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June 2000

**CONSERVATORSHIP, TRUSTS AND WILLS
FOR PEOPLE WITH DEVELOPMENTAL
OR OTHER DISABILITIES
— A GUIDE FOR FAMILIES**

STERLING L. ROSS, JR., ATTORNEY AT LAW

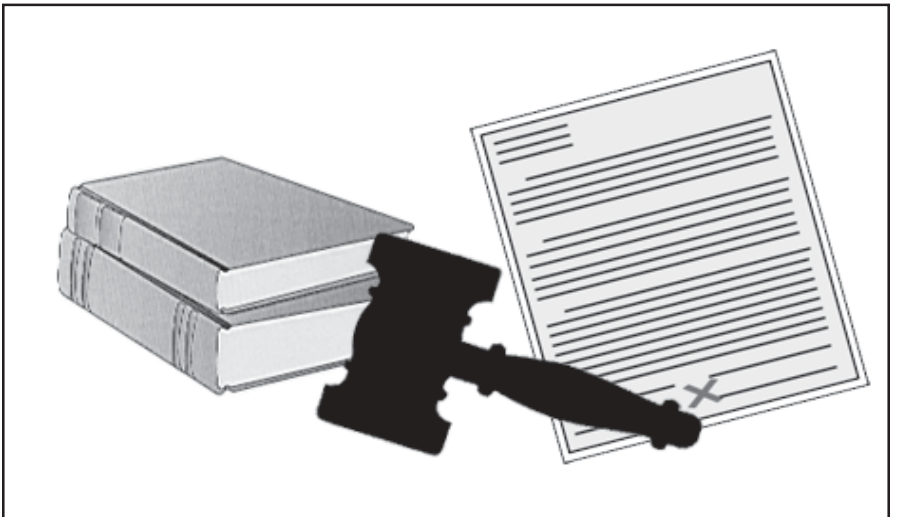
COMMISSIONED BY

ASSOCIATION FOR RETARDED CITIZENS-CALIFORNIA

6TH EDITION

REVISED IN PART AND PRINTED BY

Disability Rights California



ASSOCIATION FOR RETARDED CITIZENS-CALIFORNIA (ARC-C) is a non-profit, public benefit corporation founded over thirty years ago by concerned parents and friends of people with mental retardation. ARC-C represents over 30,000 members in local member units in more than 65 California locations. Through the years, ARC-C's primary thrust has been to represent progressive public policy to its membership, the Legislature, government officials, and other voluntary health and human service organizations. In addition to legislative advocacy, ARC-C provides technical assistance and services to local units, and serves as an information exchange forum through its various publications, seminars, meetings, workshops, and the annual state convention. For additional information, contact:

ASSOCIATION FOR RETARDED CITIZENS-CALIFORNIA (ARC-C)

1228 - 8th Street, Suite 590

Sacramento, CA 95814

(916) 552-6619



FORWARD

This handbook has been prepared by the Association for Retarded Citizens-California (ARC-C), formerly the California Association for the Retarded (C.A.R.) prior to changing its name on February 5, 1981.

The legal research and analysis for the first edition was conducted by Sterling L. Ross, Jr., Attorney at Law, pursuant to a contract with ARC-C. Mr. Ross has assisted numerous families with disabled family members during his nearly 20 years of private practice principally in San Francisco and Marin counties. Mr. Ross was the first Staff Attorney for the C.A.R. and served from 1971 through 1973.

This handbook is designed to present complex legal issues in the areas of conservatorship and limited conservatorship, and special needs trusts, and to do so in language which can be understood by the "average California reader." Because of the general audience for whom this handbook has been designed, the drafters have used language focusing on citizens who are "mentally retarded" and "developmentally disabled" and their "parents"; however, the **legal** scope is often broader. Changes in the laws effective January 1, 1996, have been included in these materials.

A glossary of legal terms frequently used in this area of the law is included, starting on the back page. Please review it prior to reading the handbook so that it can be helpful as a reference.

Legal references and detailed explanations have been omitted purposely. The reader must remember that this handbook is intended to raise issues and questions which must be considered when one explores the possibility of conservatorship, limited conservatorship, a will or a trust.

If there are any questions about the applicability of the contents of this handbook to individual situations, the reader should seek the advice of an attorney.

CHAPTER 1

CONSERVATORSHIP, GUARDIANSHIP AND LIMITED CONSERVATORSHIP

DEFINITION OF TERMS

WHAT IS CONSERVATORSHIP?

Conservatorship is a legal proceeding in which an individual or agency (to be known as the “conservator”) is appointed by a court to be responsible for a person who needs assistance in activities of daily living (the “conservatee”). A **conservator of the person** must ensure that the conservatee is properly fed, clothed and housed. A **conservator of the estate** is responsible for managing the conservatee’s money and other property. One individual may serve as either conservator of the person or conservator of the estate or both. Conservatorship applies to an adult, i.e., a person eighteen (18) years of age or older.

