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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

Estate of BURTON GOLDSTEIN,
Deceased.

BARRIE TARADAY et al.,
Petitioners and Appellants,

v.

JOHN J. DACEY,
Objector and Respondent.

A137103

(San Francisco City & County
Super. Ct. No. PES-01-282503)

Experienced attorneys know that often the hardest aspect of a successful litigation is satisfying a judgment already won. That is what this appeal is about.

Attorney John J. Dacey obtained a judgment for \$7.6 million against the estate of his deceased former partner, Burton J. Goldstein, which estate is administered by William Taraday, Goldstein's son-in-law. Dacey has received \$2.2 million from accounts in the estate. The accounts currently contain approximately \$5.1 million. Goldstein's daughters, Barrie Taraday and Gail Hart (daughters), claim that more than \$3 million should be distributed to them as the community property of their deceased mother Janet, Goldstein's widow, which she allegedly assigned and gifted to them. The probate court rejected the daughters' claim. We affirm.

BACKGROUND

The Underlying Dispute And First Trial

The root of this matter is the attorney fees generated by protracted litigation resulting from property damage caused by flooding from a break in the Yuba River levee. That litigation is described in our opinion in *Dacey v. Taraday* (2011) 196 Cal.App.4th 962 (*Dacey I*), and in the detailed 15-page statement of decision prepared by the trial court. It also figures prominently in the nine pages of stipulated facts given to the probate court. No witnesses testified at the trial. Thus, it appears that there is no genuine contested issue of fact. It is therefore appropriate to distill the following narrative from the sources mentioned.

In 1986, Goldstein, Dacey, and two other attorneys agreed to be co-lead counsel with another law firm for more than 1300 plaintiffs with tort and inverse condemnations claims resulting from flooding caused by a break in the Yuba River levee. The ensuing litigation was protracted and bitter. The case was tried twice, and generated two published opinions: *Paterno v. State of California* (1999) 74 Cal.App.4th 68, and *Paterno v. State of California* (2003) 113 Cal.App.4th 998. By the time the claims were finally settled, in 2004 for close to \$88 million, Goldstein was dead and his partnership with Dacey was long dissolved.

Goldstein died on January 2, 2001. After lengthy difficulties, many caused by representing the Yuba River clients, the Goldstein-Dacey law firm dissolved in 1990-1992. The members of the firm executed a dissolution agreement providing for completion of unfinished business and distribution of any resulting compensation. When the Yuba River cases settled, disagreement about the division of the attorney fees would, five years later, lead to *Dacey I*.

In June 2005, Janet Goldstein, now Goldstein's widow, filed a disclaimer in favor of the daughters of her right to inherit any community property assets in the fees. She had already, by written gift in December 2004, assigned her community property interest in the fees to the daughters in equal shares. Near the end of 2005, approximately \$24.2 million—fees from the settled Yuba River litigation —was paid into an account of

Goldstein's estate. This led to the first litigation here, filed in 2006, when Dacey sued William Taraday, Goldstein's son-in-law, the administrator of his estate, and an attorney. Apparently fearing that money was being paid from the estate account to the daughters, Dacey obtained an order from the probate court prohibiting withdrawals from the estate account without court approval. Dacey added the daughters as parties to his suit against Taraday, suing them for various torts, including replevin and conversion.

In 2009, before *Dacey I* was finished, Janet Goldstein, Burton Goldstein's sole testate heir, and the mother of the daughters, died, leaving the daughters as the only remaining heirs.

In fact, Janet Goldstein died only three weeks after a judgment for \$5,957,395.22 was entered against the estate. The trial court in *Dacey I* concluded that Taraday, as Goldstein's administrator, breached the dissolution agreement. For this contractual breach, Dacey was therefore entitled to a percentage of all funds (whether allocable to the estate or Janet Goldstein as the surviving spouse) the estate had received. Taraday, in his individual capacity, and the daughters, were not found liable.

This was the judgment we affirmed in *Dacey I* in 2011. The major issue we addressed was the application of the one-year statute of limitation provided by Code of Civil Procedure section 366.2.¹ We concluded that the statute did not bar Dacey's claim against the estate for breach of contract because the breach was not by Goldstein, but by Taraday as the administrator of Goldstein's estate. (*Dacey I, supra*, 196 Cal.App.4th 962, 976-986.)

¹ Which provides: "If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations that would have been applicable does not apply." (Code Civ. Proc. § 366.2., subd. (a).)

The Petition Here

Meanwhile, in 2009, the daughters filed a petition in the probate court for an order confirming their title to the settlement funds, and transferring those funds to them free of any obligation to Dacey.

Once *Dacey I* was final, and with the probate court's approval, Taraday as administrator paid Dacey \$2.2 million towards satisfying the *Dacey I* judgment. Including accrued interest, approximately \$5.5 million remained unsatisfied. More than \$4.2 million remains in Goldstein estate accounts.

The daughters' petition was tried in June 2012 by the Honorable Peter J. Busch. Dacey admitted that Janet Goldstein's December 2004 gift effectively transferred her community interest in the fees to the daughters in equal shares. Dacey further conceded that her June 2005 disclaimer was effective to renounce her interest in the fees as Goldstein's testate heir, also in favor of the daughters. However, Dacey denied that any funds in estate accounts reflected a surviving spouse interest. Among the affirmative defenses pleaded by Dacey were laches, estoppel, waiver, unclean hands, res judicata, collateral estoppel, and that the daughter's claim was time-barred by Probate Code section 13552.²

As to how the daughter's petition was decided, at this point we will (with minor nonsubstantive editorial changes) quote from Judge Busch's comprehensive final statement of decision:

"DISCUSSION

"The Dissolution Agreement created a community obligation. Therefore, Janet Goldstein is responsible for this community obligation, and she cannot avoid this responsibility by assigning her interest in the fee recovery to her daughters. Even assuming a creditor's claim is required, this issue was waived in the civil action [i.e., *Dacey I*], and the prior action does not bar Dacey's claim.

