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No. 53070-8-II

**Court of Appeals, Div. II,
of the State of Washington**

In re the Estate of Allan B. Pratt:

Joseph Jacobs, Personal Representative,

Appellant,

v.

Beverly Sanders, et al.,

Respondents.

Brief of Appellant

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1. Introduction

This is a case about the finality of judgments. After a judgment becomes final, CR 60(a) only allows trial courts to correct clerical errors that are clear from the record and do not involve legal analysis or judgment. Other than such correction of clerical errors, a judgment is entitled to finality.

Here, a Will and Codicil were admitted to probate. Some of the devisees under the original Will privately objected to the Codicil but never filed and served a proper challenge before the four-month statute of limitations for bringing a will contest expired. The trial court's order admitting the Will and Codicil became binding and final.

Months later, one of the original devisees asked the trial court to invalidate the Codicil, couching her effort as a "Motion for Clarification." The trial court, under a new judge, second-guessed the original order, concluded that the Codicil was invalid, and ordered the original order be amended, "pursuant to CR 60(a)," to expressly reject the Codicil from probate.

The trial court's order exceeded its authority under CR 60(a) by conducting a new legal analysis and changing the effect of the original order. This Court should honor the finality of the original probate order and reverse the "Order Correcting Scrivener's Errors."

2. Assignments of Error

Assignments of Error

1. The trial court abused its discretion in entering the “Order Correcting Scrivener’s Errors Pursuant to CR 60(a),” dated February 1, 2019.
2. The trial court erred in entering Finding of Fact #1, which reads, “The ‘Order Admitting Will to Probate...’ entered by this Court on February 14, 2018 contains scrivener’s errors that necessitate correction to facilitate the proper administration of this Estate.”
3. The trial court erred in entering Finding of Fact #2, which reads, “Such correction is permissible and appropriate pursuant to CR 60(a).”
4. The trial court erred in ordering amendments to the original probate order.
5. The trial court erred in considering the “Motion for Clarification” when the statute of limitations for challenging the probate orders had long passed.
6. The trial court erred in holding the January 25, 2019, hearing when the motion had not been confirmed under local court rules.

Issues Pertaining to Assignments of Error

1. Under CR 60(a), a trial court may modify a final judgment only to correct clerical errors that are apparent from the record and do not involve legal analysis or judgment. Here, the trial court engaged in legal analysis and amended the probate order to expressly reject the codicil as legally invalid. Did the trial court abuse its discretion by exceeding its authority under CR 60(a)? (assignments of error 1-4)

2. A trial court lacks jurisdiction to consider a will contest that is not brought according to statutory requirements within the statute of limitations. When the limitation period expires, the probate order is final and binding. Sanders had notice of the probate order but failed to bring a proper challenge within the statute of limitations. Did the trial court lack jurisdiction to consider Sanders' untimely request to remove the codicil from probate? (assignment of error 2)
3. Under Lewis County Local Civil Rule 3(A)(5), a hearing on a motion must be stricken if it is not confirmed by the moving party, unless the parties and the court agree otherwise. Sanders failed to confirm her motion, and Jacobs did not consent because his counsel was unavailable. Did the trial court err in holding the hearing and deciding the motion in Jacobs' absence? (assignment of error 3)

3. Statement of the Case

3.1 As personal representative of Allan B. Pratt's estate, Joseph Jacobs sought to carry out Pratt's final instructions regarding the disposition of the estate. The trial court (Judge Toynbee) admitted Pratt's Will and amendment ("Codicil") to probate.

Allan B. Pratt passed away on December 12, 2017. CP 1. Pratt had executed a Will on February 26, 2014. CP 1. The original Will devised the estate in equal shares to Pratt's sisters: Narelle Bukala, Linda Pratt, and Cheryl Hayden; and his ex-fiancé, Beverly Sanders. CP 5. The Will appointed Joseph Jacobs as personal representative. CP 2, 5. Prior to his death, Pratt left instructions to distribute specific bequests from his estate to no

less than 16 new beneficiaries. CP 87. The instructions were put into writing.¹ CP 87.

Jacobs notified the devisees under the original Will of Pratt's final instructions. CP 87, 158-62. His understanding was that the original devisees did not object to carrying out Pratt's final instructions, even though the result would be a reduction in their shares of the estate. CP 87. Accordingly, Pratt submitted both the original Will and the Codicil to probate.² CP 1-7, 87.

Judge Toynbee reviewed the documents submitted by Jacobs' attorney and signed an order admitting the Will and Codicil to probate and appointing Jacobs as personal representative with non-intervention powers. CP 9-12. The order stated that the court reviewed the testimony and evidence presented, and the records and files submitted and was "in all things advised." CP 9-10.

