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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

Estate of DELORIS HODGE, Deceased.	B281255
TOMMIE HODGE, Petitioner and Appellant, v. THEOPOLIS HODGE et al., Cross-petitioners and Respondents.	(Los Angeles County Super. Ct. No. BP038603)

APPEAL from an order of the Superior Court of Los Angeles County, David J. Cowan, Judge. Affirmed.

George M. Halimi for Petitioner and Appellant.

Katten Muchin Rosenman, Steve Cochran, Janella T. Gholian and Christina Bautista for Cross-petitioners and Respondents.

INTRODUCTION

Tommie Hodge filed a petition in probate court for "clarification and/or modification" of an eight-year-old order for final distribution of his mother's estate. Tommie's siblings, Theopolis and Tanya Hodge, filed a cross-petition. At issue were the parties' competing interests in the family home. Tommie appeals from the probate court's order denying his petition and granting the cross-petition.

The first ground the probate court cited for its ruling was issue preclusion. The first ground Theopolis and Tanya cite on appeal for affirming the probate court's ruling is issue preclusion. Tommie had rather not talk about issue preclusion. In fact, Tommie does not mention or even allude to issue preclusion, either in his opening brief or his reply brief. We affirm the probate court's order on the ground of issue preclusion.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The First Probate Proceeding*

The fourth article of Deloris Hodge's will provided: "I give, devise and bequest my entire estate, both real and personal, and of whatever kind and nature to [Tanya], [Tommie], and [Theopolis], share and share alike with the following exceptions: [¶] "Since my son [Theopolis] has special needs, I hereby grant him a life estate to reside in my home located [on West 66th Street in Los Angeles]. Said life estate does not grant [Theopolis] the power of sale or to lease said property unless [Tanya] and [Tommie] so agree. In addition, said life estate is conditioned that [Theopolis] resides in the home and to the extent he is able,

properly maintains said home and pays for any and all taxes, insurances or mortgages."

After Deloris died in 1995, the probate court admitted her will to probate. In November 2007 Tanya, as executrix, filed her final account and petition for final distribution, which stated: "As per Article Fourth, the Petitioner proposes to distribute the entire estate as follows: that real property located [on West 66th Street in Los Angeles] in equal shares to [Tanya], [Tommie], and [Theopolis] as Tenants in Common subject to that Life Estate granted exclusively to [Theopolis] by the deceased. The rest residue and remainder to wit: miscellaneous personal property valued at $1,200.00 in equal shares to [Tanya], [Tommie], and [Theopolis]." Tommie filed objections, contending the probate court should not approve the account and should remove Tanya as executrix.

In March 2008, after a hearing on Tanya's final account and petition for final distribution and Tommie's objections, the probate court signed the proposed order Tanya submitted with her account and petition. The order approved the account, denied Tommie's objections with prejudice, and provided that all property in the estate "be distributed one-third (33-1/3%) each to the three children of the decedent, [Tanya], [Theopolis], and [Tommie]."

Several months later, Tanya applied for a nunc pro tunc order regarding final distribution, explaining counsel for Tanya had neglected "to include in the proposed Order the fact that according to the Will of the decedent, her son, [Theopolis], was provided a life estate in" the home on West 66th Street. Tommie, served with the application, filed no objection. In July 2008 the probate court granted the application, ordering Theopolis "shall

have a life estate on condition that he maintains said home and pays for any and all taxes, insurances or mortgages. Further, that said property could only be sold or leased during the lifetime of [Theopolis] if all three beneficiaries so agree." Nothing in the record suggests Tommie appealed this or any other order issued in the proceeding.

B. *The Civil Proceedings*

In February 2015 Theopolis, Tanya, and Tommie were living in the house on West 66th Street when Theopolis sought and obtained an Elder or Dependent Adult Abuse Restraining Order against Tommie. The order required Tommie to move out of the house immediately.

Tommie then filed a civil action to partition the property. But after Theopolis and Tanya filed a motion for judgment on the pleadings, the trial court stayed the case until Tommie obtained a ruling on a motion, to be filed in the probate court, for "clarification and/or modification" of the probate court's orders regarding final distribution of Deloris's estate. In its order staying the case, the trial court stated: "In this court's view, there are major inconsistencies between the original judgment and the judgment 'as amended' from the probate court in that, among other things, a life estate is inconsistent with a fee holding. Here all three parties held fee interests as tenants in common, therefore, all three had a right to possession until they died or sold or transferred their interest. One alone could not have a life estate and at the same time be a tenant in common. There are also problems because under most circumstances, an ouster of one tenant in common el[i]minates the tenancy in common allowing then a partition and sale or potentially for

rental value to [be] paid to the 'ousted tenant' by those who continue to pos[s]ess or hold the 'right to possess.' There are also other issues, but hopefully the probate court will resolve them all."[1]

C. *The Second Probate Proceeding*

In October and November 2016 Tommie, on the one hand, and Theopolis and Tanya, on the other hand, filed respectively a petition and a cross-petition in the probate court for "clarification and/or modification of order for distribution" of Deloris's estate. Tommie sought a determination that "all three beneficiaries of the estate have equal right of possession" to the property at West 66th Street or, alternatively, that Theopolis "does not have the exclusive right of possession" to the property. Theopolis and Tanya sought a determination that, "consistent with the Will and [Tanya's final account and petition for final distribution, Theopolis] has an exclusive life estate in the Property, and [Tanya and Tommie] are remaindermen (having no present right to possession of the Property)."

