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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

SHELLY ALBERT et al., as Trustees, etc., Plaintiffs and Appellants, v. ROBERT DUBIN, Defendant and Respondent.	B277826 (Los Angeles County Super. Ct. No. BC586724)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Samantha P. Jessner, Judge. Affirmed.

Law Offices of Matthew C. Mickelson, Matthew C. Mickelson for Plaintiffs and Appellants.

Hamberg, Karic, Edwards & Martin, Gregg A. Martin and David M. Almaraz for Defendant and Respondent.

Shelly Albert and Craig Albert, as Trustees of the Seymour Albert and Henrietta Albert Revocable Trust (the Trustees), appeal the July 15, 2016 judgment entered against them and in favor of respondent, Robert Dubin (Dubin), following the grant of Dubin's motion for summary judgment. We affirm, determining that the Trustees lacked standing to sue to enforce the 1997 judgment entered in favor of their deceased parents.

FACTUAL AND PROCEDURAL BACKGROUND

On February 27, 1997, the Los Angeles Superior Court entered a stipulated judgment in a civil action brought by Seymour and Henrietta Albert[1] and two businesses operated by Seymour against several financial institutions and individuals including Dubin for fraud, professional negligence and other torts. (BC101768; the 1997 Judgment) The 1997 Judgment ordered Dubin to pay Seymour and Henrietta and one of the businesses which Seymour operated, $937,000.[2]

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[1] Because many of the parties share the same surname, we will refer to the deceased parents of the trustees and the individual trustees by their first names. We intend no disrespect.

[2] Dubin was also ordered to pay Bank of America $251,000 to resolve a cross-complaint which it had filed against him in that action. The 1997 Judgment also specified that each judgment creditor was to receive interest at the legal rate (10%) from the date of entry of that judgment.

In 1990 Seymour and Henrietta had created and partially funded the Seymour Albert and Henrietta Albert Revocable Trust (the Trust). At that time, Seymour and Henrietta executed an Assignment of Personal Property document (Assignment).[3] When the Trust was amended and restated in 2003, no new Assignment document was executed. Seymour and Henrietta never executed a document assigning to the Trust the amount to which they were entitled under the 1997 Judgment.

At the same time as they amended and restated the terms of the Trust, they also each executed a Will. Each Will contained the following devise: "THIRD: I give my entire estate as follows: [¶] 1. I give my estate to the trustees of [the Trust] . . . ."[4] Shelly and Craig are the adult children of Seymour and Henrietta. They were designated successor cotrustees of the Trust[5] and co-

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[3] The Assignment assigned "to the Trustee of the [Trust], dated September 24, 1990, all right, title and interest in and to all automobiles, jewelry, household goods, furniture, furnishings, appliances, clothing, coin collections and all other personal property whatsoever."

[4] Such provisions are commonly referred to as "pour over clauses" and wills containing such provisions are commonly described as "pour over wills." (California Estate Planning (Cont.Ed.Bar 1st ed. 2017) § 6.41, pp. 6-32-6-33.)

[5] In this capacity, they are referred to hereinafter as the Trustees.

executors of the Wills. Seymour died in 2009. Henrietta died in 2012. Neither Will was probated. The 1997 Judgment was never renewed.

On June 30, 2015, the Trustees commenced the present action, seeking to enforce the terms of the 1997 Judgment, pursuant to Code of Civil Procedure section 683.050.[6] In their "Complaint on Domestic Money Judgment" (Los Angeles Sup. Ct. No. BC586724) the Trustees alleged, inter alia, that Seymour and Henrietta had "intended to and did transfer the [1997] Judgment in their favor against DUBIN into the Trust," and that the Trustees are the current trustees and have the right to sue to enforce the judgment as trustees of the Trust. They also alleged that because Dubin had moved from the state of California "no later than 2000 and permanently moved to the state of Nevada . . . the ten year statute [of limitations in which] to file a lawsuit on the judgment has been tolled . . . until the present day."

In his answer, Dubin alleged several affirmative defenses including "that [the Trustees] lack standing to assert any of the claims" against him.

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[6] Code of Civil Procedure section 683.050 provides: "Nothing in this chapter limits any right the judgment creditor may have to bring an action on a judgment, but any such action shall be commenced within the period prescribed by Section 337.5."

