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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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KIRK DAYTON BULLIS,

Plaintiff and Appellant,

v.

VICTORIA HAMILTON et al.,

Defendants and Respondents.

C080856

(Super. Ct. No. 161245)

Plaintiff and appellant Kirk Dayton Bullis appeals from the trial court's dismissal of his action with prejudice after sustaining demurrers to his second amended complaint without leave to amend. Bullis also appeals from an order denying his motion to strike or, alternatively, tax defendants' costs.

Bullis raises three questions on appeal: (1) whether he filed a timely action against the trust in the person of its trustee, (2) whether the trial court prematurely awarded costs to defendants since the action should have continued at least against the trust in the person of its trustee, and (3) whether he should have been allowed to proceed against the trustee and the individual defendants as successors in interest to the decedent

under Code of Civil Procedure section 377.40. We conclude the complaint fails to state a cause of action against the trustee or the individual defendants.<sup>1</sup> Whether Bullis’s action against the trustee was timely is not as critical as the fact that he failed to identify a basis for naming her as a defendant to his personal injury action at all. Section 377.40 only authorizes lawsuits against a successor in interest “to the extent provided by statute.” Bullis has identified no statute that permits his claims against any of the defendants. The parties agree the costs award was only premature if the action continues at least as to the trustee. Because it does not, there are no issues for us to resolve with respect to the costs award. We affirm.

### **I. BACKGROUND**

On January 14, 2014, Bullis filed a personal injury action against Victoria Hamilton under section 377.40 as successor in interest to Stephen C. Olson, and Does 1 through 25. Hamilton was Olson’s cousin. Bullis alleged he was entitled to damages as a result of being shot by Olson with a gun on November 21, 2013, and Hamilton was Olson’s “only known kin.” Bullis’s first amended complaint added allegations that no probate estate had been opened for Olson, and Hamilton was a potential heir or trust beneficiary to Olson’s trust. The trial court overruled Hamilton’s demurrer to the first amended complaint. Thereafter, Bullis substituted Dione Helms, Claudia Welge and Marcia Hardcastle—each as alleged successors in interest to Olson based on Olson’s trust documents—for Does 1 through 3. These individuals were not related to Olson.

On March 18, 2015, the trial court granted defendants’ motion for summary judgment on the basis that: (1) Hamilton should have been named in her capacity as trustee because none of the individual defendants hold any of the decedent’s assets and (2) section 377.40 is insufficient on its own to authorize proceeding outside of probate

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<sup>1</sup> Undesignated statutory references are to the Code of Civil Procedure.

court, but required further specific statutory authorization such as Probate Code sections 13109 or 13550. However, the court permitted Bullis to amend his complaint, if possible. Bullis filed a second amended complaint that named Hamilton as trustee of the Stephen C. Olson Revocable Living Trust and as successor in interest to Olson, and against Helms, Welge and Hardcastle as successors in interest to Olson. The complaint alleges that, as trustee, Hamilton is Olson's successor in interest because, upon his death, she became the holder of legal title to the trust assets by operation of law. Likewise, the individual defendants are Olson's successors in interest because they became holders of equitable title to the trust assets by operation of law. Additionally, as executor of Olson's will, Hamilton transferred all of Olson's assets that were outside of the trust to the trust by declaration because they were below the statutory minimum requiring probate to be opened. As trustee, Hamilton did not utilize the optional claim procedure for revocable trusts of deceased settlors set forth in Probate Code section 19000 et seq.<sup>2</sup> The complaint

