Memorandum 91-16

Subject: Study L-3053 - Trusts for Disabled and Incapacitated Persons

The Commission has received a suggestion from Charles A. Collier, Jr., to consider the concept of a state-sanctioned family trust fund for disabled and incapacitated persons. (See letter and attachments in Exhibit 1.) Specifically, he suggests consideration of the Missouri Family Trust. This memorandum provides some background information and an overview of the Missouri Family Trust and related schemes.

The Problem

The family of a disabled or incapacitated person is faced with a serious dilemma, particularly if the person's disability is permanent. If they seek to improve the quality of life or obtain additional services for the handicapped person, they may exhaust their funds without effect, since the administering agency may reduce public benefits on a dollar for dollar basis. The existence of a trust in favor of the disabled person may also result in a determination of ineligibility, leading to an overall reduction of services. Once the private funds are exhausted, there may be a delay in qualification or requalification for governmental programs. Few families have the needed resources to establish economically efficient and effective trusts. Parents of a disabled child are also concerned with the welfare of their child after they are gone, and naturally want to find a way to preserve some family assets for the child's benefit. They may try a discretionary trust or they may find themselves in the seemingly absurd position of disinheriting their needy child and giving the family wealth to siblings of the disabled child in the hope that they will do what they can.

Use of Private Trusts

Several years ago, the Commission considered the question of reimbursement of public aid supplied to a trust beneficiary, in connection with drafting statutes concerning spendthrift and support

trusts. Probate Code Section 15306 codified the public's right of reimbursement from trust amounts that the aid recipient could reach or that the trustee determined in its discretion to pay. (See Prob. Code § 15306(a), at exhibit page 18.) Having recognized the right of reimbursement from trust assets, however, the Commission statute limited that right. Thus, Probate Code Section 15306(b) makes the reimbursement right inapplicable to a trust established for the benefit of "an individual who has a disability that substantially impairs the individual's ability to provide for his or her own care or custody and constitutes a substantial handicap." As stated in the Comment, the limitation was "intended to encourage potential settlors to provide in a trust for the care or support of a disabled person without the risk that the benefits of the trust will be taken to reimburse a public agency for a minimal level of support provided by the public agency." The limitation was intended to provide some protection for trusts established for severely disabled persons and avoid the dollar-for-dollar reduction of benefits. In sum, Section 15306 recognizes a trust for "amenities" (unfortunately also termed a "luxury" trust by some commentators).

In 1989, Section 15306(b) was amended to void the exception if the "trust results in the individual being ineligible for needed public social services" under Division 9 of the Welfare and Institutions Code. Division 9 includes the major assistance programs such as AFDC (Welf. & Inst. Code § 11200 *et seq.*), SSI (aged, blind, and disabled -- Welf. & Inst. Code § 12000 *et seq.*), Medi-Cal (Welf. & Inst. Code § 14000 *et seq.*), county aid (Welf. & Inst. Code § 17300 *et seq.*), and the Relief Law of 1945 (Welf. & Inst. Code § 18450 *et seq.*). The new exception does not apply to forms of assistance not in Division 9 of the Welfare and Institutions Code, such as aid to the mentally disabled (Section 6715 *et seq.*) or the mentally disordered (Section 7200 *et seq.*). The reason for the amendment was to avoid situations where developmentally or mentally disabled person would be receiving substantial aid, but would be ineligible for federal funds (averaging $32,000 per year per person), leaving the state responsible for the entire bill. The Department of Developmental Services reported that the section affected only six persons in developmental centers. (Based on analysis prepared for Assembly Committee on Human Services.)

It is difficult to assess, but the 1989 amendment represents a rejection of the general policy behind Section 15306(b), even if the amendment was thought to affect very few people. In sponsoring the amendment, the Department of Developmental Services focused on the specific issue of six persons with a collective worth of $816,000 who have received $1,600,000 in benefits. There are two factors at play here -- reimbursement and eligibility. Under the 1989 amendment, the trust assets in these six cases would first be exhausted in satisfaction of about half of the amount "owed" ($1.6 million), and then federal eligibility will be established, so that the state will be able to share the financial burden (reducing state expenditures by about $32,000 per year per person). This makes sense from a short-term fiscal viewpoint, but does it make sense as a long-term policy, or from an estate-planning viewpoint? What advice would an attorney give parents of a disabled child who want to provide additional services and amenities? The uncertain options of the "purely" discretionary trust or disinheritance would remain the best alternatives.

Much more could be said about the complications of using private trusts to supplement the public benefits available to a disabled person. A final answer is not possible because of the shifting nature of the applicable statutes and regulations on the state and federal levels, the ebb and flow of public policy concerns, and the judicial interpretation of different types of trust language. For example, Professor Lawrence Frolik wrote an influential article in 1979 recommending the use of a discretionary trust to supplement public aid, but six years later felt compelled to write another article expressing serious reservations the success of such trusts. See Frolik, *Estate Planning for Parents of Mentally Disabled Children,* 40 U. Pitt. L. Rev. 305 (1979); Frolik, *Discretionary Trusts for a Disabled Beneficiary: A Solution or a Trap for the Unwary,* 46 U. Pitt. L. Rev. 335 (1985).

