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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

DIANN DE MELLO, as Co-Trustee, etc.,

Plaintiff and Respondent,

v.

KATHERINE CARNEY, as Conservator,  
etc.,

Defendant and Appellant.

2d Civil No. B254899  
(Super. Ct. No. PR070047)  
(San Luis Obispo County)

In 1990 Joseph and Elizabeth Doonan created the "Family Trust."<sup>1</sup> Joseph died in 1991. Over the ensuing seven years Elizabeth exhausted the corpus of the trust. In 2001 Elizabeth executed the "Elizabeth M. Doonan Living Trust," whose corpus was, to a significant degree, composed of former assets of the Family Trust. The legitimacy of these events and the management of the two trusts were challenged in a prior suit by counsel for defendant in the instant action but found by the trial court to have been lawful. We affirmed.

In this tale of two trusts, a mother attempts to disinherit her stepson following his father's death by creating a second trust—of which he is not a beneficiary—out of assets she unlawfully converted from the original trust. That, at least, is the

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<sup>1</sup> (*Doonan v. De Mello* (Apr. 26, 2011, B225448) [nonpub. opn.] )

narrative thus far unsuccessfully advanced by the stepson, who is appellant's uncle and counsel of record, in litigation spanning almost a decade.

In the present case, respondent Diann De Mello, in her capacity as co-trustee of the second trust (appellant disputes the legitimacy of her nomination),<sup>2</sup> submitted a first and final account of the trust's assets and petitioned the trial court for settlement and final distribution. Appellant is the conservator of Audrey Carney, a beneficiary of both trusts. Appellant objected to respondent's account of the second trust and requested a surcharge of the trustees, a "complete" accounting, and the appointment of an independent successor trustee. The trial court denied appellant's subsequent motion for summary adjudication, finding it outside the scope of the pleadings and, alternatively, barred by issue preclusion. Following a court trial, the trial court accepted respondent's account with minor adjustments and ordered distribution of the trust property.

Appellant contends that the trial court erred by denying her motion for summary adjudication and by not granting her leave to amend her objections. Respondent contends that this appeal is untimely and that resolution of its merits is precluded by a final judgment in prior litigation. Although we reject both of respondent's contentions, we affirm the trial court on the first basis for its ruling—that appellant's motion for summary adjudication sought relief outside the scope of the pleadings and that amendment of the pleadings would have been futile.

### FACTS AND PROCEDURAL HISTORY

In 1990, Audrey Carney's father and his wife executed the eponymous Joseph F. and Elizabeth M. Doonan Family Trust (Family Trust). The trust was funded solely with their community property. Its only assets were a house in Lake Elsinore and personal property such as clothing and household furnishings. The beneficiaries were Joseph Doonan's five children from a previous marriage—including Audrey Carney and

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<sup>2</sup> Appellant belatedly raises this argument in her reply brief. Therefore, we do not consider it. (*Department of Fair Employment & Housing v. Ottovich* (2014) 227 Cal.App.4th 706, 716, fn. 7.)

appellant's counsel, Daniel Doonan—and six of Elizabeth Doonan's relatives, including respondent (her niece) and Edmund Fischer (her nephew).

Joseph Doonan died the following year. Upon his death, the Family Trust became irrevocable as to his one-half community property interest in the trust estate. According to the trust's terms, Elizabeth Doonan held only a life estate in this portion of the trust estate and for the most part could not invade its principal. She was entitled, however, to withdraw \$5,000 per year, which she did for five years. In addition, she sold the house for a profit of \$69,710.07 and withdrew her one-half community property interest in the trust estate. In 1998, the corpus of the Family Trust was exhausted.

Elizabeth Doonan executed the Elizabeth M. Doonan Living Trust (Living Trust), which she funded with her individual accounts and personal property, in 2001. She named as beneficiaries, in addition to her own relatives, three of Joseph Doonan's children, including Audrey Carney, but excluded Daniel Doonan. Elizabeth Doonan amended the Living Trust in 2004, naming respondent and Fischer to serve with her as co-trustees. A year later, she died.

In 2006, Daniel Doonan petitioned the trial court to return assets to the Family Trust that he claimed had been wrongfully converted by Elizabeth Doonan (prior litigation). After he presented his case at trial, the trial court granted judgment in favor of Fischer and respondent. (Code Civ. Proc., § 631.8.) The trial court found that Elizabeth Doonan had acted lawfully in accordance with the trust's terms, that Daniel Doonan had sued the wrong parties,<sup>3</sup> and that the statute of limitations had expired, precluding a suit against the proper parties. We affirmed in an unpublished disposition. (*Doonan v. De Mello, supra.*)

Respondent, as co-trustee of the Living Trust, then submitted a first and final account and petitioned the trial court to distribute the trust's assets. Appellant filed objections and supplemental objections. Subsequently, appellant moved for summary

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<sup>3</sup> His first amended petition on behalf of the Family Trust sought relief against Fischer and respondent. The trial court found that he had not sued either Elizabeth Doonan's estate or the Living Trust, that respondent was not a successor trustee of the Family Trust, and that Fischer, who was, had not been served.

adjudication on two issues. First, she asserted that the Family Trust was a bilateral contract between Joseph and Elizabeth Doonan creating a life estate to which Elizabeth Doonan was bound. Second, she asserted that Elizabeth Doonan never revoked the Family Trust.

