2d Civil No. B256889

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARK S. NOVAK,

Petitioner and Appellant,

v.

DANA TEITLER TRUST,

Respondent and Appellee,

Appeal from the Los Angeles County Superior Court
The Honorable Roy L. Paul, Judge
The Honorable James A. Steele, Judge
Case No. LP013320

APPELLANT'S OPENING BRIEF

GREINES, MARTIN, STEIN & RICHLAND LLP
*Robin Meadow, SBN 51126
rmeadow@gmsr.com
David E. Hackett, SBN 271151
dhackett@gmsr.com
5900 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90036
Tel: 310-859-7811 / Fax: 310-276-5261

Attorneys for Petitioner and Appellant
MARK S. NOVAK

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5900 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90036
Tel: 310-859-7811 / Fax: 310-276-5261

Attorneys for Petitioner and Appellant
MARK S. NOVAK

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Second **APPELLATE DISTRICT, DIVISION** Five	Court of Appeal Case Number: B256889
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* David E. Hackett (SBN 271151) Greines, Martin, Stein & Richland LLP 5900 Wilshire Boulevard, 12th Floor Los Angeles, California 90036 TELEPHONE NO.: 310-859-7811 FAX NO. *(Optional):* 310-276-5261 E-MAIL ADDRESS *(Optional):* dhackett@gmsr.com ATTORNEY FOR *(Name):* Appellant Mark S. Novak	Superior Court Case Number: LP013320 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Mark S. Novak RESPONDENT/REAL PARTY IN INTEREST: Dana Teitler Trust	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party *(name)*: Mark S. Novak

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	Abigail Morgan Lee Fay	Beneficiary of Dana Teitler Trust
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 1, 2014

David E. Hackett
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

When Douglas Kelly hired petitioner and appellant Mark Novak to represent him in a probate case, they agreed that Novak would receive a contingent fee and an equitable lien against Douglas's recovery in the case. After Novak had spent more than 320 hours working on the case and advanced more than $7,000 in costs, he obtained a favorable settlement for Douglas. But when Novak petitioned the probate court to enforce his lien and collect his share of the settlement, the probate court denied the petition, depriving him of any compensation.

The court erred. Its ruling contradicts multiple Probate Code provisions.

Douglas's probate claim was against the estate of his late wife, Dana Kelly. When he settled the claim, he received a valuable asset in return: a beneficial interest in the income and principal of Dana's inter vivos trust. In the settlement agreement, Douglas directed that upon his death, a portion of that beneficial interest should be transferred, outside of his probate estate, to Dana's daughter, Abigail Fay.

Then, Douglas died. Novak filed the underlying petition to enforce his equitable lien against Douglas's beneficial interest in Dana's trust. The probate court concluded that Novak was required, but failed, to file a claim against Douglas's probate estate within a year of Douglas's death, and that Novak's petition was therefore time-barred.

That was error. Because Novak is an equitable lienholder, Probate Code section 9391 allowed him to enforce his lien against Douglas's beneficial interest in the trust without first filing a creditor's claim in probate or complying with the creditor's claim time limit. Additionally, because the settlement agreement effected a nonprobate transfer of Douglas's beneficial interest in the trust under Probate Code section 5000, that beneficial interest—with Novak's lien already attached to it—never became part of Douglas's estate upon his death. Accordingly, Novak could not have enforced his lien through a creditor's claim against Douglas's estate.

The probate court's order denying Novak's petition must be reversed with directions to grant the petition.

STATEMENT OF FACTS

We present the facts as stated in Novak's petition and exhibits, which the probate court accepted for purposes of its legal rulings. (Appellant's Appendix [AA] Tab 10, p. 151 [in ruling on the petition, the court states that "Probate Code Section 5000 does not apply to the facts as set forth in Mark S. Novak's *Petition*"].) We do not believe there is any material factual dispute.

A. The Parties.

Petitioner and appellant Novak represented the late Douglas Kelly for more than five years.[1] Douglas hired Novak to file a probate claim on his behalf, under a contingency fee agreement. (AA Tab 3, p. 60.)

The late Dana Kelly, also known as Dana Teitler, was Douglas's wife between 2002 and her death in 2006. (AA Tab 3, p. 92.) She was a beneficiary of her grandparents' real property trust, the Teitler Family Trust, and she received payments of income and principal from that trust. (*Id.* at pp. 93-95.)

Abigail Fay is Dana's minor daughter; Douglas was her stepfather. (AA Tab 3, pp. 50-51.) Michael Fay is Abigail's father and legal guardian, and the current trustee of Dana's inter vivos trust, the Dana Teitler Trust. (*Id.* at pp. 50, 53-54.)

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[1] Because the family members involved in this case share last names, we refer to them by their first names.

B. Dana's Grandparents Create A Trust And Make Dana A Beneficiary.

Many years ago, Dana's grandparents created the Teitler Family Trust and named Dana as a beneficiary. (AA Tab 1, p. 4; AA Tab 3, p. 93.) The Teitler Family Trust includes substantial real property. (AA Tab 3, pp. 93-95.) As a beneficiary, Dana was entitled to a one-half beneficial interest in the Teitler Family Trust's assets, as well as regular payments of distributable income. (*Id.* at pp. 93-96.)

C. Dana Creates Her Own Trust, Which She Never Amended To Provide For Douglas.

In 1999, several years before she married Douglas, Dana created her own inter vivos trust, the Dana Teitler Trust (Trust). The corpus of the Trust includes Dana's beneficial interest in the income and principal of the Teitler Family Trust. (AA Tab 3, pp. 95-96; AA Tab 1, pp. 5-7.)