Conflicting Policies

One's conclusions about the advisability of a particular statutory scheme, or the need for any change at all, is probably influenced by the relative importance of several general policies. Some feel that the natural desire of parents and other family members to help a disabled relative should be encouraged by the law, rather than

discouraged. Others focus on the entire population of disabled persons and conclude that those who can pay for all or part of their own care should be required to do so, leaving more resources for those who cannot pay. On the other hand, taxpayers may justifiably feel that their disabled relative has a right to government assistance and that a right of reimbursement amounts to double taxation. Public officials need to balance their budgets and, particularly in a time of deficit, look around for other sources. The individual's right to effectively dispose of property during life or by will or trust is also important. There might also be some resentment of whatever privileged status might be apparent in an institution where most receive only the governmental minimum while a few receive additional amenities or "luxuries."

These policies, in one form or another, have been in conflict for years, perhaps back to the Elizabethan Poor Laws and before. There is probably no new answer to be discovered now, but as the following discussion should indicate, the new family trust fund proposals attempt to reconcile some of the conflict.

New Approaches

It appears that the private discretionary trust cannot be pushed any further and that its potential in this area may be exhausted, without legislative assistance, especially at the federal level. Thus, Professor Judith McMullen has proposed federal legislation to permit qualified trusts for payments to disabled beneficiaries that would not cause a dollar for dollar reduction in SSI or other benefits. See McMullen, *Family Support of the Disabled: A Legislative Proposal to Create Incentives to Support Disabled Family Members,* 23 U. Mich. J.L. Ref. 439 (1990). This proposal is, of course, beyond the scope of the Commission's concern, but it does illustrate that there may be something yet to be squeezed out of the private trust arrangement. Federal legislation has the advantage of coping with federal programs directly and providing a degree of national uniformity.

Professor McMullen's plan would eliminate the uncertainty problem inherent in the use of private trusts, but still suffers from the other disadvantages of the relatively high start up costs and administrative expenses of private trusts. Thus, even if federal legislation approved the qualified trust approach, state plans such as those discussed below offer benefits to a broader economic class.

We are aware of several varieties of nonprofit private plans and public trusts that have recently arisen in other states. These approaches provide for voluntary participation by setting up a beneficiary's account in a common trust fund.

(1) Illinois Self-Sufficiency Trust Fund: The Illinois statute provides for a charitable trust fund with the State Treasurer as custodian, and participation by the State Comptroller and Director of Mental Health and Developmental Disabilities. See Ill. Rev. Stat. ch. 91½ ¶ 5-118 (1988). Contributions to the Fund may be made by self-sufficiency trusts, which are defined as nonprofit charitable trusts for the purpose of providing care, support, or treatment of one or more developmentally disabled persons or other persons eligible for public assistance. Presumably, the self-sufficiency trust may accept funds from any source, most importantly the family of the beneficiary. An account is kept for each participating beneficiary. If the money in a beneficiary's account cannot be used for the care, support, or treatment of the beneficiary, the balance including interest is returned to the depositing self-sufficiency trust. Most importantly, the statute provides that receipt by a beneficiary of money from the Trust Fund, or of care, treatment, or support provided by the Fund, does not reduce, impair, or diminish the benefits to which the beneficiary is otherwise entitled by law. It is suggested that state backing of this sort would act to encourage participation in a self-sufficiency trust plan. See Chamberlin, *Estate Planning for Families with Disabled Children,* 75 Ill. B.J. 612, 615-16 (1987). The statute does not provide much detail, so it is difficult to judge how it might operate in practice, nor do we know whether the Illinois statute has been able to achieve the goal of insulating funds from reimbursement or eligibility considerations. If the Commission wishes to pursue this subject, we would contact authorities in Illinois for additional details and for an estimation of the degree of success of the Fund, now in its fifth year.

(2) Missouri Family Trust: The Missouri statute was enacted in 1989, contingent on federal assurance that participation in the Missouri Family Trust Fund (MFTF) will not jeopardize eligibility for public funds. See Mo. Ann. Stat. §§ 402.200-402.225 (Vernon Supp. 1990) (copy attached as Exhibit 3, at exhibit page 11). As noted in

Milton Greenfield's letter (see exhibit page 2), Missouri received commitments from federal officials that they would not disqualify or reduce benefits on account of participation in the MFTF nor would they seek reimbursement from the fund. The Missouri statute sets up a nine-member board of trustees, who serve without compensation, to govern the trust. The MFTF is authorized to accept funds from any source, other than the life beneficiaries or their spouses. As in Illinois, contributions are maintained in individual accounts and income and expenses allocated in proportion to contributions made. Beneficiaries must be Missouri residents, but the MFTF will accept contributions from anywhere. The initial contribution must be at least $500 and additions can be as little as $100. The trust annually determines the amount to be used to provide noncash benefits for the beneficiary, with the consent of the cotrustee, if any. Donors can name a cotrustee (including the donor) as to the particular life beneficiary's account. An arbitration procedure is set up to handle disputes between cotrustees and the MFTF.