² Subsequent statutory references are to the Probate Code unless otherwise indicated.

“The Dissolution Agreement Created a Community Obligation that Attached to the Entire Community Estate When Decedent Burton Goldstein Entered into that Contract in 1992

“ ‘Under the applicable California law the debts of the husband and the costs of administering his estate are chargeable against the entire community property.’ (*Pfeiffer v. U.S.* (ED CA 1969) 310 F.Supp. 392, 393, *supplemented* (ED CA 1970) 315 F.Supp. 392.) Barring a petition for debt allocation under Probate Code § 11444 (which has not been made here), a community obligation attaches to the decedent’s and surviving spouse’s interests. (See *Dawes v. Rich* (1997) 60 Cal.App.4th 24, 31-32.) Thus, the end of the community by death does not insulate the surviving spouse’s interest from a community obligation. This rule is consistent with Family Code § 910, subdivision (a): ‘Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.’

“For purposes of community liability, in the case of a contract a debt is incurred at the time the contract is made. (Family Code, § 903, subd. (a).) When it comes to contract liability, debt is deemed incurred by the community even if the breach occurs after the community ceases to exist, for example, on the spouses’ separation. (*In re Marriage of Feldner* (1995) 40 Cal.App.4th 617, 622.)

“Mr. Goldstein entered into the 1992 Dissolution Agreement while married. The resulting contractual obligation, therefore, attached in 1992 to the entire community estate he shared with Janet Goldstein. Consequently, liability for the Administrator’s post-marital breach of contract attaches to the entire former community property estate. As established in the civil action, the Administrator’s breach of contract resulted in Dacey’s judgment.

“Dacey’s Outstanding Judgment against William Taraday, as Administrator, is to be Paid out of Mr. Goldstein’s Estate

“On June 30, 2009, in the civil action, the court found in favor of Dacey on his breach of contract claim against the Estate. The basis of the judgment was that the Administrator breached the Dissolution Agreement. The court concluded that the basis of the judgment was that the Dissolution Agreement ‘ . . . included a complete assignment of the [fee recovery] to Burton Goldstein and that the [fee recovery] was not a partnership asset following dissolution [and] that the assignment . . . created a contractual obligation requiring Goldstein to pay . . . Dacey.’ The Court concluded that the breach of the Dissolution Agreement was by the Administrator, not by the decedent, and the judgment was to be paid out of the estate. . . . The judgment is now final. The June 30, 2009 judgment in Dacey’s favor against William Taraday, and to be paid out of the estate, is in the amount of \$5,957,395.22. As of June 29, 2012, the unsatisfied amount of the judgment was \$5,533,704.15.

“Assignees are in Privity with Mr. Goldstein’s Estate

“Heirs are in privity with the Administrator insofar as adverse judgments against the Administrator, and are bound by the adjudication of estate liability.

“ ‘The most common form of privity is succession in interest. One who succeeds to the interests of a party in the property or other subject of the action, after its commencement, is bound by the judgment with respect to those interests in the same manner as if he or she were a party. (C.C.P. 1908, subd. (a)(2); see Rest.2d, Judgments §§ 43, 44; *Estate of Clark* (1923) 190 Cal.354, 360 . . . [judgment against administrator was binding on heirs]; *Walker v. Hansen* (1933) 218 Cal. 619 . . . [judgment against administrator was binding on trustee of same estate]; *Luckhardt v. Mooradian* (1949) 92 Cal.App.2d 501, 519 . . . [same]; *Basore v. Metropolitan Trust Co. of Calif.* (1951) 105 Cal.App.2d 834 . . . [judgment against decedent was binding in action by administrator];. *Estate of Hansen* (1954) 126 Cal.App.2d 71, 76’ (7 Witkin, Cal. Procedure (5th ed. 2008) Judgments, § 460, p. 1119.)

“By virtue of Janet Goldstein’s 2005 disclaimer under Probate Code § 278 . . . the Assignees [i.e., the daughters] are the heirs. The court finds that the Assignees are in privity with the estate for purposes of the judgment against the estate.; thus, the judgment’s determination of liability establishes their liability as well. It follows that the Assignees, as heirs, are bound, just as the estate is bound, by the judgment’s determination of contractual liability.

“Therefore, absent a viable defense, the subject funds are available to pay the judgment without regard to whether they are characterized as estate funds or separate funds of the Assignees. Petitioners [i.e., the daughters] assert two defenses—failure to make a timely § 13550 claim and a bar based on the judgment in favor of the Assignees in the civil action.

“Assuming There is a Requirement to file a Claim Under Probate Code § 13550, the Claim Waiver from the Civil Action is Still Effective

“Petitioners argue that Dacey cannot collect his judgment against the estate from the Assignees unless he made a timely claim against the surviving spouse under Probate Code section 13550 et seq. The parties contest whether this claims procedure applies to Dacey’s efforts to collect against the Assignees on his judgment against the estate. Even assuming that it does apply, however, Petitioners cannot avoid the obligation of the judgment on that basis.