The trial court ordered, "That the Last Will and Testament of ALLAN B. PRATT ... offered herein for probate shall be and hereby is admitted to probate." CP 11. As noted above, the papers offered by Jacobs included both the Will and

¹ This writing—CP 7—is referred to as the Codicil and was attached to the will that was submitted to probate. CP 4-7.

² The Will and Codicil were presented during Lewis County Superior Court's ex-parte calendar. There was no court reporter present and no audio or video recording was made. The only record of the ex-parte proceedings are the written orders that the judge signed.

the Codicil. CP 4-7. Nothing in the order rejected any portion of the documents that were offered. CP 9-12. Indeed, the order recited as “heirs, legatees, and devisees” both the original devisees and the sixteen additional beneficiaries added by the Codicil. CP 10-11.

3.2 Jacobs sought the agreement of the devisees under the original Will before distributing any estate assets under the Codicil. Sanders disclaimed her interest under the original Will in favor of her interest under the Codicil.

After the Will and Codicil were admitted to probate, Jacobs, through counsel, contacted the original devisees asking them to confirm their acquiescence to Pratt’s instructions by signing documents disclaiming their interests in the original Will. CP 158-62. These letters included copies of the Will and Codicil. CP 158-62; *see* CP 164 (responsive letter referring to the Codicil).

Beverly Sanders signed and returned her Disclaimer/ Renunciation of Interest. CP 20-21. The disclaimer stated, “I hereby renounce and disclaim my one-quarter interest in and to the estate of ALLAN B. PRATT as set forth in his Last Will and Testament dated February 26, 2014. I do not renounce or disclaim my share as stated on Decedent’s amendment to his Will, which is attached hereto for clarity.” CP 20. The attached “amendment” was the Codicil. CP 22-23. The disclaimer further

stated, “This disclaimer is binding upon the undersigned... This disclaimer ... shall be irrevocable.” CP 20. The disclaimer, with the Codicil, was filed in the trial court in the probate action. CP 20-23.

3.3 When some of the original devisees expressed concerns about the Codicil, Jacobs opened a TEDRA action as a forum for all interested parties to resolve the matter.

The other three original devisees obtained counsel (in Australia, where they resided) and responded, through counsel, that they did not believe the Codicil was valid. CP 164. Jacobs’ counsel noted the objection and proposed that no distributions would be made until the objection could be resolved. CP 167. The objecting devisees threatened litigation. CP 169. Jacobs’ counsel responded by inviting the objecting devisees to obtain Washington-licensed counsel to handle the case. CP 171.

Almost three months after the Will and Codicil were admitted to probate, no will contest had been initiated. In an abundance of caution, Jacobs initiated his own TEDRA action to create a forum for the original devisees’ objections. CP 85-89. The petition alleged that the Will and Codicil had been admitted to probate and that concerns had been raised regarding the legitimacy of the Codicil. CP 87. The petition then stated, “The Personal Representative has determined it is in the best interests of the Estate, the Estate’s creditors, and the Estate’s

beneficiaries to bring this matter before the Court in order to give all interested parties an equal opportunity to be heard. The Personal Representative will respect the decision of the Court.” CP 88.

3.4 When none of the interested parties had filed and served a proper challenge to the Codicil after four months, Jacobs moved to voluntarily dismiss the TEDRA action.

Narelle Bukala filed a Petition for Contest of Codicil in the probate action. CP 95, 97-98. Two months later, she filed a Response to Petition in the TEDRA action. CP 95-96. Bukala failed to personally serve Jacobs with these documents within the 90-day tolling period. CP 120. She did not file or serve a TEDRA Summons. CP 121.

Four months after the TEDRA action was filed, the trial court held a hearing on Jacobs’ motion to voluntarily dismiss the action. CP 110. Jacobs informed the trial court that no counterclaim or counter-petition had been filed and served in the months since the TEDRA action was commenced. CP 101. Jacobs no longer felt it beneficial to the estate to keep the TEDRA action open any longer. CP 101.

3.5 Even though Sanders and Bukala were represented by counsel at the time, none of the original devisees responded or appeared at the hearing on the motion to dismiss. The trial court dismissed the TEDRA action.

None of the original devisees appeared for the hearing. CP 110, 111-12. Two of the original devisees, Narelle Bukala and Beverly Sanders, were each represented by counsel at the time. *E.g.*, CP 24, 106 (Gabrielle Richards appeared on behalf of Sanders two weeks before the hearing); CP 95-98 (Evan Hull represented Narelle Bukala months before the hearing). Both attorneys received timely notice of the hearing, but neither of them responded or appeared. CP 108 (notice), 110-11 (failure to appear at the hearing). The trial court dismissed the TEDRA action. CP 111-13.