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<sup>2</sup> Under Probate Code section 19003, subdivision (a), "during the time that there has been no filing of a petition to administer the probate estate of the deceased settlor in this state of which the trustee has actual knowledge, the trustee may file with the court a proposed notice to creditors" in order to obtain a case number and then publish and serve notice to creditors or potential claimants as provided in Probate Code section 19040 and subsequent sections of the Probate Code. Probate Code section 19004, in turn, provides: "If the trustee files, publishes, and serves notice as set forth in [Probate Code] Section 19003, then: [¶] (a) All claims against the trust shall be filed in the manner and within the time provided in this part. [¶] (b) A claim that is not filed as provided in this part is barred from collection from trust assets. [¶] (c) The holder of a claim may not maintain an action on the claim against the trust unless the claim is first filed as provided in this part." "[T]he practical result of these provisions is generally to shorten the time frame within which a claimant can assert a claim against a decedent's estate or trust. If the trustee files the proposed notice to creditors with the court under section 19003 of the Probate Code right after the settlor's death, and then proceeds to immediately give the notices required in Probate Code sections 19040 and 19050, a creditor could have just over 30 days to submit a claim notwithstanding the one-year statute of limitations set forth in [ ] § 366.2." (*Levine v. Levine* (2002) 102 Cal.App.4th 1256, 1261.)

also alleges Bullis “gave notice of the claim that is the subject of this action to [the] trustee.”

Hamilton, Helms, Welge and Hardcastle, individually as the purported successors in interest, demurred to the second amended complaint on the basis that it failed to state facts sufficient to constitute a cause of action. In his opposition, Bullis argued in part that his lawsuit against the individual defendants was authorized under section 377.40 because “to the extent provided by statute” only refers to the definition of successor in interest in section 377.11 and requires no additional statutory authority for the commencement of an action. Nonetheless, Bullis stated Probate Code section 13109 also “might apply here.” Probate Code section 13109 provides, in part: “A person to whom payment, delivery, or transfer of the decedent’s property is made under this chapter is personally liable, to the extent provided in [Probate Code] Section 13112, for the unsecured debts of the decedent.” Bullis further asserted he did not need to file a claim against the trust because the trustee never filed a notice to creditors. The trial court sustained the demurrer without leave to amend. Specifically, the court held: (1) Bullis had not established any statute allowing a direct proceeding against the successors in interest, and (2) Hamilton was not required to file a notice to creditors.

Defendants subsequently moved for an order striking the second amended complaint as to Hamilton as trustee and dismissing the entire action. Before the court ruled on this motion, Hamilton demurred to the second amended complaint in her capacity as trustee on the grounds that it failed to state facts sufficient to constitute a cause of action against the trustee. In her motion, she argued Bullis was required to file a creditor’s claim before proceeding under section 377.40. In his opposition, Bullis argued he could proceed directly against the trust under Probate Code section 19008 without filing a creditor’s claim first.

On July 9, 2015, the trial court dismissed the action with prejudice as to Hamilton, Helms, Welge and Hardcastle as individuals. The court denied the motion to strike the

second amended complaint as to Hamilton as trustee. The court held the amendment of the complaint to add Hamilton's capacity as a trustee was not the addition of a new party, was done pursuant to leave to amend granted by the court, and the prior version of the complaint placed Hamilton on notice that Bullis had claims against Olson's assets held in the trust.

The next day, defendants filed a memorandum of costs. Bullis then filed a motion to strike the memorandum of costs or, alternatively, to tax costs. Bullis contended, in part, that the memorandum of costs was premature because no entry of judgment or dismissal had yet been served.

On September 15, 2015, the trial court sustained the demurrer filed by Hamilton in her capacity as trustee without leave to amend. The court stated that it recognized the claims procedures for revocable trusts of deceased settlors set forth in Probate Code section 19000 et seq. "can apply to revocable trusts that become irrevocable upon death," but no claim was ever filed against the decedent's estate or trust within the one-year limitation established by section 366.2.

On October 2, 2015, the trial court entered an order denying Bullis's motion to strike and tax costs.

## **II. DISCUSSION**

### *A. Standard of Review*

"It is well established that a demurrer tests the legal sufficiency of the complaint. [Citations.] On appeal from a dismissal entered after an order sustaining a demurrer, we review the order de novo, exercising our independent judgment about whether the [complaint] states a cause of action as a matter of law. [Citations.] We give the [complaint] a reasonable interpretation, reading it as a whole and viewing its parts in context. [Citations.] We deem to be true all material facts that were properly pled. [Citation.] We must also accept as true those facts that may be implied or inferred from those expressly alleged. [Citation.] We may also consider matters that may be judicially

noticed, but do not accept contentions, deductions or conclusions of fact or law.