“A claim against a surviving spouse will be barred to the same extent as a claim against the decedent if the claims statutes have not been followed unless one of the exceptions in section 13552 applies. One of those exceptions is the filing of a timely claim in the deceased spouse’s estate. (Section 12552, subd. (c).) Although Dacey did not file a claim, Taraday waived that defense on behalf of the estate by failing to raise it effectively in the civil action. As the civil action held, the estate failed to preserve for appeal the issue that Dacey’s failure to file a timely creditor’s claim bars his breach of contract claim. (*Dacey v. Taraday* (2011) 196 Cal.App.4th 962, 976-979.) Therefore, the civil action proceeded as if a timely claim had been filed. Petitioners, being in privity with the estate, cannot now resurrect a defense based on section 13552 by arguing a

failure to file a timely claim. They cannot be in a better position in defending against collection of the judgment than the estate on this basis.

“The Judgment Against Dacey and in Favor of the Assignees Does Not Insulate the Surviving Spouse’s Interest in Estate Accounts From the Judgment Against the Estate and In Favor of Dacey

“Next, Petitioners argue that their victory against Dacey in the civil action on the claims he asserted against them bars any action he might bring to enforce the judgment he procured in that action against the estate. ‘The burden of proving that the requirements for application of res judicata have been met is upon the party seeking to assert it as a bar or estoppel.’ (*Vella v. Hudgins* (1977) 20 Cal.3d 251, 257; *Nicholson v. Fazeli* (2003) 113 Cal.App.4th 1091, 1100; 7 Witkin, Cal. Procedure, *supra*, Judgments, § 415.) Assignees argue that the judgment in their favor insulates the subject funds from satisfaction of the judgment against the estate on the basis of collateral estoppel or res judicata. The court disagrees.

“No Collateral Estoppel Effect In Favor of Assignees

“Collateral estoppel cannot arise unless the issue was ‘actually litigated’ and ‘essential’ to the judgment in the first proceeding. (*Long Beach Grand Prix Assn v. Hunt* (1994) 25 Cal.App.4th 1195, 1202 [quoting Rest.2d, Judgments, § 27]; *Barker v. Hull* (1987) 191 Cal.App.3d 221, 226 [‘. . . the party asserting a collateral estoppel must prove that the issue was raised, actually submitted for determination and determined.’]; 7 Witkin, Cal. Procedure, *supra*, Judgments, §§ 1084, 1086.) ‘That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.’ (CCP § 1911.) There must be ‘an identity of a question litigated in the two cases’ (*Quinn v. Litten* (1957) 148 Cal.App.2d 631, 633; *Weak v. Weak* (1962) 202 Cal.App.2d 632, 635 [rejecting collateral estoppel as ‘[t]he issues are not the same . . . [as] the relief sought in the two actions was not the same.’].) Although the requirement that an issue be actually litigated, essential, and actually decided includes matters reasonably encompassed within the issue, that principle does not permit application of collateral

estoppel to bar litigation of distinct issues. (7 Witkin, Cal. Procedure, *supra*, Judgments, § 419.)

“*Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore* (2008) 162 Cal.App.4th 1331, 1342, is informative on the requirement that ‘[t]he issue decided in the prior adjudication is identical to the issue in the present action.’ Reversing the lower court, the Court of Appeal held that the probate court’s order that a law firm could not recover from an estate fees that were paid to the administrator personally did not preclude the firm’s later attempt to obtain those same fees directly from the administrator. The court reasoned that whether the administrator should be held personally liable for fees was never decided by the probate court.

“Collateral estoppel does not arise here because the judgment in the civil action did not adjudicate the obligation of the surviving spouse (or her Assignees), *as such*, for the decedent’s *contractual* obligations. In the civil action, Dacey sued Assignees (and Janet Goldstein) on theories of replevin, conversion, and constructive trust/equitable lien for receipt from the estate of over \$4.8 million of the fee recovery . . . with knowledge of Dacey’s claim to an undivided, distributive interest in the fund formed by the dissolved partnership’s fee recovery from which they were paid. Assignees prevailed because the trial and appellate courts concluded that the fund was not a partnership asset. It therefore did not create a res in which Dacey had an interest that was necessary for these tort claims. The courts reasoned that the Dissolution Agreement assigned to Mr. Goldstein individually the post-dissolution fee recovery in the Yuba Levee Cases, substituting a contractual obligation to pay Dacey a percentage of the recovery in place of the pre-existing partnership rights. Dacey was relegated to his breach of contract claim against the estate on which he prevailed. The judgment in Assignees’ favor did not adjudicate the obligation of a surviving spouse or her assignees for the judgment based on the decedent’s community obligation. Collateral estoppel cannot arise because the issue of the availability of the Subject Funds to satisfy Dacey’s judgment against the estate was not actually and necessarily decided.

“No Res Judicata Bar

“Next, petitioners argue that Dacey’s claims are barred by res judicata because Dacey could have raised the issue in the prior case where he did sue them on theories relating to recovery of a portion of the fee recovery they had already received. Dacey could not have sued the surviving spouse or her Assignees for breach of contract in the prior case (because any claim against them would be premature until Dacey had established his rights against the estate). Nonetheless, Petitioners argue that he could have sought an order in the prior case in the nature of declaratory relief establishing his right to proceed against Petitioners to collect on a judgment against the estate (if he succeeded in obtaining one, and it was not satisfied).

“A litigant cannot split a cause of action or assert the same cause of action in successive proceedings. California follows the primary right theory to define a cause of action. *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.* (1994) 29 Cal.App.4th 1828, 1836-1839 is instructive in its application of the primary right theory. In the first case, the plaintiff sued for breach of contract, resulting in a judgment against the corporation, which went bankrupt. In the second case, the plaintiff, on an alter ego theory, sued shareholders for tortious conduct which prevented him from collecting on his judgment in the first case. The Court of Appeal held that the two cases presented different causes of action because different primary rights were involved: ‘In the first action the harm alleged was breach of contractual obligations. In the present case the harm suffered by appellant is respondents’ alleged tortious conduct which has prevented satisfaction of the judgment he won in the first action.’)

