

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue
San Francisco, California 94102-3688

Report

TO: Members of the Judicial Council

FROM: Probate and Mental Health Advisory Committee
Hon. Thomas W. Stoever, Chair
Douglas C. Miller, Committee Counsel, 415-865-7535,
douglas.miller@jud.ca.gov

DATE: August 31, 2004

SUBJECT: Trusts Funded by Court Order (adopt rule 7.903 of the California Rules of Court and section 40 of the Standards of Judicial Administration Recommended by the Judicial Council) (Action Required)

Issue Statement

Some courts' local rules or policies require trust instruments that define express trusts created or funded by court orders to contain certain provisions and provide for court supervision of these trusts after their creation or funding. There are no statewide rules of court governing these trusts or providing for a consistent level of judicial supervision over their administration.

Express trusts may be created or funded by court orders that approve settlements of civil actions or disposition of judgments involving minors or disabled adults. These orders are sometimes made by judicial officers in civil departments of the court who do not regularly deal with express trusts in their court assignments and may have little prior experience with trust law.

Recommendation

The Probate and Mental Health Advisory Committee recommends that the Judicial Council, effective January 1, 2005, adopt rule 7.903 of the California Rules of Court and section 40 of the Standards of Judicial Administration to promote greater statewide uniformity in judicial oversight of court-funded trusts and to encourage courts to develop procedures and practices that (1) provide for probate department determination of trust issues in certain proceedings involving court-funded trusts that are heard in civil departments of the court, or (2) ensure that judicial officers who approve the creation or

funding of these trusts in civil actions are experienced or have been trained in substantive and technical issues involving trusts.

The text of the proposed new rule, advisory committee comment, and standard, is attached at pages 8–10.

Rationale for Recommendation

Rule 7.903

Rule 7.903 would be the first statewide rule governing court-funded trusts. These are defined in subdivision (a) of the rule as trusts that will receive funds under court orders that (1) authorize a conservator to take certain actions in the name of the conservatee in the exercise of substituted judgment (Prob. Code, § 2580 et seq.); (2) authorize a spouse or registered domestic partner¹ to complete a particular property transaction for his or her disabled spouse or domestic partner who does not have a conservator (Prob. Code, § 3100, et seq.); or (3) approve compromises of claims of minors or settlement of, or disposition of the proceeds of judgments in, pending actions involving minors or disabled adults (Prob. Code, § 3600 et seq.).²

Rule 7.903(c) would require trust instruments for court-funded trusts to contain certain provisions and prohibit no-contest clauses, unless otherwise ordered by the court (subject to an exemption from some of these requirements for trusts valued at \$20,000 or less).³ Subdivision (b) of the rule would require the court's order creating or authorizing the

¹ See Family Code section 297.5(a), added to the code by the California Domestic Partner Rights and Responsibilities Act of 2003 (Stats. 2003, ch. 421, §§ 2, 4, 10, 14) and effective for members of domestic partnerships registered with the Secretary of State on or after January 1, 2005.

² Probate Code section 3600 et seq. refer to a minor or an “incompetent person.” This report adopts the term “disabled adult” and the proposed rule and standard use the term “person with a disability” instead of “incompetent person” because legislation signed by the governor on June 23, 2004 will, on January 1, 2005, replace “incompetent person” with “person with a disability” in sections 3600–3613. (Stats. 2004, ch. 67, §§ 3–11.)

³ Rule 7.903(c) and (d). The exemption for smaller trusts would also be subject to the court's discretion to order otherwise. The exemption is intended to reduce the expense, including attorney fees, of administering small trusts.

The provisions required by subdivision (c) of the rule would, inter alia, require court approval for modification or revocation of the trust and changes in trustees, clearly identify the trustee and anyone with authority to direct the trustee to make disbursements and require these persons to post surety bonds, restrict investments to those permitted conservators of the estate, require the trustee to file accounts and reports for court approval in the manner required for conservators of the estate, and require compensation for the trustee and the trustee's attorney to be fixed and allowed by the court.

