

CERTIFIED FOR PUBLICATION  
COURT OF APPEAL, FOURTH APPELLATE DISTRICT  
DIVISION ONE  
STATE OF CALIFORNIA

NICHOLAS G. EXARHOS,

Plaintiff and Appellant,

v.

HERBERT J. EXARHOS,

Defendant and Respondent.

D049883

(Super. Ct. No. GIC 856996)

ORDER DENYING REHEARING,  
AND MODIFYING OPINION

[NO CHANGE IN JUDGMENT]

THE COURT:

Nicholas Exarhos's petition for rehearing is denied.

It is ordered that the opinion filed herein on January 10, 2008 is modified as follows:

**1. On page 13, after the paragraph ending in "as well as equitable," the following is to be inserted:**

B. *Nicholas's claim that the trial court's award violates section 1026 is forfeited and, in any event, is without merit*

In a petition for rehearing, Nicholas asserts that this court must reverse the trial court's costs award because the award is contrary to

section 1026. Nicholas did not raise this argument in the trial court, nor in this court at any time prior to filing his petition for rehearing. "It is well settled that arguments . . . cannot be raised for the first time in a petition for rehearing. [Citation.]" (*Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1092 (*Reynolds*)). Accordingly, we conclude that Nicholas forfeited his contention that section 1026 bars the trial court's award in this case.

Even if we were to consider Nicholas's contention, we would reject the claim on the merits. Section 1026 provides:

"(a) Except as provided in subdivision (b), in an action prosecuted or defended by a personal representative, trustee of an express trust, guardian, conservator, or a person expressly authorized by statute, costs may be recovered as in an action by or against a person prosecuting or defending in the person's own right.

"(b) Costs allowed under subdivision (a) shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the costs to be paid by the fiduciary personally for mismanagement or bad faith in the action or defense."

We assume for the sake of argument that the attorney fees the trial court awarded pursuant to Civil Code section 1717 in this case constituted "costs" as that term is used in section 1026. We assume further that Nicholas, as Eleni's alleged successor in interest (§§ 377.30, 377.32), prosecuted this action "as a person expressly authorized by statute . . ." (§ 1026.)

However, Nicholas, as an alleged successor in interest, did not act in a representative capacity in this case, other than perhaps to represent himself. (See *Peterson, supra*, 154 Cal.App.4th at p. 509 [party acting in role of successor in interest was not acting in "representative capacity" but rather "stepped into [decedent's] position as to the survivor actions and prosecuted claims on her own behalf"].) Thus, assuming that section 1026, subdivision (a) applies in this case, the costs were chargeable to Nicholas as the "party represented" pursuant to section 1026, subdivision (b), even in the absence of a finding of bad faith.

**2. On pages 13-15, the entirety of part III.B. is deleted. In its place, the following is inserted:**

*C. Nicholas has failed to demonstrate that Eleni's estate should be liable for the attorney fee award*

Nicholas claims that Eleni's estate should have been held liable for the award of attorney fees, rather than Nicholas.

In support of this contention, Nicholas asserts that he served "essentially as a representative of Eleni's estate and its beneficiaries." We disagree. Section 377.11 provides that a successor in interest is a person who succeeds to a particular "cause of action. . . ." Section 377.30 provides that where a "cause of action . . . passes to the decedent's successor in interest," under certain circumstances, the successor in interest may commence the cause of action. Thus, a "successor in interest" has the authority to act with respect to the particular cause or causes of action to which he succeeds, rather than the entirety of the decedent's estate. (See *Peterson, supra*, 154 Cal.App.4th at p. 509.)

Nicholas also contends that, "Any judgment that might have been recovered against [the Bank] would have become property of Eleni's estate and would have been distributed pursuant to Eleni's will." Even if true, as Eleni's alleged successor in interest, Nicholas claimed he was the beneficiary ultimately entitled to receive the proceeds of this action. For example, in his declaration pursuant to section 377.32, Nicholas states that the Trust names him as the beneficiary of the savings account. In his complaint, Nicholas asserts that, as a result of the Bank's actions, "plaintiff has been damaged in the sum of at least \$177,436.96." Both of these statements clearly imply that any judgment that Nicholas might have obtained against the Bank would have passed to Nicholas by virtue of his claimed status as successor in interest. Accordingly, even if any money Nicholas might have recovered from the Bank in this case would have passed through Eleni's estate, we reject Nicholas's claim that the estate should have been liable for the attorney fee award.<sup>8</sup>

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<sup>8</sup> In his reply brief, Nicholas claims that Herbert is barred from recovering any attorney fees against Nicholas by virtue of a settlement agreement Nicholas and Herbert

Finally, Nicholas claims for the first time in his petition for rehearing that section 377.33 demonstrates that he was acting in a representative capacity. The contention is forfeited. (*Reynolds, supra*, 36 Cal.4th at p. 1092.) It is also without merit. Section 377.33 provides, "The court in which an action is commenced or continued under this article may make any order concerning parties that is appropriate to ensure proper administration of justice in the case, including appointment of the decedent's successor in interest as a special administrator or guardian ad litem." The fact that a trial court may issue an order directing a successor in interest to serve in a representative capacity does not mean that Nicholas was acting in a representative capacity in this case.<sup>9</sup>

**There is no change in judgment.**

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HALLER, Acting P. J.

Copies to: All parties

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reached in the probate proceeding. Nicholas stated in his reply brief that he would be filing a motion to augment the record on appeal to include various documents pertinent to this claim. Nicholas failed to file the motion to augment until the day prior to oral argument. We denied the motion to augment as untimely. Accordingly, we do not consider Nicholas's claim that the attorney fee order must be reversed pursuant to the settlement agreement between Nicholas and Herbert.

<sup>9</sup> As noted in the text, Nicholas raised several arguments in his petition for rehearing that he had not previously raised. Nevertheless Nicholas fails to acknowledge that he is raising these contentions for the first time, much less offer an explanation for his tardiness. His failure to timely raise these arguments, like his failure to timely file the motion to augment in this case, see fn. 8 *ante*, caused a needless expenditure of judicial resources.