The day before the hearing on the motion to dismiss the TEDRA action, Ms. Richards filed in the probate action a Declaration of Beverly Sanders in support of Bukala's Petition for Contest of Codicil. CP 26-27. Sanders stated, "I object to the contents of the purported Codicil... I never agreed to the admission of the purported Codicil. I do hereby contest the admission of the purported Codicil to probate. I object to the proposals put forth by the Personal Representative in the [TEDRA action]." CP 26-27. Sanders did not formally join in

Bukala's faulty petition and never filed or served a petition of her own to contest the Codicil.

Three weeks after dismissal of the TEDRA action, counsel for Bukala noted a hearing in the TEDRA action regarding Bukala's Petition for Contest of Codicil (which had been filed in the probate action). CP 114-15. Jacobs filed a response, arguing that the TEDRA action had been dismissed, no counterclaim had ever been filed and served, and the four-month statute of limitations for contesting a will had expired months earlier. CP 117-24. It appears Bukala abandoned her hearing and petition.

3.6 Months later, Sanders filed a "Motion for Clarification" of the original probate order, seeking to have the Codicil rejected as invalid.

Three months after dismissal of the TEDRA action (ten months after the Will and Codicil were admitted to probate), Sanders filed a "Motion for Clarification Regarding Order Admitting Last Will and Testament." CP 30. The motion questioned the validity of the Codicil. CP 31. Despite her earlier acknowledgements that the Codicil had been admitted to probate and that she objected to its validity and admission, Sanders alleged for the first time in this motion that the probate order did not make reference to the Codicil. CP 31. The motion made no mention of scrivener's errors or CR 60(a). CP 30-32.

Sanders asked the trial court to enter an order specifying whether the Codicil had been admitted to probate. CP 32.

Jacobs filed a response to the motion, arguing that the motion was nothing more than an improper and untimely will contest seeking to throw out the Codicil that had been admitted to probate in the original order. CP 33-36. Sanders had already disclaimed the original Will and adopted the Codicil in her Disclaimer/Renunciation of Interest. CP 34-35. Even if her disclaimer were not binding and irrevocable, Sanders failed to challenge the Codicil within the four-month statute of limitations and could not do so now, ten months later. CP 35-36. Jacobs argued that the trial court also lacked jurisdiction to hear the motion because Sanders failed to invoke jurisdiction by filing a petition and serving a TEDRA summons on the personal representative as required by statute. CP 36-37.

3.7 Even though Sanders failed to confirm the hearing as required under Lewis County Local Civil Rule 3(A)(5), the trial court heard and decided the motion without Jacobs or his counsel present.

Sanders had noted a hearing on her motion for January 25, 2019. CP 56, 64-65. Lewis County Local Civil Rule 3(A)(5) requires, “All motions shall be confirmed for argument through the Clerk’s Office by 12:00 noon two court days prior to the scheduled argument. Confirmations shall be made by calling the County Clerk at (360) 740-2704. Motions not confirmed will

stricken unless the parties and the Court agree otherwise.” CP 76-77. As of 4:50pm the day before the scheduled hearing, Sanders had not confirmed the hearing in accordance with the Local Rule. CP 56-57, 62.

After confirming that Sanders’ hearing had not been confirmed, counsel for Jacobs scheduled an emergency meeting with another client for the morning of the unconfirmed hearing. CP 56-57. He did not appear for the hearing, knowing that according to the Local Rule the hearing would have to be stricken. CP 56-57; RP, Jan. 25, 2019, at 2.

The trial court (Judge Lawler) called counsel for Jacobs and demanded that he appear in court within 15 minutes. RP, Jan. 25, 2019, at 2. After waiting half an hour, Judge Lawler made a record and proceeded to decide the motion without Jacobs’ participation or consent. RP, Jan. 25, 2019, at 2-3. Judge Lawler interpreted the Local Rule as being discretionary and only for the benefit of the court, not the parties. RP, Jan. 25, 2019, at 2.

3.8 The trial court (Judge Lawler) concluded that the Codicil was invalid and ordered the original probate order be amended, ostensibly under CR 60(a), to expressly reject the Codicil.

Judge Lawler, who was not the judge who had admitted the Will and Codicil to probate, examined the Codicil and concluded that it “is clearly not a codicil. It is not signed. It is

not witnessed. It is typed with some handwritten interlineations, none of which are dated or witnessed. ... So this does not constitute a valid codicil.” RP, Jan. 25, 2019, at 3.

Addressing Jacobs’ arguments that the motion was actually an improper will contest, Judge Lawler stated, “[Jacobs’] arguments may have some technical legal merit but here’s how I’m going to resolve this: The order admitting the will to probate clearly has a number of scrivener’s errors in it. The dates are all wrong. So under Civil Rule 60(a) I’m going to correct the scrivener’s error in this order admitting the will to probate.” RP, Jan. 25, 2019, at 4.