“As in *Brenelli*, a different primary right is involved here: collection of a judgment based on contract rights under the Dissolution Agreement as opposed to allegedly tortious acts to prevent Dacey from collecting his partnership share of the fee recovery through Assignees’ knowing receipt of partnership assets in which Dacey alleged a distributive interest. Only the latter were asserted against Petitioners in the civil action.

“The claims against the Assignees on which they prevailed did not turn on their status as assignees of the surviving spouse’s interest or, for that matter, their status as heirs. Thus, Dacey’s Second Amended Complaint in the civil action by which assignees were added as defendants does not allege their status as assignees of the surviving spouse’s interest. The same claims could have been asserted against anyone who ‘received’ funds with notice of the funds belonging to the dissolved partnership in which Dacey claimed a distributive interest as a partner. The [present] Amended Petition turns on Assignees’ status as heirs and Assignees. Since the source of Dacey’s claims against Assignees in the civil action is different from the source of the Assignees’ claimed rights under the Amended Petition, the identity of causes of action necessary for res judicata does not exist.

“Dacey is seeking to satisfy his judgment, which was to be paid out of the estate. This was not raised in the civil action. In the civil action, Dacey’s primary right on which his judgment was predicated arises from a breach of contract injury due to not being paid his percentage of the fee recovery. In the present probate action, his primary right arises from his judgment against the estate for breach of the decedent’s contract obligation. This is a different harm because he is not seeking to relitigate any contract or tort claims against the Assignees or William Taraday, as Administrator of Goldstein’s estate. He seeks only to collect on the judgment he won. The present claim is not based on an entitlement as a partner to the fee recovery (the basis of the rights he asserted unsuccessfully against petitioners in the prior case), but rather based on the judgment arising out of contract rights that he previously asserted only against the estate and could not have asserted directly against the Petitioners who were not parties to that contract.

“Of course, res judicata bars claims that could have been made in the prior action if they are sufficiently related to the cause of action previously litigated. The civil action determined the liability of the estate. The probate action is determinative of whether the judgment must be paid by the heirs and assignees. Even assuming that Dacey could have sought declaratory relief on the subject of his right to collect a contract judgment not yet won from parties other than the party responsible for the breach, Petitioners have not

cited any authority for the proposition that the possibility of declaratory relief not requested in an earlier case can act as a bar to assertion of accrued rights in a later case. Thus, the required identity of causes of action to sustain Assignees' res judicata does not exist here.

“CONCLUSION

“The Petition of the Assignees to Determine Ownership of Estate Property is denied. Absent Dacey's claim based on the civil action judgment, the Petitioners could have been entitled to the Subject Funds based on their mother's assigned community property interest in the fee recovery, and the Administrator would have had to pay over those funds to them. For the reasons discussed above, however, Dacey has a viable claim against Petitioners' interest in the Subject Funds. The court orders that judgment be entered in Dacey's favor and against Assignees on the Amended Petition, that Assignees take nothing by the Amended Petition, that Dacey be awarded costs in an amount to be determined on further application to this court and that, subject to any priority administrative costs, Dacey may look to the Subject Funds to satisfy his judgment against the estate.”

The daughters perfected this timely appeal from the judgment entered in due course.

REVIEW

I

The *Dacey I* judgment awarded Dacey “\$5,957,395.22 as against . . . William Taraday as Administrator of the Estate of the Burton J. Goldstein, payable out of the property in the decedent's estate.” The fulcrum for all of the daughters' contentions is the predicate that, when their father died, their mother acquired a community property interest in any fee recovery from the Yuba River cases, and she then passed that interest to her daughters. The daughters reason that their mother “did not have to pay Dacey a cent out of her own property for anything. Dacey *might* have been able to satisfy his judgment with Janet's one-half share of the community property interest in the fee recovery that she assigned to Barrie and Gail if Janet's share had been within Burton's

estate. But it wasn't. Although Burton's estate contained the totality of his property [citation], it did not include Janet's share, which was never administered or subject to administration. Janet's share, rather, belonged to her, not to Burton. It was therefore outside Burton's estate" because "when Burton died, . . . Burton's and Janet's community property interest in any fee recovery was divided by operation of law into equal shares, one belonging to him and the other to her. At that point, Burton and Janet were each free to convey his or her share as he or she wished."

This reasoning is utterly unpersuasive, and was correctly rejected by Judge Busch. The daughters elsewhere concede that their father's "interest in any fee recovery . . . was . . . a community property interest, comprising both an asset for Burton and Janet and a debt for them in favor of creditors like Dacey." However, according to the daughters' logic, as a debt this interest could in effect be renounced, but as an asset it could be passed from the mother to the daughters. As the probate court soundly concluded, such a have-your-cake-and-eat-it-too interpretation would reduce Family Code section 910 to a dead letter. The purpose of that statute (the pertinent language of which was quoted in the statement of decision) is to "make clear that the community estate is liable for all debts of either spouse absent an express statutory exception" (Cal. Law Rev. Com. com., 29C West's Ann. Fam. Code (2004 ed.) foll. § 910, p. 491), thus ensuring that "the liability of community property is not limited to debts incurred for the benefit of the community, but extends to debts incurred by one spouse alone" (*Lezine v. Security Pacific Financial Services, Inc.* (1996) 14 Cal.4th 56, 64.) The daughters' approach would also be contrary to the plain command of section 13550 that "upon the death of a married person, the surviving spouse is personally liable for the debts of the deceased spouse"

As also noted by Judge Busch, the Probate Code includes a procedure for achieving the very result desired by the daughters: under section 11440, the surviving spouse and the personal representative could have, subject to approval by the probate court, allocated the debt exclusively to the Goldstein estate. Their failure to have availed themselves of that remedy cannot be rectified with an attempt to displace a principle so

well-entrenched. Thus, all of the fee recovery proceeds that were paid into the estate constituted “property in the decedent’s estate,” from which Dacey’s judgment could be satisfied. Those proceeds were never, as the daughters argue, “outside” of their father’s estate.”