Donors are allowed to revoke gifts to the MFTF and receive the full amount of the gift if the beneficiary has not received any benefits. If benefits have been received, 90% of the unused portion of the gift may be returned to a donor on revocation; the balance is distributed to the charitable trust in the MFTF. This has the consequence of making the trust account income taxable to the donor. Contributions to the MFTF generally would be tax deductible, however.

Detailed provisions are included in the statute governing the beneficiary's withdrawal from participation. On a beneficiary's death, 100% of the contributions are distributed as designated by the donors if the beneficiary had not received any benefits, and 50% are returned if benefits had been received, with the balance passing to the charitable trust. The charitable trust is intended to provide services to handicapped persons who have no immediate family to make contributions or who are unable to make contributions to the MFTF. (Additional details are discussed in the materials attached to Mr. Collier's letter, at exhibit pages 2-8, and in the "Fact Sheet," at exhibit pages 9-10.)

(3) Other States: The "Fact Sheet" provided by the Missouri Family Trust Fund reports that a number of other states are following

the lead of Illinois, Wisconsin, and Missouri. The extent of this movement is unknown, and the staff has not been able to determine whether there has been any attempt to implement such a concept in California. We have spoken with legislative committee staff and some other sources, but no one we contacted was aware of any legislative proposals in the recent past or in the wings.

(4) Private organizations: Extra services may also be provided handicapped persons by special organizations with their own staff of employees supported by enrollment fees or trust income. Prof. McMullen reports on an organization of this type in Virginia that requires interested relatives of the handicapped person to set up a "lifetime advocacy trust" controlled by the donors during their lifetime. After death, the trust income is used to pay for services by the organization to the disabled beneficiary. On the death of the beneficiary, 25% of the principal is paid to the organization and the remainder may be distributed as directed by the donors. McMullen, *supra,* at 439 n.90. Such organizations would not appear to be in need of any special statutory authorization and may be operating in California now.

Conclusion

The family trust fund offers a way for concerned people to provide some additional assistance to incapacitated relatives or friends without jeopardizing eligibility or reducing existing benefits. It appears that this approach is catching on in other jurisdictions, particularly in light of the experience with discretionary trusts and other alternatives. Development of a practical family trust scheme could be a productive project for Commission study.

The staff has some misgivings, however, as to whether we have the needed expertise to develop the best approach in California. At a minimum, we would need to work closely with the agencies and private organizations who are experts in this area.

Respectfully submitted,

Stan Ulrich
Staff Counsel

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WRITER'S DIRECT DIAL NUMBER

November 13, 1990

Mr. John H. DeMoully
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739

Re: Missouri Family Trust Fund

Dear John:

I recently learned about a new Missouri statute establishing a Missouri family trust fund for the mentally or physically impaired.

This is a new concept. It might be of interest in California. I am enclosing a copy of a letter from Milton Greenfield of St. Louis who forwarded the material to me and a copy of the enclosures which he forwarded.

Based upon a recent article I saw in a Virginia newspaper, there is apparently a similar type of family trust fund established in the State of Virginia. I do not have the details on that nor any information about the legislative background.

Sincerely,

Charles A. Collier, Jr.

CAC:vjd
Enclosures

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October 18, 1990

Charles A. Collier, Jr., Esq.
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1800 Avenue of the Stars, Suite 900
Los Angeles, California 90067-4276

Dear Chuck:

Pursuant to your request the other day I am happy to enclose:

1. A brochure on the Missouri Family Trust Fund;
2. An outline which accompanied a talk last month to the Estate Planning Council of St. Louis. Please ignore my markings, but this is my only copy;
3. A copy of the Missouri statute.

The statute is the brainchild of Gerald J. Zafft, a respected tax practitioner in one of our fine law firms. His interest was initially motivated by his child of limited capacity. He was dissatisfied with the discretionary trusts that he was drawing in these situations.

Zafft is currently Chairman of the Board of Trustees appointed by the Governor. The law is not yet fully implemented. They believe that it will take until spring before they negotiate safekeeping and investment agreements with appropriate Trust Companies and draft the various contracts and agreements that will be required when dealing with prospective donors, etc.

Most importantly, Zafft tells us that the Trustees now have written commitments from both Medicaid and SSI that they will not (a) disqualify a recipient because of the existence of such a Trust Fund, (b) reduce the benefits payable, or (c) seek to reach the income and principal of such a Trust Fund. The first two are requirements of Section 402.225.

If there is any other information you desire, Zafft is the man to call or write. His address is One Mercantile Center, Suite 2900, St. Louis, Missouri 63101. His telephone is (314) 621-8575. I hope that all of this is helpful to you.

Sincerely,

Milton Greenfield, Jr.

MG/kk
Enclosures (3)

THE MISSOURI FAMILY TRUST FUND

Gerald J. Zafft

Coburn, Croft & Putzell

St. Louis, Missouri

I. INTRODUCTION

II. MISSOURI FAMILY TRUST FUND

1. Participation - Sec. 402.205 RSMo.

a. Any person who has a mental or physical impairment that substantially limits one or more major life activities, whether the impairment is congenital or acquired by accident, is "handicapped." Sec. 402.200(4).

b. Families, friends and guardians of persons who have a handicap or are eligible for services provided by the department of mental health may participate in the Missouri Family Trust Fund ("FTF"). Sec. 402.205.1.

c. The Board of Trustees of the FTF has determined to limit participation to Missouri beneficiaries.