Judge Lawler ruled that the first numbered paragraph on page 3 of the original order should be modified to read that the will dated February 26, 2014, is admitted to probate. RP, Jan. 25, 2019, at 4. Judge Lawler reasoned that this was merely correcting the date, which had been incorrect. RP, Jan. 25, 2019, at 4. “We’re just going to change the date. ‘It shall be and hereby is admitted to probate,’ period.” RP, Jan. 25, 2019, at 5. But then Judge Lawler went on, “And then I want to add language, ‘The document dated July 18th, 2017, is not a codicil and is not admitted to probate.’” RP, Jan. 25, 2019, at 5.

The trial court continued the matter for one week for presentation of a written order, instructing that it should be

titled, “Order Correcting Scrivener’s Error Under CR 60(a).”
RP, Jan. 25, 2019, at 5-6.

Jacobs filed a written objection to the January 25 hearing.
CP 53, 56-77. Jacobs argued that Judge Lawler violated the
Local Civil Rule by holding the unconfirmed hearing without the
agreement of the nonmoving party. CP 57-58. Jacobs argued that
the language of the Local Rule is mandatory, requiring that all
motions “shall” be confirmed or else they “will” be stricken
unless the parties and the Court agree to have the hearing.
CP 57-58.

At the February 1 hearing on presentation of the order,
Jacobs made a record of his objections. RP, Feb. 1, 2019, at 3-5.
He also argued against Sanders’ motion before being cut short
by the trial court. RP, Feb. 1, 2019, at 5-7. Judge Lawler signed
Sanders’ order. RP, Feb. 1, 2019, at 7-8; CP 54-55.

The original probate order stated,

BASED on the foregoing findings, it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That the Last Will and Testament of ALLAN B.
PRATT dated the 12th day of December, 2017,
offered herein for probate shall be and hereby is
established as the Last Will and Testament of the
decendent, and shall be and hereby is admitted to
probate.

CP 11 (emphasis added). The Order Correcting Scrivener's Error strikes this paragraph 1 and replaces it with the following:

The Last Will and Testament of ALLAN B. PRATT dated February 26, 2014 is established as the Last Will and Testament of the decedent and is admitted to probate. **The document dated July 18, 2017 is not a codicil and is not admitted to probate.**

CP 55 (emphasis added). The amendment removed the prior reference to the documents that had been offered for probate, which included the Codicil, and instead expressly rejected the Codicil as invalid—a legal conclusion that does not appear anywhere in the original order. *Compare* CP 11 *with* CP 55.

The Order Correcting Scrivener's Error further provides that the remainder of the original probate order “is unchanged.” CP 55. This would include the list of “heirs, legatees, and devisees” on pages 2-3 of the original order, which included all of the specific devisees under the Codicil. CP 10-11. Judge Lawler did not attempt to reconcile his rejection of the Codicil with this list of devisees.

Jacobs appealed the Order Correcting Scrivener's Error.

4. Argument

All interested parties knew from the beginning that the original probate order admitted both the Will and the Codicil to probate. When the devisees under the original Will failed to

properly challenge the Codicil within the statute of limitations, the order admitting the Codicil became binding and final. That judgment was entitled to finality.

The trial court violated that principle of finality when it entered the Order Correcting Scrivener's Error, ostensibly under CR 60(a) but far exceeding its authority under that rule. This Court should reverse the Order Correcting Scrivener's Error for at least three reasons: 1) The trial court abused its discretion by second-guessing the legal analysis embodied in the original order and ordering an amendment that significantly changed the rights of the interested parties; 2) The trial court erred in considering Sanders' motion, which was nothing more than an improper and untimely will contest brought long after the statute of limitations for such challenges had passed; and 3) The trial court erred in holding a hearing and deciding Sanders' motion in Jacobs' absence when the hearing had not been confirmed as required by Lewis County Local Civil Rule 3(A)(5).

4.1 The trial court abused its discretion by exceeding its authority under CR 60(a) and significantly altering the rights of the interested parties.

The finality of judgments is an important value of the legal system. *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 313, 863 P.2d 1377 (1993). In special circumstances, finality may be sacrificed to serve other important interests. *Id.*

Civil Rule 60 is the mechanism that guides the balancing between finality and fairness. *Id.* The importance of finality is protected by CR 60's list of limited circumstances for which a judgment may be vacated or amended. *Union Bank, NA v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 846, 365 P.3d 223 (2015).

Under CR 60(a), a trial court may amend a final judgment to correct clerical errors in the text:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

CR 60(a). A trial court may also vacate or amend a final judgment under special circumstances set forth in CR 60(b). However, **errors of law** in a final order **are not correctable** through CR 60, but must be raised on appeal. *In re Marriage of Tang*, 57 Wn. App. 648, 654, 789 P.2d 118 (1990) (citing *Burlingame v. Consolidated Mines Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986)). Alternatively, the issue of the validity of a will or codicil must be raised through a properly filed and served will contest within the four-month statute of limitations. RCW 11.24.010; RCW 11.24.020. Thus, the trial court's authority under CR 60(a) was limited to correcting true "clerical errors."