The parties filed cross-motions for summary judgment, and, following argument thereon, the trial court granted Dubin's motion and took the Trustees' motion off calendar as moot.[7] The trial court reasoned that the "primary dispute between the parties in this matter is whether the provisions of CCP § 351 may be applied to toll the application of CCP § 377.5[8] [sic; 337.5(b)] during Dubin's absence from California." The trial court noted that the Trustees had failed to renew the 1997 Judgment prior to its 10th anniversary and therefore could only prevail in the present action if Dubin's extended absence from California tolled application of Code of Civil Procedure section 337.5, subdivision (b).[9] The trial court reasoned that application of Code of Civil

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[7] In ruling on the motion, the trial court did not rule on any of Dubin's objections to the evidence offered by the Trustees, reasoning that they were not material to the disposition of the motion, citing Code of Civil Procedure, section 437c, subdivision (q): "In granting or denying a motion for summary judgment . . . , the court need rule only on those objections to evidence that it deems material to its disposition of the motion. Objections to evidence that are not ruled on for purposes of the motion shall be preserved for appellate review."

[8] There is no such section; this is clearly a typographical error in the subject ruling.

[9] Code of Civil Procedure, section 351 provides: "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the term herein limited, after his return to the State, and if, after the cause of action

Procedure section 351 in this case "would impermissibly burden interstate commerce and, therefore, violates the Commerce Clause as applied to . . . Dubin" and granted Dubin's motion.

The Trustees filed this timely appeal.

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accrues, he departs from the State, the time of his absence is not part of the time limited for the commencement of the action."

Code of Civil Procedure section 337.5 provides: [The period prescribed for commencement of an action other than for the recovery of real property is] "Within 10 years . . . [¶] (b) An action upon a judgment or decree of any court of the United States or of any state within the United States."

Unless it is renewed, Code of Civil Procedure, section 683.020 bars enforcement of a money judgment more than 10 years after the date of its entry.

CONTENTIONS[10]

The Trustees contend they have standing—as trustees of the Trust—to sue to enforce the 1997 Judgment and that the applicable statute of limitations, Code of Civil Procedure section 337.5, was tolled during Dubin's absence from California. For the reasons set out below, however, the Trustees lack standing to bring the action which is the basis for the present appeal. We therefore do not reach the Trustees' contention regarding the constitutionality of application of Code of Civil Procedure section 351 in this case.[11]

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[10] The Trustees err in arguing that the trial court's determination to take their motion off calendar must also be reviewed in this appeal. The case upon which they rely, *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, is inapposite. There, after denying a motion for summary judgment, there was a full trial on the merits. The question presented on appeal was whether the judgment could be set aside because the motion for summary judgment had been "improperly" denied. (*Id.* at p. 833.) The appellate court in that case held that such an "error" is not reversible unless it resulted in prejudice to the appellant under California Constitution, article, VI, section 13. Here, we affirm the ruling against the Trustees; thus taking the Trustees' motion off calendar did not result in prejudice to them as their motion for summary judgment was without merit.

[11] In deciding this case without addressing the Trustees' contention that application of Code of Civil Procedure section 351 does not implicate the Commerce Clause of the United States Constitution (U. S. Const., art. 1, § 8, cl. 3), we follow the well-established principle of avoiding deciding constitutional

DISCUSSION

A. Outline of the Trustees' Argument

Noting that judgment creditors have the right to sue to enforce a judgment (Code of Civ. Proc., § 683.050), and that Seymour and Henrietta were judgment creditors of Dubin, the Trustees argue that Code of Civil Procedure section 686.010 entitles them to sue to enforce the 1997 Judgment. For the reasons now discussed, the Trustees fail to recognize that because the estates of Seymour and Henrietta were never probated, the 1997 Judgment is not an asset of the Trust and therefore, as Trustees, they do not have standing to sue to enforce the 1997 Judgment. That Shelly and Craig are the statutory heirs of their parents (Prob. Code, § 44), nominated coexecutors of their wills and the successor trustees of the Trust, does not entitle them to avoid probate of the Wills of the parents when required by provisions of the Probate Code, as in this case.