These provisions are modeled after similar provisions in a Los Angeles local rule. (Super. Ct., L.A. County Local Rules, rule 10.186.) Some other courts have similar rules. See, e.g., Super. Ct., Contra Costa County Local Rules, rule 1002; Super. Ct., Orange County Local Rules, rule 611.08; and Super. Ct., San Francisco County Local Rules, rule 14.106L.

funding of a trust subject to the rule to provide that the trust is subject to the continuing jurisdiction of the court; it also would permit the court to order that the trust is to be subject to court supervision under the Probate Code.⁴

The proposed rule is intended to (1) create greater statewide uniformity in important provisions of trust instruments that govern court-funded trusts, and (2) establish continuing court jurisdiction under the Probate Code over such trusts.

Section 40, Standards of Judicial Administration

A petition under Probate Code section 3600 et seq. for court approval of the compromise of a claim or action or disposition of the proceeds of a judgment involving a minor or a person with a disability is heard in either a probate or civil department, usually depending on whether the petition requests court approval of the compromise of a minor's unfiled claim (probate or civil department) or the disposition of a pending civil action (civil department). In the latter situation, some courts assign responsibility for specific parts of the decision to both civil and probate departments.⁵

New section 40 of the Standards of Judicial Administration would make two recommendations to the courts concerning petitions under section 3600 that involve trusts and are assigned to or pending in civil departments of the court. The new standard would recommend that each court develop practices or procedures that (1) provide for determination of the trust issues in these matters by the probate department of the court or by a judicial officer who regularly hears probate proceedings or (2) ensure that judicial officers who hear these matters have experience or receive training in substantive and technical issues involving trusts, including special needs trusts.

Trusts designed to receive the proceeds of judgments or settlements for minors or disabled persons, particularly special needs trusts for minors or disabled adults who are

⁴ See Probate Code section 3604(a), which contains identical provisions. Section 3604 applies to special needs trusts that receive the proceeds of judgments or settlements for minors or disabled adults. The rule would extend these provisions to all court-funded trusts.

“Continuing jurisdiction of the court” is defined in the proposed rule as subject matter jurisdiction over trust proceedings under Division 9 of the Probate Code. (Cal. Rules of Court, rule 7.903(a)(2).) This definition emphasizes that the court would not be required to keep a pending civil action open indefinitely to exercise its jurisdiction over a trust that will receive the proceeds of a settlement or judgment that disposes of the action. “Court supervision under the Probate Code” means the requirement of prior court approval or subsequent confirmation of the acts of the trustee similar to a court’s supervision of a guardian or conservator of the estate. (Cal. Rules of Court, rule 7.903(a)(3).)

⁵ See, e.g., Super. Ct., Fresno County Local Rules, rule 83.5; Super. Ct., L.A. County Local Rules, rules 10.186.2 and 10.187; Super. Ct., Sacramento County Local Rules, rule 15.105; Super. Ct., San Francisco County Local Rules, rule 14.105N1; Super. Ct., San Luis Obispo County Local Rules, rule 11.2001; Super. Ct., San Mateo County Local Rules, rule 4.80; Super. Ct., Santa Clara County Local Rules, rule 5.13; Super. Ct., Stanislaus County Local Rules, rule 8.140.

also eligible for public need-based benefits, may be very technical and highly complex.⁶ Probate departments or judicial officers who regularly hear probate matters deal with these and other trusts on a daily basis. They review, interpret, and enforce trust instruments; supervise trustees in the administration of their trusts; and conduct litigation involving every aspect of trust law and policy.

Judicial officers in civil departments of the court may not have trust-law experience. They may not frequently encounter express trusts in their court assignments. In cases involving injured minors or disabled adults, they may be called upon to approve the creation or funding of express trusts on an expedited basis in settlement conferences, on the eve of trial, or even after trial of actions that do not otherwise present trust issues.

