

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

LINDA CLARK, Individually and as
Trustee, etc.,

Plaintiff and Appellant,

v.

IRA SMITH et al.,

Defendants and Respondents.

G063394

(Super. Ct. No. 30-2018-
01021840)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Erick L. Larsh, Judge. Reversed and remanded for further proceedings.

Monteleone & McCrory, Patrick J. Duffy and Martha Eager for
Plaintiff and Appellant.

SKB Law and Susan Knock Beck; Karish & Bjorgum and Alfred
Eric Bjorgum and Law Offices of Lawrence H. Nemirow and Lawrence H.
Nemirow for Defendants and Respondents.

In December 2012, Donald B. Clark sold a business called Precision Airparts Support Services, Inc. (PASS) to Tony Ordaz and Ira Smith. In connection with the sale, Ordaz and Smith signed two promissory notes: one for \$50,000 and one for \$920,000. Donald B. Clark was the holder of both notes. Payments on the notes were set to begin in January 2018.

About 18 months after the sale, Donald B. Clark and his wife, Linda Clark, restated their family trust, The Donald B. Clark and Linda Clark Trust Dated May 6, 2009, restated July 22, 2014 (the Trust).¹ By the restatement, Donald and Linda transferred all their assets—separate and community—into the Trust. Shortly thereafter, Donald died, leaving Linda as sole trustee of the Trust.

When Ordaz and Smith failed to begin payments on the notes, Linda filed suit. The matter was tried to the court, and at the conclusion of trial Ordaz and Smith moved for judgment,² arguing Linda had no standing to pursue any claim on the notes. The trial court agreed and entered judgment in favor of Ordaz and Smith. Linda appealed.

The question presented on appeal is simple: Did Linda, as trustee, have standing to sue to enforce repayment of notes held by the Trust? The answer is yes. Under the laws of California (where the suit was filed) and Colorado (the situs of the Trust), as well as under the specific terms of the Trust, Linda, as trustee, was not only empowered but required to bring

¹ Because Donald B. Clark and Linda Clark share a surname, we refer to them by their first names for clarity and convenience. We refer to their son, Donald C. Clark, by his full name to avoid confusion.

² Ordaz and Smith referred to their oral motion as a motion for nonsuit. Because the case was tried to the court, the trial court properly treated the motion as a motion for judgment. (Code Civ. Proc., § 631.8.)

suit seeking repayment of the notes. We therefore reverse the judgment and remand to the trial court for further proceedings.

FACTS

Donald purchased PASS in August 1982. He was married to Linda at the time. Thirty years later, Donald, while still married to Linda, sold PASS to respondents Ordaz and Smith. The sale closed in December 2012 in three separate transactions: purchase of the equipment; purchase of the building; and purchase of corporate stock. The purchase of the building and equipment was financed primarily by a loan from the Small Business Administration.

Ordaz and Smith also signed a promissory note in the amount of \$50,000, together with annual interest of two percent on the unpaid principal, for purchase of certain equipment not included as part of the Small Business Administration financed purchase (the Equipment Note). Repayment on the Equipment Note was to be made in monthly payments of \$184.81 beginning on January 1, 2018.

Ordaz and Smith were unable to obtain a loan for the stock purchase, so in November 2012 they signed a promissory note agreeing to pay Donald \$920,000 on January 1, 2033, for 287,520 shares of PASS—representing 95.84 percent of PASS stock (the Stock Note).³ The Stock Note also required payment of interest at the annual rate of two percent, accruing from December 5, 2012 and payable beginning January 1, 2018 and continuing through the maturity date. The Stock Note provided if Ordaz and

³ Ordaz and Smith signed a nearly identical promissory note in June 2012, also promising to pay \$920,000 for 287,520 shares of stock. It is undisputed the June 2012 note was superseded by the November 2012 note.

