

First Supplement to Memorandum 91-51

Subject: Study L-708 - Deposit of Money of Minor or Incompetent Person
in Special Needs Trust (Letters from LA Bar and
Sterling Ross)

Exhibit 1 is a letter from Carol Reichstetter for the Executive Committee of the Probate Section of the LA Bar supporting the proposal of Edmond Davis to restore the "trust company" language to Probate Code Sections 3602 and 3611. Exhibit 1 impliedly rejects the staff recommendation to adopt the Uniform Custodial Trust Act.

Exhibit 2 is a letter from Sterling Ross. He agrees with staff that the "trust company" language of prior law may have been insufficient to authorize special needs trusts, and agrees that the law should permit them. He says the Uniform Custodial Trust Act is not the way to do it. He would amend Section 3611 to allow courts to order that money of a minor or incompetent person be paid to a trust. He asks that we delay action on this proposal until the State Bar can talk to the bankers and develop language to recommend to the Commission. The staff thinks this is a good approach, and recommends it.

In developing a proposal, these questions should be addressed: Who will nominate the trustee? Who will draft the terms of the trust instrument? Will the court approve the person or institution nominated as trustee, and review and approve the trust instrument? What standards will the court use to do this? What will the investment powers of the trustee be? Will they be the same as under Trust Law?

Under Trust Law, a trustee has extensive statutory powers, subject to restriction or expansion in the trust instrument. Prob. Code §§ 16200-16249. A trustee may invest in any kind of property. *Id.* § 16223. A trustee without court approval may deposit funds in a fully insured or fully collateralized account in a financial institution, and with court approval may deposit funds greater than the insured or collateralized amount. *Id.* § 16225.

Respectfully submitted,

Robert J. Murphy III
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July 23, 1991

VIA FACSIMILE AND U.S. MAIL

Robert J. Murphy, III
Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Re: Study L-400 - Deposit of Money of Minor or
Incompetent Person in Special Needs Trust

Dear Mr. Murphy:

The Executive Committee of the Probate and Trust Law Section of the Los Angeles County Bar Association has had an opportunity to review the correspondence from Edmond R. Davis to Judge Marshall dated June 13, 1991. The Executive Committee's response was to strongly support Mr. Davis' proposal that the "trust company" language be added to Probate Code Sections 3602 and 3611.

Unfortunately, I have not had an opportunity to circulate and obtain comments on the Staff recommendation to adopt the Uniform Custodial Trust Act or on Mr. Davis' recent response. Accordingly, I can take no position on this proposal on behalf of the Executive Committee at this time.

Thank you for your consideration of these comments. I expect to attend the July meeting and would be glad to answer any questions that may arise.

Very truly yours,


Carol A. Reichstetter

cc: Members of the Executive Committee

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July 22, 1991

SENT BY FAXValerie J. Merritt
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Los Angeles, CA 90071-2498

RE: Memorandum 91-51

Dear Valerie:

I am very pleased that the LRC is taking a close look at Probate Code 3600 et. seq. but am suspicious of the LRC's motives.

There is a critical need for legislation which permits a court to direct the proceeds of litigation otherwise payable to a minor or incapacitated person to a trust. Properly drawn, the trust offers the following advantages, among others, to a court-blocked account, guardianship or conservatorship:

1. Public benefits may be maintained. Assets held in a court-blocked account, guardianship or conservatorship are all considered "available" for SSI, Medi-Cal, Regional Center reimbursement, and other purposes. As you know, a recipient of either SSI or Medi-Cal cannot have more than \$2,000 in countable resources.

2. Assets held in a court-blocked, guardianship or conservatorship are subject to probate on the minor/disabled person's death. Assets in trust, of course, pass without probate.

3. Administration of assets in trust can be substantially less expensive and more flexible than the court-blocked account, guardianship or conservatorship alternatives. I have worked with courts throughout California in structuring such trusts and most are very willing to minimize the extent of court involvement. Unlike guardianships and conservatorships, the trust may allow the trustee to invest without court approval, change trustees without court approval, sell real estate, pay fees, etc. In most instances, the courts will require periodic accountings which, for bonding purposes, is generally necessary.

Even in its pre-amended form, however, there was real uncertainty as to whether courts had the power to do what we commonly have done. Fortunately, none of the courts I have dealt with have read section 3611 carefully.

On the other hand, there is no need to resurrect the Uniform Custodial Trust Act to remedy the problem. Jim Quillinan discusses the many problems with the Act in his excellent analysis appearing as Exhibit 3 to the Memorandum. I suspect that the LRC sees this as an opportunity to bring the Uniform Act to California through the back door. Jim points out, however, that even its limited use for disabled persons causes problems with respect to eligibility for public benefits.

In my view, all that needs to be done is a revision of section 3611 that would allow the court to direct disposition of money to a trust. I am sure that we can obtain the support of the bankers in this regard and develop some language to recommend to the LRC.

I suggest that we ask the LRC to hold any Tentative Recommendation until we have had the chance to talk about this with the bankers. It would be very damaging to have a TR released with a half-baked Uniform Act approach. On the other hand, the LRC should not abandon this project.

I will be out of the office until August 5th and will give you a call on my return.

Thanks for your help. Good luck.

Very truly yours,

Sterling L. Ross, Jr.

Sterling L. Ross, Jr.

SLR:emp

cc: Bob Temmerman

a:vm72191.mis