The Trust's terms direct that upon Dana's death, all Trust assets shall be distributed to a trustee, and that ultimately significant portions of those assets shall be distributed to Abigail, a named beneficiary. (AA Tab 1, pp. 26-30, 6; AA Tab 3, p. 95.)

In 2002, Dana married Douglas. (AA Tab 3, p. 92.) They remained married until Dana's death in October 2006. (*Ibid.*) She never amended the Trust to provide for him.

Soon after Dana died, Michael was appointed Abigail's legal guardian, and he also became the trustee of the Trust. (AA Tab 3, p. 93.) At around the same time, Douglas learned that the Trust did not provide for him. (AA Tab 3, p. 60.)

D. Douglas Claims He Is An Omitted Spouse.

1. Novak agrees to represent Douglas, pursuant to a contingency fee agreement.

Douglas decided to seek a share of the Trust estate as an omitted spouse (i.e., what used to be called a "pretermitted" spouse). (See Prob. Code, § 21610.)[2] Novak agreed to represent him.

Novak and Douglas entered into an "Agreement for Contingency Fee." (AA Tab 3, pp. 60-62.) The agreement provided that Novak would represent Douglas in "securing his inheritance from his late wife Dana Kelly's estate." (*Id.* at p. 60.) It provided for a contingency fee secured by a lien:

- The agreement provided that Douglas "agrees to pay [Novak] 40% of all recoveries by way of settlement," provided that settlement was achieved "at the first mediation"; otherwise, Novak would receive 50% of all recoveries. (*Ibid.*) Under the

[2] Probate Code section 21610 provides for situations where, as here, a party marries after preparing testamentary documents and fails to provide for his or her spouse. (Prob. Code, §§ 21610; 21601, subd. (a).) In those circumstances, the omitted spouse "shall receive" certain portions of the decedent's estate. (Prob. Code, § 21610, subds. (a), (c).)

agreement, the term "'Recovery' includes, but is not limited to, all distributions to Dana Kelly's estate from the Teitler Family Trust, i.e. distribution to which [Douglas] is entitled to 50% as Dana Kelly's spouse." (*Ibid.*)

- Novak "may retain his share in full out of the amount finally collected by settlement" and "shall have all general, possessory, or retaining liens, and all special or charging liens known to the common law." (AA Tab 3, p. 61.) In addition, Douglas "expressly assigns to [Novak] to the extent of his fees and disbursements, all assets and sums realized by way of settlement." (*Ibid.*)

2. Douglas and the Trust settle their litigation and execute the Stipulation.

After executing the contingency fee agreement, Novak represented Douglas for more than five years, expending some 325 hours and advancing $7,436.27 in costs. (AA Tab 3, p. 50.) In May 2011, Novak filed an omitted-spouse claim on Douglas's behalf, alleging that Douglas was entitled to half of the Trust's assets. (AA Tab 2, pp. 41-48.)

Michael, acting as Abigail's guardian and as trustee of the Trust, settled with Douglas. (AA Tab 3, pp. 50-51.) They signed an agreement entitled "Stipulation for Settlement" (Stipulation). (AA Tab 3, pp. 92-100.) Two components are relevant here.

a. The Beneficial Interest Provisions: Douglas receives a 40 percent beneficial interest in the Trust.

Various provisions (Beneficial Interest Provisions) lay out Douglas's beneficial interest in the Trust.

The Stipulation provides that Douglas "will be entitled to receive forty percent (40%) and Abigail will be entitled to receive sixty percent (60%) of all assets, both principal and distributable income, to which Dana (Michael, as Successor Trustee) is entitled as beneficiary of the Teitler Family Trust." (AA Tab 3, p. 96.) Paragraph 5 of the Stipulation acknowledges Douglas's present beneficial interest in the Trust. (*Id.* at p. 97.)

The parties further agreed that Douglas would receive monthly payments from the Trust. "Michael, as [trustee] of [the Dana Teitler Trust], will pay Douglas the greater of: (1) forty percent (40%) of the distributable income distributed . . . to [the Dana Teitler Trust] . . . or (2) $3,500 distributed from the Teitler Family Trust to" Michael in his capacity as trustee of the Dana Teitler Trust. (AA Tab 3, p. 96.)

The Stipulation also established that, while some Trust income would be distributed on a monthly basis, Douglas would enjoy a beneficial interest in Trust assets that had not yet been distributed to him. Under Paragraph 5, even if certain Trust assets "ha[d] not been distributed to"

Douglas, he still "ha[d] a beneficial interest" in those assets. (AA Tab 3, p. 97.) Paragraph 5 further stated that Douglas had an interest in, and could make testamentary dispositions of, "all [Trust] income and principal" that were actually "distributed to him." (*Ibid.*)

b. The Disposition Provisions: Douglas directs that a portion of his beneficial interest shall be transferred to Abigail upon his death.

The Stipulation also included a set of terms (Disposition Provisions) that governed the disposition of Douglas's Trust interests "[u]pon Douglas' death." (AA Tab 3, p. 97.)

The Disposition Provisions provided that Douglas would have the right to dispose of his Trust interests upon his death as follows:

- All of the Trust assets that "have been distributed to [Douglas]" at the time of his death could "be disposed of . . . by Will, Trust, or gift(s)" as Douglas chose;
- Fifty percent of Douglas's undistributed Trust assets—that is, assets "in which Douglas has a beneficial interest which have not been distributed to" him—were "assign[ed] to Abigail"; and
- As to the remaining fifty percent of the undistributed Trust assets in which Douglas had a beneficial interest, Douglas would "have the right to dispose of them by Will, Trust, or gift(s), except that if [he] does not so dispose of them, [those

assets] may also be received by Abigail and shall be deemed assigned to Abigail."

(AA Tab 3, p. 97.)