Before the court will grant a petition for the appointment of a personal conservator, it must be shown that the proposed conservatee is unable to provide properly for his or her personal needs for physical health, food, clothing or shelter. A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources, or to resist fraud or undue influence.

WHAT IS GUARDIANSHIP?

Since January 1, 1981, guardianship applies **only** to minors, i.e., persons under the age of eighteen (18) years. The principal purpose of guardianship is to provide protection for a child who has no parent.

Before 1981, guardianship applied to adult disabled persons and was very similar to conservatorship. Any guardianship for a disabled person in effect as of January 1, 1981, **automatically** became a conservatorship if the subject of the guardianship was over the age of 18 on January 1, 1981. This change in guardianship was part of a sweeping revision of California's guardianship and conservatorship laws.

Since general conservatorship and limited conservatorship are the only protective legal arrangements for disabled adults after 1981, this handbook will include no further discussion of guardianship.

WHAT IS LIMITED CONSERVATORSHIP?

Limited conservatorship is a form of general conservatorship and applies only to adults who are "developmentally disabled" as defined in state law,¹

¹ "Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual. This term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also

and who are, or could be, clients of California's regional centers serving developmentally disabled citizens. This protective legal arrangement is "limited" because the adult with developmental disabilities retains the power to care for himself or herself and/or to manage his or her financial resources commensurate with his or her ability to do so, as determined by the court. A limited conservatorship is used to promote and protect the well being of the individual and is designed to encourage the development of maximum self-reliance and independence.

QUESTIONS ABOUT CONSERVATORSHIP

WHY IS CONSERVATORSHIP IMPORTANT?

If you are the parent of an **adult** child who is developmentally disabled, conservatorship may provide you with the authority to speak on behalf of your son or daughter, or to play a role in his or her care, which you would not otherwise have.

As the parent of a minor child, you are the natural guardian and possess generally the same powers and authority as a court-appointed guardian. When your child reaches the age of majority, he or she

include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature. (Welfare and Institutions Code § 4512.)

becomes emancipated from parental control. The law **presumes** that the individual, regardless of handicapping condition, is capable of exercising the rights of an adult.

When a developmental or mental impairment limits an adult's capacity to exercise his or her rights, the person may need someone else to exercise certain rights on his or her behalf. Conservatorship would enable the parent to act on behalf of the person subject to periodic reviews by the court.

Conservatorship is most important when consent is required for a particular act, and a person with mental retardation or other developmental disability is unable to give it. For example, the "informed consent" of a patient is required before an operation can be performed. If the patient is a **minor** with mental retardation or other developmental disability, physicians and hospitals will generally accept the consent of the parent. If the patient is an **adult** with mental retardation or other developmental disability, parental consent frequently is **not** accepted unless the parent is also the patient's conservator. Without requesting a conservatorship, a parent may petition a court for authorization to give consent to medical treatment. Additionally, in some situations, the director of a regional center may consent to medical treatment for a regional center client.

The powers and duties of the conservator will be set forth in the order of appointment and statutory law. A clear understanding of the effect of these powers and duties is important when dealing with public

agencies and managers of residential and day programs. For instance, the parent conservator may have to be notified of and approve proposed changes in residence, education or habilitation services.

HOW CAN I DETERMINE IF A CONSERVATORSHIP IS NECESSARY?

The decision whether or not to seek conservatorship will depend on the facts of your individual case, and you should seek the advice of counsel. Some questions you should ask to determine whether a conservatorship is necessary are:

1. What decisions affecting the financial well being of the individual with developmental disabilities is he or she unable to make? Can these decisions be made effectively through means other than the creation of a conservatorship? For example, if the individual's income is limited to SSI, money management may be accomplished through a representative payee.

2. Is the adult who is mentally retarded or developmentally disabled able to provide properly for his or her own personal needs for physical health, food, clothing or shelter?

3. Will a family doctor continue to accept parental consent for medical treatment for a child who is mentally retarded or developmentally disabled, even though that child is an adult?

4. Does the regional center serving the developmentally disabled person recommend conservatorship?

HOW IS CONSERVATORSHIP ESTABLISHED?

The conservatorship proceeding begins by filing a petition with the proper court, usually the Superior Court of the county in which the proposed conservatee resides. Notices of hearing and a copy of the petition must be mailed to certain persons and agencies at least 15 days before the hearing and a document, known as a citation, must be personally presented to the proposed conservatee.

The proposed conservatee must attend the hearing unless he or she is (1) out of the state when served, (2) certified as **medically** unable to do so, or (3) unwilling to attend and does not oppose the petition. Whether or not the proposed conservatee attends the hearing, a court investigator must interview the proposed conservatee and, among other things, inform him or her of the nature of the proceedings and determine whether the individual is able to attend the hearing, wishes to contest the conservatorship, objects to the proposed conservator, or wishes to be represented by legal counsel. This requirement of an investigation and report does not apply if the proposed conservatee will attend the hearing and is the person who executed the petition for conservatorship or who nominated his or her own conservator.

