursement of expenses for institutional support of a mental incompetent, the trust devices will not always insure successful creditor barriers.

Obviously, support and spendthrift trusts are inappropriate devices for parents who wish to bar state reimbursement claims. Those trusts provide an automatic entree for the state acting in its capacity as a guardian, surety, or support creditor. The discretionary trust does not have this automatic feature, however. It is only when the trustee's discretionary power is drafted to include provisions for the support or care of the beneficiary that the state can compel reimbursement from the trust res. A discretionary trust, however, need not include such provisions.

The parent who wants to establish a testamentary trust for a mentally incompetent child, secure from public reimbursement claims for institu-

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53. *Estate of Hinckley v. Blackstock*, 195 Cal. App. 2d 808, 813, 15 Cal. Rptr. 570, 575 (1961); *Lackmann v. Department of Mental Hygiene*, 156 Cal. App. 2d 674, 680, 320 P.2d 186, 190 (1958); *In re Will of Cooper*, 76 Misc. 2d 166, 169, 349 N.Y.S.2d 613, 616 (Sur. Ct. 1973); *In re Crow's Will*, 56 Misc. 2d 398, 398, 288 N.Y.S.2d 965, 965 (Sur. Ct. 1968); *State v. Rubion*, 158 Tex. 43, 48, 308 S.W.2d 4, 9 (1957).

54. *Lackmann v. Department of Mental Hygiene*, 156 Cal. App. 2d 674, 320 P.2d 186 (1958); *In re Will of Cooper*, 76 Misc. 2d 166, 349 N.Y.S.2d 613 (Sur. Ct. 1973); *In re Crow's Will*, 56 Misc. 2d 398, 288 N.Y.S.2d 965 (Sur. Ct. 1968); *Department of Mental Hygiene & Correction v. Kreitzer*, 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968).

55. *Lackmann v. Department of Mental Hygiene*, 156 Cal. App. 2d 674, 320 P.2d 186 (1958); *Department of Pub. Welfare v. Meek*, 264 Ky. 771, 95 S.W.2d 599 (1936); *In re Gruber's Will*, 122 N.Y.S.2d 654 (Sur. Ct. 1953). It is probable, then, that even a discretionary trust without specified shares for the class members would not prevent support creditors from reaching the trust if intent to support is contained in the instrument. See generally 2 S. SCOTT, *supra* note 37, §§ 155(1), Comment d; 161, Comment b.

tional care, may do so by drafting a discretionary trust carefully limited to *exclude any provisions for support, care, or maintenance*. The parent-testator should make clear his intent to *limit application of the trust assets to supplementing benefits provided at public expense*. Such a trust clearly withdraws whatever interest the child may possess from the property classification essential to a public reimbursement claim. This trust construction rule is in accord with accepted testamentary and trust provisions applied in cases dealing with reimbursement statutes.<sup>56</sup>

#### V. THE FINAL OBSTACLE: POLICY CONSIDERATIONS

This general rule is subject to rejection by the legislature or by the judiciary. Rejection would, however, establish the primacy of the policy of reimbursing public expenses over the policy of free testamentary disposition whenever the policies conflict. Justification for rejecting this general rule would have to be sufficient to override two strong considerations: the historical evaluation of the competing policies and the sociological evolution of public support conceptions.

The first consideration, the historical evaluation of the competing policies, has been addressed by the courts. The judiciary has mandated strict construction of reimbursement statutes whenever there is a conflict with testamentary dispositions.<sup>57</sup> This posture has been adopted for two reasons. First, the concept of devising property freely has been considered a basic constitutional right.<sup>58</sup> Second, the burden of providing care for the mental incompetent originally fell on the public.<sup>59</sup> These reasons suggest that testamentary dispositions should be given deferential treatment, whenever possible, in those situations involving a conflict with reimbursement statutes.

The second consideration, the sociological evolution of public support conceptions, evinces a trend which would have to be ignored by any legislature or court which rejects the proffered general rule. That trend is the conceptual evolution of welfare from a charitable status to a status of right and entitlement deserving of constitutional protection.<sup>60</sup>

When viewed as a gift, the stigma of charity traditionally attached to public assistance has prompted courts to deny that a testator could have intended that the object of his bounty become a public charge in order to

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56. An overview of cases where the trusts withstood state reimbursement claims and cases where the trusts failed this purpose will make the general rule apparent. *Compare* Estate of Hinckley v. Blackstock, 195 Cal. App. 2d 808, 15 Cal. Rptr. 570 (1961)(state claims denied); City of Bridgeport v. Reilly, 133 Conn. 31, 47 A.2d 865 (1946)(reimbursement claims denied); and *In re* Wright's Will, 12 Wis. 2d 375, 107 N.W.2d 146 (1961) (state claims denied) *with* Lackmann v. Department of Mental Hygiene, 156 Cal. App. 2d 674, 320 P.2d 186 (1958)(state claims allowed); *In re* Gruber's Will, 122 N.Y.S.2d 965 (Sur. Ct. 1968)(state claims allowed); and Department of Mental Hygiene & Correction v. Kreitzer, 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968) (state claims allowed).