B. Standard of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the moving and opposition papers except

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questions unless absolutely necessary. (See, *People v. Brown* (1993) 6 Cal.4th 322, 334–335; *City of Huntington Park v. Superior Court* (1995) 34 Cal.App.4th 1293, 1299 [court has obligation to avoid deciding constitutional questions unless absolutely necessary to do so and notwithstanding that they are "interesting"].)

that to which objections have been made and sustained. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) . . . [W]e determine with respect to each cause of action whether the defendant seeking summary judgment has conclusively negated a necessary element of the plaintiff's case, or has demonstrated that under no hypothesis is there a material issue of fact that requires the process of trial, such that the defendant is entitled to judgment as a matter of law. [Citations omitted, fn. omitted.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334–335.)

"We are not bound by the trial court's stated reasons or rationales. [Citation omitted.] We accept as true the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn from them. [Citation omitted.] (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1039.) "In undertaking our independent review of the evidence submitted, we apply the same three-step analysis as the trial court. First, we identify the issues framed by the pleadings. Next, we determine whether the moving party has established facts justifying judgment in its favor. Finally, if the moving party has carried its initial burden, we decide whether the opposing party has demonstrated the existence of a triable, material fact issue. [Citation.]" (*Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438; accord *Cucuzza v. City of Santa Clara, supra*, at p. 1039; Code Civ. Proc., § 437c, subd. (p)(2).)

In our independent analysis, "'"[w]e liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party."'" (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.)" (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.)[12]

And, we affirm the trial court on any correct legal basis, even one not reached by that court. "'The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' (*Davey v. Southern Pacific Co*. (1897), 116

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[12] The trial court's rulings on the parties' written objections to evidence are not challenged on appeal. (See, *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1182, fn. 5 [appellant's failure to address trial court's evidentiary rulings in connection with summary judgment forfeited contentions of error regarding rulings].)

Cal. 325, 329.)" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18–19.)

C. Applicable Probate Code statutes and principles

As noted in a leading practice guide, Drafting California Revocable Trusts (Cont.Ed.Bar. 4th ed. 2017), when a revocable living trust is established, it is typically funded in part by an assignment of personal property. (*Id*. at § 21.15, p. 21-22-21-23.) To take into account the likely acquisition of property between the time of funding of the trust and death, a settlor[13] of such a trust commonly includes in his or her will a provision to "pour over" into the revocable living trust property that was not previously transferred to the trust. In this manner, the entirety of the decedent's estate can be administered as a unit. (California Estate Planning (Cont.Ed.Bar. 1st ed. 2017) § 6.41, p. 6–32.)

Effecting the transfer of property by a pour over clause in a will on the death of a decedent is not automatic, however. In order for property which is not an asset of the revocable living trust on the date of death of a settlor of a trust to become an asset of that trust requires probate of the will of the decedent, unless

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13 The term "settlor" refers to the party who established the trust (Prob. Code, § 15400; California Trust Administration (Cont.Ed.Bar 3d ed. 2017) § 15.39A, p. 15–43).

an exception applies. (Prob. Code, § 13501, subd. (b);[14] 15 Witkin & Epstein, Summary of Cal. Law (11th ed. 2017) Wills & Probate, § 867.)

While there is no exception to the requirement to probate wills containing "pour over" clauses, there is an exception for estates the value of which does not exceed a specific threshold, $100,000, later increased to $150,000.[15]

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[14] Probate Code section 13501 provides: "Except as provided in Chapter 6 . . . , the following property of the decedent is subject to administration under this code: . . . (b) Property disposed of in trust under the decedent's will."

[15] From July 1, 1991 until January 1, 2011, Probate Code section 13100 provided, with exceptions not relevant to the present case, ". . . if the gross value of the decedent's real and personal property in this state does not exceed one hundred thousand dollars ($100,000) and if 40 days have elapsed since the death of the decedent, the successor of the decedent may, without procuring letters of administration or awaiting probate of the will, do any of the following with respect to one or more particular items of property: (a) Collect any particular item of property that is money due the decedent. (b) Receive any particular item of property that is tangible personal property of the decedent. (c) Have any particular item of property that is evidence of a debt, obligation, interest, right, security, or chose in action belonging to the decedent transferred, whether or not secured by a lien on real property."