2. Eligibility for Entitlements - Sec. 402.205.2.

a. All state agencies shall disregard the trust as a resource when determining eligibility for assistance under Chapter 208, RSMo.

b. Health Care Financing Administration has ruled that principal and income of FTF should not count in determining Medicaid eligibility.

b. The donor may designate the beneficiary and a co-trustee, to serve with the Board of Trustees. Sec. 402.215.2(2).

i. The donor can designate successor co-trustee(s).

c. The designated co-trustee and the FTF will meet annually and agree on the use of income or principal or income and principal to be used and the benefits to be provided. Sec. 402.215.2(3).

i. If donor and FTF cannot agree, then nothing is distributed.

ii. If successor co-trustee and FTF cannot agree, then either can request arbitration.

d. The donor may revoke the gift to the trust. Sec. 402.215.2(4).

i. If the beneficiary has received no benefits from use of trust fund income or principal, then 100% of the "original contribution" shall be returned.

A. "Original contribution" is the principal balance of all contributions made, excluding appreciation in value or accretions.

B. "Original contribution" cannot exceed the total of all contributions made to a particular account.

ii. If the beneficiary has received benefits, then 90% of the "original contribution" as adjusted shall be returned.

iii. The portion of the "original contribution" not returned and undistributed income are distributed to the charitable trust.

e. A co-trustee other than the donor may revoke the gift to the trust. Sec. 402.215.2(5).

i. The co-trustee needs to state a "good and sufficient reason."

A. The sufficiency of the reason is subject to arbitration.

ii. If the beneficiary has received no benefits, or has received benefits for 5 years or less, then 90% of the "original contribution" shall be distributed to the standby trust. Sec. 402.215.2(6).

iii. If the beneficiary has received benefits for more than 5 years, then 75% of the "original contribution" shall be distributed to the standby trust. Sec. 402.215.2(6).

iv. In each case, the portion of the "original contribution" not returned and undistributed income are distributed to the charitable trust.

f. Termination by the Board of Trustees.

i. If the beneficiary moves from Missouri or ceases to be eligible and neither the donor nor the successor co-trustee revokes, then the Board of Trustees may terminate.

ii. If there is a judicial or administrative determination that FTF principal or income adversely affects a beneficiary's entitlement, then the Board of Trustees shall terminate the trust as to such beneficiary.

iii. If the Board of Trustees determines that it is not practical or economical to continue the trust for a beneficiary, the Board may terminate the trust as to such beneficiary.

A. The Board's determination is subject to arbitration.

g. Death of a Beneficiary - Sec. 402.215.2(7).

i. If a beneficiary dies before receiving any benefits, then 100% of the "original contribution" shall be distributed to whomever the donor has designated. Sec. 402.215.2(7).

ii. If a beneficiary dies after having received benefits, then 50% of the "original

contribution" shall be distributed to whomever the donor has designated and the balance shall be distributed to the charitable trust. Sec. 402.215.2(7).

h. Standby Trust - Sec. 402.215.2(8).

i. The standby trust shall be for the benefit of the beneficiary for life, to be funded only upon revocation by a co-trustee other than the donor.

ii. The standby trust is to be re-designated as the "Successor Trust."

i. Charitable Trust - Sec. 402.215.2(9).

i. The charitable trust is to provide similar benefits for indigent persons with a handicap.

ii. The beneficiaries are to be recommended to the FTF by the Missouri Department of Mental Health and others.

3. Effective Date - Sec. 402.225.

a. The FTF shall be effective when the Department of Mental Health determines and notifies the revisor of statutes that there has been federal legislation or administrative rulings that participation will not jeopardize a beneficiary's eligibility.

i. The administrative rulings have been issued.

ii. Notification to the revisor of statutes was given on September 29, 1989.

V. FTF DOCUMENTS

1. Terms And Conditions -

a. The Board of Trustees has developed a document entitled "Terms And Conditions Of The Missouri Family Trust," setting forth the main features of the Trust.

b. The Board of Trustees has also developed a document entitled "Missouri Family Trust Agreement," which is similar to an adoption agreement.

i. The Agreement identifies the donor, beneficiary, co-trustee, successor co-trustee, and recipients of the distribution upon the death of the beneficiary.

ii. The donor completes the Agreement, which is then signed by the donor and on behalf of the Board of Trustees.

VI. CONCLUSION -

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MISSOURI FAMILY TRUST FUND

FACT SHEET

1. Why should one use this method of providing funds, rather than a traditional trust?

1. This form of supplemental funding does not preclude a person from eligibility for state and federal entitlement programs which are designated to help those persons with mental and/or physical disabilities.

2. Are there any state and federal laws or regulations guaranteeing that the assets in the family trust fund will not preclude an individual from entitlement programs?

2. Yes. In Missouri, Chapter 402 of the Revised Statutes is the law which authorizes the family trust fund to protect entitlements. The family trust fund has also received favorable rulings from the Health Care Financing Administration and the Social Security Administration.