Smith defaulted in payment of the principal or the interest, the whole amount could, at the note holder's option, become immediately due.⁴

About eighteen months after the sale of PASS, Donald and Linda executed a restatement of their Trust.⁵ Donald and Linda remained the settlors and trustees and, by the restatement, transferred almost all of their assets—whether separate or community property and whether acquired

⁴ Respondents' brief devotes significant space to their theory that Donald and Linda's son, Donald C. Clark, was one of the purchasers of PASS and that language in the Trust demonstrated Donald's intent to have any evidence of Donald C. Clark's indebtedness returned to Donald C. Clark upon Donald's death. The Notes that are the subject of the action, however, were signed only by Ordaz and Smith and do not reflect any indebtedness by Donald C. Clark.

⁵ The Trust was created "under the laws of Colorado and under the laws of any state in which any trust created under this trust document is administered." The litigation was filed in California. The trial court relied on law from both California and Colorado in determining Linda did not have standing. Appellant and respondents cite both Colorado and California law in their briefs but do not address whether standing should be determined as a procedural matter under California law or a substantive matter under Colorado law. We need not address that issue, however, because our decision is the same under the law of either jurisdiction.

before or after the execution—into the Trust.⁶ Under the terms of the restated Trust, when either Donald or Linda passed away, the assets of the Trust—except for certain funeral expenses, taxes, and a family cabin—were to be divided into the Survivor’s Trust and the Marital Share. The surviving spouse was the trustee of both the Survivor’s Trust and the Marital Share, with absolute power over the Survivor’s Trust and the right to distribute the principal of the Marital Share to him- or herself. In August 2015, just over a year after the Trust was restated, Donald passed away, leaving Linda as sole trustee of the Trust.

In July 2018, six months after payments on the Equipment Note and Stock Note (collectively, the Notes) came due, Linda sent a letter to Ordaz and Smith demanding monthly payments on the Equipment Note and payment of the entire amount of \$956,800 due under the Stock Note’s acceleration clause.

⁶ The relevant provision reads, in full: “By executing this instrument, we transfer, convey, and assign the property described in the attached schedules to our Trustee [sic]. We also transfer all our right, title, and interest in and to all of our property that may legally be held in trust and that may be transferred to our trust by this assignment. This assignment includes all of our real, personal, tangible, and intangible property located in the United States, whether separate property or community property, and whether acquired before or after the execution of this instrument, except for these assets that are expressly not transferred by this instrument: [¶] life insurance policies, unless the ownership of a policy is transferred to our trust by a separate instrument that specifically refers to the policy; [¶] corporate and self-employed (*Keogh*) pension, profit-sharing, and stock bonus plans; [¶] qualified retirement plans; [¶] commercial annuities; [¶] Section 1244 (small business) stock; and [¶] any property, the transfer of which would result in the immediate recognition of income subject to income or other taxes, would result in the loss of a homestead exemption, or would violate a restriction on transfer agreement.”

PASS did not pay. Instead, two months later, PASS filed a civil complaint against Linda, the Trust, and the Estate of Donald Clark, alleging breach of contract, breach of the covenant of good faith and fair dealing, and fraud, all based on the assertion Donald had lied in connection with the sale of PASS about the value of the equipment and PASS. The complaint was amended three times. The third amended complaint named PASS, Ordaz, and Smith (collectively, respondents) as plaintiffs, named Linda as the only defendant, and alleged claims of breach of contract, breach of the covenant of good faith and fair dealing, negligent misrepresentation, unjust enrichment, and indemnification.

In November 2018, Linda filed a complaint against respondents seeking to collect on the Notes. Her case was consolidated with respondents' action for all purposes.

Trial of the consolidated action began in May 2023 and proceeded on and off for the next month. On June 7, 2023, in the midst of trial, the trial court granted Linda leave to amend her complaint. Linda's original complaint had stated she was suing as an individual and as the surviving beneficiary of the Trust. The amended complaint stated Linda was suing as an individual, as the surviving trustee and surviving beneficiary of the Trust, and as the community property owner of the Notes. Respondents dismissed their complaint the same day, leaving trial to continue only as to Linda's claims.