“A distinction exists between a clerical error, which may be corrected under CR 60(a), and a judicial error, which may not. A clerical error is a ‘mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney [or judge].’” *Marriage of Stern*, 68 Wn. App. 922, 927, 846 P.2d 1387 (1993). In contrast, “a judicial error is an error of substance.” *Id.* Judicial error may not be corrected under CR 60(a). *Presidential Estates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996).

In deciding whether an error is “judicial” or “clerical,” a reviewing court must ask itself whether the amended judgment embodies the trial court’s original intent, as expressed in the record at the time of the original judgment. *Barrett*, 129 Wn.2d at 326. If the amendment expresses the original intent, it is permitted as a correction of clerical error under CR 60(a). *Id.* But if the amendment varies from the original intent, it is an impermissible attempt to correct judicial error and must be reversed. *Id.*

Once a trial court enters a written judgment, it cannot, under CR 60(a), go back, rethink the case, and enter an amended judgment that does not find support in the trial court record. *Barrett*, 129 Wn.2d at 326. “In the absence of any expression in the trial record showing that the trial court intended at the time the original judgment was entered to grant

[the relief in the proposed amendment], there is simply no basis upon which this, or any reviewing court, can possibly fit the correction within the scope of CR 60(a).” *Barrett*, 129 Wn.2d at 328.

This Court reviews a trial court’s decision to amend judgment under CR 60(a) for abuse of discretion. *Barrett*, 129 Wn.2d at 325-26. A trial court abuses its discretion when exceeds its authority under CR 60 and attempts to correct a judicial or legal error rather than a clerical one. *Id.*

In order to determine whether the trial court exceeded its authority in this case, this Court must first determine the trial court’s original intent based on the record at the time of the original decision. Here, the record demonstrates that the trial court’s original intent was to admit the Codicil to probate. Next, this Court must determine whether the trial court’s amendment is consistent with the original intent. Here, rather than seeking to determine and clarify the original intent, Judge Lawler second-guessed Judge Toynebee’s legal conclusions and made a new substantive determination, rejecting the Codicil, contrary to the original intent. Because Judge Lawler’s order attempted to correct a judicial or legal error, the trial court abused its discretion. This Court should reverse and restore Judge Toynebee’s original, final, probate order.

4.1.1 The record demonstrates that Judge Toynbee’s original intent was to admit the Codicil to probate.

In reviewing a CR 60(a) order, this Court must rely only on the record that existed at the time of the original order.

Barrett, 129 Wn.2d at 326. Here, the only record consists of the documents submitted and the orders entered. *See* CP 1-14.

Courts must interpret an order as a whole to ascertain the intent of the court that entered it. *In re Marriage of Thompson*, 97 Wn. App. 873, 878, 988 P.2d 499 (1999). The meaning of an order is a question of law subject to de novo review. *Id.* at 877.

In determining the original intent of an order, a court must use the general rules of construction applicable to statutes and contracts. *Thompson*, 97 Wn. App. at 878. The court must view the order as a whole, giving meaning and effect to each word. *Stokes v. Polley*, 145 Wn.2d 341, 346, 37 P.3d 1211 (2001). The court must also interpret the order in a manner that avoids absurd results. *See State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740 (2015).

The papers Jacobs presented to the court included both the Will and the Codicil. CP 4-7 (titled “Last Will and Testament of Allan B. Pratt and Codicil”). The trial court’s original order stated that the court reviewed the testimony and evidence presented, and the records and files submitted and was “in all things advised.” CP 9-10. Indeed, the trial court had a statutory

duty to review the Will and Codicil that were offered “and either probate or reject such will as the testimony may justify.”

RCW 11.20.020.

Judge Toynbee ordered, “That the Last Will and Testament of ALLAN B. PRATT dated the 12th day of December, 2017, **offered herein for probate** ... shall be and hereby is admitted to probate.” CP 11 (emphasis added). As noted above, the document that had been “offered herein for probate” contained both the Will and the Codicil. CP 4-7. This statement expressly admits the documents that were offered for probate, including both the Will and the Codicil.

When documents are offered for probate, the trial court must “make and cause to be entered a formal order, either establishing and probating such will, or refusing to establish and probate the same.” RCW 11.20.020. In other words, the order must specify if anything is rejected. Here, the trial court reviewed what had been offered and admitted it to probate, without rejecting any portion of it.

The original order listed all of the devisees under the Codicil, identifying them as “heirs, legatees, and devisees.” CP 10-11. It would be absurd indeed for the trial court to have intended to reject the Codicil and yet list all of the Codicil’s beneficiaries as devisees under the Will.