3. Are there other programs like this in the nation?

3. Yes. A number of other states are now following the lead of Illinois, Wisconsin and Missouri. Various organizations, such as the National Alliance for the Mentally Ill and the Mental Health Association, fully endorse such programs and hold workshops to teach others about them.

4. Is the family trust fund a state governmental entity?

4. Yes and no. The family trust fund is not part of state government and is not subject to legislative appropriation or state funding. Thus, it will maintain fiscal independence from the state. The family trust fund will be administered by a Board of Trustees appointed by the Governor with the advice and consent of the Senate.

5. When can one begin putting assets into the family trust fund ?

5. Immediately.

6. What is the minimum amount required to begin an account with the family trust fund ?

6. $500.

7. What assets may be contributed to the family trust fund to begin an account?

7. Cash, and other liquid assets such as marketable securities in the form of stocks or bonds, money market funds and treasury bills. The family trust fund may be named as the beneficiary of insurance policies and annuities.

8. May assets be added to the family trust fund at a latter date?

8. Yes. Additional funds may be added at any time, although there will be a minimum requirement of $100.

9. May more than one person contribute to an individual account for the benefit of a beneficiary?

9. Yes.

10. How will the monies contributed to the family trust fund be invested ?

10. The assets will be conservatively invested with due regard to the purpose of the family trust fund. For those donors who wish to designate what investments will be utilized, several options will be offered.

11. Are the earnings from the assets which are placed in the family trust fund for the benefit of a designated individual tax deductible by the donor?

11. No.

12. Is the income which the beneficiary receives from the family trust fund considered taxable during a donor's lifetime?

12. The principal is considered as a contribution to a grantor trust, the earnings of which are taxed to the donor, because the donor has a right to reclaim all or part of the amount placed into the family trust fund during his lifetime.

13. Is it possible for a donor to make a tax deductible contribution to the family trust fund?

13. Yes. The contribution must be made to the Board of Trustees of the family trust fund and no specific beneficiary designated.

14. How are the assets and earnings in one's account in the family trust fund used?

14. The co-trustee designated by the donor at the time the account is established will meet with representatives of the family trust fund at least annually to decide on the use of the assets and/or income in the beneficiary's account.

15. If one's own financial status changes after an account in the family trust fund is begun, can those assets be reclaimed while the donor is still alive?

15. Yes. There are established procedures for the return of all or a part of the amount put into the family trust fund.

16. What are the projected costs for the overall operation of the family trust fund?

16. It is hard to estimate, but the cost should be competitive with the cost of administration of other trusts, and probably less. The fees charged will not be more than the fees charged by trust companies doing business in Missouri.

17. May the family trust fund make payments before a donor's death?

17. Yes. These payments must be made according to the terms and conditions of the family trust fund agreement.

18. Will the donor receive regular statements on the family trust fund's performance?

18. Yes. Monthly statements will be sent directly to the donor and after his or her death to the designated successors (trustees, co-trustees, conservators, guardians, etc.) by the financial institution that holds the trust fund accounts.

19. Must a donor reside in Missouri to participate in the family trust fund ?

19. No. The donor may reside anywhere; however, the beneficiary must be a resident of Missouri.

20. Will a beneficiary's participation in the family trust fund be affected if his residence changes from Missouri?

20. Yes. There are established procedures in the family trust fund for the return of all or part of the amount put into an account if the beneficiary's residence is changed from Missouri.

21. Does one need the services of an attorney to participate in the family trust fund?

21. No. It is suggested, not required, by the family trust fund that legal counsel review the trust agreement before a donor begins participation in the fund.

22. Will a guardian for the beneficiary of the family trust fund be necessary to ensure that such beneficiaries' interests are protected?

22. No. The co-trustee designated by the donor at the time the account is established will represent the interest of the beneficiary in the family trust fund. However, for other reasons it may be appropriate to have a guardian appointed; this has to be determined by each family, after consulting with their own attorney.

23. How are the assets in the charitable trust to be used?

23. At the discretion of the Board of Trustees for those indigent persons with a mental and/or physical disability.

24. Where does one get more information about the family trust fund?

24. By writing directly to the Missouri Family Trust Fund at P.O. Box 1112, Jefferson City, MO 65102, or by telephone at 314/634-4484.

MISSOURI FAMILY TRUST FUND

[Mo. Ann. Stat. §§ 402.200-402.225 (Vernon Supp. 1980)]

402.200. Definitions

As used in sections 402.200 to 402.220, the following terms mean:

(1) **"Board of trustees"**, the Missouri family trust board of trustees;

(2) **"Charitable trust"**, the trust established to provide benefits for individuals for whom no contribution to the trust has been made, as set forth in section 402.215;

(3) **"Department"**, the department of mental health;

(4) **"Handicap"**, a mental or physical impairment that substantially limits one or more major life activities, whether the impairment is congenital or acquired by accident, injury or disease, and where the impairment is verified by medical findings;

(5) **"Life beneficiary"**, a designated beneficiary of the Missouri family trust fund;

(6) **"Requesting party"**, the party desiring arbitration;

(7) **"Responding party"**, the other party in arbitration of a dispute regarding benefits to be provided by the trust;

(8) **"Standby trust"**, the trust established by a donor at the time of the original contribution to the trust and administered as set forth in section 402.215;

(9) **"Trust"**, the Missouri family trust fund established pursuant to sections 402.200 to 402.220;

(10) **"Trustee"**, a member of the Missouri family trust board of trustees. (L.1989, H.B. No. 318, § 1.)