II

Daughters next attack Judge Busch for concluding that, even if it did apply, section 13552 was not a bar to Dacey’s effort to satisfy his judgment.

Section 13552 provides:

“If proceedings are commenced in this state for the administration of the estate of the deceased spouse and the time for filing claims has commenced, any action upon the liability of the surviving spouse pursuant to Section 13550 is barred to the same extent as provided for claims under Part 4 (commencing with Section 9000) of Division 7, except as to the following:

“(a) Creditors who commence judicial proceedings for the enforcement of the debt and serve the surviving spouse with the complaint therein prior to the expiration of the time for filing claims.

“(b) Creditors who have or who secure the surviving spouse’s acknowledgment in writing of the liability of the surviving spouse for the debts.

“(c) Creditors who file a timely claim in the proceedings for the administration of the estate of the deceased spouse.”

Two statutes within “Part 4 (commencing with Section 9000)” of the Probate Code, specifically sections 9000 and 9100, are relevant here.

Section 9000 provides: “As used in this division:

“(a) ‘Claim’ means a demand for payment for any of the following, whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated:

[¶] (1) Liability of the decedent, whether arising in contract, tort, or otherwise.

[¶] (2) Liability for taxes incurred before the decedent’s death, whether assessed before or after the decedent’s death, other than property taxes and assessments secured by real property liens. [¶] (3) Liability of the estate for funeral expenses of the decedent.

“(b) ‘Claim’ does not include a dispute regarding title of a decedent to specific property alleged to be included in the decedent’s estate.

“(c) ‘Creditor’ means a person who may have a claim against estate property.

Subdivision (a) of section 9100 provides: “A creditor shall file a claim before expiration of the later of the following times: [¶] (1) Four months after the date letters are first issued to a general personal representative. [¶] (2) Sixty days after the date notice of administration is mailed or personally delivered to the creditor. Nothing in this paragraph extends the time provided in Section 366.2 of the Code of Civil Procedure.”

The daughters reason that section 13552 applies because Dacey is seeking payment of a “claim,” as that term is defined by section 9000, but he did not file that claim in a timely manner, under section 9100, in that “[t]he time for filing creditor’s claims against the estate commenced when William [Taraday], who had been appointed as the estate’s administrator and had been issued letters of administration, served potential creditors, including Dacey, with notice of administration of the estate in February 2002.” As the daughters see it, “Section 13552 expressly barred Dacey from bringing an action against Janet for Burton’s debt to obtain a judgment compelling her to pay him. And section 13552 impliedly barred Dacey from making any end run around that bar by satisfying his judgment against William with Janet’s share.”

Judge Busch concluded that the present action by Dacey came within the exception set out in section 13552, subdivision (c), namely, that Dacey was a creditor who had “file[d] a timely claim in the proceedings for the administration of the estate of the deceased spouse.” We agree that the daughters’ claim will not prevail.

This is not the first time the issue of Dacey’s timeliness has arisen. In *Dacey I*, we described the initial procedural history of this litigation: “Dacey did not file a creditor’s claim in the probate court and Taraday paid him nothing from the fee recovery. Dacey sued Taraday, as the administrator of the estate, for breach of the dissolution agreement He also sued Taraday, as an individual, . . . Janet Cross Goldstein, [and the daughters] [T]he lower court ruled, among other things, that the statute of limitations under Code of Civil Procedure section 366.2, subdivision (a) did not apply to

Dacey’s claims against the estate because the administrator, not [the decedent] Goldstein, breached the dissolution agreement.” (*Dacey I, supra*, 196 Cal.App.4th 962, 966-967, fns. omitted.) As Judge Busch noted, we affirmed that determination. In the course of doing so, we first addressed the same issue the daughters now advance:

“The estate maintains that Dacey is not entitled to any portion of the fee recovery because, after Goldstein’s death, he failed to file a creditor’s claim in the probate proceedings as required by . . . Probate Code section 9100” (*Dacey I, supra*, 196 Cal.App.4th 962, 976.)

“The estate filed a motion for summary judgment and argued that all of Dacey’s claims were barred ‘by the statute of limitations set forth in [Code of Civil Procedure section] 366.2, . . . Probate Code sections 9000, 9100, 9103, and/or 9352.’ Under the heading related to Code of Civil Procedure section 366.2, the estate mentioned the following: ‘Plaintiffs’ claims are clearly barred by section 366.2, as well as Probate Code section 9100[, subdivision,] (a), because they are all founded upon plaintiffs’ respective demands as creditors for payment of Goldstein’s contingent debt to them under the Dissolution Agreement.

“When denying the estate’s summary judgment motion, the trial court ruled that the statute of limitations under section 366.2 did not apply. The court did not make any independent ruling on Dacey’s failure to file a creditor’s claim. The estate never objected to this ruling on the ground it failed to address any argument regarding a creditor’s claim; nor did the estate raise this issue at trial. [¶] . . . [¶] Here, a claim based on failure to file within the claims filing period of the Probate Code was mentioned in conjunction with the statute of limitations under section 366.2, but was not presented as an independent defense. Accordingly, we conclude that this issue was not sufficiently preserved for appeal as an *independent basis* for rejecting Dacey’s breach of contract claim.

