

#L-708

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09/11/91

First Supplement to Memorandum 91-55

Subject: Study L-708 - Special Needs Trust for Disabled Minor or
Incompetent Person (Letter From Terry Ross)

Exhibit 1 is a letter from Terry Ross reemphasizing his opposition to allowing public entities to assert claims for reimbursement against a special needs trust after the death of the beneficiary. He would not make a special rule for trusts created for proceeds of judgment or settlement for a minor or incompetent person. He prefers to deal with the problem comprehensively for all trusts. If such a rule is to be enacted, he thinks it should go with other enforcement provisions in the Welfare and Institutions Code, not in the Probate Code.

Respectfully submitted,

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September 10, 1991

Of Counsel:
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SENT BY FAX

California Law Revision Commission
4000 Middlefield Road, Suite D-2
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Attn: Robert J. Murphy III

RE: Memo 91-51: Deposit of Money of Minor or
Incompetent Person in Special Needs Trusts
(Probate Code §3600 at seq.)

Dear Bob:

This is in response to your request for additional information concerning my position on the proposed amendments to Probate Code §3600 at seq.

The State Bar Ex Comm has not had an opportunity to discuss 91-51 so my comments are only my own. I have been assigned by Ex Comm to communicate its views and will do so shortly after our meeting of September 16th.

As you are aware, I oppose the addition of any language to §3600 at seq. which would empower public agencies to assert claims against trusts established pursuant to this section. As I understand the Commission's view, it wants to insert provisions enabling public agencies to be reimbursed from §3600 trusts after the death of the disabled beneficiary.

Existing law (discussed below) already contains provisions allowing public entities to pierce the spendthrift protections of such trusts in certain situations. If the LRC believes these laws are insufficient, then a further study ought to be conducted involving the various public agencies and departments affected. Representatives of groups for the disabled, of course, should also be included.

In addition, creditors remedies must apply consistently to all trusts, not just those established under §3600. If the Commission believes existing law needs revision in this area, it must look at the entire pattern of public agency remedies against trusts. Giving creditors of trusts established under §3600 greater or lesser rights than creditors of other trusts fosters the piecemeal approach to legislative reform which the LRC is trying to avoid.

For example, any legislation affecting creditors rights in §3600 trusts should also apply to the substituted judgment provisions of the conservatorship law (Probate Code §2580 et seq.) As you are aware, §3600 gives the court approving the compromise or judgment of a minor's or incompetent's claim the right to direct handling of the funds in a form other than a guardianship or a conservatorship (such as a court-blocked account or trust). It is possible, however, that when the lawsuit was settled no special provision was made for disposition of the funds and they were paid directly to a conservator.

Under substituted judgment, the court might approve a transfer of the assets held in conservatorship to the trustee of a special needs trust. The ultimate result is the same but the legislative avenues were different. Unless the same creditors' rights language is made applicable to the substituted judgment situation, we may have similar trusts governed by different rules. Once again, this highlights the fundamental problem that creditors remedies must apply to all trusts, not simply those established under the narrow provisions of §3600.

Although it is by no means exhaustive, the following is a summary of existing law and practice in this area as I understand it.

Subdivision (b) of Probate Code §15306 limits the state's right to reach the beneficiary's interest in a trust that was specifically established to provide care for a disabled person who is unable to provide for his or her own care.

The last sentence of subdivision (b) narrows this protection:

If, however, the trust results in the individual being ineligible for needed public social services under Division 9 (commencing with Section 10000) of the Welfare and Institutions Code, this subdivision is not applicable and the provisions of subdivision (a) are to be applied.

Subdivision (a) sets forth procedures under which the state is permitted to reach the beneficiary's interest in a trust if the beneficiary resides in a state institution.

The term "public social services" as defined in Division 9 means those activities and functions of the state and local government administered by the State Department of Health Services for financially needy persons and principally refers to Aid to Families with Dependent Children (§§11200 -- 11507), State Supplementary Program for Aged, Blind and Disabled (§§12000 -- 12401) and Medi-Cal (§§14000 -- 14196).

The "public agencies" most likely to assert claims against a disabled beneficiary of a special needs trust are the state "development centers" for the developmentally disabled and mentally ill (formerly called state hospitals). If a development center

resident receives Medi-Cal, the federal government pays a substantial share of the development center costs. Historically, if the beneficiary of a special needs trust were eligible for Medi-Cal, the state has not been aggressive in pressing claims against such trusts for the obvious reason that federal funds are largely paying for the costs of care.

If, however, the resident is not receiving Medi-Cal, the state will seek reimbursement for the costs of care from a trust established for the resident. The last sentence of 15306(b) permits this action. Such claims are generally asserted during the beneficiary's life and often result in regular payments from the trust to the state for the cost of care.

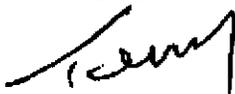
If the trustee is interested in avoiding such claims, obtaining Medi-Cal for the beneficiary is one solution. This usually requires a court order ruling that the trust corpus is not available to pay for the beneficiary's medical needs. In some cases the trustee may be able to obtain such an order, and in others he or she may not. In either event, the state's interest in obtaining payment for the costs of care is protected.

The next question is whether Medi-Cal, having paid for the beneficiary's cost of care in a development center, can recover such payments from the trust. Welfare and Institutions Code §14009.5 provides that "when a decedent has received health care services...the department may claim against the estate of the decedent, or against any recipient of the property of that decedent by distribution or survival an amount equal to the payments for the health care services received." The department may not assert a claim, however, (1) if the eligible person was under 65 when services were received, (2) there is a surviving spouse, or (3) there is a surviving child under 21 or who is blind or permanently disabled.

§14009.5 further states that the department may waive its claim, in whole or in part, if it determines that the enforcement of the claim would result in substantial hardship to other dependents, heirs, or survivors of the individual against whose estate the claim exists.

I am unaware whether Medi-Cal is dissatisfied with the foregoing provision. If so, and if the LRC believes that this is an issue which it wants to tackle, then the above statutes, not §3600, appear to be the place to focus its efforts.

Very truly yours,



Sterling L. Ross, Jr.

SLR:emp

cc: Valerie Merritt
Bob Temmerman