402.205. Trust fund, who may participate—trust benefits not to affect state benefits

1. The families, friends and guardians of persons who have a handicap or are eligible for services provided by the department of mental health, or both, may participate in a trust fund which may supplement the care, support, and treatment of such persons pursuant to the provisions of sections 402.200 to 402.220. Neither the contribution to the trust for the benefit of a life beneficiary nor the use of trust income to provide benefits shall in any way reduce, impair or diminish the benefits to which such person is otherwise entitled by law; and the administration of the trust shall not be taken into consideration in appropriations for the department of mental health to render services required by law.

2. Unless otherwise prohibited by federal statutes or regulations, all state agencies shall disregard the trust as a resource when determining eligibility for assistance under chapter 208, RSMo.

(L.1989, H.B. No. 318, § 2.)

Date Effective

For the effective date of this section, see § 402.225

402.210. Board of trustees—members, appointment, term, qualifications, expenses—"immediate family" defined

1. There is hereby created the "Missouri Family Trust Board of Trustees". The board of trustees shall consist of nine persons appointed by the governor with the advice and consent of the senate. The members' terms of office shall be three years and until their successors are appointed and qualified. The trustees shall be persons who are not prohibited from serving by sections 105.450 to 105.482, RSMo, and who are not otherwise employed by the department of mental health. The board of trustees shall be composed of the following:

(1) Three members of the immediate family of persons who have a handicap or are the recipients of services provided by the department in the treatment of mental illness. The advisory council for comprehensive psychiatric services, created pursuant to section 632.020, RSMo, shall submit a panel of nine names to the governor, from which he shall appoint three. One shall be appointed for a term of one year, one for two years, and one for three years. Thereafter, as the term of a trustee expires each year, the Missouri advisory council for comprehensive psychiatric services shall submit to the governor a panel of not less than three nor more than five proposed trustees, and the governor shall appoint one trustee from such panel for a term of three years;

(2) Three members of the immediate family of persons who are recipients of services provided by the department in the habilitation of the mentally retarded or developmentally disabled. The Missouri advisory council on mental retardation and developmental disabilities, created pursuant to section

633.020, RSMo, shall submit a panel of nine names to the governor, from which he shall appoint three. One shall be appointed for one year, one for two years and one for three years. Thereafter, as the term of a trustee expires each year, the Missouri advisory council on mental retardation and developmental disabilities shall submit to the governor a panel of not less than three nor more than five proposed trustees, and the governor shall appoint one trustee from such panel for a term of three years;

(3) Three persons who are recognized for their expertise in general business matters and procedures. Of the three business people to be appointed by the governor, one shall be appointed for one year, one for two years and one for three years. Thereafter, as the term of a trustee expires each year, the governor shall appoint one business person as trustee for a term of three years.

2. The trustees shall receive no compensation for their services. The trust shall reimburse the trustees for necessary expenses actually incurred in the performance of their duties.

3. As used in this section, the term **"immediate family"** includes spouse, parents, parents of spouse, children, spouses of children and siblings.
(L.1989, H.B. No. 318, § 3.)

Date Effective

For the effective date of this section, see § 402.225

402.215. Board of trustees, duties—provisions for trust documents

1. The board of trustees is authorized and directed to establish and administer the Missouri family trust. The board shall be authorized to execute all documents necessary to establish and administer the trust including the formation of a not for profit corporation created pursuant to chapter 355, RSMo, and to qualify as an organization pursuant to section 501(c)(3) of the United States Internal Revenue Code.

2. The trust documents shall include and be limited by the following provisions:

(1) The Missouri family trust fund shall be authorized to accept contributions from any source, other than the life beneficiaries and their respective spouses, to be held, administered, managed, invested and distributed in order to facilitate the coordination and integration of private financing for individuals who have a handicap or are eligible for services provided by the Missouri department of mental health, or both, while maintaining the eligibility of such individuals for government entitlement funding. All contributions, and the earnings thereon, shall be administered as one trust fund; however, separate accounts shall be established for each designated beneficiary. The income earned, after deducting administrative expenses, shall be credited to the accounts of the respective life beneficiaries, in proportion to the amount of the contribution made for each such life beneficiary, reduced from time to time by any distributions or encroachments, to the total contributions, re-

duced from time to time by any distributions or encroachments, made for all life beneficiaries.

(2) Every donor may designate a specific person as the life beneficiary of the contribution made by such donor. In addition, each donor can name a cotrustee, including the donor, and a successor or successors to the cotrustee, to act with the trustees of the trust on behalf of the designated life beneficiary; provided, however, a life beneficiary shall not be eligible to be a cotrustee or a successor cotrustee.