On June 13, 2023, at the close of Linda's case, respondents made an oral motion for nonsuit on the ground Linda was not a holder in due course of the Notes or, in the alternative, did not have standing to sue on them.

The trial court requested and reviewed supplemental briefing from both parties on the standing issue. In September 2023, the trial court,

correctly treating respondents' motion for nonsuit as a motion for judgment (Code Civ. Proc., § 631.8), found Linda lacked standing to bring her claims and, on that ground, awarded judgment in favor of respondents and declared them the prevailing parties. Linda appeals the judgment.⁷

DISCUSSION

Respondents argue Linda lacks standing to sue on the Notes because (1) her complaint was never amended to allege she was suing as trustee, (2) the Notes were Donald's separate property and never belonged to Linda, and (3) Linda did not seek or obtain permission from a probate court to bring the claims. Linda contends her position as trustee of the Trust gives her standing to sue on the Notes.

I.

LINDA'S COMPLAINT WAS AMENDED TO SUE AS TRUSTEE OF THE TRUST

Respondents assert Linda's complaint was never amended because, although the trial court orally allowed the amendment, the oral pronouncement was never reflected in a written order.⁸ Even if a written order was necessary, respondents' argument fails for the simple reason that, after stating at least three times on the record that it allowed Linda to amend

⁷ Following the judgment, the trial court awarded PASS, as the prevailing party, more than \$40,000 in costs. Linda challenges that postjudgment order by a separate appeal pending in this court (case No. G063597).

⁸ Respondents cite two cases in support of this argument, *Pacific Home v. County of Los Angeles* (1953) 41 Cal.2d 855, 857–858 and *Diaz v. Professional Community Management, Inc.* (2017) 16 Cal.App.5th 1190, 1206–1207. Neither case is relevant, as each involves a situation where the court's oral pronouncement contradicted its subsequent written order. That is not the case here.

her complaint to allege she was suing as trustee, the court issued two *written* orders confirming it had granted Linda leave to amend her complaint, and Linda filed the amended complaint.

On June 7, 2023, the trial court informed the parties on the record: “the amendment has been received, and the court’s going to allow the amendment as filed.” Five days later—at the next trial session—respondents’ counsel asked the court to confirm “the amendment [Linda] presented has been accepted and is operative.” The court’s response was unequivocal: “The court accepted the amendment and allowed it to be filed. That would be the operative complaint wherein which Linda Clark changed Linda Clark as an individual to Linda Clark, Trustee. And that should be the operative complaint.” The court further clarified the amended complaint also stated Linda was suing on a community property interest as a beneficiary. The very next day, the court reiterated its ruling on the record: “Linda Clark is the trustee of the trust, and I’ve allowed amendment. She sued as an individual under holder in due course. Then we amended that, and it was Linda Clark trustee and with community property interest.”

The trial court then confirmed its oral rulings in two written orders. The court’s June 12, 2023 minute order reads, in part: “Court reconfirmed its ruling to allow [Linda’s counsel] to file an Amended Complaint.” The court’s September 25, 2023 minute order reiterated: “The court allowed Ms. Clark to amend the complaint, prior to the close of evidence, alleging as well that she was acting in the capacity of trustee of the Donald B. Clark and Linda Clark trust.”

Under both the trial court’s oral and written orders, Linda was granted leave to—and did—amend her complaint to sue as trustee of the Trust.

II.

AS TRUSTEE, LINDA HAS STANDING TO SUE ON THE NOTES

Respondents assert Linda does not have standing to sue on the Notes because they were Donald's separate property. The argument misconstrues both the law and the plain directions of the Trust. When the Trust was restated, virtually all of Donald's and Linda's property—including their separate and community property—was placed in the Trust.⁹ Accordingly, even if the Notes were Donald's separate property, they became assets held in the Trust. No evidence was presented at trial that the Notes were ever removed from the Trust. Thus, under the terms of the Trust, when Donald died, Linda became the sole trustee, with power over all the Trust assets, including the Notes.