The Probate and Mental Health Advisory Committee believes that, where possible, the experience and expertise concerning trusts gained by probate departments or judicial officers who hear probate matters should be applied to the determination of trust issues presented in proceedings under Probate Code section 3600 even though those proceedings arise in civil departments of the court. Courts that do not directly assign these matters to probate departments should ensure that judicial officers who do hear them are experienced or trained in trust-related issues.

Alternative Actions Considered

Rule 7.903(b) as it was originally drafted and circulated for comment included a provision for mandatory review by probate departments or judicial officers of the terms of trusts that will receive the proceeds of settlements or judgments for minors or disabled adults under Probate Code section 3600. The mandatory provision was removed from the rule and revised to be the proposed Standard of Judicial Administration in response to objections raised by the Civil and Small Claims Advisory Committee, as further discussed below.

Comments From Interested Parties

In addition to the standard list of interested court executives, individuals, and organizations, this proposal was circulated to a special list of judicial officers, probate examiners and attorneys, other court staff interested in probate matters, and probate-interest sections of local bar associations. A chart showing the comments received and the responses of the Probate and Mental Health Advisory Committee is attached at pages 11–13.

Because proposed rule 7.903 as it was circulated for public comment would have required probate department approval of the terms of trusts involved in proceedings under Probate Code section 3600, the rule was presented to and considered by the Trial Court Presiding Judges, Court Executives, and Civil and Small Claims Advisory Committees.

⁶ See, e.g., Probate Code section 3604, concerning special needs trusts.

Public Comments

Six comments were received from the public. Five were entirely favorable, although one of those, the comment of private attorney Richard Haeussler of Newport Beach, requests greater flexibility for permitted investments by trustees of court-funded trusts.

The sixth comment, that of Stanislaus County Superior Court staff member Sandy Almansa, recommends that subdivision (b) of the rule as it was circulated for comment be deleted in favor of local rules in the Superior Courts of Stanislaus and Sacramento Counties. Subdivision (b) contained the provision requiring probate department approval of the terms of court-funded trusts that will receive the proceeds of settlements or judgments in civil cases.

The local rules preferred by Ms. Almansa allocate responsibility between the probate and civil departments of the court for approval of civil-action settlements or judgments for minors or disabled adults involving trusts and prescribe the procedure for obtaining probate department approval.⁷ The Probate and Mental Health Advisory Committee disagreed with Ms. Almansa's recommendation. However, her concern was later mooted by the advisory committee's decision to eliminate the rule's mandatory review provision in favor of the recommendations contained in its proposed standard.

Trial Court Presiding Judges and Court Executives Advisory Committees

Rule 7.903, as revised in response to the public's comments, was considered and unanimously approved by the Joint Rules Subcommittee of the Trial Court Presiding Judges and Court Executives Advisory Committees. The rule approved by that subcommittee included the mandatory probate department review provision of former subdivision (b), noted above.

Civil and Small Claims Advisory Committee

Rule 7.903 was presented to the Civil and Small Claims Advisory Committee at that committee's meeting of July 30, 2004. The rule presented to that meeting was in the form approved by the presiding judges and court executives.

⁷ Super. Ct., Stanislaus County Local Rules, rule 8.140, and Super. Ct., Sacramento County Local Rules, rule 15.105. The Stanislaus rule applies to special needs trusts only. The Sacramento rule applies to all trusts and to certain other dispositions of net proceeds. Both rules require the civil department where the case is pending to approve all other parts of the proposed settlement, including the economic terms and expenses and attorney fees to be deducted from the gross settlement or judgment, and then require the petitioner to proceed in the probate department of the court on a separate petition. In the Superior Court of Stanislaus County, the probate department reviews the terms of the proposed special needs trust. In the Superior Court of Sacramento County, the probate department conducts a hearing as to the establishment, terms, and conditions of the proposed disposition, in trust or otherwise.