The probate court approved the settlement in January 2012. (AA Tab 3, pp. 101-110.)

3. Novak serves a "Notice of Lien" informing Michael of his attorney's lien against Douglas's settlement recovery.

After Douglas and Michael signed the Stipulation, Novak served Michael with a "Notice of Lien." (AA Tab 3, pp. 53, 111-116.) The Notice of Lien described the nature of the contingency fee agreement between Douglas and Novak; affirmed that "Novak is entitled to forty percent (40%) of Douglas Kelly's recovery" plus fees and costs; and explained that under the contingency fee agreement, "Novak will have a lien against any recovery, settlement, award, or Judgment received by Douglas Kelly," to "the extent of 40% thereof plus all costs advanced." (*Id.* at p. 112.) The Notice of Lien also warned Michael that if he were in possession of "assets in which Douglas Kelly has a beneficial interest, including cash distributable to Douglas Kelly," then "no such distribution to Douglas Kelly should occur unless you concurrently distribute" 40% of those distributions to Novak. (*Ibid.*)

4. After Michael distributes Trust assets to Douglas for five months, Douglas dies intestate.

After the Stipulation was approved, Michael, as trustee, received multiple cash distributions from the Teitler Family Trust, totaling approximately $290,000. (AA Tab 3, p. 53.) He distributed five monthly payments of $3,500 to Douglas. (*Ibid.*)

However, in July 2012, six months after the probate court approved the settlement, Douglas died intestate. (AA Tab 3, p. 52.) He left no will or inter vivos trust. (*Ibid.*) Except for the Disposition Provisions in the Stipulation for Settlement, he had made no gifts of his estate or any portion of his estate. (*Ibid.*)

E. Probate Court Proceedings.

1. Novak petitions the probate court to enforce his claim against the Trust.

After Douglas's death, Michael refused to remit any Trust assets to Novak, claiming that Abigail was entitled to all of Douglas's entitlements under the Stipulation. (AA Tab 3, pp. 52-54.)

Novak filed a petition in the probate court alleging that he was a lienholder and asking the court to enforce his claim against the Trust. (AA Tab 3, pp. 49-120.) He asked the court to compel Michael to remit Trust distributions to him and to grant him an interest in the Trust principal. (*Id.* at pp. 57-58.)

Michael, as trustee of the Trust and as Abigail's guardian, opposed the petition. (AA Tab 5, pp. 127-136.) Among other things, he argued that Novak was one of Douglas's creditors; that therefore Novak could only collect his fees by filing a creditor's claim against Douglas's probate estate; and that any creditor's claim was time-barred under Code of Civil Procedure section 366.2, since Novak did not file a creditor's claim within a year after Douglas's death. (*Id.* at pp. 131-132.)[3]

At the hearing, the probate court said that it was inclined to deny Novak's petition, because "any claim of [Novak] would be against the estate of Douglas Kelly" and was "now time-barred." (1RT 2.) Novak argued that Douglas "left no probate estate, no assets" because all of Douglas's beneficial interests in the Trust were transferred by the Disposition Provisions, and Douglas had no other assets. (1RT 2-3; see also 1RT 10 [representing that Douglas "was living hand-to-mouth"].)

Novak further argued that the Disposition Provisions in the Stipulation were a nonprobate transfer of Douglas's Trust interests under Probate Code section 5000, and that therefore Douglas's only assets—his Trust interests—had passed outside of probate and were in the possession

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[3] Code of Civil Procedure section 366.2, subdivision (a), extends any unexpired statute of limitations for a claim against a decedent for a year after the decedent's death.

of Michael, as trustee, not in Douglas's probate estate. (1RT 3; see Argument § II.3, *post*.)[4]

The probate court stated that it "recognize[d] the size of the amount [Novak] worked for and the hours. And I do want to indicate I recognize that." (1RT 17.) But, the court reasoned, Novak's "petition should have been against the estate of Douglas Kelly" and was therefore time-barred. (1RT 16.) Moreover, the court determined, section 5000 did not apply to the circumstances in Novak's petition, and would not permit Novak's claim to proceed. (See 1RT 17.)

2. Novak argues that section 9391 exempted him from filing a creditor's claim.

Both sides filed proposed orders for the court's signature. (AA Tab 7, p. 144.) The court ordered the parties to submit "a brief argument in support of, or opposition to[,] any proposed order." (*Ibid.*)

Novak and Michael responded to the order by filing letters in the probate court. (AA Tab 8, p. 146; AA Tab 9, pp. 147-149.)

In his letter, Novak "invite[d] the Court's attention to Probate Code §9391." (AA Tab 9, p. 148.)[5] Novak argued that he was "the holder of

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[4] Undesignated citations are to the Probate Code.

[5] Section 9391 provides: "Except as provided in Section 10361 [application of proceeds of sale of encumbered property], the holder of a mortgage or other lien on property in the decedent's estate, including, but not limited to, a judgment lien, may commence an action to enforce the lien against the property that is subject to the lien, without first filing a claim as

a lien" and that under section 9391, he was neither required to file a creditor's claim in probate nor subject to the one-year bar of Code of Civil Procedure section 366.2. (*Id.* at pp. 147-148.) Acknowledging that section 9391's terms required lien creditors to provide an "express waiver" of recourse against a decedent's estate in order to collect on their liens, he said that if an "express waiver" of recourse against Douglas's estate was required, he would "amend [his] Petition to set forth such express waiver." (*Id.* at p. 149.) Finally, Novak suggested that the court "may want to set a further hearing as to the effect of [section] 9391" on the petition. (*Ibid.*)

3. The trial court denies the petition, concluding that Novak was required to file a creditor's claim against Douglas's estate.