On January 30, 2017 the probate court denied Tommie's petition and granted Theopolis and Tanya's cross-petition. The

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[1] Although not challenged in this appeal, this order was erroneous. The trial court in the partition action should have decided the issues in the case rather than requiring Tommie to file a probate petition and having the probate court decide issues the trial court in the partition action could and should have decided. (See Cal. Code of Jud. Ethics, canon 3(B)(1) ["[a] judge shall hear and decide all matters assigned to the judge except those in which he or she is disqualified"].)

court found that, under the doctrine of issue preclusion,[2] the prior proceeding regarding final distribution of Deloris's estate barred Tommie from seeking the relief he now sought. The court also rejected Tommie's arguments on their merits. The court modified the July 2008 nunc pro tunc order to "add the word 'exclusive' in front of the term 'life estate' so that the Order, as modified, states '[Theopolis] shall have an exclusive life estate on condition that he maintains said home and pays for any and all taxes, insurances or mortgages. Further, that said property could only be sold or leased during the lifetime of [Theopolis] if all three beneficiaries so agree." Tommie timely appealed.[3]

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[2] The probate court used the term "collateral estoppel," as do Theopolis and Tanya in their brief on appeal. (See *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824 ["[t]o avoid future confusion, we will follow the example of other courts and use the term[ ] . . . 'issue preclusion' to encompass the notion of collateral estoppel"].)

[3] The January 30, 2017 ruling directed Theopolis and Tanya to "submit an order on the above proceedings, as well as a separate one clarifying the previously corrected March 28, 2008 order, consistent with the foregoing," which they did. The court signed and filed those orders on February 28, 2017. Although Tommie incorrectly appealed from the January 30, 2017 ruling, we construe his appeal to be from the February 28, 2017 order denying the petition and granting the cross-petition. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 669 ["a notice of appeal which specifies a nonappealable order but *is timely* with respect to an existing appealable order or judgment will be construed to apply to the latter judgment or order"]; accord, *Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 21.)

DISCUSSION

Tommie contends the probate court erred by distributing to Theopolis an "exclusive life estate" in the West 66th Street property. Tommie argues this distribution gave Theopolis an "*exclusive right of possession [and] occupancy*," which impermissibly deprived Tommie of possessory and occupancy rights because under the will he "inherited an interest in [the] property as a tenant in common." Among the many problems with Tommie's argument is the one Tommie does not address: The probate court decided the issue of Theopolis's exclusive right of possession and occupancy in 2008, and Tommie is precluded from relitigating it.[4]

"'Issue preclusion prevents "relitigation of issues argued and decided in prior proceedings." [Citation.] The threshold requirements for issue preclusion are: (1) the issue is identical to that decided in the former proceeding, (2) the issue was actually litigated in the former proceeding, (3) the issue was necessarily decided in the former proceeding, (4) the decision in the former proceeding is final and on the merits, and (5) preclusion is sought against a person who was a party or in privity with a party to the former proceeding.'" (*Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 398-399; see *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 826-827 ["[t]he bar is asserted against a party who had a full and fair opportunity to litigate the issue in the first case but lost," and "[t]he point is that, once an issue has

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[4] The question of the applicability of claim preclusion or issue preclusion is one of law, which we review de novo. (*Johnson v. GlaxoSmithKline, Inc.* (2008) 166 Cal.App.4th 1497, 1507.)

been finally decided *against* such a party, that party should not be allowed to relitigate the same issue in a new lawsuit"].)

The relevant prior proceeding was the probate court's 2008 consideration of Tanya's final account and petition for final distribution, which included rulings on Tommie's objections and Tanya's subsequent application for a nunc pro tunc order. In that proceeding Tanya, citing the fourth article of Deloris's will, proposed distributing the West 66th Street property to the three siblings as tenants in common, "subject to that Life Estate granted exclusively to [Theopolis] by the deceased." The proceeding concluded with the probate court approving Tanya's final account, over Tommie's objections, and ordering that Theopolis "shall have a life estate [in the West 66th Street property] on condition . . . he maintains said home and pays for any and all taxes, insurance, and mortgages" and that "said property could only be sold or leased during the lifetime of [Theopolis] if all three beneficiaries so agree."