57. Estate of Randall v. Colorado State Hosp., 166 Colo. 1, 9, 441 P.2d 153, 156 (1968); *In re* Houghton Estate, 114 N.H. 33, 35, 314 A.2d 674, 676 (1974).

58. *E.g.*, State v. Rubion, 158 Tex. 43, 308 S.W.2d 4 (1957); *In re* Wright's Will, 12 Wis. 2d 375, 107 N.W.2d 146 (1961).

59. See text accompanying note 9, *supra*.

60. *Cf.* Goldberg v. Kelly, 397 U.S. 254 (1970) (some welfare benefits are a right for which one must be accorded due process before the benefits can be terminated).

preserve trust assets.<sup>61</sup> Courts have so held in instances where no specific reference to public support considerations could be found in the will. Courts have even used this rationale in instances where the trust instrument directed the trustee to consider other available resources in dispensing trust benefits.<sup>62</sup> In short, when viewed as charity, courts will not consider public assistance as an available resource when reviewing a trustee's use of discretion.

This public conception of welfare as charity has changed with the expansion of welfare benefits. The advent of medicare, social security, and the like, has extended public assistance to a growing number of citizens. With this expansion, the functional view of welfare has evolved from a charitable one to one embracing a public insurance program with vested rights for citizens.<sup>63</sup> Just as it would be unfair to deny with impunity these vested rights in all but the most destitute situations, so would it be unfair to deny a mental incompetent public assistance because he possesses a limited beneficial interest in a trust fund.<sup>64</sup>

#### SUMMARY

Public confiscation of trust funds set aside for the benefit of a publicly institutionalized mentally incompetent child can be prevented by careful drafting of a testamentary trust. This conclusion has been clearly expressed in case law:

This case presents a striking example of what happens so frequently in instances where testators seek to provide a trust for the benefit of some unfortunate relative or friend. Welfare officials are, generally, very active in taking advantage of these situations. Although these situations are of very common occurrence, I never have observed one where the simple precaution of drafting was adequately taken to insure the little patrimony provided against the onslaughts of welfare officials. Without protective language accompanying it, discretion given to the fiduciary is not enough. . . . In every such case, it would be an easy matter to prevent any such controversy by the simple means of more explicit draftsmanship, plus selection of a fiduciary who could be depended upon to take a friendly and efficient interest in the intended beneficiary.<sup>65</sup>

The explicit language to which the court refers should be sufficient to take the trust out of the ambit of support or spendthrift trusts and to place it clearly within the province of a discretionary trust. Further, the testator

61. *In re Will of Cooper*, 76 Misc. 2d 166, 349 N.Y.S.2d 613 (Sur. Ct. 1973); *In re Crow's Will*, 56 Misc. 2d 398, 288 N.Y.S.2d 965 (Sur. Ct. 1968).

62. *Lackmann v. Department of Mental Hygiene*, 156 Cal. App. 2d 674, 320 P.2d 186 (1958); *In re Gruber's Will*, 122 N.Y.S.2d 654 (Sur. Ct. 1953); see *Department of Mental Hygiene & Correction v. Kreitzer*, 16 Ohio St. 2d 147, 243 N.E.2d 83 (1968). *But see Reilly v. State*, 119 Conn. 508, 177 A. 528 (1935); *In re Wright's Will*, 12 Wis. 2d 375, 107 N.W.2d 146 (1961).

63. *Estate of Escher*, 94 Misc. 2d 952, 407 N.Y.S.2d 106 (Sur. Ct. 1978), reviews this evolutionary change in the perception of public assistance from a gift to a right.

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

65. *In re Emmon's Will*, 59 N.Y.S.2d 264, 269 (Sur. Ct. 1946)(Page, Sur.)(citations omitted).

should make clear his intent to limit the trustee's discretionary actions to the application of trust assets for benefits which supplement any public assistance received by the incompetent beneficiary.<sup>66</sup>

Application of this rule will not defeat the purpose of a reimbursement statute. It will only exclude the statute's application in those specific instances where a parent employs the rule to secure benefits for a mentally incompetent child. This will result in a proper balancing of the competing policies of public reimbursement and free testamentary disposition. The rule represents a compromise which allows both policies to coexist in a fair and equitable manner.

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66. See *In re Wright's Will*, 12 Wis. 2d 375, 107 N.W.2d 146 (1961), for an example of explicit "supplement only" language which proved successful. See also S. SCOTT & S. SIUTA, LEGAL RIGHTS OF DEVELOPMENTALLY DISABLED PERSONS 227 (1979), for suggested wording that "[t]he trust is intended to *supplement* the disabled person's earnings or governmental financial assistance." *Id.* (emphasis added).