Family Support of the Disabled: A Legislative Proposal to Create Incentives to Support Disabled Family Members

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Parents of disabled children face a difficult problem. They frequently desire to provide continued support for their disabled children. But disabled children require longer, more expensive support than nondisabled children. The cost of such support is astronomical, leaving many middle-class parents no choice but to allow their children to rely upon social support programs for living and medical expenses. Because of the current program eligibility requirements, any contributions to the support of these children will reduce or eliminate benefits to the child. Thus, parents who cannot afford to support fully their disabled children find it very difficult to contribute to the support of those children in a meaningful way.

This Article argues that the current eligibility requirements for social assistance programs create a disincentive for middle-class parents who might otherwise contribute to the support of their disabled children through gifts or inheritances. I suggest that this disincentive be removed by creating a limited exception to the eligibility requirements for certain state and federal assistance programs.

Provision for disabled children is, of course, only one part of the ancient question of who should control the disposition of

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1. Throughout this Article, the terms "child" and "children" will be used to designate a familial relationship, and will thus apply to adults as well as to minors. The term "disabled" will denote those persons whose physical or mental condition prevents them from obtaining consistent and sufficient employment through which they could support themselves.

2. The problem discussed in this Article is primarily a problem of the middle classes. Poor people do not have enough money or property to have the option of giving it to their children through gift or inheritance. Conversely, wealthy people have enough resources to completely support their children without recourse to public assistance programs.
property, both during the owner’s life and after the owner’s death. The concept of passing property down to one’s children is almost as old as Western civilization. Indeed, some societies recognized the property rights of descendants while the property-owning ancestors were still living.  

Although the majority of Americans may agree with the concept of descendant inheritance, the almost complete freedom of testation permitted by American law produces many situations contrary to this norm. A child is not legally entitled to receive his parent’s property unless the parent chooses to give it to him. The parent may, for a variety of reasons, not want to give property to her child. She may disapprove of the child’s lifestyle or dislike his choice of mate.

In some situations, even if the parents wish to leave property to improve the life of a surviving child and the child has a right to the property, the law may impede such gifts. Parents of a disabled child may not be able to leave property to that child without disrupting the social support benefits to which the child otherwise may be entitled. The parents may set up an estate plan in which a child technically receives money or other property, only to have it claimed by public authorities as reimbursement for social services or, similarly, to have the child face a dollar-for-dollar reduction in disability benefits. The child’s inheritance cannot, in such a case, meaningfully improve the quality of the child’s life.

Several authorities in the field of estate planning have examined in great detail the options currently available to the parents of disabled children. The options are limited. Ideally, laws should address the concerns of the families of disabled children while providing those families with the incentive to help bear the financial costs of providing for their children. New legislation is needed to achieve this dual objective. This legislation must establish a method by which parents can improve meaningfully the quality of a surviving disabled child’s life without  

3. See infra note 20 and accompanying text.  
5. See id.  
6. See infra notes 26-27 and accompanying text.  
7. See infra notes 53-54 and accompanying text.  
8. See infra note 69 and accompanying text.  
substantially increasing the social cost of supporting that disabled child. This Article proposes one plan for such legislation.

Part I of this Article describes the change in focus in inheritance from an institution that protects and benefits the family to one that protects complete freedom of testation. This Part shows how this shift has made it possible for parents to disinherit their children.

Part II describes the situation of the disabled child. There are several federal and state social programs that are designed to help disabled persons. This Article focuses on the Supplemental Security Income program (SSI) to illustrate how the eligibility requirements for such programs discourage middle-class parents (as well as other interested persons, such as grandparents) from contributing to the support of a disabled child. Although other federal programs also create this disincentive, SSI serves as an especially good illustration both because of its widespread effect and because there are uniform federal regulations interpreting the program. State programs have varying regulations and would unnecessarily confuse the discussion.

10. This is not the first proposal for some sort of legislative remedy to help parents of disabled children (as well as the children themselves). See, e.g., Whitman, Present Policies Do Not Benefit Disabled Children (Guest Editorial), TR. & Est. Apr. 1989, at 10. Professor Whitman suggests that “tax policy should be changed to encourage annual gift giving by the parents to such children and to exempt such gifted funds from being counted in determining the child’s eligibility for public support.” Id. at 62.

11. The most significant of these are the Medical Assistance Program, 42 U.S.C. §§ 1396-1396s (1982 & Supp. V 1987), commonly referred to as Medicaid, and Federal Old-Age, Survivors and Disability Insurance Benefits; id. §§ 401-33, which may be available to a disabled child of a person who is entitled to Social Security where the child’s disability began before age 22. 20 C.F.R. § 404.350 (1989). Of course, a disabled child may herself have worked enough prior to the disability to qualify for Social Security in her own right. See generally 42 U.S.C. §§ 401-33 (1982 & Supp. V 1987).


14. See, for example, Frolik’s brief discussion of state standards:

For estate planning purposes it is enough to realize that state assistance may come in the form of cash payments, or the provision of community or residential services. Eligibility standards for state welfare assistance cash payments may or may not parallel federal eligibility standards, and thus the particular state standards must be taken into account when determining what effect an outright gift or bequest will have upon the eligibility of the recipient for state assistance.

Frolik, supra note 9, at 320.
Part III of this Article argues that SSI and similar programs should offer a limited exception to the existing eligibility requirements. The exception would provide incentives for families to assume some responsibility for the support of disabled children. My plan would allow a qualified trust that could provide supplemental income and principal to a disabled beneficiary without disqualifying him from receiving public benefits.15 The trust payments would reduce government benefits proportionately, but by much less than the current dollar-for-dollar reduction. Upon the child's death, the balance of the trust, if any, would be subjected to a death tax. Finally, Part III examines whether the proposal could achieve the intended social goals without itself creating insurmountable difficulties.

I. THE FRAMEWORK OF INHERITANCE LAWS

Although some societies focus on how transfers of a dead person's property can benefit the family or society,16 estate planning in the United States today focuses on the free disposition of property during life or at death, according to the plan or whim of a property owner.17 This emphasis on individual freedom of testation is a relatively recent phenomenon in Western countries.18

The custom of passing property from the dead to the living was once perceived as a benefit to the family and to society. Having an orderly transition of property as directed by will or laws of intestate succession eliminated an unseemly struggle among survivors for possession of property at the owner's death bed.19 Earlier Western societies also viewed property, especially land, as something in which living descendants already had an enforceable interest.20 If inheritance laws still followed this

15. Such a trust could be utilized for either lifetime gifts or for inheritances. However, this Article will focus mainly on inheritance.