D. Standing

"Only a real party in interest has standing to prosecute an action, except as otherwise provided by statute. (Code Civ. Proc., § 367.) A party who is not the real party in interest lacks standing to sue. (*Cloud v. Northrop Grumman Corp*. (1998) 67 Cal.App.4th 995, 1004.) 'A real party in interest ordinarily is defined as the person possessing the right sued upon by reason of the substantive law.' (*Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605.)" (*Redevelopment Agency of San Diego v. San Diego Gas & Elec. Co*. (2003) 111 Cal.App.4th 912, 920–921.) Without standing, there is no actual or justiciable controversy, and courts will not entertain such cases. (3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 44, pp. 70–72; *Clifford S. v. Superior Court* (1995) 38 Cal.App.4th 747, 751.)

An inquiry to determine standing is critical because a plaintiff who lacks standing cannot state a valid cause of action. A contention based on a plaintiff's lack of standing cannot be waived and may be raised at any time in the proceedings,

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If an estate qualifies to use this procedure, the successors must jointly execute the declaration or affidavit prescribed by section 13101.

Probate Code section 13100 was amended to increase the amount which may pass without probate to $150,000, effective January 1, 2012. (Prob. Code, § 13100, as amended by Stats. 2011, ch. 117, § 4) We need not address any argument that that increase is retroactive, as in this case, the amount of the 1997 Judgment exceeds each of these statutory thresholds.

including for the first time on appeal. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 438-439 [standing issue involves "jurisdictional challenges" and may be raised for the first time on appeal; in that case, for the first time before the Supreme Court]; *McKinny v. Board of Trustees* (1982) 31 Cal.3d 79, 80–81; *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 619; *Parker v. Bowron* (1953) 40 Cal.2d 344, 351; *Drake v. Pinkham* (2013) 217 Cal.App.4th 400, 407 [issue raised in respondent's brief on appeal].)

E. Additional facts and application

The parties do not dispute the facts relevant to determination of the issue of the Trustees' standing: The Trustees agree that the Wills of Seymour and Henrietta were not probated and Dubin does not contest the authenticity or terms of those Wills, of the Trust, of the 1990 Assignment, or that the 1997 Judgment was the result of an action maintained by Seymour and Henrietta as individuals and not as Trustees of the Trust. Nor is there any evidence of any assignment of personal property to the Trust executed after 1990 or of a specific assignment of the 1997 Judgment to the Trust. Instead, each of the Trustees executed a declaration dated in 2016 which they contend complies with Probate Code sections 13100 and 13101. We also assume for this analysis that the principal of the 1997 Judgment was the community property of Seymour and

Henrietta, thus reducing the principal and interest due on the 1997 Judgment in each estate on the date of death by half.[16]

In the trial court, it was Dubin's burden to establish, as a matter of law, that the Trustees lacked standing to bring the action. Relying on the essentially undisputed material facts, that the 1997 Judgment was obtained by Seymour and Henrietta as individuals, and that the present action was commenced by Shelly and Craig as Trustees on behalf of the Trust, Dubin argued below, and contends on appeal, that "it is undisputed that [Trustees] were not parties to the original action upon which [the 1997 Judgment] was obtained against Dubin. . . . As such [they] have no standing to prosecute this claim against Dubin."[17] This

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[16] The 1997 Judgment accrued interest at 10 percent from the date of the judgment pursuant to Code of Civil Procedure section 685.010. A declaration filed by Shelly in the trial court contains a computation of interest due on the 1997 Judgment through February 25, 2016, in the amount of $1,780,300, with a daily interest accrual thereafter of $256.71. As of the date she executed her declaration, the total amount due was computed to be $2,741,430.70. We need not address whether this calculation is accurate. Even excluding interest due thereon, the community property interest in the principal amount due on the 1997 Judgment to each decedent far exceeded the maximum allowable for use of the exception to the probate of each of the Wills of Seymour and Henrietta permitted by Probate Code section 13100.

[17] In these arguments, Dubin relies for support upon Code of Civil Procedure sections 377.11 and 377.32. We need not address

shifted the burden to the Trustees to refute Dubin's claims. The Trustees argued there, and raise on appeal, the following counter-arguments, which we now address.[18]

The Trustees first argue that they may enforce the 1997 Judgment as trustees of the Trust on the authority of Code of Civil Procedure section 686.010 which provides: "After the death of the judgment creditor, the judgment may be enforced as provided in this title by the judgment creditor's executor or administrator or successor in interest." They advance this argument in reliance on the Law Revision Commission Comment to this statute, which merely rephrases the statute, and on

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his reliance on these specific statutes because his argument that the Trustees lack standing is correct, albeit based on other statutes—those cited by the Trustees, and because Dubin's standing claims are fundamental to our jurisdiction.