The Civil and Small Claims Advisory Committee voted to oppose adoption of rule 7.903 because of the mandatory probate department review provision mentioned above. One member of that committee who opposed the rule characterized this part of the rule as representing Judicial Council micromanagement of local courts' case assignment responsibilities and requiring one judicial officer to review the work of another judicial officer of the same court. Other civil committee members said that courts could meet the primary objective of this part of the rule by providing education and training concerning trusts or the assistance of probate department staff to civil department judicial officers. No opposition was expressed to subdivision (a), (c), or (d) of the rule.

In response to the action taken by the Civil and Small Claims Advisory Committee, the Probate and Mental Health Advisory Committee revised rule 7.903 by changing the mandatory probate department review provision to a recommendation and moving it from subdivision (b) of the rule to a new section 40 of the Standards of Judicial Administration.⁸ The revised rule and the new standard were discussed at a meeting of representatives of both advisory committees, arranged by both committees and their staffs in an effort to reach a consensus.

The civil committee representatives expressed support at that meeting for the revised rule 7.903 and the probate committee's goal of increasing the expertise of judicial officers who hear proceedings under Probate Code section 3600 on trust issues. However, they continued to oppose the recommendation contained in the standard for probate court review of trusts in section 3600 proceedings for the same reasons that the entire civil committee had opposed the former mandatory provision in the rule.

One of the civil committee representatives stated that a standard of judicial administration on this topic should include recommendations for increased education and training on trusts and the assistance of probate department staff for judicial officers in civil departments who hear matters under section 3600 as alternatives to direct probate department review of the trusts. The Probate and Mental Health Advisory Committee responded to this suggestion by revising its proposed standard to include a second recommendation that courts develop practices and procedures to ensure the assignment of proceedings under section 3600 that involve trusts to judicial officers who are experienced or have been trained on substantive and technical trust issues.

The Civil and Small Claims Advisory Committee has advised that its concerns have been satisfied by the revised rule and the revised standard.

⁸ Subdivision (b) of rule 7.903 was entirely rewritten. It now provides for continuing court jurisdiction and court supervision of court-funded trusts.

Implementation Requirements and Costs

This proposal will incur the normal costs associated with the adoption and publication of any new rule of court or standard of judicial administration. In the long run, however, court time spent in reviewing provisions of court-funded trusts should be reduced as the terms of these trusts become more standardized throughout the state. To the extent the recommendations in the proposed standard are implemented, practice in this area should also become more uniform and efficient throughout the state. Improvement in the overall quality of trusts created or funded with the proceeds of judgments or settlements under Probate Code section 3600 should reduce the amount of subsequent litigation involving these trusts.

Attachments

Rule 7.903 of the California Rules of Court and section 40 of the Standards of Judicial Administration Recommended by the Judicial Council are adopted, effective January 1, 2005, to read:

1 **Rule 7.903. Trusts funded by court order**

2
3 **(a) [Definitions]**

4
5 (1) “Trust funded by court order” under this rule means and refers to a trust
6 that will receive funds under Probate Code section 2580 et seq.
7 (substituted judgment); section 3100 et seq. (proceedings for particular
8 transactions involving disabled spouses or registered domestic partners);
9 or section 3600 et seq. (settlement of claims or actions or disposition of
10 judgments involving minors or persons with disabilities).

11
12 (2) “Continuing jurisdiction of the court” under (b) means and refers to the
13 court’s continuing subject matter jurisdiction over trust proceedings under
14 division 9 of the Probate Code (Prob. Code, § 15000 et seq.).

15
16 (3) “Court supervision under the Probate Code” under (b) means and refers to
17 the court’s authority to require prior court approval or subsequent
18 confirmation of the actions of the trustee as for the actions of a guardian
19 or conservator of the estate under division 4 of the Probate Code (Prob.
20 Code, § 1400 et seq.).

21
22 **(b) [Continuing jurisdiction and court supervision]** The order creating or
23 approving the funding of a trust funded by court order must provide that the
24 trust is subject to the continuing jurisdiction of the court and may provide that
25 the trust is to be subject to court supervision under the Probate Code.

