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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

Conservatorship of the Person and Estate of
CARLA HORTON,

ELAINE ABBOTT, as Conservator, etc.

Petitioner and Appellant.

B253487

(Los Angeles County
Super. Ct. No. SP005963)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Roy Paul, Judge. Dismissed.

Oldman Cooley Sallus Birnberg & Coleman, Justin B. Gold for Petitioner and
Appellant.

A conservatorship was created for Carla Horton, who is severely impaired by a traumatic brain injury from a 1982 automobile accident, has multiple sclerosis and requires 24-hour care. A paid professional conservator, appellant Elaine Abbott, manages Horton's affairs.

Appellant petitioned the Probate Court to establish a special needs trust for Horton.¹ The court denied appellant authority to execute the proposed special needs trust; denied authority to transfer conservatorship assets to the trust; denied appellant's request for a bond; and denied authority to purchase and sell mutual funds. The conservator appealed.

Appellant's proposed special needs trust is based on a federal statute, 42 United States Code section 1396p(d)(4)(A). It defines the trust as one "containing the assets of an individual *under the age of 65* who is disabled." (*Conservatorship of Kane* (2006) 137 Cal.App.4th 400, 405, italics added.) Trial counsel advised the Probate Court that a special needs trust could not be funded after the conservatee turned 65. Horton turned 65 in November 2013.

This Court sent counsel a letter asking for further briefing, seeking an explanation why this appeal should not be dismissed as moot. (Gov. Code, § 68081.) The basis for the conservator's petition was "to obtain government benefits without the cost of health care costing [Horton] all of [her] money." At age 65, Horton qualified for government Medicare benefits, neutralizing appellant's concern about health care costs. More important, a special needs trust *cannot be created for persons over 65 years of age* under 42 United States Code section 1396p(d)(4)(A), and Horton is 66 years old.

In response, appellant submitted a letter brief proposing a "pooled special needs trust" under 42 United States Code section 1396p(d)(4)(C), which is "established and managed by a non-profit association." A pooled trust was not at issue in the court below: it is a new idea that came to appellant after we pointed out that she cannot proceed under

¹ No respondent was named in the petition.

the federal statute cited in the Probate Court, due to Horton's age. Appellant writes that her new proposal was not raised below "because the concept of a Pooled Special Needs Trust was not then known by Petitioner as a viable alternative"

Appellant attached an exemplar of a "joinder agreement for the Z pooled trust" to her letter brief. She also attached an article about pooled trusts (from an unknown source) which states that "[o]ne of the major differences" between the type of special needs trust that she originally proposed for individuals under 65 and the pooled special needs trust is that the pooled trust "has no age limitation and the benefits recipient can protect eligibility for SSI and Medicaid . . . *without or with court permission.*" (Italics added.) If it is true that court approval is unnecessary, this litigation is superfluous.

We decline appellant's invitation to rule on an issue that was never presented to the Probate Court, never adjudicated, and is inadequately briefed. The proposed trust presented to the Probate Court does not remotely resemble the newly submitted exemplar for a "Z pooled trust." "Of course, it is for the probate court, in the first instance, *to exercise its discretion* as to whether such a [special needs] trust should be created" (*Conservatorship of Kane, supra*, 137 Cal.App.4th at p. 408, italics added.)

We cannot tell how this type of pooled trust will improve the quality of conservatee Horton's life. Although the record shows Horton's annual expenses, there is no breakdown showing how much is spent on Horton herself and how much is expended on conservator's fees and attorney fees. Because this litigation has not benefitted Horton, there will be no reimbursement from Horton's assets for fees expended on this litigation.

Appellant may bring a new petition before the Probate Court regarding a pooled trust, if necessary. The conservator should carefully consider whether further litigation will merely waste Horton's assets. The appeal is dismissed because the proposed creation of a special needs trust for a person under age 65 pursuant to 42 United States Code section 1396p(d)(4)(A) is moot.

DISPOSITION

The appeal is dismissed. Appellant Abbott is to bear all costs and attorney fees, *not* the conservatee.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.