The probate court denied Novak's petition. (AA Tab 10, pp. 150-152.) The court reasoned that the proper collection procedure in these circumstances was for Novak to file a creditor's claim against Douglas's estate, if necessary opening a probate proceeding for the sole purpose of pursuing his creditor's claim. (*Id.* at p. 151.) The court concluded that because Novak had not filed such a claim, and because more than a year had passed since Douglas's death, Novak's claim was time-barred. (*Id.* at

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provided in this part, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate. Section 366.2 of the Code of Civil Procedure does not apply to an action under this section. The personal representative shall have the authority to seek to enjoin any action of the lienholder to enforce a lien against property that is subject to the lien."

pp. 151-152.) The court also ruled, without explanation, that section 5000 did not apply to the facts set forth in Novak's petition. (*Id.* at p. 151.) The court did not address whether the petition was appropriate under section 9391.

F. Statement of Appealability.

The probate court's December 16, 2013 order denying Novak's petition is appealable as a final order denying a petition to allow a claim against a decedent's trust. (Code Civ. Proc., § 904.1, subd. (a)(10); Prob. Code, § 1304, subd. (b), §§ 19020-19022.)

The clerk did not serve a copy of the order or notice of its entry. Michael mailed a notice of entry of the order on April 11, 2014. (AA Tab 11, p. 154.) Novak filed his notice of appeal on June 10, 2014. (AA Tab 12, pp. 158-160.) The notice of appeal was timely because Novak filed it 60 days after Michael mailed notice of entry of the order and less than 180 days after entry of the order, i.e., before June 14, 2014. (Cal. Rules of Court, rules 8.104(a)(1)(B)-(C).)

STANDARD OF REVIEW

Where, as here, the probate court's ruling rests on legal determinations and does not resolve disputed facts, the ruling is reviewed de novo. (*Estate of Wilson* (2012) 211 Cal.App.4th 1284, 1290.)

ARGUMENT

I. NOVAK HOLDS AN EQUITABLE LIEN AGAINST DOUGLAS'S BENEFICIAL INTEREST IN THE TRUST.

A. Douglas's Interest In The Trust Is A "Recovery" To Which The "Charging Liens" In The Contingency Fee Agreement Attached.

1. The contingency fee agreement granted Novak an interest in Douglas's recovery by settlement, secured by a lien.

The language of the contingency fee agreement is clear. Douglas agrees that: (a) Novak shall have a 40% contingent interest in any settlement of Douglas's omitted-spouse claim—the exact claim that the Stipulation settled—and (b) Novak shall have an attorney's lien to secure his interest in the settlement. (See AA Tab 3, p. 60 [Douglas "agrees to pay (Novak) 40% of all recoveries by way of settlement" and the term "'Recovery' includes, but is not limited to, all distributions . . . to which (Douglas) is entitled to 50% as Dana Kelly's spouse"]; p. 61 [Douglas

agrees that Novak "shall have all general, possessory, or retaining liens, and all special or charging liens known to the common law"].)

2. The Stipulation conferred upon Douglas a beneficial interest in the Trust.

The language of the Stipulation is also clear. In return for releasing his omitted-spouse claim, Douglas becomes a Trust beneficiary. (AA Tab 3, pp. 95-98.) Specifically, Douglas "will be *entitled to receive forty percent (40%)* . . . of all assets, both principal and distributable income, to which Dana . . . is entitled as beneficiary of the Teitler Family Trust." (*Id.* at p. 96, emphasis added.) Other Stipulation provisions indicate that Douglas "has a beneficial interest" in the "assets of" the Dana Teitler Trust, and that interest extends to both: (a) "income and principal of [the Trust] that have been distributed to him" and (b) "assets of [the Trust] which have not been distributed to" him. (*Id.* at p. 97.)

In sum, under the Stipulation's governing language, Douglas acquired a 40% beneficial interest in the income and principal of the Trust, and under the contingency fee agreement's governing language, Douglas granted Novak a lien against 40% of Douglas's beneficial interest in the Trust (i.e., 40% of Douglas's 40%).

3. Douglas had the legal right to grant Novak a lien against his interest in the Trust.

Unless the trust instrument bars him from doing so, a trust beneficiary may sell, assign, or encumber his beneficial interest in a trust

for any purpose he sees fit. (*Hunt v. Lawton* (1926) 76 Cal.App. 655, 666-667; see also 13 Witkin, Summary of Cal. Law (10th ed. 2005) Trusts, § 143, p. 707 [if "the beneficiary has capacity to transfer property, the beneficiary has power to transfer his or her equitable interest without consent of the trustee, unless restricted by the terms of the trust"].)

Neither the Stipulation, nor the probate court's approval order, nor the Trust instrument itself limited Douglas's power to encumber his beneficial interest in the Trust. Thus, Douglas was empowered to, and did, encumber his beneficial interest in favor of Novak.

B. Novak Acquired An Equitable Lien Against Douglas's Interest In The Trust At The Moment Douglas Himself Acquired That Interest.

Novak's equitable lien attached to Douglas's Trust interest at the moment Douglas acquired that interest—at the latest, when the probate court approved the settlement and compromise, January 27, 2012. (See *Pearson v. Superior Court* (2012) 202 Cal.App.4th 1333, 1337 [compromise of a minor's claims is valid only after superior court approval].) That is because:

- Attorney's charging liens are equitable. (See *Haupt v. Charlie's Kosher Market* (1941) 17 Cal.2d 843, 845 [The "special or charging lien of an attorney has been held to be an equitable right to have the fees and costs due to him for services in a suit secured to him out of the judgment or recovery in the particular

action, the attorney to the extent of such services being regarded as an equitable assignee of the judgment."]; *Gilman v. Dalby* (2009) 176 Cal.App.4th 606, 618 [same].)