16. For example, the British family maintenance system allows certain specified persons to petition a court to reform a decedent's will so as to provide support for dependents. Inheritance (Provision for Family and Dependants) Act, 1975, ch. 63 § 1.

17. See infra notes 21-26 and accompanying text.

18. See Note, supra note 4, at 680 (“Historically, freedom of testation is a relatively new concept, having arisen in sixteenth century England.”).


20. For example, in England during the middle ages a landowner could not will, sell, or otherwise dispose of the ancestral land without the consent of his sons. In some parts of Germany, sons could require a father to partition the land even during the father's lifetime. 2 F. Pollock & F. Maitland, THE HISTORY OF ENGLISH LAW 248 (2d ed. 1968).
model, parents of disabled children would have no opportunity to reduce the child’s share or to disinherit the disabled child altogether.

Modern American rules governing inheritance, however, are largely based on the right of a person to dispose of her own property in any way she sees fit. Potential beneficiaries, including children and other direct descendants, generally have no ownership rights in property during the owner’s lifetime and have no absolute right to receive the property of any decedent.21 This freedom of testation is somewhat restricted by statutorily imposed requirements that the testator provide for the surviving spouse. A spouse may not be completely disinherited.22 In community property states, each spouse is presumed to own half of the community property throughout the marriage, and this ownership continues after the death of one spouse.23 In other states, the spouse may elect to take a statutory share of the estate rather than the share given under the will.24

Although theoretically there could be a similar prohibition against disinheriting surviving offspring, disabled or otherwise, this has not yet happened.25 Hence, a child can be intentionally

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21. See Note, supra note 4, at 674-75.
22. See id. at 675 (“All states except South Dakota have some provision for the surviving spouse. . . .”) (citations omitted).
23. See, e.g., Wis. Stat. § 861.01(1) (1987-88): “SURVIVING SPOUSE’S ONE-HALF INTEREST IN MARITAL PROPERTY. Upon the death of either spouse, the surviving spouse retains his or her undivided one-half interest in each item of marital property. The surviving spouse’s undivided one-half interest in each item of marital property is not subject to administration. . . .”
If a will is renounced by the testator’s surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator’s estate after payment of all just claims: ⅓ of the entire estate if the testator leaves a descendant or ⅔ of the entire estate if the testator leaves no descendant.
25. See generally Kirkland, Should You Leave It All to the Children? FORTUNE, Sept. 29, 1986, at 18 (discussing wealthy parents’ decisions to disinherit their children). Indeed, even living parents are not legally obligated to provide for the care of children over the age of 21. See, for example, the Illinois statute dealing with public aid and reimbursement therefor:
A husband is liable for the support of his wife and a wife for the support of her husband. The parents are severally liable for the support of any child under age 21, except that a parent is not liable for a child age 18 or over if such child is not living with the parent or parents.
Ill. Rev. Stat. ch. 23, para. 10-2 (1988). But see Van Tinker v. Van Tinker, 38 Wash. 2d 390, 229 P.2d 333 (1951) (holding that a support order in a divorce case could not be extended past the age of majority, but recognizing that the father might nonetheless be compelled to support his adult child):
[T]he legal duty of a parent to support his normal children ceases at the age of majority, but if any of them are so defective as to be incapable of self-support he
Although a testator is no longer legally obligated to transfer wealth to his descendants, this is still a fundamental desire of many testators. However, because a property holder is no longer obligated to make either inter vivos or testamentary transfers of property to his offspring or to anybody else, he must make a conscious decision as to how to distribute his property. Many factors may influence this decision.

Among other things, a parent may consider the financial situations of his children in determining whether to make gifts or bequests to them. A financially secure child might receive less whereas a needy child may be given more parental financial aid. Sometimes parents consider the lifestyles of their children or grandchildren. For instance, the "black sheep" of the family may receive a lesser share of the estate, or no share at all. Further, a parent may consider his own inclinations to give to charity or to nonrelatives. Even a parent's own feelings about the advisability of inheritance may come into play. Finally, a parent's decision may be influenced by his perception that the money will actually go to the child, as opposed to the child's creditors, spouse, religious order, or the government. A parent, who fears that his child will be unable to benefit from an inheritance because some individual or institution will claim it, has less incentive to leave property to the child at all. It is certainly legal and, as we shall see, may be rational to disinherit a disabled child.

Id. at 391, 229 P.2d at 334.

Most states permit a testator to disinherit his children if language specifically expressing that intent appears in the will. J. Ritchie, N. Alford, Jr. & R. Effland, Cases and Materials on Decedent's Estates and Trusts 183 (6th ed. 1982).

Of course, not every parent wishes to leave property to her children. See Langbein, The Twentieth-Century Revolution in Family Wealth Transmission, 86 Mich. L. Rev. 722, 737 (1988). However, the common inclination to do so is perhaps best illustrated by the presumption in the law of wills that a testator did not intend to disinherit lawful heirs, absent a clear and unambiguous expression of intent to the contrary. See, e.g., Lanison v. Record, 141 Ill. App. 3d 477, 481, 489 N.W. 2d 925, 928 (1986).

For example, Warren Buffett, a man with personal wealth estimated at $1.5 billion, has stated that he intends to leave the bulk of his vast fortune to charity because it would be "'antisocial'" to allow his children to inherit "'a lifetime supply of food stamps just because they came out of the right womb.'" Kirkland, supra note 25, at 18; see also Langbein, supra note 23, at 737.
II. THE DISABLED CHILD: PARENTAL QUANDARY

Frequently, parents of disabled children would like to plan their estates so that each child, including a disabled child, will receive a share of the property. In fact, concerns for the disabled child’s welfare after the parents are gone may make these parents even more eager to provide for the child's lifelong comfort and support. In addition to the usual uncertainties about their children’s futures, parents of disabled children have even more serious concerns. Unfortunately, few parents are likely to have the financial resources to provide for either the short-term or the long-term support of a disabled child. Medical expenses are notoriously high, and the costs of institutionalization, whether in private nursing homes or in state-run facilities, are astronomical. Even the relatively modest expense of living in a group home or a halfway house could, over the course of a few years, deplete the financial resources of all but the wealthiest families. An additional problem is the extreme difficulty, if not impossibility, of accurately predicting the extent of care that will be needed by a particular disabled person in the future.