“The estate asserts that, even if the issue was not sufficiently preserved, it could raise this issue for the first time on appeal because Dacey’s failure to file a claim represents an incurable defect in Dacey’s pleading. (See *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 831, fn. 18.) . . . [¶] We do not agree that the failure to plead

compliance with Probate Code section 9100 represents an incurable defect. Courts have held that in some limited circumstances the time requirement for filing a creditor's claim can be waived or the estate may be estopped from relying on it

“In the present case, the estate failed to assert that Dacey's claims were barred solely on the basis of his failure to comply with Probate Code section 9100 and the trial court never had the opportunity to consider whether the facts of the present case supported a finding that the period should be tolled or that estoppel applies. Accordingly, we conclude that the estate failed to preserve for appeal the issue that Dacey's failure to comply with the Probate Code and file a timely creditor's claim bars his breach of contract claim.” (*Dacey I, supra*, 196 Cal.App.4th 962, 977-979.)

The purpose of section 9100's claim requirement is to provide notice to the executor or administrator of an estate of obligations that may have to be satisfied out of the assets of the estate. (See *Nathanson v. Superior Court* (1974) 12 Cal.3d 355, 365 and decisions cited.) Our discussion in *Dacey I*, after noting that compliance with section 9100 could be waived, concluded that the administrator, Taraday, had in effect lost the protection of that statute by not asserting it in a timely fashion. After a second trial, Judge Busch concluded that the daughters—who appear to have been parties from the beginning of this litigation—were bound by that determination and thus “cannot now resurrect a defense based on . . . a failure to file a timely claim.” To adapt the daughters' own term, it is they who are attempting an “end run” around *Dacey I*. Judge Busch correctly rejected that attempt.

III

Again using the erroneous predicate that their mother's gift and “disclaimer” of her community property interest in the estate was immediately effective to irrevocably transfer that interest to them free from any and all competing claims, the daughter's final contention is that “the probate court erred in concluding that neither res judicata nor collateral estoppel barred Dacey from satisfying his judgment in the civil action with the one-half share of the community property interest in the fee recovery that Janet assigned to [them].” We do not agree.

The governing principles are well known:

“ ‘Res judicata’ describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action on a second suit between the same parties or parties in privity with them Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause [of action] is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves a bar to further litigation of the same cause of action. [¶] . . . ‘ ‘Res judicata precludes piecemeal litigation by splitting a single cause of action on a different legal theory or for different relief.’ ’ [Citation.]” (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897.) “On the other hand, if the causes of action in the second proceeding are not the same as those asserted in the prior litigation, then the judgment in the prior proceeding does not constitute a bar in the subsequent proceeding. ‘Unless the requisite identity of causes of action is established, however, the first judgment will not operate as a bar.’ [Citation.]” (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340.)

“ ‘ ‘The requisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding.’ ” [Citations.]’

“Here, we are concerned with the claim preclusion aspect of res judicata. To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have ‘consistently applied the “primary rights” theory.’ [Citation.] Under this theory, ‘[a] cause of action . . . arises out of an antecedent primary right and corresponding duty and the delict or breach of such primary right and duty by the person on whom the duty rests. “Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term” ’ [Citation.]

“ ‘In California the phrase “cause of action” is often used indiscriminately . . . to mean *counts* which state [according to different legal theories] the same cause of action. . . .” [Citation.] But for purposes of applying the doctrine of *res judicata*, the phrase ‘cause of action’ has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. [Citations.] . . . “[T]he “cause of action” is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. “Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief.” [Citations.]’ Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right. [Citation.]” (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797-798.)

As the preceding authorities make plain, the doctrine of *res judicata* employs the prohibition against splitting a cause of action to preclude multiple, or piecemeal, litigation when the same party, the plaintiff, makes repeated affirmative claims for relief. All of the authorities cited by the daughters follow this scenario. (*Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th 888, 893 [plaintiff first files complaint for declaratory relief regarding contract with defendant, then a complaint for damages for breach of that contract]; *Gill v. Hughes* (1991) 227 Cal.App.3d 1299, 1303 [physician first tries to overturn suspension of hospital staff privileges, then sues for damages from that suspension]; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 794 [minor injured in vehicle collision not allowed second action for driver’s negligence following change in law]; *Panos v. Great Western Packing Co.* (1943) 21 Cal.2d 636, 637 [after plaintiff loses first suit against employer and employee, not allowed to file second complaint against employer “alone to recover damages in the same amount and for the same injuries”]; *Wulfjen v. Dolton* (1944) 24 Cal.2d 891, 892-894 [plaintiff not allowed to file suit for

fraud damages relating to contract that plaintiff unsuccessfully sought to rescind in prior action]; *Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1248 [plaintiff not allowed in second action to reframe “breach covenant” claim as “breach of warranty” claim].) But that is not the situation here.

Dacey was the plaintiff in *Dacey I*, but not in the second trial, the one tried by Judge Busch in the probate court. No, that action was initiated by the daughters, who sought to vindicate their position that certain monies already in the estate should not be paid to Dacey as a consequence of the judgment in *Dacey I*.³ Dacey is not making repeated affirmative claims for relief in succeeding actions. He is not seeking to increase what he was awarded in *Dacey I*. There are no new theories for expanding his recovery, no new “redress for [the same] harm suffered.” (*Boeken v. Philip Morris USA, Inc.*, *supra*, 48 Cal.4th 788, 798.) He is not splitting his cause of action. The second round of litigation, which is still the same estate action as *Dacey I*, was not at his instigation. It would follow that res judicata has no applicability to Dacey. (See *Wulfjen v. Dolton*, *supra*, 24 Cal.2d 891, 894-895 [“The rule against splitting a cause of action is based on two reasons,” one of which is “That *the defendant should be protected* against vexatious litigation,” italics added]; 4 Witkin, Cal. Procedure, *supra*, Pleading, § 45, p. 108 [“If splitting is attempted, the *defendant in the second action . . . may set up [the judgment from a prior action] as a bar*,” italics added].) It further follows that, even if for a differing reason, we agree with Judge Busch that res judicata has no adverse impact to Dacey.