- Equitable liens attach to assets as the assignor/debtor acquires them. (Civ. Code, § 2883; *Garter v. Metzdorf Associates* (1963) 217 Cal.App.2d 812, 821 [motel lease created equitable lien "which attached to each item of furniture or equipment as it was subsequently acquired" and installed in the motel]; *Bridge v. Kedon* (1912) 163 Cal. 493, 499 [assignment of appellant's expectancy in his mother's estate as security for a loan was valid; citing 3 Pomeroy's Equity Jurisprudence, § 1271, court concluded that assignee of an expectancy acquires a present equitable right over the proceeds of the expectancy as soon as the assignor acquires them].)

These principles govern here. When Douglas executed the contingency fee agreement, he granted to his attorney, Novak, an equitable lien against an expectancy—a recovery in the omitted-spouse suit. Eventually, that expectancy ripened into an actual recovery, as Douglas acquired his beneficial interest in the Trust. And as soon as that beneficial interest came into Douglas's possession, Novak's attorney's lien attached to it. (*Bridge v. Kedon, supra*, 163 Cal. at p. 499; Civ. Code, § 2883.)

Thus, well in advance of Douglas's death, and at all times thereafter, Novak has held an equitable lien against Douglas's beneficial interest in the Trust.

C. Michael's Constructions Of The Contingency Fee Agreement And The Stipulation Are Inconsistent With The Language Of Those Agreements.

Michael may argue, as he did in the probate court (AA Tab 5, pp. 130-131), for a different interpretation of the contingency fee agreement and the Stipulation. He claimed that: (a) Douglas never actually realized or collected any assets beyond the $3,500 monthly payments he received from the Trust; and (b) Douglas's beneficial interest in the Trust "ceased to exist upon [his] death when [he] failed to dispose of said interest by Will, Trust or gift." (*Ibid.*) Neither argument is consistent with the language of the contingency fee agreement or the Stipulation.

Michael highlighted the contingency fee agreement's provision that Novak "may retain his share in full out of the amount *finally collected* by settlement" and that Douglas "expressly assigns to [Novak] to the extent of his fees and disbursements, all assets and sums *realized* by way of settlement, arbitration or trial." (AA Tab 5, p. 130, emphasis in original; see also AA Tab 3, p. 61.) According to Michael, the only "assets *realized and/or collected* by Douglas Kelly were the payments of $3,500 per month he received prior to his death." (AA Tab 5, p. 130, emphasis in original.) Thus, Michael apparently contends that Douglas had no interest in anything

but the $3,500 monthly payments he received, and that Novak's share extends only to those monthly payments.[6]

Michael is wrong. As shown above, the Stipulation does not limit Douglas to receiving only the $3,500 monthly payments. It instead renders Douglas a present beneficiary of the Trust, who was "entitled to receive forty percent (40%) . . . of all assets, both principal and distributable income, to which Dana . . . is entitled as beneficiary of the Teitler Family Trust." (AA Tab 3, p. 96.) And Paragraph 5 of the Stipulation acknowledges that Douglas "has a beneficial interest" in the "income and principal of [the Trust] that have been distributed to him" as well as the "assets of [the Trust] which have not been distributed to" him. (*Id.* at p. 97.) Thus, when the probate court approved the Stipulation, Douglas not only realized a right to the $3,500 monthly payments, but also realized a present beneficial interest in the Trust's income and principal.

Furthermore, the contingency fee agreement does not limit Novak's share of Douglas's settlement to amounts finally collected or realized. The contingency fee agreement instead provides that Douglas "agrees to pay [Novak] 40% of *all recoveries* by way of settlement," and it defines "Recovery" to include "*all* distributions to Dana Kelly's estate from the Teitler Family Trust, i.e. distribution to which [Douglas] is entitled to 50%

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[6] Novak acknowledged in his petition that he had "voluntarily waived his rights under his Contingent Attorney Fee Agreement to any portion of [the] $3,500 support payments." (AA Tab 3, p. 53.)

as Dana Kelly's spouse." (AA Tab 3, p. 60, emphasis added.) The contingency fee agreement includes additional language confirming that Novak has an interest in amounts "finally collected," and that Douglas expressly assigns a portion of the "realized" assets and sums to Novak. (*Id.* at p. 61.) But the key term—the definition of Novak's payment entitlement—broadly refers to "all recoveries," not some lesser, limited portion of Douglas's interests in the Trust. (*Id.* at p. 60.)

Michael's argument that Douglas's beneficial interest in the Trust simply evaporated upon his death contradicts the language of the Stipulation itself. Michael is basically arguing that Douglas had only a life estate. But if that were true, the Stipulation would have been worded differently: The *entirety* of Douglas's interest would have automatically passed to Abigail at his death, not just 50%. Instead, Paragraph 5 states that 50% of Douglas's beneficial interest in the Trust would "be deemed *assigned* to Abigail" if it were not disposed of by will, trust or gift. (AA Tab 3, p. 97, emphasis added.) There's nothing in the Stipulation to suggest a disappearance or an extinguishment of Douglas's interest—only a transfer of the interest to Abigail.

II. NOVAK WAS NOT REQUIRED TO FILE A CREDITOR'S CLAIM.

The central premise of the probate court's order denying Novak's claim was that "the proper procedure for [Novak's] recovery of his attorney's fees and costs is to file a creditor's claim against Douglas Kelly's estate, pursuant to [section] 9000, et seq." (AA Tab 10, p. 151.) As we now demonstrate, that premise is incorrect. There are two independent reasons, each sufficient to require reversal:

- Because Novak is a lien creditor, section 9391 permitted him to enforce his lien without filing a creditor's claim.
- Because Douglas transferred his beneficial interest in the Trust outside of probate under section 5000, it was never a part of his estate upon his death. Novak could not have properly enforced his lien claim by filing a creditor's claim in probate.