(3) The trust, with the consent of the cotrustee, shall annually agree on the amount of income or principal or income and principal to be used to provide noncash benefits and the nature and type of benefits to be provided for the life beneficiary. Any net income which is not used shall be added to principal annually. In the event that the trust and the donor, serving as the cotrustee, shall be unable to agree either on the amount of income or principal or income and principal to be used for or the benefits to be provided, then none of the income or principal shall be used. In the event that the trust and the cotrustee, other than the donor, shall be unable to agree either on the amount of income or principal or income and principal to be used or the benefits to be provided, then either the trust or the cotrustee shall have the right to request that the matter be resolved by arbitration. The requesting party shall send a written request for arbitration to the responding party and shall in such request set forth the name, address and telephone number of such requesting party's arbitrator. The responding party shall, within ten days after receipt of the request for arbitration set forth in writing to the requesting party the name, address and telephone number of the responding party's arbitrator. Copies of the request for arbitration and response shall be sent to the director of the department. If the two designated arbitrators shall be unable to agree upon a third arbitrator within ten days after the responding party shall have identified such party's arbitrator, then the director of the department shall designate the third arbitrator by written notice to the requesting and responding parties' arbitrators. The three arbitrators shall meet and render a decision within thirty days after the appointment of the third arbitrator. A decision of a majority of the arbitrators shall be binding upon the requesting and responding parties. Each party shall pay the fees and expenses of such party's arbitrator and the fees and expenses of the third arbitrator shall be borne equally by the parties.

(4) Any donor, during his lifetime, may revoke any gift made to the trust. In the event that at the time the donor shall have revoked his gift to the trust, the life beneficiary shall not have received any benefits provided by use of trust income or principal, then an amount equal to one hundred percent of the original contribution shall be returned to the donor. Any accumulated net income shall be distributed to the charitable trust. In the event that at the time the donor shall have revoked his gift to the trust, the life beneficiary shall have received any benefits provided by the use of trust income or principal, then, an amount equal to ninety percent of the original contribution, reduced by any distributions or encroachments of principal previously

made, shall be returned to the donor. The balance of the original contribution, as reduced, together with all accumulated net income, shall be distributed to the charitable trust.

(5) Any acting cotrustee, other than the original donor of a life beneficiary's account, shall have the right, for good and sufficient reason upon written notice to the trust and the department stating such reason, to withdraw all or a portion of the original contribution, reduced by any distributions or encroachments previously made, made to the trust for the benefit of the life beneficiary. In such event, the applicable portion, as set forth below, of the original contribution, as reduced by distributions or encroachments, made for the benefit of the life beneficiary, shall then be distributed to the standby trust and the balance of the original contribution, as reduced, together with all accumulated net income, shall be distributed to the charitable trust.

(6) If at the time of withdrawal of a life beneficiary's account from the trust either the life beneficiary shall not have received any benefits provided by the use of the trust income or principal or the life beneficiary shall have received benefits provided by the use of trust income or principal for a period of not more than five years from the date a contribution shall have first been made to the trust for such life beneficiary, then an amount equal to ninety percent of the original contribution, reduced by any distributions or encroachments of principal previously made, shall be distributed to the standby trust, and the balance of the original contribution, as reduced, together with all accumulated net income, shall be distributed to the charitable trust; provided, however, if the life beneficiary at the time of such withdrawal by the cotrustee shall have received any benefits provided by the use of trust income or principal for a period of five years or more from the date a contribution shall have first been made to the trust for such life beneficiary, then an amount equal to seventy-five percent of the original contribution, reduced by any distributions or encroachments of principal previously made, shall be distributed to the standby trust, and the balance of the original contribution, as reduced, together with all accumulated net income, shall be distributed to the charitable trust.

(7) If the life beneficiary dies before receiving any benefits provided by the use of trust income or principal, then an amount equal to one hundred percent of the original contribution shall be distributed to such person or persons as the donor shall have designated. Any accumulated net income shall be distributed to the charitable trust. If at the time of death of the life beneficiary, the life beneficiary shall have been receiving benefits provided by the use of trust income or principal or income and principal, then, in such event, an amount equal to fifty percent of the original contribution, reduced by any distributions or encroachments of principal previously made, shall be distributed to such person or persons as the donor designated, and the balance of the original contribution, as reduced, together with all accumulated net income, shall be distributed to the charitable trust.

(8) The standby trust shall be created by the donor at the time of the original contribution. An amount equal to ten dollars from the original

contribution to the family trust fund shall be set aside as a separate share, but shall be administered as part of the family trust fund. The standby trust shall be for the benefit of the life beneficiary and shall provide that its income shall be accumulated and reinvested until such time as the standby trust receives a distribution from the family trust fund. Thereafter, income or principal or income and principal of the standby trust shall be used to provide benefits for the life beneficiary for the rest of his life. After the death of the life beneficiary, the remaining principal and accumulated income of the standby trust shall be distributed to such person or persons as the donor shall have designated. The donor shall designate the trustee or trustees of the standby trust.

(9) The charitable trust shall be administered as part of the family trust fund, but as a separate account. The income attributable to the charitable trust shall be used to provide benefits for individuals who have a handicap or who are eligible for services provided by or through the department and who either have no immediate family or whose immediate family, in the reasonable opinion of the trust, is financially unable to make a contribution to the trust sufficient to provide benefits for such individual, while maintaining such individuals' eligibility for government entitlement funding. As used in this section, the term **"immediate family"** includes parents, children and siblings. The individuals to be beneficiaries of the charitable trust shall be recommended to the trust by the department and others from time to time. The trust and the department shall annually agree on the amount of charitable trust income to be used to provide benefits and the nature and type of benefits to be provided by or through the department for each identified beneficiary of the charitable trust. Any income not used shall be added to principal annually.