The estate-planning problems associated with planning for a potential beneficiary who is disabled are enormously complicated because many of these disabled persons are eligible for some type of public assistance. This eligibility could be jeopardized, interrupted, or lost altogether if the disabled person is a

29. For instance, it may not be currently possible to assess the extent of the disabled person’s impairment. Also, new medical treatments may become available, or currently available treatments may become advisable in the future. Leimberg & Hinkle, Financial and Estate Planning for Parents of the Disabled, J. Am. Soc’y CLU & ChFC, May 1989, at 38-39.

30. See, e.g., Schneider, Md. Plan to Charge for Care of Disabled Stirs Controversy: Families of Retarded Oppose Schaefer Proposal, Washington Post, Jan. 30, 1989, at D1, col. 1. As another example, the cost of 40 years of medical care for chronic schizophrenia, with some hospitalization every three years (and no adjustment for inflation) has been estimated to be $294,800. This includes acute-care hospitalization ($135,000), less intense hospitalization ($6,000), outpatient visits ($66,200) and drugs ($87,600). Kranion, Psychiatric Care: Orphan of Insurance Coverage, N.Y. Times, Feb. 9, 1989, at B16, col. 1 (table). This figure does not include food, housing or other living expenses during a period when the schizophrenic will most likely be unable to work consistently, if at all.

31. At the end of June 1988, 38,436,593 beneficiaries received a total of $17.8 billion in monthly cash benefits from the Federal Old-Age, Survivors, and Disability Insurance Benefits program, 42 U.S.C. §§ 401-33 (1982 & Supp. V 1987). Social Security Admin., U.S. Dep’t Health & Human Services, 51 Social Security Bulletin, 2-3 (Sept. 1988). Seven percent, or 2,807,330 of these beneficiaries were disabled workers, who received an average monthly benefit of $508.55. Also in June 1988, 4,412,500 persons received federally administered SSI payments which totaled $1.1378 billion, representing an average payment of $258. This figure represents both federal SSI payments and federally admin-
beneficiary of another person’s estate. Because most estates contain insufficient assets to provide long-term support for a disabled child, it will be important to preserve long-term eligibility for public assistance.

A. The Supplemental Security Income Program (SSI)

SSI is a need-based program designed to provide a minimum level of income to persons who are elderly (over sixty-five), disabled, or blind. Unlike straightforward disability insurance, SSI requires neither that the disabled person be the child of a person entitled to Social Security insurance benefits nor that the child qualify for Social Security benefits due to her own employment. Whereas disability insurance is typically tied to the amount of income earned prior to the disability, SSI is aimed at maintaining a predetermined income level. SSI provides cash stipends to disabled individuals whose income does not exceed specified levels, but is not generally available to a prospective beneficiary during a period of hospitalization. As one commentator has noted: "Although conceived primarily as a substitute and supplement to Social Security insurance for the aged[,] the program is moving towards serving more disabled than aged."

Income is defined as "anything you receive in cash or in kind that you can use to meet your needs for food, clothing, or shelter. In-kind income is not cash, but is actually food, clothing, or

stered state supplementation. In addition, state-administered supplements are available: 269,850 individuals received such payments in March 1988. Id. at 3.

Eligibility for these programs may be based on entitlement or on need. See 20 C.F.R. §§ 404.130-.133, 416.202 (1989). Need-based programs, such as SSI, have very strict eligibility requirements which can be easily violated by acceptance of even a modest gift or bequest. See id. §§ 416.200-.214.

32. See 20 C.F.R. § 416.1121(g) (1989) (including gifts and inheritances in unearned income).

33. See supra note 30 and accompanying text.

34. 42 U.S.C. §§ 1381-1383c (1982 & Supp. V 1987); see 20 C.F.R. § 416.101-.2227 (1989). For an excellent discussion of estate planning where the client is eligible for SSI, as well as an excellent discussion of estate planning to preserve eligibility for state institutional care and Medicaid, see Mooney, supra note 9, at 954-63.


38. Frolik, supra note 9, at 316-17 (discussing 20 C.F.R. § 416.231 (1978)).

39. Id. at 317.
shelter, or something you can use to get one of these." 40 The term "income" includes both earned and unearned income, and receipt of more than a minimal amount of either will result in a dollar-for-dollar reduction of SSI benefits. 41 Gifts and inheritances are considered income. 42

In addition to income-level limits, eligibility for SSI requires that a disabled person have no more than minimal resources:

[R]esources means cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his or her support and maintenance.

(1) If the individual has the right, authority or power to liquidate the property or his or her share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse). 43

Certain assets (e.g., an owner-occupied home), however, are excluded from the definition of resources. 44

As these stringent requirements make clear, the SSI program provides a safety net only for those people who have neither significant assets nor any means of support. Thus, any property given to a disabled child, either inter vivos or at death, will result in equivalent reduction in SSI benefits, because gifts and inheritances, whether in cash or in kind, are considered income of the recipient.