26
27 **(c) [Required provisions in trust instruments]** Except as provided in (d), unless
28 the court otherwise orders for good cause shown, trust instruments for trusts
29 funded by court order must:

30
31 (1) Not contain “no-contest” provisions;

32
33 (2) Prohibit modification or revocation without court approval;

34
35 (3) Clearly identify the trustee and any other person with authority to direct
36 the trustee to make disbursements;

37
38 (4) Prohibit investments by the trustee other than those permitted under
39 Probate Code section 2574;

- 1
2 (5) Require persons identified in (3) to post bond in the amount required
3 under Probate Code section 2320 et seq.;
4
5 (6) Require the trustee to file accounts and reports for court approval in the
6 manner and frequency required by Probate Code section 1060 et seq. and
7 section 2320 et seq.;
8
9 (7) Require court approval of changes in trustees and a court order appointing
10 any successor trustee;
11
12 (8) Require compensation of the trustee, the members of any advisory
13 committee, or the attorney for the trustee, to be in just and reasonable
14 amounts that must be fixed and allowed by the court. The instrument
15 may provide for periodic payments of compensation on account, subject
16 to the requirements of Probate Code section 2643 and rule 7.755.
17

18 (d) [Trust instruments for smaller trusts] Unless the court otherwise orders for
19 good cause shown, the requirements of (c)(5)–(8) of this rule do not apply to
20 trust instruments for trusts that will have total assets of \$20,000 or less after
21 receipt of the property ordered by the court.
22

23 **Advisory Committee Comment (2005)**

24
25 Subdivision (a) of this rule defines a court-funded trust as a product of three court
26 proceedings. Two of these—a petition for substituted judgment in a probate
27 conservatorship (Prob. Code, § 2580) and a proceeding for a particular transaction in the
28 property of an impaired spouse or domestic partner without a conservator (Prob. Code, §
29 3100; Fam. Code, § 297.5)—are regularly heard in the probate department of the court.
30 The third proceeding, an application for an order approving the settlement of a minor’s
31 claim or a pending action involving a minor or person with a disability or approving the
32 disposition of the proceeds of a judgment in favor of a minor or person with a disability
33 (Prob. Code, § 3600), may be heard in either a probate or a civil department.
34

35 The Judicial Council has adopted section 40 of the Standards of Judicial Administration
36 to address proceedings under section 3600 that involve court-funded trusts and are heard
37 in civil departments. The standard makes two recommendations concerning the expertise
38 of judicial officers who hear these proceedings on trust issues. The recommendations are
39 to develop practices and procedures that (1) provide for determination of the trust issues
40 in these matters by the probate department of the court or by a judicial officer who
41 regularly hears probate proceedings or (2) ensure that judicial officers who hear these
42 matters have experience or receive training in substantive and technical issues involving
43 trusts, including special needs trusts.

1
2 **Section 40. Settlements or judgments in certain civil cases involving minors or**
3 **persons with disabilities**
4

5 In matters assigned to or pending in civil departments of the court where court approval
6 of trusts that will receive proceeds of settlements or judgments is required under Probate
7 Code section 3600, each court should develop practices and procedures that:
8

- 9 (1) Provide for determination of the trust issues by the probate department of the court
10 or, in a court that does not have a probate department, a judicial officer who
11 regularly hears proceedings under the Probate Code; or
12
13 (2) Ensure that judicial officers who hear these matters are experienced or have
14 received training in substantive and technical issues involving trusts (including
15 special needs trusts).

