STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of GARY THOMAS NOON, SR.,
Deceased.

VIRGINIA NOON,

Petitioner-Appellant,

V

DONNA MOTTE, LEE ANN O'MALLEY, CARRIE LUOMA, KRISTEN DUNN, and DALE NOON,

Respondents-Appellees.

UNPUBLISHED
November 3, 2009

No. 280864
Oakland Circuit Court
LC No. 2005-298790-DA

Before: Fort Hood, P.J., and Wilder and Borrello, JJ.

PER CURIAM.

Petitioner appeals as of right from the probate court's order granting a property interest in certain real property to respondents Donna Motte, Lee Ann O'Malley, Carrie Luoma, Kristen Dunn, and Dale Noon. We reverse and remand for further proceedings.

This is a dispute over real property located in the city of Hazel Park. Petitioner, decedent Gary Noon, Sr's second wife, was married to decedent at the time of his death in 2005. Respondent Motte was decedent's first wife. Respondents Lee Ann O'Malley, Carrie Luoma, Kristen Dunn, and Dale Noon are decedent's children from his marriage to Motte, and thus petitioner's step-children.[1]

Decedent and Motte purchased the Hazel Park property in 1970. Motte (then known as Donna Noon) filed a complaint for divorce in 1973. A default judgment of divorce was entered in 1974. The judgment of divorce stated, in relevant part, that the real property at issue would be occupied by decedent, but that, at such time as the property was sold, or otherwise disposed of, fifty percent of the equity would be divided equally between the five children. The judgment

[1] Gary Noon, Jr., a fifth step-child, died in 1999.

also stated that it would constitute an encumbrance on the property, precedent to any subsequently-created encumbrance. However, the judgment was not recorded until March 1999.

On May 11, 1999, while he was engaged to the petitioner and before he married her, decedent executed a will, which gave petitioner a life estate in the property, subject to conditions. The remainder, after the termination of the life estate, would be distributed under the residuary clause, under which, the property would be divided in equal shares to his surviving children. A few weeks later, decedent executed a codicil, modifying the life estate.

On an unknown date in November 1999, Gary Noon Sr. married petitioner. In 2000, decedent quitclaimed the property to himself and petitioner. In 2003, decedent and petitioner refinanced the property, discharging the Integrity Home Loans mortgage, and signing a mortgage agreement with Citicorp. The Citicorp mortgage was recorded.

Decedent died in January 2005. On June 15, 2005, Luoma filed a petition, on behalf of herself and her siblings, asserting interests in the property. That petition asserted that decedent died intestate. On June 30, 2005, petitioner filed a petition for probate, or for appointment of a personal representative, asserting that decedent died testate, and disputing Luoma's petition assertion that the property was not an asset of the estate. Petitioner's assertion that the property was part of the estate was based on the fact that the decedent had quitclaimed the property to himself and petitioner in 2000. Petitioner asked that Luoma's petition be dismissed, and her own petition granted.

In September 2005, Luoma objected to petitioner's motion to appoint herself personal representative of the estate, arguing that the 1974 divorce judgment between Motte and decedent distributed fifty percent of the equity in the property to the Noon children, making petitioner a tenant in common with the Noon children. In November 2005, the four surviving Noon children, and Motte filed an action to quiet title to the property in a circuit court action against the estate of decedent, petitioner, and Citicorp. Also in November 2005, the probate court appointed Virginia Noon and Luoma as joint personal representatives. In the quiet title action, in July 2006, the surviving Noon children and Motte, and petitioner, filed cross-motions for summary disposition. In August 2006, the circuit court denied the motion filed by the children and Motte, and granted the motion filed by petitioner under MCR 2.116(C)(4) and (6).

In February 2007, Motte filed a motion in the family division of the circuit court, under the caption of the 1973 divorce case, seeking an order directing the joint personal representatives to specifically perform the property settlement clause of the 1974 divorce judgment. In April 2007, the circuit court denied the motion, on the grounds that the relief requested was within the exclusive jurisdiction of the probate court.

In the probate court action (the instant matter), petitioner argued that the divorce judgment provision was unenforceable because the circuit court in the divorce case had no jurisdiction to compel a party, in this case decedent, to convey a property interest to a third person, even if the person is a child of the parties. Petitioner also argued that the circuit court's rulings in the divorce case, that Luoma and her siblings had no ability to seek enforcement of the divorce judgment, and that Motte had no claim to compel conveyance of the property, barred respondents' claims for that same relief in this action. Finally, petitioner argued that the statute of limitations barred the claims of the Noon children and Motte. The Noon children and Motte

argued, on the other hand, that decedent was barred from unilaterally altering the property division ordered in the divorce judgment. The probate court agreed with respondents, holding that the 1974 divorce judgment controlled over the will, and ordering the property divided, half to the Noon children, and half to petitioner.

Petitioner first argues that given the circuit court's ruling in the divorce action, res judicata barred the probate court's determination that respondents had an interest in the real property. We disagree. This issue presents a question of law that this Court reviews de novo. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 417; 733 NW2d 755 (2007).