B. Two Social Principles in Conflict

The policies and goals behind SSI are inextricably linked to the political choices made to implement the entire Social Security system. On the one hand, Congress wanted to provide a safety net so that people would not face dire poverty at the end of their working years. 45 On the other hand, Congress desired to

41. Id. §§ 416.1104, .1110 to .1112 (earned income rules); id. §§ 416.1120-.1124 (unearned income rules).
42. Id. § 416.1121(g).
43. Id. § 416.1201(a).
44. Id. § 416.1212.
45. See S. Mezey, supra note 37, at 27.
maintain incentives so that potential beneficiaries would choose to remain self-sufficient to the greatest extent possible.\footnote{46}

Many politicians opposed simply doling out money to "poor people," however they might be defined. Several opposed need-based welfare programs and maintained that even government aid should be earned or purchased.\footnote{47} Social support programs such as SSI reflect a tension between the policies of distributing benefits according to need and allocating them in proportion to how fully they have been earned by payment of taxes.\footnote{48} SSI epitomizes the allocation-based-on-need concept that characterizes a welfare system, whereas other programs\footnote{49} demonstrate the entitlement philosophy.\footnote{50}

The original Social Security programs enacted in 1935 provided pensions and unemployment insurance,\footnote{51} two programs which were philosophically consistent with the notion that these benefits were somehow earned through previous employment.\footnote{52} President Roosevelt, however, immediately appointed a committee to study programs for disability insurance; the Social Security Board, which adopted the committee's proposal, continued to push for enactment throughout the 1940s and into the 1950s.\footnote{53} The reasoning was simple: any social insurance program which claimed to offer protection against interruption of income would have to take into account the possibility of disability due to illness.\footnote{54}

\footnote{46. See Mashaw, Disability Insurance in an Age of Retrenchment: The Politics of Implementing Rights, in Social Security: Beyond the Rhetoric of Crisis 151, 154 (1988) (claiming that "[t]he commitment to maintaining work incentives in a market economy delayed the addition of disability insurance in Social Security"). Note the implicit assumption that self-sufficiency, or lack thereof, is a matter of choice.}

\footnote{47. See S. Mezey, supra note 37, at 27-45; cf. 79 Cong. Rec. 7,839 (1935).}

\footnote{48. S. Mezey, supra note 37, at 27. The current federal programs are traceable to the Social Security Act of 1935. Social Security Act, ch. 531, 49 Stat. 621 (1935) (codified as amended at 42 U.S.C. §§ 301-1397e (1982 & Supp. V 1987)). Early proponents of the Social Security program characterized the program as insurance that was effectively purchased by workers from the government. The notion that people were entitled to the benefit payments answered the objections of those who opposed government payments on the grounds that these were welfare payments that fostered dependency upon the government. See S. Mezey, supra note 37, at 27-45; see also Ball, The Original Understanding on Social Security: Implication for Later Developments in Social Security: Beyond the Rhetoric of Crisis, supra note 46, at 17-39.}


\footnote{50. See S. Mezey, supra note 37, at 28-29.}


\footnote{52. See Mashaw, supra note 46, at 154.}

\footnote{53. Id.}

\footnote{54. Id.}
Family Support of the Disabled

The disability program which finally began in 1956 struggled to balance the concerns over work incentives with concerns over the reasonable provision of social insurance to those who most needed it. In the words of Jerry L. Mashaw, "Adequate and comprehensive coverage competes with the desire to eliminate free tickets out of the work force." In determining who is eligible for benefits, the philosophy of the Social Security disability programs is essentially very restrictive. Mere need does not constitute sufficient grounds for social assistance: the programs are designed to help those who cannot help themselves.

Despite the movements to expand the restrictive eligibility definition, the SSI program has retained its emphasis on limiting eligibility to the neediest group: those persons unable to maintain any meaningful job in the economy, and having only minimal assets. After all, society must pay for even meager benefits. Both federal disability benefits and state support programs depend upon budget considerations. The limited resources available are only sufficient to provide a certain minimum care level. If fewer people receive those benefits, the minimum care level can be higher.

In addition to limiting the allocation of scarce resources to those who need them most, restrictions on eligibility for programs such as SSI are a response to the concern that providing

55. Id. at 156.
56. Once the decision has been made to award disability benefits based on need, the level of benefits that will be adequate must be determined. The question really has two parts: 1) What circumstances will make a person eligible for benefits; and 2) what standard of living should the benefits support for a person who is deemed eligible to receive them? This Article addresses the factors involved in answering the first question.
57. This reflects a deeply ingrained philosophy:
It is, strictly speaking, the pauper, and not the poor man, who has claims on public charity. It is not one who is in want merely, but one who, being in want, is unable to prevent or remove such want. There is the idea of helplessness as well as of destitution. We speak of those whom society must aid as the dependent classes, not simply because they do depend on society, but because they cannot do otherwise than thus depend. Cold and harsh as the statement may seem, it is nevertheless true that the obligation of the state to help is limited to those who are unable to help themselves.
58. S. Mezey, supra note 37, at 40; cf. Mashaw, supra note 46, at 156-58.
60. This assumes, of course, that the same amount of resources will be allocated to the Social Security pool even if the number of potential recipients changes. In reality, this might not happen. The Article assumes, however, that what was theoretically available in one situation could also be made available in the other situation. Fewer people receiving disability may mean more resources available for those who are receiving benefits or it may mean a lower overall taxpayer cost, or both.
government funds will foster dependency on the government and will discourage independence and self-support.\textsuperscript{61} This concern assumes that the person who is potentially eligible for benefits is the only one to induce to provide support. In fact, though, the disabled person's friends and relatives could be encouraged to support her, which would make the disabled person at least partially independent of government support, if not self-sufficient.

Because the purpose of SSI is to provide only for those who have virtually no resources, any gift or inheritance from family members may result in a disabled person losing eligibility for public benefits.\textsuperscript{62} Moreover, the property received may be claimed by the state or by other creditors as reimbursement for previous expenditures,\textsuperscript{63} leaving the disabled person without resources and needing to have SSI and other public benefits reinstated. Thus, a system that has limited its potential beneficiaries partly on the theory that they will therefore become motivated to support themselves has overlooked the fact that relaxing eligibility requirements might provide an incentive to a different group, namely members of the disabled person's family, who could insure at least partial independence from government support for the disabled.

C. An Incentive to Disinherit

The structure of the current federal program provides a strong incentive to disinherit the disabled child. This is so because payments to the child will reduce or cause termination of disability payments, but unless the gift or inheritance is extremely large, it may not meaningfully or continuously improve the beneficiary's standard of living. Moreover, when the gift or inherited property is exhausted, there may be a delay in reinstating payment of the disability benefits. Faced with such ungratifying prospects, many people will conclude that a gift or bequest is not a good idea and will search for other options.\textsuperscript{64}

\textsuperscript{61} See supra note 46 and accompanying text.


\textsuperscript{63} See, e.g., Estate of Dodge v. Scott, 281 N.W.2d 447 (Iowa 1979) (trustee having discretion to distribute trust funds for disabled beneficiary's care and maintenance compelled to invade trust to reimburse nursing home for services provided).

\textsuperscript{64} See generally Mooney, supra note 9 (discussing extensively other estate planning options).
Consider the example of a person receiving SSI benefits in the amount of $336 per month. Suppose this person's parents have a modest income and a projected estate of $100,000 consisting of equity in their house and some savings. The parents have four children, including the disabled child, and would like the children to share the estate equally. Even if the parents were willing to disinherit the other three children (which most are not), $100,000 would not generate enough income to provide for the long-term support of the child, particularly if, as is often the case, the child requires intermittent hospitalization.

If the disabled child’s $25,000 share were placed in trust, it could generate $208 of supplementary income per month. Combined with the child’s SSI benefits, this could improve the child’s quality of life considerably, giving him the means to purchase clothes, train tickets home for the holidays, modest entertainment, or a better place to live. In fact, however, it would only mean a dollar-for-dollar reduction in his SSI benefits. The payments from the trust do not provide any significant financial benefits to the disabled child, although they do provide the government with a benefit: money it need no longer pay to the child.

66. Although at current interest rates $100,000 could generate more than $336 per month in income, this hypothetical SSI recipient would also be eligible for a total package of other public benefits such as Medicaid. One hundred thousand dollars probably could not generate enough income to support the medical care and living expenses that are provided by this combination of benefits, nor could expenditures of the principal do so for long. This Article uses the Social Security disability program as an example of how difficult it is to contribute meaningfully to the support of a disabled person who would otherwise be eligible for public benefits.
67. See supra note 30 and accompanying text.
68. This assumes a rate of return of approximately 10%.
69. Actually, an SSI recipient may receive $20 in unearned income per month, without any reduction in benefits. 20 C.F.R. § 416.1124(c)(12) (1989). Additional unearned income results in a dollar-for-dollar reduction in the amount of SSI benefits. See id. §§ 416.410-414. Thus, a trustee could distribute $20 in cash per month without triggering a benefit reduction.
70. Professor Frolik has stated the problem succinctly: “Gifts to a disabled child which reduce the child’s state or federal aid are not gifts to the child: they are gifts to the state or federal government.” Frolik, supra note 9, at 315.

The government must, however, perform a delicate balancing act. Jerry Mashaw discusses how we can balance the social value of giving disability benefits to the severely handicapped with the social costs, such as lost productivity when someone leaves the work force or lower taxpayer morale due to supporting unemployed persons. “Those who are most deserving, that is, those with respect to whom we derive the most satisfaction from paying benefits, are also those from whom society loses least when they leave the work force. And their support at public expense imposes very small psychic costs on taxpayers.” J. Mashaw, BUREAUCRATIC JUSTICE 83 (1983).
Faced with this prospect, parents may wish to disinherit the disabled child or leave him only a token amount of property. In either case, the parents may hope that the child’s siblings will informally share their own inheritances with the child.

A system that provides an incentive to disinherit a disabled child has a two-fold effect. First, it virtually assures that the disabled will not improve their standard of living. Second, it creates a situation whereby people who have some resources will not use them in a way that could lessen society’s burden of caring for the disabled. The end result is that the disabled remain at a subsistence level and the government alone bears the expense.

D. Current Estate-Planning Options

Many estate planners have grappled with the problem described above. The fact that a moderate-sized estate may be insufficient to support a disabled child for any length of time is complicated by the reality that many parents would like to divide that moderate estate among all of their children. The alternatives facing these parents are far from ideal. The parents have the following options: leave the disabled child an outright estate share, make the child the beneficiary of a support trust, completely disinherit the child, or make the child the beneficiary of a wholly discretionary, or so called “luxury” trust. In addition, there is the possibility in some states of a state-sponsored “self-sufficiency trust.” The first four of these options have been thoroughly discussed in the literature, and will only be discussed briefly here.

1. Outright share or share in a support trust— The futility of giving an outright share of the estate to the disabled child is usually obvious after an examination of public assistance eligibility requirements. However, parents sometimes consider giving their entire estate to the disabled child, while giving only token amounts to the other children. The rationale behind this method

It seems logical to assume that where the society benefits from providing benefits in appropriate circumstances, the society would also benefit from removing benefit payments from certain people whose circumstances make them less obviously appropriate recipients of benefits. Hence, the government will sometimes have an incentive to reduce certain benefit payments and preserve the resources for other purposes.

71. See supra note 9.
72. See infra notes 84-89 and accompanying text.
73. See, e.g., Frolik, supra note 9; Leimberg & Hinkle, supra note 29; Mooney, supra note 9.
of distribution is that the family resources will be marshalled for the member of the family most in need of them. An outright share has the advantage of supporting the disabled child as long as possible, but it may well alienate the other children as well as offend the parents’ notions of fairness. Moreover, even requiring this kind of sacrifice from the nondisabled children will only assure lifetime security for the disabled child in the handful of cases where the parents’ estate is large enough to finance the staggering costs of lifetime support.

Leaving the disabled child’s share of the estate in a support trust creates the same problems as leaving an outright share. Any creditor that has provided support to the beneficiary, including the state, can claim reimbursement from the trust.74

Thus, leaving an outright share to a disabled child or making that child the beneficiary of a support trust are essentially non-options. At the least, these provisions will destroy the child’s eligibility for public support programs.75 In addition, the inheritance or trust funds may be subject to back claims for reimbursement of state benefits previously provided. At worst, the funds will run out quickly and the child will be back on public support programs without ever having realized any real benefits from his parents’ resources.

2. Disinheritance— The parents may also disinherit the disabled child and leave all of the estate to the other siblings. Where the estate is modest and concerns about interfering with public benefit eligibility are paramount, this may seem to be the most sensible option. Parents may be less reluctant to disinherit where they have an informal understanding with one or more of the other children that the disabled child will be provided with whatever care or luxuries are not provided by public programs.