The statutes do not require that a person seeking a conservatorship be represented by an attorney. However, in view of the complexity of court procedures and rules, as well as recent changes in the law, the parties may wish to retain counsel in these matters.

Once established, a probate conservatorship need not be renewed but continues until the death of the conservatee or until otherwise terminated by order of the court. The death of a limited conservator terminates the relationship of limited conservator/limited conservatee. To fill the vacancy, a petition for appointment of a successor limited conservator must be filed.

Within 90 days after appointment, all conservators must file with the court and the court investigator a general plan detailing how the personal and financial needs of the conservatee will be met. Notice of the filing of the plan must be given to all those who received notice of the original petition. The court has the option of scheduling a hearing if it determines that the plan is not in the best interests of the conservatee or if it receives objections to the plan within 30 days after mailing the notice of filing.

If the conservatorship includes estate management, an accounting must be filed with the court at the end of the first year after appointment and every two years thereafter. Whether or not an accounting is required, the court investigator must interview the conservatee again on or about the anniversary of the establishment of the conservatorship and every other year thereafter. The purpose of the interview is essentially to determine whether the conservatorship continues to be necessary and whether the conservator is acting in the best interests of the conservatee. The investigator's report is forwarded to the court with a copy to the conservator or to his or her attorney. The investigator may visit persons other

than the conservatee to determine whether the conservator is acting in the conservatee's best interests. Conservatees are charged the cost to the county of the initial investigation and all subsequent periodic investigations. However, if the conservatee does not have sufficient funds to pay this cost, or if it would pose a hardship, the court will waive this charge.

WHO MAY ACT AS CONSERVATOR?

Any individual who is an adult may be a conservator if the court is convinced that the person would act in the best interests of the conservatee. If there is competition for the position and the applicants are equally qualified, the law prefers the following persons in the order listed: nominee of the proposed conservatee, spouse of the proposed conservatee, adult child of the proposed conservatee, parent of the proposed conservatee, brother or sister of the proposed conservatee. Private professional conservators may also serve in this capacity, as long as they file a background statement annually about the person(s) who perform the conservatorship services.

A non-profit corporation may serve as conservator of the person or estate, **or both**, if the articles of incorporation authorize the organization to accept such appointments and the corporation has been providing care, counseling or financial assistance to the proposed conservatee under the supervision of a licensed social worker.

Two or more persons may serve as joint conservators. Because a majority of the conservators must join in any action, it is often cumbersome to have more than two conservators. The advantage of having more than one conservator is that, if one should die, the other may continue to act without the necessity of filing another petition for the appointment of a new conservator.

AT WHAT POINT SHOULD I CONSIDER CONSERVATORSHIP?

Parents may wish to seek the advice of an attorney regarding conservatorship on two occasions: (1) when the child who is mentally retarded or developmentally disabled has reached (or is nearing) 18 years of age, and (2) when the parents are writing their wills.

Conservatorship planning as a child reaches the age of 18 is important for the reasons already discussed. When drafting wills, one should consider conservatorship in the event that the person who is disabled will require supervision after the parents have died. If so, the will may be used to nominate a conservator to be appointed upon the death of both parents. Though the nomination is not legally binding, courts will make every effort to honor it unless convinced that conservatorship is unnecessary or that the person nominated would not act in the best interests of the proposed conservatee.

HOW DO I FIND AN ATTORNEY KNOWLEDGEABLE IN THIS FIELD?

Contact your local Association for Retarded Citizens (ARC). Most associations are familiar with the attorneys in their area who have had experience in advising parents with children who are mentally retarded or developmentally disabled. If you are still unsuccessful, many municipal and county bar associations have a lawyer referral panel.

MAJOR CHANGES IN CONSERVATORSHIP RESULTING FROM PROBATE CODE AMENDMENTS OF 1979 AND 1980

A. LIMITED CONSERVATORSHIP

WHAT POWERS ARE LIMITED?

Like a general conservator, a limited conservator has the care, custody and control of the limited conservatee except that, **unless specifically requested** in the petition and granted in the court's order, a limited conservator **does not have** any of the following powers or controls:

1. To determine the limited conservatee's place of residence;
2. To have access to the limited conservatee's confidential records;
3. To control the limited conservatee's right to marry;

4. To control the limited conservatee's right to contract;

5. To give consent for the limited conservatee's medical treatment;

6. To control the limited conservatee's social and sexual contacts and relations;

7. To make decisions concerning the limited conservatee's education.

However, each limited conservator is required to secure for the limited conservatee such habilitation or treatment, training, education, medical and psychological services, and social and vocational opportunity as appropriate and as will assist the limited conservatee in the development of maximum self-reliance and independence.

Any time a conservatorship petition alleges that the proposed conservatee lacks the capacity to give informed consent to medical treatment and asks that the court give the proposed conservator exclusive power in that domain, the petition must be accompanied by a medical doctor's declaration which states that the proposed conservatee lacks the capacity to give informed consent to any form of medical treatment. In addition, a limited conservator of the estate has authority to manage only those assets of the limited conservatee which are listed in the order of appointment.