³ This statement is subject to a significant proviso. The daughters commenced their section 850 petition while *Dacey I* was on appeal. At the request of Dacey—whose original position in *Dacey I* was that the fee recovery never went into Goldstein’s estate because it remained an asset of the dissolved partnership—the probate court ordered proceedings on the petition “abated pending final judgment” in *Dacey I*. We do mean to imply that the daughters filed their petition in anticipation of losing their appeal in *Dacey I*, which was stoutly prosecuted by the same counsel as represent them on this appeal.

Here, we are concerned only with the issue of whether the instant action was based on “the . . . identical . . . claim or issue litigated in [the] prior proceeding.” As the daughters see it, in both actions “Dacey alleged a single primary right—his asserted right not to be deprived of funds flowing from his asserted entitlement to Janet’s one-half share of the community property interest in the fee recovery based on the dissolution agreement.” This is not how Judge James McBride, the trial judge in *Dacey I*, saw it. In his comprehensive statement of decision, Judge McBride identified “[t]he primary issue to be determined” as whether the dissolution agreement “resulted in a contractual assignment” of the Yuba River cases to Goldstein “or whether it remained a partnership asset following dissolution.” Judge McBride concluded that what resulted was a contractual assignment, and one provision of the agreement was “Dacey’s contractual right to receive 17.685% of the net recovery of fees received by Goldstein.” Judge McBride further concluded: “Goldstein’s obligation to pay Dacey passed to his estate. William Taraday in his capacity as Administrator of the Estate of Burton J. Goldstein has breached the Dissolution Agreement and the Estate is liable to Dacey,” and thus “Dacey shall have judgment against the estate in the amount of \$4,330,708.64.”

The daughters’ view is also at odds with their actions in the probate court. They and Dacey submitted a “Combined Statement of Issues” in which both sides identified the two primary issues as follows:

“A. Whether petitioners Barrie Taraday and Gail Hart are entitled to possession of and title to the funds in Bank of America Account No. 41713637, presently under the name of William Taraday as administrator of the Estate of Burton J. Goldstein, deceased, insofar as such funds (or any interest therein) represent their mother Janet Goldstein’s 2004 assignment to them of her interest in the Yuba Levee Fee Award.

“B. Whether John J. Dacey, who holds a judgment against William Taraday in the latter’s capacity as administrator of the Estate of Burton J. Goldstein, deceased, can reach the interest of Janet Goldstein which was assigned to Barrie Taraday and Gail Hart in the funds in Bank of America Account No. 41713637.”

We believe that, even assuming for purposes of argument that res judicata may be invoked by the daughters, it was properly rejected by Judge Busch, who understandably took some guidance from *Brenelli Amadeo, S.P.A. v. Bakara Furniture, Inc.*, *supra*, 29 Cal.App.4th 1828 (*Brenelli Amadeo*). The plaintiff there obtained a judgment against a corporation which it was unable to satisfy. The plaintiff then commenced another action against the corporation and its shareholders for “alleged alter ego liability, fraudulent conveyance, conspiracy to fraudulently transfer corporate assets, accounting of profits, intentional misrepresentation of fact, suppression of fact, conspiracy to defraud, and conversion.” (*Id.* at p. 1833.) The trial court sustained a general demurrer to some of these claims on the ground they “were barred by operation of res judicata because they arose from the same transaction upon which the previous case was based.” (*Id.* at p. 1834.)

The Court of Appeal reversed: “In the first action the harm alleged was breach of contractual obligations. In the present case the harm suffered by appellant is respondents’ alleged tortious conduct which has prevented satisfaction of the judgment it won in the first action. Although appellant pleads various theories of recovery, they all address the same legal wrong—respondents’ tortious conduct preventing appellant from collecting on its judgment. Some of these theories happen to bear the same name as theories pleaded in the first case. But the primary theory they embody is different and thus res judicata does not apply.” (*Brenelli Amadeo, supra*, 29 Cal.App.4th 1828, 1837-1838, fn. omitted.)

Brenelli Amadeo is obviously not a perfect fit. Our situation is different in that Dacey, not having tried to satisfy his judgment, cannot yet claim he has been “unfairly deprived” of it. (*Brenelli Amadeo, supra*, 29 Cal.App.4th 1828, 1837.) The soundness of divorcing establishing liability from obtaining satisfaction of that liability, even if tortious, may be open to question and might cause difficulties in application. Certainly, as the daughters so expansively frame the issue, all that Dacey does will have but one theory—to get his hands on his share of the fee recovery from the Yuba River cases. Every effort by him to that end is, as the daughters view it, “additional theories . . . not

‘different wrongs’ that give rise to different primary rights,” merely “different ways of committing the same wrongs.” (*Bescos v. Bank of America* (2003) 105 Cal.App.4th 378, 397.)