[Citation.]” (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869-870; see also *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

“If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

*B. Trustee’s Demurrer*

We begin by isolating the critical question in this appeal—whether Bullis has alleged facts sufficient to constitute a cause of action against Hamilton as trustee under any theory. Bullis does not attack the trial court’s conclusion that he did not perfect a creditor’s claim in a timely manner. Instead, Bullis argues no creditor’s claim was required to assert his claim against the trustee, and his action against the trustee was timely because his original complaint against Hamilton as successor in interest was against the trust assets and the amendment to include Hamilton’s capacity as trustee merely relates back to the original complaint. Under section 366.2, Bullis had one year from the date of Olson’s death to file an action arising out of the shooting.<sup>3</sup> Regardless, the issues of timeliness and whether a creditor’s claim was required in this case are

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<sup>3</sup> Section 366.2, subdivision (a) provides in pertinent part as follows: “If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply.”

largely irrelevant to our analysis. It is the last issue raised by Bullis—whether he stated a claim under section 377.40—that is the most important. Bullis needed to allege facts sufficient to constitute a cause of action against Hamilton as trustee under a theory that did not involve a creditor’s claim. We conclude he did not.

While the second amended complaint purports to assert a claim against the trustee under section 377.40, that statute does not itself authorize litigation against a trustee. Section 377.40 provides: “Subject to Part 4 (commencing with Section 9000) of Division 7 of the Probate Code governing creditor claims, a cause of action against a decedent that survives may be asserted against the decedent’s *personal representative* or, to the extent provided by statute, against the decedent’s *successor in interest*.” (Italics added.) A trustee is not the same as a personal representative, which is an executor or administrator. (See Prob. Code, §§ 58, subd. (a) [defining “personal representative”], 84 [defining “trustee”].) Thus, Bullis contends his complaint states a cause of action against the trustee as a successor in interest under section 377.40. The complaint alleges the trustee was a successor in interest because she “became holder of legal title to all trust assets by operation of law.” We assume without deciding that this allegation was sufficient to allege the trustee was Olson’s successor in interest under the definition provided by statute. (See § 377.11.) But once Bullis chose to proceed under a theory that the trustee was the *successor in interest*, he triggered the limitation in section 377.40 that a cause of action against a successor in interest is only viable “to the extent provided by statute.” Section 377.40 does not itself authorize actions against a successor in interest. Therefore, Bullis’s invocation of this statute alone was insufficient to state a claim against a trustee, and we must look elsewhere for a statutory basis that can support his claim.

Before the trial court, the only other statutory basis Bullis identified to support a claim against the trustee was Probate Code section 19008.<sup>4</sup> While Probate Code section 19008 does apply, it also does not authorize actions against a trustee. Here, the trustee did not utilize the optional trust claim procedures set forth in Probate Code section 19000 et seq. and there was no probate proceeding. Where no trust claims or probate procedure has been initiated, Probate Code section 19008 provides that “the liability of the trust to any creditor of the deceased settlor shall be *as otherwise provided by law*.” (Prob. Code, § 19008, italics added.) Thus, Probate Code section 19008 does not itself authorize lawsuits against a trustee. Bullis cites *Embree v. Embree* (2004) 125 Cal.App.4th 487 (*Embree*) and *Valentine v. Read* (1996) 50 Cal.App.4th 787 (*Valentine*) in support of his assertion that he may proceed against the trust pursuant to Probate Code section 19008 by way of a lawsuit against the trustee. Both cases, however, simply state the rule in Probate Code section 19008 with no elaboration: Where neither a probate proceeding nor a trust claims proceeding has been initiated, the availability of trust property to any creditor of the deceased settlor “ ‘shall be as otherwise provided by law.’ ” (*Embree, supra*, at p. 494; *Valentine, supra*, at p. 793.) *Embree* and *Valentine* then proceed to mention that Probate Code section 19400 “permits a creditor to proceed against property distributed to the beneficiaries of the judgment debtor’s revocable living trust, subject to the one-year limitation period of section 366.2.” (*Embree, supra*, at p. 494; see also *Valentine, supra*, at p. 793.) Bullis does not rely on Probate Code section 19400, and neither *Embree* nor *Valentine* suggests Bullis may proceed against a trustee under Probate Code section

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<sup>4</sup> It appears to be the same on appeal because his reference to Probate Code section 13109 is unclear and insufficient, as discussed below.