The first requirement of issue preclusion (that the prior proceeding decided the identical issue) was satisfied because in the 2008 proceeding the probate court decided Theopolis had a life estate in the West 66th Street property, without making any special provision for rights of possession or occupancy. The declaration of a life estate without a special provision regarding rights of possession or occupancy confers on the life tenant an exclusive right of possession and occupancy. (*Horstmann v. Sheldon* (1962) 202 Cal.App.2d 184, 190; see *ibid.* ["[i]t is settled that, in the absence of some special provision, and there is none here, a declared life estate is unqualified as to use and occupancy and is exclusive as to possession"]; Miller & Starr, Cal. Real Estate (4th ed. 2017) § 12:21, p. 45 ["[a] life tenant has all the

rights of an absolute owner, subject to the privilege of the remainder holder to enter on the property to see if waste is being committed," and "[a]bsent a specific provision in the grant or will to the contrary, the life estate is unqualified as to use and occupancy, and is exclusive as to possession"].)

The second requirement (that the issue was "actually litigated" in the prior proceeding) was satisfied because Tanya's final account and petition for final distribution proposed granting Theopolis a life estate in the West 66th Street property, without restriction as to rights of possession or occupancy, based on the fourth article of the will, and the probate court adopted that proposal. (See *Murphy v. Murphy*, *supra*, 164 Cal.App.4th at p. 400 [""[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated""].)[5] It is not clear whether Tommie argued in his objections to Tanya's final account and petition for final distribution that Theopolis was not entitled to exclusive rights of possession and occupancy, but he had "a full and fair opportunity" to do so, and that is sufficient. (*DKN Holdings LLC v. Faerber*, *supra*, 61 Cal.4th at p. 826; see *Murphy v. Murphy*, at p. 401 ["[a] party cannot by negligence or design withhold issues and litigate them in consecutive actions," and thus "the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable"]; *Bacon v. Kessel* (1939) 31 Cal.App.2d 245, 250 [an order of final distribution is determinative of matters presented "or which might have been presented"].)

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[5] In fact, the Hodge siblings actually litigated the issue twice because Tanya's application for a nunc pro tunc order put the issue before the court and Tommie a second time.

The third requirement (that the prior proceeding "necessarily decided" the issue) was satisfied because, for the probate court to distribute the property of the estate, the court had to decide and rule on Tanya's proposal to grant Theopolis a life estate. (*Murphy v. Murphy*, *supra*, 164 Cal.App.4th at pp. 398-399; see *id.* at p. 400 ["[w]hether an issue was '"necessarily decided" . . . mean[s] that the issue was not '"entirely unnecessary"' to the judgment in the prior proceeding'"].)

Finally, the probate court's 2008 order for final distribution "binds and is conclusive as to the rights of all interested persons" (Prob. Code, § 11605), which includes Tommie (see *ibid.*, § 48 [defining "interested person"]), who, in fact, appeared in the proceeding as an objector (see *ibid.*, § 1043, subds. (a), (b)). Thus, the remaining requirements of issue preclusion (that the prior decision was "final and on the merits" and that preclusion is asserted against a party to the prior proceeding or its privy) were also satisfied. (*Murphy v. Murphy*, *supra*, 164 Cal.App.4th at pp. 398-399; see *Bacon v. Kessel*, *supra*, 31 Cal.App.2d at p. 250 [probate court's "decree of distribution from which no appeal was taken is a final judgment" is "determinative of the facts presented or which might have been presented therein, and is conclusive upon the parties or their privies as to those facts when *incidentally* put in issue between them in relation to a different matter, in the same or any other court"].)

Courts have consistently held that final probate distributions, like the one Tommie challenges here, are "immune from collateral attack," even if the distribution contravenes the terms of the will. (*Harvey v. Smith* (1957) 147 Cal.App.2d 646, 649.) '"In general, . . . the rule would appear to be well

established that even though from a standpoint of following the specific provisions of the will, a decree of distribution of the estate is inaccurate and incorrect, nevertheless after the decree has become final, for all time thereafter, it remains the unalterable measure of the rights of all persons who may be interested in the estate.'" (*Ibid.*; see *Meyer v. Meyer* (2008) 162 Cal.App.4th 983, 992 [""[o]nce final, the decree [of distribution] supersedes the will [citations] and becomes the conclusive determination of the validity, meaning and effect of the will, the trusts created therein and the rights of all parties thereunder""]; *Woodring v. Basso* (1961) 195 Cal.App.2d 459, 467 ["'[i]t is settled . . . that, once final, an erroneous decree of distribution, like any other erroneous judgment, is as conclusive as a decree that contains no error'"].)[6] Thus, even if there were any merit to Tommie's current challenge to the distribution of the assets of his mother's estate, he lost his chance to contest Theopolis's exclusive right of possession and occupancy when he did not appeal from the 2008 order of final distribution. (See *Meyer v. Meyer, supra*, at p. 992 ["'[i]f the decree erroneously interprets the intention of the testator it must be attacked by appeal and not collaterally'"].)

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[6] Although an exception to this general rule exists where the decree was the result of extrinsic fraud or where the language of the decree is "uncertain, vague or ambiguous" (*Harvey v. Smith*, *supra*, 147 Cal.App.2d at p. 649), Tommie invokes neither exception.

DISPOSITION

The order is affirmed. Theopolis and Tanya are to recover their costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J.

FEUER, J.*

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