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Sewell v Clean Cut Mgt, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001), quoting *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). In order for res judicata to apply, there must have been (1) a prior decision on the merits, (2) the issue must have been resolved in the prior action, and (3) both actions must involve the same parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). "The doctrine of res judicata applies not only to facts previously litigated, but also to points of law necessarily adjudicated in determining and deciding the subject matter of the litigation." *Jones v State Farm Mut Automobile Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1993), mod 447 Mich 429 (1994).

Petitioner's res judicata argument lacks merit because the circuit court decision was not a prior decision on the merits. The circuit court granted summary disposition in favor of petitioner under MCR 2.116(C)(6) because the divorce action was not then pending before the circuit court, and the probate court action involved the same claims. Dismissal is appropriate under subrule (C)(6) if "[a]nother action has been initiated between the same parties involving the same claim." Thus, because the circuit court granted summary disposition for petitioner under MCR 2.116(C)(6), the dismissal did not constitute a prior decision on the merits to which the doctrine of res judicata would apply.

Similarly, the circuit court's dismissal of respondents' claim under MCR 2.116(C)(4) did not constitute a prior decision on the merits. The circuit court stated in part:

> [T]he Estates and Protected Individuals Code (EPIC) confers exclusive subject-matter jurisdiction in the probate court over matters "relat[ing] to the settlement of a deceased individual's estate," including, but not limited to, proceedings involving "estate administration, settlement and distribution" and "declaration of rights involving an estate, devisee, heir or fiduciary." MCL 700.1302(a)(ii) and (iii). Accordingly, this Court does not have jurisdiction over the subject matter of Plaintiffs' claims. MCR 2.116(C)(4).

Thus, the circuit court relied on MCR 2.116(C)(4) to dismiss the action for lack of jurisdiction to hear the matter, not on the basis of the merits of the case. Accordingly, this decision also did not constitute a prior decision on the merits that would be binding on the parties.

Although res judicata did not bar the probate court's decision, we conclude, nevertheless, that the probate court erred when it determined that the 1974 divorce judgment controlled over the decedent's will.

Petitioner correctly argues that the trial court judge who entered the default judgment of divorce had no authority to order the decedent to convey a property interest to his children. "Absent allegations of fraud, the trial court in a divorce action may only adjudicate the rights of the spouses whose marriage is being dissolved." *Reed v Reed*, 265 Mich App 131, 157-158; 693 NW2d 825 (2005). "'The circuit court has no jurisdiction in a divorce case to compel a party to convey property or a property interest to a third person, even a child of the parties, or to adjudicate claims of third parties.'" *Hoffman v Hoffman*, 125 Mich App 488, 490; 336 NW2d 34 (1983), quoting *Krueger v Krueger*, 88 Mich App 722, 724-725; 278 NW2d 514 (1979).

In *Krueger, supra* at 723-274, the divorcing parties reached an agreement that was incorporated into the divorce judgment. Pursuant to the agreement, the husband was required to name the parties' son as the beneficiary of his life insurance policy until the son reached the age of 21 or graduated from college. *Id.* at 724. When the son was 18 years of age, however, the husband changed the beneficiary to his mother and died the following year. Both the son and the husband's mother claimed the proceeds of the policy. The trial court determined that the son was the proper beneficiary and the mother appealed. *Id.* After recognizing that a circuit court has no jurisdiction in a divorce case to compel a party to convey a property interest to a third person, this Court opined that if the husband had appealed the divorce judgment, this Court "would probably be required to hold in his favor." *Id.* at 724-725. Considering the circumstances of the case, however, this Court opined that the divorcing parties reached an agreement whereby the wife took no alimony and collected less child support than she was entitled to collect in exchange for the agreement benefiting the parties' child. *Id.* at 725. Under these circumstances, this Court enforced the agreement although "the [trial] court would have had no power to order the same disposition in a contested case." *Id.*

Unlike *Krueger*, this case did not involve an agreement whereby the decedent agreed to grant his children an interest in his property. Rather, the divorce judgment was a *default* judgment of divorce and was not entered pursuant to a settlement agreement between the decedent and Motte. Accordingly, the circuit court that entered the default judgment of divorce had no jurisdiction to order the decedent to convey a property interest to respondents. *Hoffman, supra* at 490. As such, the provision is unenforceable and the probate court erred by determining that the provision controlled over the will.

Our resolution of the foregoing issues renders petitioner's remaining issues moot. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 332 n 7; 761 NW2d 293 (2008).

We reverse the probate court's decision, and remand this case to the probate court for further proceedings consistent with this opinion. On remand, the probate court shall determine the rights of the parties with respect to the Hazel Park property, including a determination of the effect of the 2000 quitclaim deed on decedent's will and codicil.

Reversed and remanded for further proceedings. We do not retain jurisdiction. Appellant Virginia Noon, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello