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## FIDUCIARY NEWSLETTER

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### **FIRST- PARTY SPECIAL NEEDS TRUSTS: CHANGES IN THE LAW**

With the recent passage of A.B. 1851, the State of California has made significant changes to Probate Code Sections 3600-3613 governing first-party special-needs trusts.

The word “incompetent” has been replaced with the term “person with disability,” as defined in Section 4512 of the California Welfare and Institutions Code. This change allows for the use of special-needs trusts by persons who meet the needs-tested definition of disability, but who have legal capacity (i.e. someone with a physical disability).

Under the revised statutes, the probate court now has jurisdiction to set up a special-needs trust with assets received as part of a personal injury settlement when the trust was, for whatever reason, not established by the trial court. This allows for the disabled person to use other means, including having a parent or grandparent establish the special-needs trust, to shelter the litigation proceeds. Also, under the new statutes, a disabled person who is not incapacitated, may be able to undertake litigation outside of Probate Code Sections 3600-3612, may forego public benefits, and simply use the proceeds directly.

In addition, the courts have the authority to establish a trust for a minor that will continue after the minor reaches majority, so long as the minor remains disabled. Therefore, the parents of such minor do not have to resort to establishing a conservatorship, once the minor reaches the age of majority.

These changes provided greater flexibility for attorneys, trustees, and disabled individuals, as well as a tremendous cost savings for disabled individuals and their families.

If you have any questions regarding special-needs trusts, please feel free to contact our office.

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## **DURABLE POWERS OF ATTORNEY FOR FINANCIAL MATTERS: CORPORATE FIDUCIARIES ACTING AS ATTORNEY IN FACT**

California Probate Code Section 4200 governs who may act as an attorney in fact. Under Probate Code Section 4200, “only a person having the capacity to contract is qualified to act as an attorney in fact.”

Under California Probate Code Section 56, a bank or trust company is a “person” having capacity to contract and is therefore qualified to act as an attorney in fact. However, while a corporate fiduciary is not precluded from acting as an attorney in fact under a Durable Power of Attorney for Financial Matters, it is up to the corporate fiduciary or institution to decide whether they want to take on the tasks involved (i.e. monitoring the principal’s overall health and capacity).

For further information regarding corporate fiduciary obligations under the foregoing code sections, please contact our offices.

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