A. Section 9391 Permitted Novak To Enforce His Equitable Lien Without First Filing A Creditor's Claim In Probate.

Section 9391 provides that the holder of a lien on property in the decedent's estate can sue to enforce the lien against the subject property without first filing a creditor's claim. The only requirement is that he must expressly waive all recourse against other property in the estate.

The lienholder-exemption statute dates back at least to 1872, and courts have been enforcing it ever since. (E.g., *Cosentino v. Coastal Construction Co.* (1994) 30 Cal.App.4th 1712, 1716-1718 (*Cosentino*); *Grant v. De Otte* (1954) 122 Cal.App.2d 724, 728 [collecting cases; attorney's suit to enforce equitable lien representing attorney's fees and other sums advanced on client's behalf could be brought without first filing a claim in the client's estate]; *In re Clanton's Estate and Guardianship* (1915) 171 Cal. 381, 385-386 (*Clanton's Estate*) [guardian of incompetent's estate could enforce equitable lien for his fees even where he failed to present any claim against the estate]; Code commrs., note foll. 2 Ann. Code Civ. Proc., § 1500 (1st ed. 1872, Haymond & Burch, Commrs.-annotators) p. 226 [supp. reflecting legislation effective Mar. 15, 1876].)

Therefore, Novak was entitled to enforce his lien against the subject property—Douglas's beneficial interest—without regard to any probate claim-filing requirements or the one-year statute of limitations. That's exactly what he tried to do here, and he completed all necessary steps to do so.

While the lienholder-exemption statute requires an express waiver of recourse against the debtor's estate, the requirement is not absolute. It is not necessary where the lienholder "has no claim against the other property" in the estate. (*Clanton's Estate*, *supra*, 171 Cal. at p. 386, discussing former Code Civ. Proc., § 1500.) Moreover, courts have refused

to enforce section 9391's express waiver requirement where the waiver would be an idle act. (See *Cosentino*, *supra*, 30 Cal.App.4th at p. 1716; see also Civ. Code, § 3532.)

Clanton's Estate, *supra*, 171 Cal. 381, involved a dispute over payment of guardianship fees; the legal guardian of a ward tried to collect his fees after the ward's death, but the heirs of the ward opposed. (*Id.* at pp. 382-384.) The decedent's heirs argued that the guardian could not collect his fees because he had failed to assert a claim against the ward's estate. (*Id.* at p. 385.) The court disagreed, concluding that the guardian had a lien for his fees and the right to enforce it "without having filed or presented a claim against the estate." (*Id.* at p. 386, citing section 9391's predecessor statute, former Code Civ. Proc., § 1500.) And the guardian did not need to "waive recourse against other property" in the estate, as former section 1500 required, because he had "no claim against the other property." (*Ibid.*)

In *Cosentino*, *supra*, 30 Cal.App.4th 1712, the court likewise refused to require compliance with the statute's waiver-of-recourse requirement. The *Cosentino* debtors bought a parcel of residential real estate and gave the seller a promissory note secured by a deed of trust. (*Id.* at p. 1714.) The deed of trust eventually went into default; the debtors died; and the second to die bequeathed the property to the plaintiff. (*Ibid.*) When the seller nonjudicially foreclosed, the plaintiff heir sought an injunction,

which the trial court granted on the basis that the seller had not filed a claim in the debtor's estate. (*Ibid.*)

The Court of Appeal reversed. It explained that the transaction involved a purchase money trust deed and that the "holder of a purchase money trust deed may only look to the security for recovery of the obligation." (*Cosentino*, *supra*, 30 Cal.App.4th at p. 1716.) The court therefore agreed with the seller's argument that "compliance with" section 9391's waiver-of-recourse requirement "would be a meaningless act"—the creditor never had a claim against any estate assets because the note was non-recourse. (*Id.* at p. 1715.) Because "the law neither does nor requires idle acts," compliance with section 9391's waiver-of-recourse requirement was excused. (*Id.* at p. 1715, citing Civ. Code, § 3532, internal quotation marks omitted.)

Here, just like the creditors in *Clanton's Estate* and *Cosentino*, Novak never had any possible claim against any of Douglas's other property—his claim was only against Douglas's recovery obtained through the Stipulation. And in any event, there is no dispute that Douglas was destitute, and therefore a waiver of recourse against nonexistent property would be meaningless.

Furthermore, even if a waiver of recourse were somehow required in these circumstances, Novak asserted on multiple occasions that he sought no recourse against property in Douglas's probate estate and that there was no such property. In his letter to the probate court, Novak offered to

"amend [his] Petition to set forth [an] express waiver" of recourse against Douglas's estate as required by section 9391. (AA Tab 9, p. 149.) And at the probate court hearing, Novak repeatedly informed the court that he was not seeking, and could not have sought, any recourse against Douglas's other assets. Novak specifically told the court that he contended Douglas had "no assets, no estate" (1RT 3, 14); that "what we have is a no probate estate, no assets" (1RT 3); that "Doug[las] Kelly was impecunious"; and that Douglas "was living hand-to-mouth." (1RT 10.)

Section 9391 required the probate court to grant Novak's petition. On this basis alone, the Court can and should reverse.

B. Alternatively, Because Douglas Made A Nonprobate Transfer Of His Beneficial Interest In The Trust, That Beneficial Interest Was Not Part Of His Estate, And Novak's Claim Therefore Could Not Have Been The Proper Subject Of A Creditor's Claim.