It would also be absurd to conclude that Jacobs would prepare a proposed order that did not admit to probate both the Will **and** Codicil that he was offering up. Judge Toynbee accepted and signed Jacobs' proposed order without any changes. Surely if Judge Toynbee had intended to reject the Codicil, he would have inserted language to that effect, as a clear signal to Jacobs that the court was not accepting everything that was offered. But the judge did not do that. The judge signed Jacobs' proposed order, unchanged, which by its terms admitted to probate the documents that were "offered herein for probate." CP 11.

This record shows that the trial court was aware of the Codicil and intended to admit it to probate. Sanders' suggestion that the trial court was not aware of it or did not intend to admit it is not supported by any evidence in the record. Contrary to Sanders' late assertion that the order does not make reference to the Codicil, the trial court's original order referred to the documents "offered herein for probate," which the record establishes included the Codicil. The order listed the devisees under the Codicil, finding that they were devisees under the admitted documents. The order did not reject the Codicil. Read as a whole, the trial court's original order intended to, and did, admit the Codicil to probate.

4.1.2 This Court should not countenance Sanders’ new-found argument that the original order did not admit the Codicil to probate because it contradicts her own prior positions and sworn statements in this case.

Sanders’ newly-minted assertion that the Codicil was never admitted to probate is disingenuous and should not be permitted, given her own prior positions and sworn statements in this case. Sanders has at least twice acknowledged under penalty of perjury that the Codicil **was**, in fact, admitted to probate by the trial court’s original order.

On February 26, 2018, Sanders signed, under penalty of perjury, a “Disclaimer/Renunciation of Interest,” in which she disclaimed her interest in the original will. CP 20-21. In doing so, she specifically **relied** on the validity of the Codicil: “I do not renounce or disclaim my share as stated on Decedent’s amendment to his Will, which is attached hereto for clarity.” CP 20. The attachment was the Codicil. CP 22-23.

In hopes of escaping her own previous position, Sanders has argued that she was not represented by counsel at that point.³ But she **was** represented by counsel by the time she

³ Sanders was advised by counsel for Jacobs as early as February 16, 2018, that she could obtain her own counsel before signing the disclaimer. CP 47 (“If you are in agreement with [the disclaimer], please sign and return to me in the envelope provided. If you are not in agreement, or have questions regarding the matter, please feel free

made her next sworn statement acknowledging admission of the Codicil.

Gabrielle Richards appeared as counsel for Sanders on August 24, 2018. CP 24, 106. On August 30, 2018, Sanders signed a declaration—on her attorney’s own paper—that acknowledged that the Codicil had been admitted to probate. CP 26-27. The declaration was filed in support of Narelle Bukala’s attempted will contest. CP 26. Bukala’s petition clearly acknowledged that the Codicil was admitted to probate, asking the probate court to “rescind the order admitting the Codicil to probate.” CP 17. In support of that petition, Sanders stated, “I do hereby contest the admission of the purported Codicil to probate.” CP 27. In other words, she joined in Bukala’s request to rescind the order that admitted the Codicil. Sanders’ declaration is entirely inconsistent with her new-found argument that the Codicil was never admitted to probate.

Sanders did not concoct her new position regarding the Codicil until after she had failed to properly contest the validity of the Codicil in a TEDRA action before the statute of limitations

to contact me. Of course, if you would like independent legal advice, you are entitled to contact your own attorney.”). It is unknown why she chose not to do so at the time or why she took so long to obtain Washington licensed counsel. There is no evidence in the record that Sanders was unaware of the legal validity of the Codicil when she signed her disclaimer.

for such a challenge had long expired. Still wanting to avoid the effect of the Codicil, Sanders made her “Motion for Clarification” some ten months after the Codicil had been admitted, for the first time asserting that the Codicil might not have been part of the court’s original order. CP 30-32.

This Court should disregard Sanders’ arguments under the doctrine of Judicial Estoppel. Judicial estoppel is an equitable doctrine that precludes a party from taking a position in one court proceeding and later seeking an advantage by taking an inconsistent position in a subsequent proceeding. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006). “The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes; to bar evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings.” *Id.*

Sanders has already disclaimed her interest under the original Will in favor of the Codicil. Her disclaimer was “binding” and “irrevocable,” signed under penalty of perjury. CP 20-21. As such, she no longer has any interest under the Will. It is unclear, then, what she hoped to accomplish in asking Judge Lawler to amend the probate order to reject the Codicil. Sanders’ either lacked standing due to her disclaimer or she should have been barred from taking an inconsistent position.

Either way, her motion was improper and should have been denied.

This Court should not countenance Sanders' arguments that the Codicil was not admitted to probate by Judge Toynbee's original probate order. Such arguments are directly contrary to her own prior positions and sworn statements. This Court should reverse Judge Lawler's order.