We also reject the Trustees' argument that they may sue on the 1997 Judgment as "successor[s] in interest" within the meaning of Code of Civil Procedure section 337.30 because that statute does not supersede the requirement that they first comply with requirements for its transfer to them pursuant to the Probate Code.

[18] Because the trial court did not address the issue of standing in its decision, in compliance with Code of Civil Procedure section 437c, subdivision (m)(2), we offered the parties an additional opportunity to brief the issue and the related issue of any need to probate the decedents' interests in the 1997 Judgment. Only the Trustees filed a response, but it does not alter our analysis.

Darter v. Magnussen (1959) 172 Cal.App.2d 714, from which they quote the following passage: "'". . . it is well settled that death of the plaintiff after judgment in his favor and while the judgment stands does not abate the action or affect the validity of the judgment. . . . Such a judgment becomes part of his estate and may be enforced by his representatives.'" (*Id*. at p. 719) The quoted language does not abrogate the requirement to probate a will when required by statute.

And, nothing in the cited statute, or in the Enforcement of Judgments Act (Code of Civ. Proc., §§ 680.010 et seq.), repeals or supersedes any provision of the Probate Code: it is that code (with exceptions not relevant here) which regulates the procedure by which "a judgment becomes part of [the decedent's] estate" after which it may be "enforced by [the] "representatives" of the decedent. (*Ibid*.)[19]

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[19] In construing provisions of the Code of Civil Procedure and Probate Code, we apply well-established principles of statutory construction. "'The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.]' (*Dyna–Med, Inc. v. Fair Employment & Housing Com*. (1987) 43 Cal.3d 1379, 1387.) Thus, 'every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect.' (*Moore v. Panish* (1982) 32 Cal.3d 535, 541; see also *Mejia v. Reed* [2003] 31 Cal.4th [657,] at p. 663; *City of Huntington Beach v. Board of Administration* [1992] 4 Cal.4th [462,] at p. 468.) Where

Properly construed, the section upon which the Trustees rely means that a judgment does not expire on death and that it may be enforced *by the appropriate representative*. As we have noted, *ante*, determining who is the appropriate representative requires compliance with provisions of the Probate Code.

Nor does *Darter v. Magnussen, supra*, 172 Cal.App.2d 714, support the Trustees' claim that death brings about the *automatic* transfer of an asset, whether to the heirs under a will or to the trustees or beneficiaries of a revocable living trust. In that case, the executor of the estate of the deceased wife had substituted into a family law proceeding for the wife who had died after entry of an interlocutory decree of divorce for the

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several codes are to be construed, 'they "must be regarded as blending into each other and forming a single statute." [Citation.] Accordingly, they "must be read together and so construed as to give effect, when possible, to all the provisions thereof." [Citation.]' (*Tripp v. Swoap* (1976) 17 Cal.3d 671, 679, overruled on another point in *Frink v. Prod* (1982) 31 Cal.3d 166, 180; accord, *Mejia v. Reed, supra,* 31 Cal.4th at p. 663.)" (*Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54; accord, Civ. Code, § 1858; *Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 191–192.)

Probate Code section 1000 makes clear that Code of Civil Procedure "rules of practice" apply only to the extent the Probate Code is silent as to a particular *procedural rule*. Rules of substance, such as those set out in the Probate Code regarding when a will must be probated, are given primacy.

purpose of collecting for her estate assets due to the deceased wife under that decree. There is nothing in that case to suggest that death *automatically* brings about a transfer of assets prior to probate when other statutes require compliance with the Probate Code.

It is a fundamental principle that statutes and codes are to be construed in harmony unless there is a specific reason not to do so. (See, fn. 19, *ante*.) The Trustees present no argument that that rule should not be applied here.

Second, appellants argue that they have standing because (a) each of the wills of Seymour and of Henrietta, of which they are co-executors, provides that all of the decedent's property is to be transferred to the Trust upon his and her deaths; [20] (b) the 1997 Judgment is personal property, vested under the authority of Probate Code section 62 and *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982 (*Rappleyea*); and (c) "the Trust as a matter of law inherits the [1997] Judgment."