There is a second, independent, and equally well-founded basis for reversal. Novak's equitable lien attached to an asset—Douglas's beneficial interest in the Trust—that was not, and could not have been, a part of Douglas's estate upon his death.

As we now demonstrate, the Stipulation effected a section 5000 nonprobate transfer of Douglas's beneficial interest in the Trust. Accordingly, that interest—with Novak's existing lien attached—passed entirely outside of Douglas's probate estate, and could never have been the

proper subject of a creditor's claim. Novak had no way, and therefore no need, to file a probate creditor's claim to enforce his lien.

1. A nonprobate transfer is a transaction directing that upon one's death, assets are to be transferred to another person.

Section 5000 was enacted to bring California's probate laws in line with reforms included in the pre-1989 Uniform Probate Code. (Cal. Law Revision Com. 1990 com., 53 West's Ann. Prob. Code (2009 ed.) foll. § 5000, p. 5.) Consistent with those reforms, section 5000 adopts the substance of former Uniform Probate Code section 6-201, and aims to permit individuals to transfer assets outside of probate by preparing written instruments called nonprobate transfers. (*Ibid.*; see also Com., West's U. Prob. Code (pre-1989 version), § 6-201.)[7] Section 5000 affirms that these nonprobate transfers are valid and are effective to transfer a decedent's assets outside of probate, even though the documents do not observe the formalities that were historically required in the statute of wills. (§ 5000, subd. (a); Cal. Law Revision Com. 1990 com., 53 West's Ann. Prob. Code (2009 ed.) foll. § 5000, p. 5; Com., West's U. Prob. Code (pre-1989 version), § 6-201.)

The effect of such a transfer is that "the personal representative [does not] have any power or duty with respect to the property transferred."

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[7] The substance of section 6-201 now appears in section 6-101 of the Uniform Probate Code (2010 revision).

(Cal. Law Revision Com. 1990 com., 53 West's Ann. Prob. Code (2009 ed.) foll. § 5000, p. 5.)

Section 5000, subdivision (a) lists a number of specific types of transfers, but the list is explicitly non-exhaustive:

> A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or *other written instrument of a similar nature* is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

(Emphasis added.)

Under section 5000, subdivision (b)(1), a non-probate transfer may also be accomplished by "[a] written provision that money *or other benefits* due to, controlled by, or owned by a decedent before death shall be paid *after the decedent's death to a person whom the decedent designates* either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later." (Emphasis added.) This precisely describes the Stipulation.

2. Under the Stipulation's Disposition Provisions, Douglas made a nonprobate transfer of his beneficial interest in the Trust.

In the Disposition Provisions, Douglas provided that "[u]pon [his] death," two clauses would govern the distribution of the "assets" in the Dana Teitler Trust "in which [he] has a beneficial interest [and] which [assets] have not been distributed" to him. (AA Tab 3, p. 97.) In the first clause, Douglas directed that half of those assets should be distributed to Abigail. (*Ibid.*) In the second clause, Douglas retained a contingent right to "dispose of" the other half of those assets "by Will, Trust, or gift(s)," but otherwise distributed this second half to Abigail as well. (*Ibid.*)

The Disposition Provisions meet all the requirements of section 5000, subdivision (b)(1). They are in writing. They direct payment, after Douglas's death, of "benefits due to, controlled by, or owned by" Douglas—namely his beneficial interest in the Trust—"to a person whom [he] designate[d] . . . in the instrument"—Abigail. (§ 5000, subd. (b)(1).)

Even if there were some doubt about whether the Disposition Provisions fell within the express language of the nonprobate transfer statute, the Law Revision Commission's commentary to section 5000 would put that doubt to rest. It states that the statute "is intended broadly to validate written instruments that provide for nonprobate transfers on death" and that the "listing in the section of types of written instruments is not exclusive." (Cal. Law Revision Com. 1992 supp. com., 53 West's Ann.

Prob. Code (2009 ed.) foll. § 5000, pp. 5-6.) Thus, the Law Revision Commission envisioned an expansive reach for the nonprobate transfer statute.

Decisional law confirms this breadth. In *Estate of Petersen* (1994) 28 Cal.App.4th 1742, the court held that a type of annuity contract not specifically enumerated in section 5000 was a nonprobate transfer subject to the statute. *Petersen* involved a joint annuity account that did not name a specific person to whom the annuity funds should be paid upon the annuitant's death, but instead directed that the "surviving spouse" of the "deceased owner" should receive the funds. (28 Cal.App.4th at p. 1748.) Quoting the Law Revision Commission's directive to construe section 5000 broadly, the court concluded that despite its generic format, the contract at issue "fit the broad description of section 5000." (*Id.* at p. 1751.) Accordingly, it effected a valid nonprobate transfer of funds. (*Id.* at p. 1753.)

The Disposition Provisions easily qualify as nonprobate transfers governed by section 5000. They clearly manifest Douglas's intention that Abigail receive his beneficial interest in the Trust upon his death, unless he chose to direct it elsewhere. The probate court's ruling that "[s]ection 5000 does not apply to the facts as set forth in" Novak's petition was erroneous. (AA Tab 10, p. 151.)

3. Since Douglas made a nonprobate transfer of his beneficial interest in the Trust, that interest was not a part of his estate upon his death.

From the conclusion that the Disposition Provisions effected a nonprobate transfer of Douglas's beneficial interest in the Trust, flows the further conclusion that Douglas's Trust interest was not, and could not have been, a part of his estate upon his death. (See *Petersen*, *supra*, 28 Cal.App.4th at p. 1746 ["Property which is excluded from probate includes . . . (3) property which has been disposed of by provision for nonprobate transfer in a written instrument (§ 5000)"]; *Estate of Allen* (1993) 12 Cal.App.4th 1762, 1766 ["a Totten trust account"—a particular type of nonprobate transfer (see fn. 8, *post*)—is "not part of the testator's estate at the time of his death"].)