However, the practice of disinheriting the disabled child has a number of drawbacks. First of all, the disabled child may feel abandoned or rejected by the parents. Second, if the parents expect the other children to financially support the disabled child, this arrangement places a heavy burden on the siblings who must manage the money.76 Third, because the money must be given directly to the other siblings and is not held in trust for

74. Mooney, supra note 9, at 943; see also Restatement (Second) of Trusts § 147 (1959).
75. See supra note 7-8 and accompanying text.
76. For example, because the nondisabled sibling owns the property, she will be obliged to pay tax on any income from that property. The sibling may feel morally obligated, however, to expend all of the before-tax dollars for the disabled person. Mooney, supra note 9, at 940.
the disabled child, it is available to the creditors of the other children. The other children may experience conflicts of interest between providing for their disabled sibling and improving the quality of life for their own families. Finally, the siblings may predecease the disabled child, in which case the property inherited from the parents would be in the siblings' estates, and disposed of accordingly.\textsuperscript{77}

3. \textit{Wholly discretionary trusts}—Parents may also choose to utilize a wholly discretionary, or luxury, trust. With this type of trust, the parents attempt to avoid the forced invasion of trust funds to reimburse state agencies for provision of support to the disabled beneficiary. The theory is that the creditor state cannot demand any more property from the trust than can the beneficiary. Where disbursement of principal and income is wholly within the trustee's discretion and not tied to a standard of use for the support and welfare of the beneficiary, the beneficiary has no absolute right to receive anything from the trust.\textsuperscript{78} Because the trustee has no obligation to support the beneficiary, those governmental agencies who do provide support cannot look to the trustee for reimbursement,\textsuperscript{79} nor is the undistributed property in the trust treated as a resource for purposes of determining SSI eligibility.\textsuperscript{80}

Once money is paid out to the beneficiary, however, two things happen. First, the state may claim reimbursement from the beneficiary for past support and, second, the amount of money or property received by the beneficiary may disqualify him from eligibility for federal or state benefits. The only practical way to avoid these undesirable consequences is to provide in-kind "extras"—plane, train and bus tickets home, modest entertainment, payment of noncovered dental bills, and the like—and only small amounts of cash. Such in-kind payments would not be considered cash, food, clothing, shelter, or something which could be used to obtain one of these.\textsuperscript{81} The use of the trust to provide "extras" to supplement the support already being received is the reason behind the name "luxury trust."

\textsuperscript{77} Id.

\textsuperscript{78} See G. Bogert \& G. Bogert, \textsc{Handbook of the Law of Trusts} § 41 (5th ed. 1973). For an excellent discussion of the complex issues of trust law which are involved here, see Frolik, supra note 9, at 328-37.

\textsuperscript{79} Mooney, supra note 9 at 950-54.

\textsuperscript{80} Id. at 956-57 (discussing Dep't of Health and Human Services, Social Security Admin., Program Operations Manual System, SI 01120.105 A.2. (Pub. No. 68-05D1120) (1981)).

\textsuperscript{81} See 20 C.F.R. §§ 416.1102-.1103 (1989); see also Mooney, supra note 9, at 958-60.
The use of luxury or discretionary trusts has been approved by courts or statute in some states. 82 Other states have statutes or case law that allow the principal or interest of such trusts to be claimed as reimbursement for state support. 83

Luxury trusts suffer their most severe limitation under federal relief programs. The chief concern is that any payments from the trust not disqualify the beneficiary from SSI, which may be the primary means of support for nonhospitalized disabled persons. As discussed above, any payments in cash or in kind that are or can be used for support will cause a dollar-for-dollar reduction in SSI payments. 84

If the trustee is authorized to distribute funds to enable the beneficiary to afford more expensive rent or better quality clothes, for example, these will be deemed to be payments used for support, which will trigger a dollar-for-dollar reduction in SSI payments. The trust funds could be used to provide things that are not included in the definition of support, for example, dental services that are not covered by public benefits or tuition to enroll in a course. These are certainly improvements to the beneficiary's life. However, sometimes better housing, more food, and warmer clothes are the things that a disabled beneficiary most needs to improve the quality of life. Yet distribution of trust funds for these purposes will cause a dollar-for-dollar benefit reduction, which means that the beneficiary will not have more dollars to spend on support, but rather will have the same number of dollars, only from a different source. Thus, the trust cannot disburse funds in a way that is most likely to improve the quality of a disabled beneficiary's life.

4. Self-sufficiency trusts— A so-called "self-sufficiency trust" provides yet another option. A self-sufficiency trust consists of a pool of assets contributed by participating families. The trust funds are invested, and the interest earned is used to provide services for the disabled members of the participating families. Illinois has set up such a program, which is being used

82. See, e.g., Wis. Stat. § 701.06(5m) (1987).
83. See, e.g., Department of Mental Health & Developmental Disabilities v. First Nat'l Bank, 104 Ill. App. 3d 436, 432 N.E.2d 1086 (1982) (holding that interests of beneficiaries in spendthrift trusts were "estates" within meaning of statute enabling state agencies to claim reimbursement for services from the beneficiary's "estate"). Trusts which are more clearly limited in purpose (such as most luxury trusts) could still be immune from state claims for reimbursement under the language of this decision. However, the court's reasoning relied heavily on the public policy argument that persons who have any sort of trust interest are not the needy persons for whom cost-free care should be provided. Id. at 465-66, 432 N.E.2d at 1088-89.
84. See supra notes 40-42 and accompanying text.
as a prototype for programs in other states. The Illinois model includes a charitable trust fund, which will be funded with contributions from private donors, private business, and foundations. It will provide services for disabled persons whose families cannot afford to enroll them in the regular self-sufficiency trust program. When a disabled participant in the regular self-sufficiency plan dies, some of the principal from the original family contribution may pass to surviving family members, but at least half of it must be paid to the charitable trust.

The self-sufficiency trust is intended to supplement rather than supplant Social Security disability (as well as Medicaid) benefits. Trust expenditures will not cause a reduction or cessation in SSI benefits, because the trust does not make cash distributions. Rather, it finances services that will enhance the quality of life for the disabled beneficiaries, so that the trust expenditures are not income—they are not "anything you receive in cash or in kind that you can use to meet your needs for food, clothing, or shelter." Indeed, the services include social and medical services that are specifically exempted from the definition of income.

Some communities have organizations that attempt to provide services similar to those provided by a state-sponsored self-sufficiency trust. Such organizations employ staff members who provide enrolled disabled persons with help in the management of their personal or financial affairs. These services are provided at an agreed-upon hourly rate, which may be funded by income from an enrollment fee or by income from a trust set up for that purpose.