WHAT ROLE DOES THE REGIONAL CENTER PLAY IN LIMITED CONSERVATORSHIPS?

In every conservatorship involving a person who is developmentally disabled (subject to the consent of the proposed limited conservatee) the appropriate regional center must perform an assessment of the proposed conservatee and submit a report to the court. The report must specify the nature and degree of the proposed conservatee's disability and the areas in which the proposed conservatee may need assistance. The costs of these assessments will be borne by the regional center. At least five days before the hearing, a copy of the regional center's report must also be sent to the proposed conservatee and to the petitioner and/or to any attorneys representing the parties.

MAY A GENERAL CONSERVATOR, RATHER THAN A LIMITED CONSERVATOR, BE APPOINTED FOR A PERSON WHO IS DEVELOPMENTALLY DISABLED?

Yes. The court has the discretion to establish a general conservatorship for a developmentally disabled adult who lacks the capacity to perform "all of the tasks necessary to provide properly for his or her own personal needs for physical health, food, clothing, or shelter, or to manage his or her own financial resources." If the court finds that the proposed conservatee lacks the capacity to perform some, **but not all**, of the tasks necessary to provide properly for

his or her own needs for physical health, food, clothing, or shelter, or to manage his or her own financial resources, the court has no discretion to establish a general conservatorship - a limited conservatorship must be established.

DID EXISTING CONSERVATORSHIPS FOR PERSONS WITH DEVELOPMENTAL DISABILITIES BECOME LIMITED CONSERVATORSHIPS AFTER JANUARY 1, 1981?

No. General conservatorships involving persons with developmental disabilities did not automatically become limited conservatorships after January 1, 1981. Many of the advantages of limited conservatorship, including flexibility in determining which rights and responsibilities may be affected by an order of the court, are available under the general conservatorship laws.

B. GENERAL CONSERVATORSHIP

DID THE NEW LAW CHANGE THE POWER AND AUTHORITY OF AN EXISTING CONSERVATOR?

1. Consent to Treatment — Since January 1, 1981, a conservator does not have the power to consent to medical treatment on behalf of the conservatee unless a court order is obtained which authorizes substituted consent. The only exception to this rule is that consent may be given without a court order if the conservatee **does not object** to the proposed treatment.

The order authorizing substituted consent may be one which finds the conservatee incapable of giving consent to any form of treatment and transfers the sole power of consent to the conservator. Such an order need be obtained only once since it applies to all forms of permitted treatment. If the conservatee is capable of consenting to some forms of treatment but not others, then the conservator must wait until treatment is required and obtain an order relating to the specific form of treatment proposed.

Under the Due Process Incompetence Determinations Act, effective in 1996, a person has the capacity to give informed consent to medical treatment if the person is able to do all of the following:

- (a) Respond knowingly and intelligently to questions about medical treatment.
- (b) Understand the nature and seriousness of the illness that the person has.
- (c) Understand the nature of the medical treatment that is being recommended by the health care provider.
- (d) Understand the probable degree and duration of any benefits and risks of the medical treatment that is being recommended and the consequences of lack of treatment.
- (e) Understand the nature, risks and benefits of any reasonable alternatives.

Of course no conservator may give consent to treatment which would be harmful to the conservatee. Also, the law **prohibits** either a conservator or a court from authorizing electro-shock therapy, psycho-

surgery, or the administration of certain experimental drugs. Sterilization may occur in the context of a limited conservatorship but only under certain narrow circumstances. Sterilization cannot occur in any instance where it is determined that the individual knowingly opposes sterilization. Even absent this opposition, for a sterilization to occur, a special procedure must be followed which involves many protections for the limited conservatee. These protections include: mandatory appointment of counsel for the limited conservatee, appointment of a “facilitator” to assist the limited conservatee, assembly of a special panel of experts to personally interview the limited conservatee and make a recommendation to the court, and investigation by the appropriate regional center.

2. Contractual Capacity — Since January 1, 1981, a conservatee cannot enter into contracts or other financial transactions in excess of necessary expenses for food and clothing. To see the significance of this change, it is necessary to review briefly the nature of conservatorship prior to January 1, 1981.

Previously, there were two forms of conservatorship: one in which the conservatee was adjudicated incompetent and one in which he or she was not. Contracts for conservatees who were declared incompetent were **void** and could not be enforced regardless of the circumstances surrounding the transaction. The financial dealings of conservatees not found incompetent were enforceable if these dealings were in the conservatee’s best interests.

Limited conservatorship did not exist prior to 1981. The power of limited conservatees to contract is not inhibited, unless, and only to the extent that, the court transfers the power to contract to the limited conservator at the hearing on the petition.

For adults under guardianships existing prior to January 1, 1981, and for conservatees found to be incompetent, the new law brought no major change in contractual capacity since, under both the pre- and post-1981 statutes, such persons' financial dealings are unenforceable, except for necessities.