Comments for Proposal SPR04-37
California Rule of Court, rule 7.903, Court-Funded Trusts

	Commentator	Position	Comment on behalf of group?	Comment	Probate and Mental Health Advisory Committee Response
1.	Ms. Sandy Almansa Supervising Legal Clerk II Superior Court of California, County of Stanislaus 1100 I Street, Modesto, CA 95353	AM	N	Delete section 7.903(b). Reason: As outlined in the Invitation to Comment, both Stanislaus and Sacramento courts have similar local rules. These rules work best for our courts and impact on future direct calendaring is minimal.	The advisory committee believes that probate department review and approval of court-funded trusts that are part of settlements in civil cases is an important safeguard that should be expanded to all courts. However, the provision requiring such approval has been changed to a recommendation only and moved from the proposed rule to a standard of judicial administration.
2.	Ms. Mary Majich Davis Chief Deputy Executive Officer Superior Court of California County of San Bernardino 172 W. 3rd St., 2nd Floor San Bernardino, CA 92415	A	N	Approve the proposed new rule 7.903. However, if the rule is implemented, it appears that this rule would require our court to hear all Special Needs Trusts in the probate department, even the trust is part of a non-probate proceeding. Thus, for example, a Special Needs Trust established as part of a settlement in a personal injury action would be heard in the probate department rather than the assigned civil department.	Rule 7.903 and section 40 of the Standards of Judicial Administration would not require any matter to be heard in the probate department. The standard is a recommendation only and includes the alternative of assigning judicial officers to hear these matters who are experienced or trained in trust-related issues.
3.	Mr. Robert Dimitrijevic	A	N	Agree with proposed changes.	

Comments for Proposal SPR04-37
California Rule of Court, rule 7.903, Court-Funded Trusts

	Commentator	Position	Comment on behalf of group?	Comment	Probate and Mental Health Advisory Committee Response
	Court Probate Examiner Superior Court of California, County of San Luis Obispo 1035 Palm Street San Luis Obispo, CA 93401			<p>This is an important provision and excellent movement in the right direction. Perhaps the rule could be expanded in scope to authorize court supervision of a trust that pre-exists the appointment of the Guardian or Conservator in those circumstances where the trust would supersede the necessity of the establishment of the estate.</p> <p>This is particularly important where the trustee and the guardian or conservator are the same person.</p>	The advisory committee will investigate the possibility of expanding the rule as requested. The rule as presently drafted would not interfere with a court's discretion to condition approval of a proposed distribution from a guardianship or conservatorship estate to a preexisting trust on the trust's willingness to be subjected to continuing court supervision.
4.	Mr. David Flinn Supervising Probate Judge Superior Court of California, County of Contra Costa 725 Court Street Martinez, CA 94553	A	N	Agree with proposed changes.	No response necessary
5.	Mr. Richard L. Haeussler Attorney 4425 Jamboree Road, Ste. 117 Newport Beach, CA 92660	A	N	<p>Agree with proposed changes.</p> <p>I agree with the changes, but would ask that the probate court judge be given some additional flexibility in the choice of investment.</p> <p>I have been able to obtain an approval for a California ScholarShare account from the Superior Court, County of Los Angeles for a minor, while the court in Orange County refuses to consider even the</p>	Proposed rule 7.903(c) would authorize a court, for good cause shown, to approve an investment that is not permitted by Probate Code section 2574, including an investment in a California ScholarShare account, by the trustee of a court-funded trust subject to the rule. The commentator's different experiences in the

Comments for Proposal SPR04-37
California Rule of Court, rule 7.903, Court-Funded Trusts

	Commentator	Position	Comment on behalf of group?	Comment	Probate and Mental Health Advisory Committee Response
				<p>most conservative of the ScholarShare Investments, the Guart. Fund, [the principal is insured by TIAA CREF, while the interest is set at a rate once a year.]</p> <p>The ScholarShare also will abide by the Court Order of NO DISTRIBUTION UNTIL 18 or further court order.</p> <p>I would request that the committee allow “trust investment” in such other investment vehicles as the court may find appropriate for the circumstances of the trust, such as a ScholarShare Trust.</p>	Superior Courts of Los Angeles and Orange Counties may simply be examples of the exercise of that kind of discretion by different judges in different courts under different circumstances.
6.	Ms. Kim Hubbard President Orange County Bar Association P.O. Box 17777 Irvine CA 92623-7777	A	N	Agree with proposed changes.	No response necessary