5. Combination plans— Many parents opt for some variation of the preferred option of dividing the estate among all of the children. Simply leaving a proportionate share to the dis-

86. ILL. REV. STAT. 85 ch. 91 1/2, para. 5-118 (1988); Teltsch, supra note 85.
87. Teltsch, supra note 85.
88. 20 C.F.R. § 416.1102 (1989); see Teltsch, supra note 85.
89. 20 C.F.R. § 416.1103 (1989); see Teltsch, supra note 85.
90. One such organization, PLAN (Planned Lifetime Assistance Network), exists in Charlottesville, Virginia. This organization requires interested relatives (usually parents) to set up a "lifetime advocacy trust," which they can control during their lifetimes. After the death of the relative, the trust income is used to pay for PLAN services for the disabled family member. When the disabled person dies, 25% of the principal must be paid to PLAN, while the remainder may be distributed to persons designated by the contributing relatives. See Topolnicki, *Protecting the Future of a Child Who's Handicapped*, MONEY, Nov. 1988, at 94, 99.
abled child will lead to the many complications already discussed. To avoid these problems, the disabled child’s share can be placed in a discretionary luxury trust, a self-sufficiency trust, or a privately run trust that provides services to the disabled beneficiaries. Sometimes, a combination of these options may produce a workable solution. For most families, this may well be the best way to handle the situation.

Even a well-designed plan is no panacea. Although parents seek to improve the quality of the disabled child’s life, the kinds of services and “extras” provided by luxury or self-sufficiency trusts do not directly improve the most essential factors in determining the overall quality of the disabled person’s life—living quarters, food, or clothing. As described above, the eligibility rules for benefits remove any incentive for parents or other relatives to contribute for primary support.

III. The Case for a Legislative Solution

Ideally, programs such as SSI should provide a safety net for those without resources while maintaining incentives for parents and other relatives of potential beneficiaries to contribute to the support of disabled family members. Of course, achieving both of these goals is difficult, if not impossible. Eligibility requirements could not, for instance, be based on parental financial circumstances, as are educational loans. Such a system would force parents to be financially responsible for adult children, and our society is unlikely to require such responsibility. We cannot discount the possibility that some families will refuse to support their members, even if the consequence is destitution for the disabled family member. The present system, however, tends to destroy the incentive to help support disabled family members. Given the danger of interruption or discontinuation of SSI and other benefits, middle-class parents have little incentive to contribute at all.

91. See, for example, the plan devised by the Bannings, a young couple whose only child is retarded. The plan included a discretionary spendthrift trust and PLAN services. Id.

92. See supra Part II.C.

93. Eligibility for student loans is based largely on financial circumstances, including the financial circumstances of the student’s parents. See generally 34 C.F.R. § 682 (1989).

94. See supra notes 4-6 and accompanying text.
To meet the dual objectives of encouraging parents to support their disabled children and reducing—or at least not increasing—costs to society, a program must satisfy three conditions. First, it must assure parents that the child will not lose whatever minimal quality of life has been achieved. In particular, the child should not be disqualified from receiving SSI. Second, the child must receive a higher standard of living as a result of the parents’ efforts. This does not occur, for example, when parental support results in a dollar-for-dollar reduction in SSI and leaves the child with virtually the same income as before; nor does it occur when funds from the parents disqualify the child from public benefits. In the latter case the parents’ money supports the child at a minimum level for a short time, and, when that money is gone, the child returns to the public aid that provided that minimum level originally. Third, from society’s perspective, the program should not provide SSI support for families wealthy enough to support their own disabled child.

Current Social Security regulations do little to balance the conflicting interests of society and the disabled. If we could provide an incentive for parents and other family members to support the disabled child to the extent they are comfortably able, we could reduce the social costs of caring for the disabled.

I propose an exception to the current SSI eligibility requirements permitting interested persons to establish qualified trusts. These trusts would supplement SSI benefits with income and principal and thus improve the quality of life for designated disabled persons.  

A. Characteristics of the Proposed Qualified Trust

This new qualified trust would allow payments for disabled beneficiaries, but if the trust met certain requirements these payments would not cause a dollar-for-dollar reduction in SSI benefits. Only the disabled child would be eligible to receive trust property during that child’s lifetime, and at the child’s death the remainder could be taxed, with the tax revenues returning to the Social Security fund. Each of these requirements would enable partial support of disabled children, while making

95. Again, because this Article focuses on SSI, the proposal is presented as a change in the SSI eligibility requirements. A similar exception could be made to the eligibility requirements of other programs as well.
it difficult to manipulate the trust structure for tax or other benefits.

The most salient feature of this arrangement would be proportional, not dollar-for-dollar, reduction in SSI benefits for every payment from the trust to the disabled person. For every dollar of trust support, a beneficiary could lose fifty cents of SSI benefits. Payments of income and principal from a qualified trust would not count for purposes of establishing initial eligibility for SSI, so a disabled beneficiary could receive income supplements from the trust without being disqualified from receiving SSI benefits.96

Thus, people without resources would not receive as many total support dollars from the combination of SSI benefits and trust disbursements as would people with family resources, and people with family resources would not receive as much public support as would people with no family resources at all. However, the very real monetary benefit available to a person whose family is willing to contribute support would provide an incentive for parents and others to set up qualified trusts.

A number of other requirements for the trust structure would ensure that such trusts could not be unduly manipulated for financial gain to unintended persons. First, the beneficiary would be entitled to all of the trust income, payable at least quarterly. This would prevent manipulation of trust income to evade proportionate benefit reductions.97

Second, at the disabled child’s death, the balance remaining in the trust, if any, would be taxed, with the tax revenues returning to the Social Security fund. In the alternative, a set percentage of the funds remaining in trust could be turned over to the government.98 During the disabled person’s lifetime, no other person could receive property from the trust. This would prevent depletion of the trust to avoid the death tax through lifetime payouts to third persons. Finally, anything remaining in the

96. There would be a limit to the amount of money which could be received from the trust while still receiving SSI benefits. It would depend on the proportionate amount of reduction in benefits. For example, if SSI benefits were reduced fifty cents for each dollar received from the trust, the beneficiary could receive twice the dollar value of his SSI benefit from the trust before becoming completely ineligible for SSI.