At oral argument, Respondents asserted—for the first time and without citation to authority—that the restated Trust's general assignment was insufficient to transfer the Notes into the Trust. Pursuant to Probate Code section 15200, a trust is created by several methods, including “[a] declaration by the owner of property that the owner holds the property as trustee” (*id.*, subd. (a)), “[a] transfer of property by the owner during the owner's lifetime to another person as trustee” (*id.*, subd. (b)), and “[a] transfer of property by the owner, by will or by other instrument taking effect upon the death of the owner, to another person as trustee” (*id.*, subd. (c)). Colorado law recognizes the same methods of trust creation. (Colo. Rev. Stat. § 15-5-401.) “Property” is defined in California's Probate Code as “anything that may be the subject of ownership and includes both real and personal property

⁹ The only exceptions were certain specified assets, which did not include the Notes.

and any interest therein.” (Prob. Code, § 62.) Colorado law is nearly identical, defining “[p]roperty” as “both real and personal property or any interest therein and anything that may be the subject of ownership.” (Colo. Rev. Stat. 15-10-201.)

Property may be transferred into a trust by a general assignment: “[A] general assignment of a party's real and personal property in a written instrument is sufficiently certain to be legally effective.” (*Ukkestad v. RBS Asset Finance, Inc.* (2015) 235 Cal.App.4th 156, 162, fn. 6; see also *Kucker v. Kucker* (2011) 192 Cal.App.4th 90, 95 [“There is no California authority invalidating a transfer of shares of stock to a trust because a general assignment of personal property did not identify the shares. Nor should there be”].) So, whether the Notes were separate or community property, the Clarks’ transfer of “all of our real, personal, tangible, and intangible property, located in the United States, whether separate property or community property” was sufficient to transfer the Notes.

As trustee, Linda had the power to sue for collection on the Notes. (Prob. Code, § 16249 [a “trustee has the power to prosecute or defend actions, claims, or proceedings for the protection of trust property”]; Colo. Rev. Stat. § 15-5-816(x) [a trustee has power to “[p]rosecute . . . an action, claim, or judicial proceeding in any jurisdiction to protect trust property”].) Indeed, Linda not only had the *power* to prosecute claims but, as trustee, she had the *duty* to protect trust property, including by enforcement of claims. (Prob. Code, §§ 16007 [trustee has “a duty to make the trust property productive”] & 16010 [trustee has “a duty to take reasonable steps to enforce claims that are part of the trust property”]; see also *Purdy v. Johnson* (1917) 174 Cal. 521, 528 [“It was the duty of the trustees to collect [the promissory

notes], and they were liable for the amount of them with interest, unless they made it appear that the failure to collect the notes was not due to their fault”]; Col. Rev. Stat. §§ 15-5-809 [trustee is required to “take reasonable steps to take control of and protect the trust property”] & 15-5-811 [trustee is required to “take reasonable steps to enforce claims of the trust”].)

When a trustee brings an action regarding trust property, it must do so in his or her own name. “[A] trust is not a person but rather ‘a fiduciary *relationship* with respect to property.’ [Citations.] Indeed, ““an ordinary express trust is not an entity separate from its trustees.”” [Citation.] For that reason, the trustee, rather than the trust, is the real party in interest in litigation involving trust property.” (*Moeller v. Superior Court* (1997) 16 Cal.4th 1124, 1132, fn. 3; see also Colo. Rules Civ. Proc., rule 17.1 [“Every action shall be prosecuted in the name of the real party in interest; but [a] trustee of an express trust . . . may sue in his own name without joining with him the party for whose benefit the action is brought”].) Linda properly sued in her own name.