4.1.3 Rather than seeking to determine and clarify the original intent, Judge Lawler abused his discretion by second-guessing Judge Toynbee's legal conclusions and making a new substantive determination, rejecting the Codicil, contrary to the original intent.

Judge Lawler titled his order, "Order Correcting Scrivner's Errors Pursuant to CR 60(a)," but that is not what the order did. In reality, this order materially and substantially changed what had been admitted to probate in Judge Toynbee's original order. As discussed in Part 4.1, above, such a change is not permitted under CR 60(a).

Civil Rule 60(a) permits a court to correct only clerical errors. CR 60(a). A clerical error is a "mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision or judgment by an attorney [or judge]." *Stern*, 68 Wn. App. at 927. A trial court may not, under

CR 60(a), second-guess the prior legal conclusions and enter a judgment inconsistent with the original intent. *Barrett*, 129 Wn.2d at 326.

Here, Judge Lawler second-guessed Judge Toynebee's conclusions regarding the Codicil. Rather than seeking to determine Judge Toynebee's original intent, Judge Lawler's first thoughts focused on the validity of the Codicil: "[It] is clearly not a codicil. It is not signed. It is not witnessed. It is typed with some handwritten interlineations, none of which are dated or witnessed. ... So this does not constitute a valid codicil." RP, Jan. 25, 2019, at 3.

Judge Lawler then sought a mechanism to make the substantive change of rejecting the Codicil and proposed that it could be done under CR 60(a): "The order admitting the will to probate clearly has a number of scrivener's errors in it. The dates are all wrong. So under Civil Rule 60(a) I'm going to correct the scrivener's error in this order admitting the will to probate." RP, Jan. 25, 2019, at 4. "We're just going to change the date. 'It shall be and hereby is admitted to probate,' period." RP, Jan. 25, 2019, at 5. "And then I want to add language, 'The document dated July 18th, 2017, is not a codicil and is not admitted to probate.'" RP, Jan. 25, 2019, at 5.

The fact that Judge Lawler called the rejection of the codicil a clerical correction does not make it so. Contrary to the

order’s Findings of Fact, whether the original order contained “scrivener’s errors,” whether Judge Lawler’s “corrections” were necessary “to facilitate the proper administration of this Estate,” and whether the corrections were permissible under CR 60(a) are all legal conclusions that should be reviewed de novo by this Court.⁴ Judge Lawler erred in entering these findings of fact (which are actually conclusions of law).

The record demonstrates that in entering the original order, Judge Toynbee intended to admit the Codicil to probate. His reasons for doing so cannot be questioned under CR 60(a). Judge Lawler’s contrary conclusion was the result of legal analysis and judicial discretion. Thus, Judge Lawler was not correcting a clerical error; he was attempting to correct a judicial error, which is not permitted under CR 60(a).

Even assuming that Judge Toynbee’s admission of the Codicil to probate was a legal error, legal errors can only be

⁴ The labels used by a trial court do not control appellate review of findings of fact and conclusions of law. *In re Welfare of A.L.C.*, ___ Wn. App. 2d ___, 439 P.3d 694, 698 (2019). “A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law.” *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986). “If a determination concerns whether the evidence showed that something occurred or existed, it is properly labeled a finding of fact. However, if a determination is made by a process of legal reasoning from, or interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law.” *A.L.C.*, 439 P.3d at 698. Conclusions of law are reviewed de novo. *Id.* at 698-99.

corrected through direct appeal, or, in the context of wills, through a TEDRA petition properly filed and served within the statute of limitations for such a contest. Judge Toynbee's order admitting the Codicil was not appealed, and none of the interested parties ever properly challenged the Codicil within the statute of limitations. In such a situation, the principle of finality wins out over legal correctness. Where Sanders failed to provide justification for relief under CR 60(b), Judge Toynbee's order admitting the Codicil is entitled to finality and cannot be changed.

In attempting to change the substance of the original probate order contrary to Judge Toynbee's original intent evident in the record, Judge Lawler abused his discretion. The "Order Correcting Scrivener's Errors" exceeded the trial court's authority under CR 60(a). This Court should reverse Judge Lawler's order and honor the finality of the original probate order, which admitted the Codicil to probate.

4.2 The trial court erred in considering Sanders' untimely and improper challenge to the validity of the Codicil.

An order admitting a will to probate is a final judgment as to what the will is, subject only to a contest properly initiated within the four-month statute of limitations. RCW 11.24.010; *see In re Estate of Jepsen*, 184 Wn.2d 376, 379-80, 358 P.3d 403

(2015). An interested party who wishes to contest the validity of a will or codicil must properly initiate a petition within four months after the order admitting or rejecting the will or codicil. *Id.* “If no person files and serves a petition within the time under this section, the probate or rejection of such will **shall be binding and final.**” *Id.* (emphasis added); *Jepsen*, 184 Wn.2d at 380.