Appellants err in each claim. To the extent they rely on the pour over clause in each of the Wills of Seymour and Henrietta, and as we have discussed, *ante*, the presence of such a clause in a will is not an automatic exception to the requirement that each decedent's will, even one containing such a provision, must be probated unless an exception applies. There is no "automatic"

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[20] Each of these Wills contains the pour over clause quoted at page 3, *ante*.

exception to probate; probate is mandatory unless a specific statutory exception applies. (See California Decedent Estate Practice (Cont.Ed.Bar 2nd ed. 2017) § 3.11, p. 3–9.) The Trustees also err in their reliance upon Probate Code section 62, which contains only a definition of the term property.[21]

Nor does the Trustees' reliance on *Rappleyea, supra,* support their argument. That case does not address any issue of relevance to the Trustees' claim that personal property is automatically transferred to a revocable living trust on the death of one of its settlors. Instead, the case concerns principles to be applied in ruling on a motion to set aside a default and default judgment, only incidentally referencing the circumstance that a judgment is a form of personal property.

Third, the Trustees argue that section 2.4 of the Trust "ensure[s] that the judgment is now part of the property owned by the Trust" because that section authorizes the Trustee to "*accept* additions to this trust from any source." Based on this provision, the Trustees argue that the Wills of Seymour and Henrietta automatically transferred all property to the Trust, including the 1997 Judgment. However, the third sentence of the same paragraph requires "That additional property shall become part of the trust estate on written acceptance of it by the trustee."

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[21] Probate Code section 62 provides: "'Property' means anything that may be the subject of ownership and includes both real and personal property and any interest therein."

There is no evidence that any such "written acceptance" of the 1997 Judgment was ever executed.

Further, the third sentence of the same paragraph states: "That additional property shall become part of the trust estate on written acceptance of it by the trustee." There is no evidence that any such "written acceptance" of the 1997 Judgment was ever executed.[22]

Fourth, appellants argue, "[e]ven if Code of Civil Procedure section 686.010 and Section 2.4 of the Trust were not sufficient to, by themselves, vest ownership and the power to enforce the

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[22] As we discuss, *ante*, the 1990 Assignment did not transfer the 1997 Judgment to the Trust. By its terms, the Assignment addresses property in the possession of the settlors of the Trust on the date of its execution. In addition to the arguments discussed in the text of this opinion, the idea that the settlors intended to add the 1997 Judgment automatically to the property held by the Trust is at least doubtful because, when they executed the Assignment in 1990, the Trustees were entirely unaware they had any claim against Dubin. As they allege in the complaint they filed in 1995, five years after they executed the Assignment, they did not discover any potential that Dubin had been defrauding them until at least July or August 1993. As an unknown claim, any potential right to recovery was a mere expectancy. California does not recognize such expectancies as property capable of being conveyed. (Civ. Code, §§ 700 ["A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind"] and 1045 ["A mere possibility, not coupled with an interest, cannot be transferred"]; see Restatement Second of Trusts, section 75 ["An interest which has not come into existence . . . cannot be held in trust"].)

judgment in the Trust, the Trust still possesses standing" because a "'settlor can manifest his intent to create a trust.'" In making this argument, the Trustees confuse the intent to create a trust with the intent to fund it with assets. Their claim must be that the settlors intended to place all of their personal property in the Trust (a) by use of the 1990 Assignment of Personal Property; (b) "in terms of their Wills," (suggesting that the pour over clauses in the Wills of Seymour and Henrietta were sufficient to make the transfer); and (c) "by numerous conversations with their children, who are now successor trustees . . . ."

We have addressed, *ante*, the error in the Trustees' arguments based on the 1990 Assignment. And we have pointed out that the Probate Code requirement to probate an estate over a certain amount is not obviated by the presence in a Will of a "pour-over" provision.