(L.1989, H.B. No. 318, § 4.)

Date Effective

For the effective date of this section, see § 402.225

402.220. Liability of trustees, limitations on

No trustee, cotrustee or successor cotrustee serving pursuant to the provisions of sections 402.200 to 402.220 shall at any time be held liable for any mistake of law or fact, or of both law and fact, or errors of judgment, nor for any loss sustained by the trust estate or by any beneficiary under the provisions of sections 402.200 to 402.220, or by any other person, except through actual fraud or willful misconduct on the part of such trustee, cotrustee or successor cotrustee.

(L.1989, H.B. No. 318, § 5.)

Date Effective

For the effective date of this section, see § 402.225

402.225. Sections 402.200 to 402.220 to be effective, when

The provisions of sections 402.200 to 402.220 shall be effective upon a determination by the department of mental health and notification to the revisor of statutes that there has been federal legislative or administrative assurance that participation in the trust as established herein will not jeopardize a beneficiary's eligibility for public assistance and will not reduce the payment of covered services for which the beneficiary is eligible, and not otherwise.

(L.1989, H.B. No. 318, § A.)

Probate Code § 15306. Liability for public support

§ 15306. (a) Notwithstanding any provision in the trust instrument, if a statute of this state makes the beneficiary liable for reimbursement of this state or a local public entity in this state for public support furnished to the beneficiary or to the beneficiary's spouse or minor child, upon petition to the court under Section 709.010 of the Code of Civil Procedure by the appropriate state or local public entity or public official, to the extent the court determines it is equitable and reasonable under the circumstances of the particular case, the court may do the following:

(1) If the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, order the trustee to satisfy all or part of the liability out of all or part of the payments as they become due, presently or in the future.

(2) Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, order the trustee to satisfy all or part of the liability out of all or part of the future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary.

(3) If the beneficiary is a settlor or the spouse or minor child of the settlor and the beneficiary does not have the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, to the extent that the trustee has the right to make payments of income or principal or both to or for the beneficiary pursuant to the exercise of the trustee's discretion, order the trustee to satisfy all or part of the liability without regard to whether the trustee has then exercised or may thereafter exercise the discretion in favor of the beneficiary.

(b) Subdivision (a) does not apply to any trust that is established for the benefit of an individual who has a disability that substantially impairs the individual's ability to provide for his or her own care or custody and constitutes a substantial handicap. If, however, the trust results in the individual being ineligible for needed public social services under Division 9 (commencing with Section 1000) of the Welfare and Institutions Code, this subdivision is not applicable and the provisions of subdivision (a) are to be applied.

Comment. Section 15306 continues Section 15306 of the repealed Probate Code without substantive change. This section is drawn from Wisconsin law. See Wis. Stat. Ann. § 701.06(5)-(5m) (West 1981).

Subdivision (a) is generally consistent with prior California law which permitted a state institution in which the beneficiary of a spendthrift trust was an inmate to reach the beneficiary's interest. See Estate of Lackmann, 156 Cal. App. 2d 674, 678-83, 320 P.2d 186 (1958) (citing Restatement of Trusts § 157). Section 15306 applies to reimbursement for public support provided in the form of aid furnished to an individual who is not in an institution as well as aid furnished while the individual is a resident of a state institution. See, e.g., Welf. & Inst. Code §§ 903 (liability for support of minor under order of juvenile court), 17403

(liability for support of indigent from public funds). However, subdivision (a) of Section 15306 makes clear that the state or local agency has the right to reach the beneficiary's interest for reimbursement of support provided to the spouse or minor child of the beneficiary.

Subdivision (b) limits the right of the state or a local agency to reach the beneficiary's interest in welfare cases where the trust was established to provide for the care of a disabled beneficiary who is unable to provide for his or her own care or custody. This limitation is intended to encourage potential settlors to provide in a trust for the care or support of a disabled person without the risk that the benefits of the trust will be taken to reimburse a public agency for a minimal level of support provided by the public agency. However, this rule is subject to the exception provided in the last sentence of subdivision (b).

For general provisions relating to petitions and other papers, see Sections 1020-1023, 17201; see also Sections 1021 (petition to be verified), 1041 (clerk to set petition for hearing). For general provisions relating to notice of hearing, see Sections 1200-1221, 15802-15804, 17100-17105, 17203-17205; see also Sections 1260-1265 (proof of giving notice). For general provisions relating to hearings and orders, see Sections 1040-1050, 17000-17006, 17201-17202, 17206-17207; see also Section 15308.

Background on Section 15306 of Repealed Code

Section 15306 was a new provision added by 1986 Cal. Stat. ch. 820 § 40. The section was amended by 1989 Cal. Stat. ch. 748 § 2 to add the last sentence to subdivision (b). For background on the provisions of this division, see the Comment to this division under the division heading.