Of course, the daughters’ formulation is overbroad. Even according to the daughters’ formulation, if Dacey establishes his entitlement to a portion of funds being administered by the estate, and even if establishing that entitlement requires him to defeat the daughters’ competing claims, all of this activity still comes down to who gets how much out of Goldstein’s estate. All that occurred before Judge McBride was that Dacey established he had a liquidated claim on the estate, but Judge McBride did not purport to decide how that claim should be paid. And he most certainly did not determine that Dacey was to be paid out of a specific account, which was the issue before Judge Busch. The daughters admit as much at a different stage of their brief: in discussing collateral estoppel, the daughters state “It is true that, in the civil action, there was no adjudication of Janet’s, Barrie’s, and Gail’s obligation as to Burton’s community obligation.” Conversely, there is nothing in the current litigation about the impact of the dissolution agreement on distribution of the fee recovery.

The final issue is whether, having failed with *res judicata*, the daughters can succeed with collateral estoppel.

“Although a second action between the parties on a different cause of action is not barred by *res judicata*, nevertheless ‘. . . the first judgment “operates as an estoppel or conclusive adjudication as to such issues in the second action as were *actually litigated and determined in the first action.*” [Citation.]’

“ ‘In general, collateral estoppel precludes a party from relitigating issues litigated and decided in a prior proceeding.’ [Citation.] ‘Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom

preclusion is sought must be the same as, or in privity with, the party to the former proceeding.’ [Citation.]

“Consequently, ‘ . . . a former judgment is not a collateral estoppel on *issues which might have been raised but were not*; just as clearly, it is a collateral estoppel on issues which were raised, *even though some factual matters or legal arguments which could have been presented were not*.’ [Citation.]” (*Branson v. Sun-Diamond Growers, supra*, 24 Cal.App.4th 327, 345-346.)

Again, the daughters’ entire argument rests on the erroneous predicate that “as assignees, they were entitled to Janet’s one-half share of the community property in the fee recovery and that Dacey was barred from reaching that share to satisfy his judgment.” But they do acknowledge “It is true that, in the civil action, there was no adjudication of Janet’s, Barrie’s and Gail’s obligation as to Burton’s community obligation.” Beyond that, the daughters argue that their “entitlement, as assignees, to Janet’s one-half share of the community property interest in the fee recovery was decided impliedly in the civil action when the trial court entered judgment declaring that Dacey was not entitled to recover from them or from Janet on any basis. . . . [¶] . . . That judgment . . . awarded Dacey \$6 million against William, as administrator of Burton’s estate, payable out of estate property, for breaching the dissolution agreement, but also adjudicated that he was not entitled to anything else from anyone else—including Janet, Barrie, and Gail—on any other basis.”

It appears that the daughters view of collateral estoppel is pretty much a one-way street. They fault Dacey because he “could have litigated in the civil action other factual matters relating to Barrie and Gail’s entitlement,” which may be an oblique reference to the effect of their mother’s gift and assignment. But that same logic is equally applicable to them. It would have been just as easy for them to advance the issue before Judge McBride as it was for them to commence this proceeding, particularly after this proceeding was stayed pending completion of the trial before Judge McBride. (See fn. 3, *ante*.) But to judge from Judge McBride’s 23-page statement of decision, the daughters did not do so. The sole mention of the daughters and their mother occurs in the

introduction where they are mentioned as parties and then lumped together with a collective designation. There is no mention of either the assignment or the gift to the daughters from their mother. This is hardly sufficient to establish that the issue of the validity of the daughters' "entitlement" vis-à-vis Dacey was " " " " "actually litigated and determined in the first action." " " " " (Boeken v. Philip Morris USA, Inc., supra, 48 Cal.4th 788, 797; Branson v. Sun-Diamond Growers, supra, 24 Cal.App.4th 327, 346.)

Similarly, against the requirement that an issue have been "necessarily decided" in the prior proceeding (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077; *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 828), the daughters can only proffer that the issue of their exclusive right to the accounts in their father's estate was "impliedly decided in the civil action." But Dacey presents a persuasive argument that Judge McBride was not considering the entirety of monies in the Goldstein estate, but simply one specific amount. Because that amount appears in Judge Busch's statement of decision, and because it does not draw adverse comment in the daughters' opening brief, it appears that only a portion of the estate was being contested before Judge McBride. It would therefore not be necessary for him, in adjudicating that dispute, to decide either Dacey's or the daughters' entitlement to other sums.⁴

⁴ Particularly as he, Judge McBride, was told by counsel for Taraday and the daughters that the estate had "\$6.5 million set aside frozen in a fund . . . [which] . . . is more than the \$5.6 being claimed" by Dacey.

Dacey argues in his brief that, by virtue of this statement alone, the daughters should be equitably stopped "from asserting collateral estoppel." "Generally, four elements must be present for the doctrine of equitable estoppel to apply. First, the party to be estopped must have been aware of the facts. Second, that party must either intend that its act or omission be acted upon, or must so act that the party asserting estoppel has a right to believe it was intended. Third, the party asserting estoppel must be unaware of the true facts. Fourth, the party asserting estoppel must rely on the other party's conduct, to its detriment." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 994.) Establishing these elements is an evidence-dependent issue of fact. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) Given the restricted scope of evidence submitted to Judge Busch, a point mentioned at the beginning of this opinion, it is

In light of the foregoing, we perceive no error in Judge Busch’s conclusions that neither res judicata nor collateral estoppel required sustaining the daughters’ petition.

The judgment is affirmed.

Richman, J.

We concur:

Kline, P.J.

Brick, J.*

understandable that Dacey does not point to specific evidence satisfying the elements for equitable estoppel. Moreover, to judge from his trial brief and the parties’ “Combined Statement of Issues for Hearing—both of which mention only *judicial* estoppel—Dacey does not persuade us that the issue of equitable estoppel was raised before Judge Busch, thus preserving the issue for appellate review.

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