There also is no merit to the argument that the 1997 Judgment must be an asset of the Trust based on the "numerous conversations with their children." Such a claim cannot prevail over the Probate Code requirement that a person dying with more than $100,000 in assets must commence and complete the probate process to effect the transfer of those assets as designated in the will of a decedent. Indeed, it is by probate that these claimed numerous conversations with their parents stating

the intentions of the parents are carried into effect. The Trustees' reliance on *Kucker v. Kucker* (2011) 192 Cal.App.4th 90 (*Kucker*) to support this argument is misplaced. There, when the settlor of that revocable living trust amended and restated her revocable living trust, she executed an assignment "transferring all of her shares of stock in 11 specified corporations and funds." She omitted one security from that list. (*Id*. at pp. 92, 94.) In reversing the probate court's ruling that the omitted security was not an asset of the trust, the court of appeal relied on the clearly expressed intent of the settlor to transfer all of her securities to the trust, ruling that the omission of a single security when all others were expressly stated as being transferred was clearly an inadvertent omission. (*Id*. at pp. 94–95.) The *Kucker* court continues by referencing a practice guide which suggests that settlors periodically execute a general assignment of all of their assets to their trusts so that later acquired items can be added to those trusts on petition to the probate court.[23] (*Id*. at p. 95.) The

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[23] The court in *Kecker, supra*, cites *Estate of Heggstad* (1993) 16 Cal.App.4th 943, in which the appellate court approved a mechanism by which the trustees of a trust may apply to the probate court for an order adding omitted real property to a trust in absence of a deed conveying that property to the trustees of the trust when there was an unrecorded assignment which listed that real property as an asset of the trust. (*Id*. at p. 948.) Here, there is no such specific assignment and no probate court proceeding to confirm that the 1997 Judgment is an asset of the

"asset" at issue in this case was unknown to Seymour and Henrietta until three years after they executed the Assignment. And, there is no evidence here that any later Assignment was executed. Nor have the Trustees sought to add the 1997 Judgment to the Trust by application to the probate court.

Fifth, the Trustees rely on the "Declaration pursuant to Probate Code section 13100" which they contend "automatically transfers the property owned by the decedents—the 1997 Judgment—to the Trust, pursuant to the terms of the Will."

In support of this claim, the Trustees rely on the declaration filed by each of the Trustees, dated February 24, 2016, stating,[24] inter alia:

"4. The current gross fair market value of the decedents' real and personal property in California . . . does not exceed one hundred fifty thousand dollars ($150,000)."

This claimed fact is clearly false. First, the face of the 1997 Judgment indicates that the amount due to Seymour and Henrietta is $937,000 plus interest. And, within a few days of the date she signed her declaration purporting to rely on the exception to probate contained in Probate Code section 13100,

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Trust. For these reasons, the Trustees' reliance on this case is misplaced.

[24] The same declarations state that "[n]o probate proceeding is now being or has been conducted in California for administration of the decedents' estates."

Shelly signed a second declaration in which she references these section 13100 declarations, recites the principal balance of the 1997 Judgment as $937,000 and then sets out in detail the calculation of interest in the nine years since the date of the 1997 Judgment, concluding with the statement: "Added to the principal, the total amount to satisfy the judgment is therefore $2,741,430.70."[25]

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[25] At argument, counsel for the Trustees argued that we must accept without question the representation in the Probate Code section 13100 declarations which each trustee filed that the fair market value of the 1997 Judgment did not exceed $100,000, and thus that those declarations were effective to transfer the right to collect on that judgment to the Trustees. We cannot agree. First, these claims of valuation are made without any statement of how either declarant has the expertise to competently testify to the present value of the 1997 Judgment. Second, five days before Shelly filed the declaration, upon which her counsel relies, she filed the declaration quoted in the text in support of the Trustees' motion for summary judgment. Third, in the memorandum of points and authorities filed by counsel for the Trustees in support of their motion for summary judgment, he states that "the Court must enter judgment against [Dubin] in the principle [sic] sum plus interest accrued since its entry, which totals $2,741,430.70." Fourth, the Separate Statement in support of the Trustees' motion for summary judgment states as Undisputed Fact 16: "The current value of the judgment, with interest, is $2,741,430.70."

We take judicial notice that the amount of the 1997 Judgment—whether its original principal amount, or with the addition of over nine years of interest—is far greater than the maximum allowable to avoid probate under Probate Code section 13100.

We conclude that the 1997 Judgment has never been properly conveyed to the Trustees in their capacity as trustees of the Trust. The present action was necessarily premised upon the standing of the Trustees to sue in their capacities *as trustees of the Trust* to enforce the 1997 Judgment. However, because the 1997 Judgment is not an asset of the Trust, the Trustees lack standing to sue to collect on it.

DISPOSITION

The July 15, 2016 judgment is affirmed. The parties shall each bear their own costs on appeal pursuant to California Rules of Court, rule 8.278(a)(5).

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J. HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.