19008 alone.<sup>5</sup> In short, Bullis’s second amended complaint and subsequent briefing have failed to articulate any basis for proceeding against the trustee in these circumstances.

*C. Individual Defendants’ Demurrer*

Bullis similarly contends that section 377.40 supports his action against the individual defendants because they are the decedent’s *successors in interest*. The second amended complaint alleges the individual defendants are Olson’s successors in interest because, upon his death, they “became holders of one-quarter equitable title of all the assets in the aforementioned trust pursuant to the terms of said trust [citation], by operation of law.” But as discussed above, regardless of whether the individual defendants qualify as successors in interest, to assert a cause of action against them requires a statute other than section 377.40. Again, Bullis has failed to identify a statute that would support a cause of action under these facts.

Probate Code section 13109 is the type of separate authority referenced by section 377.40 because it can create personal liability against a successor in interest. Probate Code section 13109 provides, in pertinent part: “A person to whom payment, delivery, or transfer of the decedent’s property is made [outside of probate by affidavit or declaration pursuant to Probate Code section 13100] is personally liable, to the extent provided in [Probate Code] Section 13112, for the unsecured debts of the decedent. . . . [The one-

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<sup>5</sup> Probate Code section 19400 allows certain creditor claims against beneficiaries of trusts who have accepted distributions from the trust. (*Levine v. Levine, supra*, 102 Cal.App.4th at p. 1262; see Prob. Code, § 19400 [“Subject to Section 366.2 of the Code of Civil Procedure, if there is no proceeding to administer the probate estate of the deceased settlor, and if the trustee does not file a proposed notice to creditors pursuant to [Probate Code] Section 19003 and does not publish notice to creditors pursuant to Chapter 3 (commencing with [Probate Code] Section 19040), then a beneficiary of the trust to whom payment, delivery, or transfer of the deceased settlor’s property is made pursuant to the terms of the trust is personally liable, to the extent provided in [Probate Code] Section 19402, for the unsecured claims of the creditors of the deceased settlor’s probate estate”].)

year statute of limitations set forth in] Section 366.2 of the Code of Civil Procedure applies in an action under this section.” In the trial court, Bullis made a very limited argument that Probate Code section 13109 “might apply here.” On appeal, his reliance on Probate Code section 13109 is no clearer. And to the extent that his reference to this statute appears under a heading arguing that *section 377.40* allows this action, that reference to Probate Code section 13109 is insufficient to raise the issue. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830, fn. 4.)

Nonetheless, we also observe that Bullis’s hesitance regarding Probate Code section 13109 is consistent with the fact that while the allegations in his complaint suggest that assets may have been transferred to the trust without a probate proceeding as contemplated in section 13100 et seq., it also appears that any transfer occurred after the one-year statute of limitations had expired. On this issue, the second amended complaint alleges that, as executor of Olson’s will, Hamilton transferred all of Olson’s assets that were outside of the trust to the trust by declaration because they were below the statutory minimum requiring probate to be opened. This allegation is supported by a citation to Hamilton’s declaration in support of defendants’ motion for summary judgment, which also says the assets were transferred to the trust more than a year after the decedent’s death. Thus, the declaration cited by Bullis to support the application of Probate Code section 13109 also shows a claim under this section would not be viable because the asset transfer by declaration occurred after the statute of limitations had expired. We concur with the trial court’s conclusion that Bullis’s second amended pleading and allusion to Probate Code section 13109 are insufficient, and he “has not established any statute allowing a direct proceeding against the successors in interest.”

### III. DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

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RENNER, J.

We concur:

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DUARTE, Acting P. J.

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HOCH, J.