The trial court denied appellant's motion for summary adjudication on May 6, 2013, finding that her arguments were outside the scope of the pleadings and the issues were in any event precluded due to the judgment in the prior litigation. The trial court denied appellant's motion for reconsideration on June 18, 2013. Following a bench trial, the trial court approved respondent's account, with two minor exceptions raised by appellant in her objections,<sup>4</sup> and directed respondent to distribute the Living Trust's assets to its beneficiaries. Appellant filed her notice of appeal on March 6, 2014.

## DISCUSSION

### Timeliness of the Appeal

Respondent argues that we should dismiss this appeal as untimely. Respondent served on appellant notice of entry of judgment on January 8, 2014. Appellant filed her notice of appeal 57 days later. The appeal is thus timely. (Cal. Rules of Court, rule 8.104(a)(1)(B).) Notwithstanding respondent's unsupported argument to the contrary, a party may challenge the denial of a motion for summary adjudication as part of an appeal from a final judgment after trial. (E.g., *Gackstetter v. Frawley* (2006) 135 Cal.App.4th 1257, 1267-1270.)

### Issue Preclusion

Appellant contends that the trial court erred in ruling that principles of collateral estoppel preclude consideration of the issues in her motion for summary adjudication. Reviewing the question de novo (*In re Conservatorship and Estate of Buchenau* (2011) 196 Cal.App.4th 1031, 1040), we agree.

An earlier ruling will be given preclusive effect in subsequent proceedings if (1) the claim or issue raised in the later proceeding is identical to the claim or issue

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<sup>4</sup> The trial court disallowed a duplicate billing entry for attorney fees in the amount of \$812.50 and expenses incurred for a "celebration of life" in excess of \$2,500.

litigated in the earlier proceeding; (2) the earlier proceeding resulted in a final judgment on the merits; and (3) the party against whom estoppel is being asserted was a party or in privity with a party to the earlier proceeding. (*People v. Barragan* (2004) 32 Cal.4th 236, 253.) Although we agree with the trial court that the first two elements are met here, respondent has not carried her burden of establishing the third.

In the prior litigation, it was Daniel Doonan who raised the issues regarding the propriety of Elizabeth Doonan's withdrawing assets from the Family Trust. He is not a party here, and his status as appellant's counsel is irrelevant. (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 126 ["[T]he existence of an attorney-client relationship does not establish privity between the attorney and client for purposes of collateral estoppel under California law"].) Moreover, he raised the issues in his capacity as a co-trustee of the Family Trust. Although Audrey Carney was a beneficiary of that trust and Daniel Doonan thus represented her interests, here she is not raising the issues as a beneficiary of the Family Trust. Indeed, she would not have standing to do so. (See *Patton v. Sherwood* (2007) 152 Cal.App.4th 339, 345, fn. omitted [In general, "only a trustee or 'beneficiary' may petition the probate court 'concerning the internal affairs of a trust'"].) Because Audrey Carney, through appellant, raises the issues here in her capacity as a beneficiary of the Living Trust, there is no community of interest. (See *Finnerty v. Cummings* (1933) 132 Cal.App. 48, 49.) Consequently, collateral estoppel does not apply.

#### Scope of the Pleadings

We may affirm the judgment if it is correct on any ground. (*R.P. Richards, Inc. v. Chartered Const. Corp.* (2000) 83 Cal.App.4th 146, 154.) The trial court's first basis for denying appellant's motion for summary adjudication was that it exceeded the scope of the pleadings. We agree.

The pleadings delimit the scope of the issues on a motion for summary adjudication. (*State Comp. Ins. Fund v. Superior Court* (2010) 184 Cal.App.4th 1124, 1132.) Such a motion cannot be granted on a ground that is not raised by the pleadings. (See *Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663.)

"Evidence offered on an unpleaded claim, theory, or defense is irrelevant because it is outside the scope of the pleadings. [Citation.]" (*California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637, fn. 3.)

Respondent's petition sought approval of her account and distribution of the Living Trust's assets. In appellant's objections and supplemental objections, she claimed that respondent was not a legitimate trustee, that respondent wrongfully converted property belonging to the Living Trust, and that certain expenditures were inappropriate and should not be paid out of trust assets. Although appellant is correct that resolution of the issues surrounding Elizabeth Doonan's use of the Family Trust's assets conceivably could impact the Living Trust's assets, that was not an issue in the pleadings. The trial court appropriately denied appellant's motion for summary adjudication for that reason.

A trial court does not abuse its discretion in denying leave to amend where, as here, "permitting an amendment would be futile." (*Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 828.) Appellant's proposed amendment would have been futile, among other reasons, because her interpretation of Elizabeth Doonan's rights under the Family Trust lacks any support in the text of the trust instrument or in law.

#### DISPOSITION

The judgment is affirmed. Costs to respondent.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jac Crawford, Judge  
Superior Court County of San Luis Obispo

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Law Offices of Doonan & Doonan, Inc., and Daniel J. Doonan for  
Defendant and Appellant.

George Cyr, J.K. George and Anne C. Cyr for Plaintiff and Respondent.