Filed 7/22/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

WILLIAM J. MURPHY, JR., **Plaintiff and Respondent,** **v.** **MAUREEN MURPHY, Individually and as Trustee, etc.,** **Defendant and Appellant.**	**A115177** **(San Francisco County Super. Ct. No. CGC-04-433798)** **ORDER MODIFYING OPINION AND DENYING REHEARING** **NO CHANGE IN JUDGMENT**

THE COURT:

It is ordered that the opinion filed herein on June 26, 2008, be modified as follows:

At the end of the first full paragraph on page 24, add the following language:

> This definition of "issues actually litigated" applies equally in probate cases. "Although the order settling the account is not conclusive as to matters which might have been passed upon but were not, it *is* conclusive as to matters which *are* passed upon although some factual or legal arguments which could have been presented on the issue were not presented. [Citations.]" (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 592; accord, *Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 862.)

So that the paragraph reads as follows:

> "The fact that different forms of relief are sought in the two lawsuits is irrelevant, for if the rule were otherwise, 'litigation finally would end only when a party ran out of counsel whose knowledge and imagination could conceive of different theories of relief based upon the same factual background.' [Citation.] . . . '. . . Obviously, if [the matter] is actually raised by proper pleadings and treated as an issue in the cause, it is

> conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it could have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. Hence 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. . . . [Citation] . . . "But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result . . . This principle also operates to demand of a defendant that all of its defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them." ' " (*Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal.App.3d 177, 181-182 (*Interinsurance*), italics omitted; accord, *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 47-48; *Warga v. Cooper* (1996) 44 Cal.App.4th 371, 377-378.) This definition of "issues actually litigated" applies equally in probate cases. "Although the order settling the account is not conclusive as to matters which might have been passed upon but were not, it *is* conclusive as to matters which *are* passed upon although some factual or legal arguments which could have been presented on the issue were not presented. [Citations.]" (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 592; accord, *Noggle v. Bank of America* (1999) 70 Cal.App.4th 853, 862.)

There is no change in the judgment.

Respondent's petition for rehearing is denied.

Dated:_____ _____, P. J.