Conservatees who were not declared incompetent prior to January 1, 1981, were **automatically** deprived of the right to make gifts or to enter into binding contracts after that date. The result is especially harsh for elderly persons with substantial assets who possess both the capacity and desire to make gifts while living but who are under conservatorship.

The only way a competent conservatee may retain the right to enter into contracts is to obtain an order from the Superior Court. The procedure for obtaining such an order is set out in the 1981 statute.

If you have questions about the applicability of changes in the conservatorship law to your individual situation, you should seek the advice of an attorney.

CHAPTER 2

WILLS AND TRUSTS

SHOULD PARENTS EXCLUDE A SON OR DAUGHTER WHO IS DEVELOPMENTALLY DISABLED FROM SHARING IN THEIR ESTATE?

One of the primary goals of estate planning for a family with a child or family member who is mentally retarded or developmentally disabled is to ensure that, after the death of both parents, the person who is handicapped continues to receive basic support and maintenance from public sources. This interest in public benefits, of course, is caused by the inability of most parents to pay the staggering cost of lifetime care for a family member with handicaps.

The major source of public support for persons unable to maintain themselves by competitive employment is Supplemental Security Income (SSI). Existing regulations prohibit an SSI recipient from having non-exempt resources in excess of \$2,000.

To facilitate SSI eligibility, parents might simply exclude a child or family member who is developmentally disabled from their will. Complete reliance on public benefits requires confidence that such funds will continue to be available for the life of the recipient and will adequately pay for all basic needs.

Because public assistance programs are exceedingly vulnerable to changing political currents and may not pay for certain essential needs, outright

exclusion of the child who is handicapped from the parents' wills is generally not advisable.

IS THERE A WAY PARENTS CAN LEAVE MORE THAN \$2,000 TO A CHILD AND NOT MAKE THE CHILD INELIGIBLE FOR SSI?

Yes. Under the Social Security Program Operations Manual, any funds held for an individual in a discretionary (special needs) trust are not an includable resource to the beneficiary and, therefore, are not included in the \$2,000 resource limitation. To qualify, the beneficiary must not be able to revoke the trust or to control the amount or frequency of distributions from the trust. It is also recommended that the trustee's discretion regarding distributions apply to trust income. If all income must be distributed periodically, SSI benefits may be either reduced or terminated.

WHAT HAPPENS TO SSI BENEFITS WHEN FUNDS FROM THE TRUST ARE DISTRIBUTED TO THE BENEFICIARY?

Funds distributed from the trust directly to the beneficiary are counted as unearned income. The total amount of such distributions in any month, in excess of the \$20 unearned income exclusion, will reduce the SSI benefit in that month dollar-for-dollar.

Distributions from the trust to a third person, other than the beneficiary, are not considered unearned income to the beneficiary if the payments are made for purposes other than food, clothing and shelter. This means, for example, that the trustee of a

special needs trust may purchase an airplane ticket for the beneficiary directly from the airline or travel agent without affecting the beneficiary's SSI.

Money received by the SSI recipient in one month counts as income for that month. What is left over as of the beginning of the next month counts as resources. If the beneficiary's resources outside the trust exceed SSI limits (currently \$2,000 for a single person), SSI will be suspended. SSI will also be suspended if the unearned income received in any month from the trust and any other sources (such as Social Security Adult Disabled Child Benefits) exceeds the SSI benefit amount plus \$20.

Once suspended, SSI will be reinstated as of the month in which income and resources are within SSI limits. However, if the suspension lasts 12 months or more, a new application must be made.

Termination or suspension of SSI may cause Medi-Cal benefits and In-Home Supportive Services benefits to be terminated as well.

WHAT HAPPENS TO ASSETS IN THE TRUST AFTER THE DEATH OF THE BENEFICIARY?

Trust provisions will control the distribution of trust assets after the death of the beneficiary. Usually, parents prefer that the remainder of the trust go to their other children, if living, or to their grandchildren.

ARE THE ASSETS IN A DISCRETIONARY TRUST SUBJECT TO THE CLAIMS OF THE STATE OF CALIFORNIA FOR THE COSTS OF STATE-SUPPORTED RESIDENTIAL CARE?

No. It is the author's opinion that a properly drafted discretionary trust should insulate any funds in the trust from claims of the state for reimbursement for the costs of state-supported residential care, except as hereafter noted.

California Probate Code Section 15306 provides that the principal of a discretionary trust is not subject to state claims for reimbursement if the trust is established for a person with a disability which constitutes a substantial handicap and substantially impairs the individual's ability to provide for his or her own care or custody.

Section 15306 was amended effective January 1, 1990, to partially erode this protection. The amendment provides, in substance, that the Section 15306 protection shall not apply to trusts which cause the beneficiary to be ineligible for Medi-Cal.

For persons receiving SSI, the amendment is inconsequential because such persons are automatically eligible for Medi-Cal. Individuals residing in any non-Medicaid-funded state- or county-run developmental centers, skilled nursing facilities, or intermediate care facilities may not receive any SSI. In order for their trusts to be protected, those individuals must establish Medi-Cal eligibility without linking it to the receipt of any amount of SSI, but rather by satisfying the stricter Medi-Cal trust rules.

Examples of devices which may assist in accomplishing this objective are:

1. Special Needs Provisions — In addition to a properly drafted discretionary distribution provision, it is very helpful to inform the trustee that the purpose of the trust is to supplement, not supplant, the beneficiary's public assistance benefits.

"Special needs" are defined in the trust instrument as those requisites for maintaining the beneficiary's good health, safety, and welfare which, in the discretion of the trustee, are not being provided by any public agency. By limiting the trustee's authority to make distributions for the "special needs" of the beneficiary, parents can ensure that public resources will be fully explored before any distribution is made. This provision will also assist the trustee in defending the trust on public policy grounds if challenged by a public entity.

2. Sprinkling Provisions — Another modification of the standard discretionary trust is to include several beneficiaries and authorize the trustee to "sprinkle" funds of the trust among the various beneficiaries. If a creditor of the beneficiary who is developmentally disabled attempts to invade the trust, the creditor must contend with the interests of the other beneficiaries who owe the creditor nothing.

3. Charitable Remaindermen — Directing that a charity serving persons who are developmentally disabled receive what is left in the trust after the death of the beneficiary is likely to discourage a legal challenge, since it is government policy to assist charities and encourage charitable giving.

4. No Over-Funding — Funding special needs trusts with more assets than are necessary to supplement public benefits for the life of the beneficiary is likely to encourage attempts by creditors to invade the trust. Appropriate amounts cannot be set forth in this brochure since they depend on the circumstances of each individual case. Because of the complexities in this area of estate planning, knowledgeable legal advice is very important.

WHAT IS A PRECATORY TRUST AND WHEN SHOULD IT BE USED?

A precatory trust is not really a trust at all. It is simply a gift to another person combined with a statement of intention as to how the assets should be held. For example, if parents are concerned that the law regarding SSI eligibility may change and make funds in a discretionary trust a countable resource, they might bequeath the money they would otherwise have put in trust to a brother or sister of the child who is developmentally disabled. The will would include a request that such person keep and conserve these funds for the benefit of the child who is handicapped.

Although a precatory trust accomplishes the goal of SSI eligibility, the request is not legally enforceable. Also, the keeper of the funds is subject tax on any income produced by the assets, and the keeper's creditors can make claims against these funds. Finally, if the holder dies before the precatory beneficiary, the funds will pass to the holder's heirs in

accordance with his or her will. For these reasons, precatory trusts are not frequently used.

HOW DOES A PARENT PROTECT AGAINST POSSIBLE FUTURE CHANGE IN THE LAW REGARDING SSI ELIGIBILITY?

A safety-valve provision should usually be added directing the trustee to transfer all trust assets to a precatory trustee if the existence of the legal trust causes the beneficiary to be ineligible for SSI or other public benefit.

Also, a will may be amended at any time before the death of the testator. If changes in the law occur during this period, the necessary trust revisions may be made.

ARE THE RULES GOVERNING SSI ELIGIBILITY THE SAME FOR MEDI-CAL?

Effective January 1, 2000, the SSI trust rules are very similar to the Medi-Cal trust rules.

Prior to 2000, the major difference between the two programs related to the transfer-of-asset rules. With respect to trusts established before January 1, 2000, an SSI recipient (but not a Medi-Cal recipient) could establish a trust with the recipient's own assets and not lose SSI. This practice is no longer permissible as the result of the SSI rule changes in the Foster Care Independence Act of 1999 (H.R. 3443).

Now, both the Medi-Cal and SSI rules focus on whether the beneficiary established the trust (called "self-settled" or "first party" trusts). If the beneficiary

established the trust, the assets of the trust are considered an available resource to the beneficiary. If total available resources exceed \$2,000, the beneficiary will be ineligible for Medi-Cal.

If the trust is not established by the beneficiary or someone acting on the beneficiary's behalf (such as a trust established by a parent for a son or daughter), whether the trust assets are available to the beneficiary depends on whether the beneficiary can revoke the trust or control distributions from the trust. If so, the trust assets are an available resource.

There is one type of self-settled trust that does not disqualify the beneficiary from SSI and Medi-Cal: a court-ordered trust for a disabled person who is under 65 when the trust is established if the state will be reimbursed on the termination of the trust for the Medi-Cal benefits paid while the trust was in existence.

Court-ordered trusts are typically trusts established for disabled persons who receive personal injury awards. California law permits such proceeds to be placed in a Special Needs Trust for a disabled plaintiff if certain criteria are satisfied.

If your child is about to receive money from a court case, ask your attorney about establishing a court-ordered Special Needs Trust to receive and manage these funds.

WHEN SHOULD THE SPECIAL NEEDS TRUST BE ESTABLISHED — DURING THE PARENTS' LIFETIME OR UPON THEIR DEATH?

It is generally better to wait until both parents are deceased before putting the special needs trust into effect. If either parent is alive, the trust is unnecessary since funds to supplement public assistance may be provided by the parent. Including the trust in the wills of both parents, to go into effect only upon the death of the survivor, is the usual practice.

In certain circumstances, establishing the trust during the life of the parents may be necessary. For example, if a grandparent leaves money to the child who is developmentally disabled, a trust may be warranted. A conservator of the estate would have to be appointed, who would then transfer such assets to a trustee to be held in accordance with a written trust agreement.

Frequently, parents are advised to establish a living trust (a trust created during life) for themselves to avoid probate and minimize expense. The special needs trust is easily integrated into this plan and generally becomes effective upon the death of either the first or second spouse.

² Refer to the Inland Counties Master Trust — information available from Inland Counties Regional Center, P. O. Box 6127, San Bernardino, CA 92412.

WHO SHOULD SERVE AS TRUSTEE OF THE SPECIAL NEEDS TRUST?

Either a private person or a bank may act as a trustee. In certain circumstances, a non-profit corporation may act as trustee.²

Because a corporate trustee, such as a bank, charges an annual commission based upon a percentage of the assets in the trust, it is generally more economical for a member of the family or close friend to serve as trustee. However, one should note that an individual may be entitled to a fee for serving in such a capacity. An individual trustee may also be more closely involved in the day-to-day activities of the beneficiary.

On the other hand, banks and other corporate trustees generally offer greater experience in the management of funds and preparation of accounts and tax reports.

A third alternative is to have both an individual and a bank act together as co-trustees. The success of co-trusteeship largely depends on the bank's willingness to act in this capacity and the division of responsibility among the co-trustees.

WHAT ARE THE MOST COMMON ERRORS IN FINANCIAL PLANNING FOR A PERSON WHO IS DEVELOPMENTALLY DISABLED?

1. Including a child who is developmentally disabled as primary or alternate beneficiary on life insurance policies;

2. Naming a conservator of the estate, instead of a trustee, to manage any assets left by parents to a son or daughter who is developmentally disabled;

3. Appointing a conservator of the estate for a person who is developmentally disabled when the only asset of the conservatee is public assistance.

CAN A TRUSTEE CONSENT TO MEDICAL TREATMENT ON BEHALF OF THE BENEFICIARY AND MANAGE OTHER NON-FINANCIAL MATTERS?

No. A trustee's authority is limited to financial management. A conservator of the person should be appointed upon the death of the surviving parent if personal supervision is necessary.

SHOULD THE TRUSTEE AND CONSERVATOR OF THE PERSON BE THE SAME INDIVIDUAL?

Preferably, no. Separating financial management from personal control creates a check-and-balance system. The conservator is responsible for personally visiting the conservatee. If there are unmet needs, the conservator must notify the trustee, who is responsible for making funds available in accordance with the provisions of the written trust agreement. Any failure of the trustee to perform properly would come to the attention of the conservator, just as any failure of the conservator would be noticed by the trustee.

When parents do not have the luxury of a wide selection, or if they have absolute confidence in one

person, the same individual may serve in both capacities.

HOW DO PARENTS ARRANGE FOR THE APPOINTMENT OF A CONSERVATOR OF THE PERSON TO BE EFFECTIVE WHEN THEY ARE GONE?

In their wills, parents should nominate a conservator of the person to be appointed upon the death of the surviving parent. The procedure for appointment is the same as that for initiating any conservatorship, even if parents are simply nominating a conservator to succeed themselves.

A conservator nomination may occur other than by will. Any written document is legally effective as a nomination if it reveals this intention and is signed and dated by the parent.

ARE THERE ARRANGEMENTS OTHER THAN A WILL WHICH PARENTS SHOULD CONSIDER FOR A CHILD WITH HANDICAPS?

Yes. When parents are making funeral or burial arrangements for themselves, they should consider making such arrangements for their child. Any plans for burial or funeral should be contained in a document, usually titled "Instructions To My Executor," and placed in a safe deposit box. Included in the document should be any directions concerning arrangements for the care of the individual immediately after the death of the surviving parent. Instructions relating to medications and residential placement are common examples.

NOTE: The following is an example of instructions to estate representatives used by one California court. Interested persons are urged to contact their local court and/or investigator for specifics in their area.

PROBATE COURT

THE SUPERIOR COURT

GENERAL INSTRUCTIONS TO ESTATE REPRESENTATIVES

(Conservator, Guardian, Administrator, or Executor) (Attorneys are requested to deliver to Representative)

You have been appointed a Representative of an estate by this court. Upon qualification as such Representative you become an officer of the court and assume certain duties and obligations. An attorney is best qualified to advise you regarding these matters, but you should clearly understand the following:

1. You must keep the money and property of this Estate separate from your own, and must never commingle them with your own or other property. When you open a bank account for the funds, it must be in the name of the Estate, by its fiduciary (yourself). The securities of the Estate must also be held in the name of the Estate. In a minor's guardianship, with more than one ward, you must keep a separate ledger account of all property belonging to each ward and all receipts for and disbursements from each

such account. The surety who posted your bond guaranteeing the Estate against loss may require that its representative, or your attorney, join with you in signing checks or other orders for withdrawal of money from the bank.