97. For example, in the absence of such a requirement, the trustee could pay out more than enough funds to eliminate SSI benefits for the year, but not pay out in succeeding years so that benefits would resume even though the disabled person might still have use of the money already paid out.

98. This suggestion is consistent with a requirement of self-sufficiency trusts that 50% is turned over to the charitable trust component at the death of the beneficiary. See supra note 74 and accompanying text.
trust after the payment of the death tax could pass as the child appoints by will, or in default of appointment, to the remainder men designated by the settlor.

B. Advantages of a Qualified Trust

The proposed qualified trust would improve the quality of life of the disabled person by enabling her to maintain the minimum level already provided by SSI while supplementing that level with payments from the parents' trust. This opportunity to make a real difference in the quality of the disabled child's life would provide a powerful incentive for parents and other interested persons to make testamentary or lifetime provisions for the child. Most parents have this natural impulse anyway, but they may feel compelled to act against it due to the futility of leaving property to a disabled child.

The qualified trust would also reduce society's burden. Even though the proposal would lower the percentage reduction in SSI benefits for each parental contribution from one hundred percent to fifty percent, it could actually decrease the total amount paid though SSI because it would encourage more parents to give. Taxation of the trust corpus at the child's death would then provide further reimbursement to the SSI program.

This qualified trust improves the position of all parties involved. Thus, the government would benefit financially, because under the present system many people are completely supported by public benefits even though their families could make some contribution to their support. The disabled child would have an improved quality of life. Finally, the parents could achieve at least some peace of mind.

C. Comparison with the QTIP Exception to the Estate Tax

This proposed trust is analogous to the marital qualified terminable interest property trust (QTIP), which allows the estate to claim the marital deduction for terminable interests, such as life estates in property passing to a surviving spouse, as long as those terminable interests are in a qualifying trust.99 The QTIP

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99. I.R.C. § 2056(b)(7) (1988). In other words, the QTIP allows estate taxes to be deferred until the deaths of both spouses, but allows each spouse to control the long-term disposition of his own property. See Cameron, Hoffman & Ytterberg, Marital and
epitomizes a successful exception to existing rules, where a limited exception can be used to advance social policy objectives.\textsuperscript{100}

Like the QTIP, the proposed qualified trust for the disabled would be a limited exception to existing regulations. Both require that no one have the power to appoint any property to anyone other than the life beneficiary (the wife or the disabled person) during the beneficiary’s lifetime.\textsuperscript{101} Unless the trust proceeds are completely exhausted during the beneficiary’s lifetime, this assures that the remaining property will be subject to tax in the beneficiary’s estate. Both types of trust would entitle the beneficiary to all of the income from the trust (or, in the case of a QTIP, to all of the income from a designated portion of the trust) payable at least annually.\textsuperscript{102}

The QTIP allows a limited exception to the general rule that a terminable interest is not eligible for the marital deduction. It is perceived as offering greater flexibility in estate planning, especially when a person wants her spouse to have lifetime security, but also wants to ensure that her own children ultimately receive whatever remains of the property.\textsuperscript{103} The QTIP allows this flexibility while assuring that any property that in fact goes to persons other than the surviving spouse will ultimately be taxed in that surviving spouse’s estate.\textsuperscript{104}

The qualified trust for the disabled would allow a similarly limited exception to the SSI benefit reduction rules. It would offer flexibility in planning for disabled persons where a parent’s estate is not by itself large enough to comfortably support the disabled child without government aid. It would allow this flexibility, yet provide for a Social Security tax to be imposed on remaining trust assets at the death of the disabled beneficiary.

\textbf{D. Objections to a Qualified Trust Exception}

There are, of course, certain problems inherent in this proposal. The most obvious objection is that this plan would set up

\textit{Premarital Agreements, 39 Baylor L. Rev. 1095, 1121 (1987).} Previously, of course, no marital deduction was allowed for terminable interests in property because if that were allowed, the remainder interest could escape estate taxation entirely.

\textsuperscript{100} In the case of the QTIP, the exception makes it easier to provide for both a spouse and the children of a marriage.


\textsuperscript{102} See id. § 2056(b)(7)(B)(ii)(I).


\textsuperscript{104} See I.R.C. § 2056 (1988); see also Cameron, Hoffman & Ytterberg, \emph{supra} note 99, at 1121.
a system whereby the government would have to support people who have other resources. This is a contradiction to the usual position that SSI and programs like it are solely intended as a safety net for those persons who have no other options.105

As we have seen, however, excluding supplementary benefits will more likely reduce supplementary benefits than reduce the number of people receiving SSI. Thus, it is not necessarily true that more money could be distributed among those who have no hope of help from other sources.106

A second possible objection is that these qualified trusts will require periodic review. As with the QTIP exception to the estate tax rules, however, this regulation can be achieved within the existing administrative structure, which determines initial and continuing eligibility for benefits.

IV. Conclusion

Current eligibility requirements for social benefit programs for the disabled are apparently designed to assure that only the truly needy will receive aid. These programs actually discourage middle-class parents who cannot completely support their disabled offspring from contributing anything to the child’s support. A dollar-for-dollar reduction in benefits to someone who has received funds from a gift or estate does not necessarily mean that disabled persons who are potential estate and gift beneficiaries will forgo public benefits. Instead, it means that parents will dispose of their estates so that their offspring will continue to receive public benefits, even if it means that the disabled children will receive little or no inheritance.

Congress should create a limited exception to these eligibility requirements. By allowing benefit recipients to receive gifts and inheritances which meet strict limitations, the law would encourage people to provide for disabled family members. This could eventually decrease dependence on government assistance. It could even achieve the elusive goal of improving the quality of life of some of the less fortunate members of our society.

105. See supra Part II.B.

106. Moreover, there is precedent for favoring quality of life over purely economic considerations. Consider, for example, the homestead exemption, which exempts owner-occupied housing (up to a certain dollar value) from the claims of most creditors, including the state, if it has provided services to the disabled person. See, e.g., Wis. Stat. § 815.20 (owner is liable only for such debts as mortgages, laborers’, mechanics’ and purchase money liens and taxes).