Further, in California when a trustee brings an action in its own name regarding trust property, it is not required to mention the trust. (See *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 171, disapproved on another ground in *People v. Rogers* (2013) 57 Cal.4th 296, 330–331 [a trustee can maintain an action on trust property in their own name “without mentioning the trust”]; & *McKoin v. Rosefelt* (1944) 66 Cal.App.2d 757, 769 [“it is unnecessary for the trustee in the pleadings . . . to describe himself as trustee. He can proceed in the action as though he were the owner of the claim which he is enforcing. If he does describe himself as trustee the description is treated as surplusage”].)

In sum, Linda had standing to pursue recovery on the Notes and could do so even without mentioning the Trust or identifying herself as trustee in the complaint.

III.

LINDA DID NOT NEED PROBATE COURT AUTHORIZATION TO SUE ON THE NOTES

Respondents argue Linda was required to obtain permission from a probate court to sue on the Notes either by filing a *Heggstad* petition (*Estate of Heggstad* (1993) 16 Cal.App.4th 943 (*Heggstad*)) or by initiating a probate proceeding. We disagree.

Linda was not required to file a *Heggstad* petition. *Heggstad* addressed the transfer of real property into a trust and held “a written declaration of trust by the owner of real property, in which he names himself trustee, is sufficient to create a trust in that property, and . . . the law does not require a separate deed transferring the property to the trust.” (*Heggstad, supra*, 16 Cal.App.4th at p. 950.) Named after *Heggstad*, a *Heggstad* petition is a device to ask the probate court to transfer legal title to real property when the settlor made the necessary declaration but failed to transfer the title by a deed or other written document sufficient to satisfy the statute of frauds. Here, as set forth above, the Notes were transferred to the Trust by the general assignment. The Notes were not real property, and *Heggstad* is inapplicable.

Neither was Linda required to initiate probate proceedings to obtain court permission to pursue payment under the Notes. One of the primary functions of a revocable inter vivos trust—such as the Trust here—is to “avoid probate upon death.” (*Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1583; see also *Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 633 [a “revocable inter vivos trust [is] a probate avoidance device”] & *Estate of*

Parrette (1985) 165 Cal.App.3d 157, 164 [“When a person creates, and transfers property to, an inter vivos trust and the trust estate does not revert to the settlor’s estate on his death, the trust property is not subject to probate administration in the settlor’s estate. [Citation.] The property is not subject to probate administration even if the decedent-settlor was a life beneficiary of the trust or retained the unexercised power to revoke”].) Further, “when property is held in this type of trust, the settlor and lifetime beneficiary “has the equivalent of full ownership of the property.”” (*Boshernitsan v. Bach* (2021) 61 Cal.App.5th 883, 892.)

Trustees are not required to obtain court approval or authority to pursue claims relating to trust property under either California or Colorado law. (Prob. Code, § 16200, subd. (b) [a trustee may exercise “the powers conferred by statute” “without the need to obtain court authorization”]; Colo. Rev. Stat. § 15-5-815(1)(b)(III) [a trustee may exercise any powers “conferred by this code” “without authorization by the court”].) In addition to the power conferred by statute, the Trust at issue here specifically empowered the trustee to act without court approval: “Except as otherwise specifically provided in this trust, our Trustee may exercise the powers granted by this trust without prior approval from any court, including those powers set forth

under the laws of the State of Colorado or any other jurisdiction whose law applies to this trust.”¹⁰

Linda did not require court approval or permission to bring her claims against respondents.

DISPOSITION

The judgment is reversed, and the matter is remanded for the trial court to conduct further proceedings consistent with this opinion. Linda shall recover costs on appeal.

GOODING, J.

WE CONCUR:

MOTOIKE, ACTING P. J.

DELANEY, J.

¹⁰ On June 26, 2023—after the trial court initially had taken the motion for judgment under submission—Linda filed a petition for formal probate of the will with the District Court in Colorado Springs, Colorado. Respondents argue this filing “showed Mrs. Clark knew the Notes were property of [Donald’s] *Will*” Respondents, however, do not offer any authority supporting the proposition that the filing of the Colorado probate proceedings has any impact on Linda’s standing to pursue the claims in California.