Thus, the Disposition Provisions disposed of Douglas's beneficial interest in the Trust and operated to transfer it to Abigail, wholly outside of Douglas's probate estate.

4. Douglas's nonprobate transfer of his beneficial interest in the Trust was subject to Novak's lien.

Although Douglas's nonprobate transfer kept his beneficial interest in the Trust out of his probate estate, it did not affect Novak's lien. That is because nothing in section 5000 "limits the rights of creditors under any other law." (§ 5000, subd. (c).)

Estate of Allen, 12 Cal.App.4th 1762, illustrates the point. There, a woman executed a will leaving her property to a church and opened three Totten trust accounts naming the church as a beneficiary. (*Id.* at pp. 1764-1765.)[8] She then married, but did not amend her will or otherwise provide for her husband. (*Id.* at p. 1765.) Upon her death, her property consisted only of her separate property. (*Ibid.*) The husband filed a probate petition seeking a half interest in the wife's property as an omitted spouse, and the church filed a petition to determine that the Totten trusts belonged to it. (*Ibid.*)

The husband argued that he was entitled to a share of the Totten trust accounts as an omitted spouse, and he relied in part on section 5000, subdivision (c), which states that "[n]othing in this section limits the rights of creditors under any other law." (*Estate of Allen*, *supra*, 12 Cal.App.4th at pp. 1765, 1768 [citing § 5000, subd. (c)], 1771.) The Court of Appeal rejected this argument, concluding that the husband was not entitled to the status of a creditor. (*Id.* at pp. 1768, 1770.) In so doing, the court observed that section 5000, subdivision (c), "reflects the rule that the decedent can give away only what he or she owns, i.e., that his or her assets may be subject to debts." (*Id.* at p. 1769.)

Section 5000, subdivision (c) operates similarly here. Because Novak's lien attached to Douglas's beneficial interest in the Trust at the

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[8] In essence, a Totten trust is a bank account that is payable to a third party on the decedent's death. (*Id.* at p. 1766.)

moment Douglas acquired that interest (Civ. Code, § 2883), Abigail received only what Douglas himself had—an interest that was subject to Novak's lien.

5. Since Douglas's beneficial interest in the Trust was not part of his estate, Novak was not required to—and indeed could not—open probate or file a creditor's claim in order to enforce his lien.

Because the Disposition Provisions effected a nonprobate transfer of Douglas's beneficial interest in the Trust, Douglas's estate never included that beneficial interest. Therefore, Novak did not need to file a creditor's claim in order to enforce his lien attached to that beneficial interest.

In *Lewis v. Neblett* (1961) 188 Cal.App.2d 290, for example, the court explained that where claims relate to assets that were never part of the decedent's estate, they are not properly subject to a creditor's claims against the estate. There, the plaintiff had established in prior proceedings that the administrators of an estate were holding real property in trust for her benefit, and that she should recover the income received by the administrators. Although the administrator conveyed the property to her, he resisted paying over the income from it, urging among other things that the plaintiff had failed to file a creditor's claim. (*Id.* at pp. 298-299.) The Court of Appeal rejected this argument. It held that the amounts accrued during administration were not a part of the decedent's estate. (*Id.* at p. 299.) That being so, those amounts "would not be a proper basis for

a creditor's claim" and "it was not necessary for plaintiff to present a creditor's claim" in order to obtain those amounts. (*Ibid.*)

Here, too, Douglas's beneficial interest in the Trust was not a part of his probate estate. Because there "would not be a proper basis for a creditor's claim" against this nonprobate asset, Novak could not be required to file such a claim. (*Lewis v. Neblett*, *supra*, 188 Cal.App.2d at p. 199.)

Similarly, the California Probate Practice Guide states that "a 'creditor' is 'a person who may have a claim against *estate property*.'" (Ross & Moore, Cal. Practice Guide: Probate (The Rutter Group 2013) ¶ 8:9, p. 8-11, emphasis added, citing § 9000, subd. (c).) Here, Douglas's beneficial interest in the Trust never was "estate property"; it was instead immediately transferred to Abigail (with Novak's lien attached) upon Douglas's death. Novak's lien-enforcement petition is thus not the claim of a "creditor"; it is instead the claim of a lienholder asserting his lien against the *other claimants* to the *underlying property*—namely the Trust and Abigail. Such a claim would have been neither appropriate nor necessary in a probate administration of Douglas's estate, which did not include the underlying property subject to the lien.

CONCLUSION

Novak was not required to file a creditor's claim. The trial court erred in ruling otherwise. The Court should reverse with instructions to grant Novak's petition.

DATED: December 1, 2014

Respectfully Submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
Robin Meadow, Esq.
David E. Hackett, Esq.

By _____
David E. Hackett

Attorneys for Petitioner and Appellant
MARK S. NOVAK

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **APPELLANT'S OPENING BRIEF** contains **7,258 words**, not including the tables of contents and authorities, the caption page, signature blocks, the verification or this certification page, as counted by the word processing program used to generate it.

Dated: December 1, 2014

David E. Hackett

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On December 1, 2014, I served the foregoing document described as: **APPELLANT'S OPENING BRIEF** on the parties in this action by serving:

Susan Stricklin Wilson
416 Second Street
Encinitas, California 92024
Attorneys for Respondent,
DANA TEITLER TRUST

Supreme Court of California
350 McAllister Street
San Francisco, California 94102

The Honorable Roy L. Paul,
The Honorable James A. Steele
Los Angeles Superior Court – Central District
111 N. Hill Street
Los Angeles, California 90012

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Executed on December 1, 2014, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Joyce McGilbert