2. A parent is not entitled to use a minor's property for the support of such minor. The Court may permit you to make certain payments from the minor's funds after a hearing on a petition filed by you, but you may not use the money until a court order is signed. As the Representative, you must not spend the Estate's money until you have received permission from the Probate Court to do so. If you do not obtain such permission, you will be surcharged for the same, i.e., you will have to reimburse the Estate from your funds. (There are exceptions, such as approved Creditors' Claims or tax payments. However, consult your attorney before paying these.)

3. You may reimburse yourself for official court costs paid by you to the County Clerk and for the premium on your bond. You may not pay fees to your attorney or to yourself without prior order of court.

4. Within 3 months after your appointment you must file with the court an inventory of all money and other property belonging to the Estate and held by you. You must arrange to have a court-appointed Referee fix the value of such property, and the inventory and Appraisement must then be filed with the court. (The Representative, rather than the Referee, determines the value of certain "cash items" and your attorney will advise you as to this procedure.)

5. After you have qualified as an Estate Representative, you must file an account annually (or as often as the court directs) which shows all property you have received during the year, and what you have spent. You must describe in detail what you have left after the payment of expenses (“balance on hand”).

6. You must obtain the court’s permission to sell, leave, mortgage or invest the property of an Estate. Application for such permission is usually made by your attorney.

It is important that you cooperate with your attorney at all times so that he or she may assist you in carrying out the responsibilities entrusted to you. When in doubt, contact your attorney.

SUPERVISING PROBATE JUDGE
Courtesy ... LONG BEACH REPORTER
P. O. Box 4278
3010 E. Anaheim St.
Long Beach, CA 90804
(213) 432-5207 or (213) 438-5641

GLOSSARY OF LEGAL TERMS

Beneficiary. The individual or corporation who receives the benefit of a transaction, e.g., beneficiary of a life insurance policy, beneficiary of a trust, beneficiary under a will.

Codicil. An amendment to a will. The codicil is a separate document. It is signed with the same formalities as a will. The codicil can be changed or canceled at any time.

Conservatee. The person under a conservatorship for whom a conservator has been appointed.

Contract. A legally enforceable agreement.

Discretionary trust. A trust that provides a fund for the maintenance of a beneficiary, which by its terms insulates the beneficiary's interest from the claims of creditors.

Estate taxes (federal). The death taxes imposed by the federal government on the transfer of assets on death. The taxes are generally paid by the executor of the estate.

Heir. The person who inherits property under state law.

Inheritance taxes. Death taxes imposed according to the relationship to the decedent of the person who receives the property. California's inheritance tax was repealed by Initiative Statute in June 1982.

Inter vivos trust. A trust created "between the living," also called a "living trust." The grantor (trustor) is a living person. Compare this to a testamentary trust.

- Irrevocable trust.** A trust whose terms and provisions cannot be changed or revoked. Under certain limited circumstances, a court may make limited changes.
- Issue.** Generally, offspring or lineal descendants; but a testator can, in a will, define issue to include adopted children.
- Joint tenancy.** A form of property ownership by two or more persons designated as “Joint Tenants with right of survivorship.” When a joint tenant dies, his or her interest in the property automatically goes to the surviving joint tenant outside of and beyond the power of the will of the deceased joint tenant; the property passes outside probate.
- Life estate.** An interest in property, the length of which is measured by the life of the person holding the life interest.
- Minor.** In California, a person who is under the age of 18.
- Personal property.** Movable property as contrasted with real property, which is fixed. Personal property includes furniture, automobiles, and equipment.
- Probate.** The court proceedings in which the probate court has supervision over property passing from a deceased person to beneficiaries under a will or to heirs when there is no will.
- Real property.** An interest in land, or in property permanently affixed to land.

Remainder interest. The remaining property left in trust after a previous owner or life tenant has received all the property benefits to which he or she was entitled.

Remainderman. The person entitled to receive a remainder interest.

Revocable trust. A trust whose terms and provisions can be changed.

Tenancy in common. A form of holding title to real or personal property by two or more persons. Because there is no right of survivorship, the legal relationships and results are very different from joint tenancy.

Testator. The person who signs the will, and in it disposes of his property. Testatrix is the female term, but it is common as a convenience to use the term testator for either a man or a woman.

Trust. A legal entity established either by a written agreement signed during life or by a will. The trust is governed by the terms in the document.

Trustee. The individual or corporation who manages the property in trust.

Trustor. The person who establishes the trust. There can be more than one trustor.

Trust corpus. The property held in a trust, including both principal and income.

Will. The document a person signs to provide for the orderly disposition of assets after death.



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**Association for Retarded Citizens-California
1228 - 8th Street, Suite 590
Sacramento CA 95814-2213
(916) 552-6619**



PAI

**Protection & Advocacy, Inc.
100 Howe Avenue, Suite 185-N
Sacramento CA 95825
(916) 488-9950 or
Toll-free 1-800-776-5746**