

Second Supplement to Memorandum 91-51

Subject: Study L-708 - Deposit of Money of Minor or Incompetent Person
in Special Needs Trust (Memo from Edmond Davis)

Exhibit 1 is a memo from Edmond Davis. Mr. Davis originally asked the Commission to study special needs trusts. He urges the Commission to reject the staff recommendation to develop a statute for special needs trusts drawn from the Uniform Custodial Trust Act. His view in this respect is the same as that of Sterling Ross and the Executive Committee of the LA Bar Probate Section.

Mr. Davis apparently still wants to restore the repealed "trust company" language to Probate Code Sections 3602 and 3611. He cites *Christensen v. Superior Court*, 193 Cal. App. 3d 139, 239 Cal. Rptr. 143 (1987), for the proposition that the "trust company" language of those sections did authorize the court to approve creation of a special needs trust. But the *Christensen* case did not involve the "trust company" language. The court held the trial court should not have rejected the parent's proposal to buy two-year CDs with the minor's settlement money.

Nor does the dictum in *Christensen* support court discretion to create a trust: The court said subdivision (b) of Section 3611

. . . does not expressly grant discretion to the court to impose conditions beyond those described in the statute on the deposit of a minors' money. *Christensen* contends this omission shows legislative intent to leave all other details to the discretion of the parent, as trustee.

We are reluctant to adopt her position.

The staff reaffirms the recommendation in the First Supplement to delay action on this proposal until the State Bar can talk to the bankers and develop language that will more clearly authorize special needs trusts than the repealed "trust company" language.

Respectfully submitted,

Robert J. Murphy III
Staff Counsel

JUL 24 1991**RECEIVED**MEMORANDUM 91-51

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

TO: Law Revision Commission Members

FROM: Edmond R. Davis

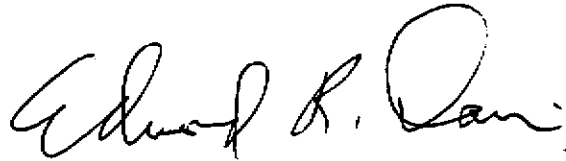
I have received Memorandum 91-51 prepared by the staff of the Law Revision Commission, relating to the above-mentioned subject. I believe a few comments will be helpful to the Commission Members in considering restoring the language to Probate Code Sections 3602(c)(1) and 3611(b) so that deposits in trust companies would be authorized as an alternative. Although there is no appellate decision directly on point of which I am aware, a number of the Superior Courts in this state have determined that the establishment of special needs trusts in connection with the settlement of personal injury claims was authorized under former Probate Code Section 3611. The court orders in those matters approve the settlement, the use of the special needs trust, and the terms of the special needs trust. There is one case reported under Probate Code Section 3611, Christensen v. Superior Court 193 Cal.App.3d 139, 239 Cal.Rptr. 143 (1987). In that case, the Court of Appeal decided that the Superior Court has flexibility to achieve the purposes of Probate Code Section 3611.

Contrary to the comments in the staff Memorandum, the Uniform Transfers to Minors Act is no substitute for a special needs trust. The situations where special needs trusts arise for minors are often cases where the minor is severely handicapped and will never be competent to handle his or her own financial affairs or personal needs. As you know, the Uniform Transfers to Minors Act is time limited. Also as noted in the Memorandum, one of the goals of the special needs trust is to preserve the availability of public benefits for the severely handicapped person. It is likely that assets held under the Uniform Transfers to Minors Act would not accomplish this purpose. Similarly, depositing funds for an adult incompetent person under the Uniform Custodial Trust Act would likely not accomplish this purpose. One of the basic issues in the use of special needs trusts probably is the concept of "constructive receipt". It seems quite clear that assets placed in a trust under the Uniform Custodial Trust Act would be considered as having been constructively received by the injured party.

The concept of the special needs trust, as pointed in the article by Prenskey & Ross referred to in the Memorandum, is that the assets of the special needs trusts are intended to supplement, and not replace, public benefits. The special needs trust is not a support and maintenance trust. Under the statutes and regulations relating to public benefits, the public benefits usually are designed to provide basic support and medical care. However, as will be explained in more detail at the meeting of

the Law Revision Commission, the public benefits provided in many cases are not adequate to meet the special needs of the injured person.

It is our belief that the Superior Court should have the discretion and flexibility, in the appropriate case, to approve the use of a special needs trust in connection with the settlement of a personal injury claim of a minor or incompetent adult person. It is not every case where the special needs trust will be appropriate. We believe this decision is properly left to the discretion of the court, and that the language that permits such discretion should be restored to the statutes.

A handwritten signature in cursive script, reading "Edward R. Davis". The signature is written in dark ink and is positioned to the right of the main text block.