In a non-intervention estate, the court has no authority to intervene except if a person with standing properly invokes the court’s limited authority under a statutory exception. *In re Estate of Rathbone*, 190 Wn.2d 332, 339, 412 P.3d 1283 (2018). One such exception is a will contest under RCW 11.24.010. Proper initiation of a will contest requires that “notice shall be given as provided in RCW 11.96A.100” to all interested persons. RCW 11.24.020. The required notice is a TEDRA Summons as set forth in RCW 11.96A.100(3). Proper service of process is essential in order to invoke the jurisdiction of the court and to commence the will contest. *Jepsen*, 184 Wn.2d at 380-81; *In re Estate of Kordon*, 157 Wn.2d 206, 209, 137 P.3d 16 (2006). The TEDRA summons must be personally served on the personal representative within the four-month statute of limitations or within 90 days of filing a timely will contest petition. RCW 11.24.010; *Jepsen*, 184 Wn.2d at 380; *Kordon*, 157 Wn.2d at 213.

Sanders’ “Motion for Clarification” questioned the validity of the Codicil and invited the trial court to enter an order

rejecting it from probate. CP 30-32. The motion did not invoke CR 60, did not request correction of a “clerical error,” and did not establish grounds for changing the substance of the original decision. The motion disingenuously failed to notify the court that for ten months prior to the motion, the parties had all acknowledged that the original order admitted the Codicil to probate. The motion failed to notify the court that no will contest had ever been properly initiated. The motion set forth the formal requirements of a validly executed will and pointed out deficiencies in the Codicil. CP 31. Sanders “request[ed] entry of an Order specifying whether the purported codicil is admitted to probate in this matter.” CP 32.

The motion was nothing more than a thinly veiled challenge to the validity of the Codicil. As such, it was required to have been brought as a will contest under RCW 11.24.010, with notice by TEDRA Summons personally served on the personal representative as required by RCW 11.24.020 and RCW 11.96A.100 within the four-month statute of limitations specified in RCW 11.24.010. Sanders’ motion did not comply with any of these requirements. *See* CP 37.

Sanders had ample opportunity to properly challenge the Codicil within the four-month statute of limitations. Jacobs sent her copies of the Will and Codicil immediately after the original probate order. CP 158-59. He invited her to obtain the advice of

counsel and to contact him if she disagreed with the Disclaimer/ Renunciation of Interest. CP 158. Sanders chose to sign the disclaimer. CP 20-21.

When none of the original devisees properly initiated a challenge to the Codicil, Jacobs initiated his own TEDRA petition within the statute of limitations to provide a forum for the parties to resolve their differences. CP 85-88. When none of the original devisees properly responded or initiated a counter-petition, Jacobs moved to dismiss the TEDRA petition, providing notice of the motion to all interested parties. CP 100-05, 108-09. Even though Sanders was represented by counsel at the time of receiving notice of Jacobs' motion to dismiss, CP 106, 108, she failed to respond to the motion or appear at the hearing, CP 110.

Sanders slept on her rights from beginning to end and missed her opportunity to challenge the Codicil. She knew from the beginning that the Codicil had been admitted. She relied upon it in her disclaimer of the original Will. She acknowledged it in declarations signed under penalty of perjury and filed with the court. But she never properly challenged it within the time allotted for doing so. After Jacobs' TEDRA action was dismissed and the four-month statute of limitations had already passed, the admission of the Codicil to probate was binding and final, and there was no remaining recourse for Sanders to challenge it.

Sanders' motion was an improper and untimely will contest. The trial court erred in considering and deciding the motion. This Court should reverse the resulting order.

4.3 The trial court erred in holding a hearing and deciding Sanders' motion in Jacobs' absence when Sanders had failed to confirm the hearing as required by Lewis County Local Civil Rule 3(A)(5).

Lewis County Local Civil Rule 3(A)(5) requires, "All motions shall be confirmed for argument through the Clerk's Office by 12:00 noon two court days prior to the scheduled argument. Confirmations shall be made by calling the County Clerk at (360) 740-2704. Motions not confirmed will [be] stricken unless the parties and the Court agree otherwise." Lewis County LCR 3(A)(5). Sanders did not confirm the hearing in accordance with the Local Rule. CP 56-57, 62.

Court rules, including Local Rules, are reviewed de novo. *State v. Otton*, 185 Wn.2d 673, 677-78, 374 P.3d 1108 (2016). They are interpreted the same way as statutes, applying principles of statutory construction, starting with the plain language of the rule. *Id.* at 681. It is well settled that use of the word "shall" or "will" in a statute or court rule "imposes a mandatory requirement unless a contrary legislative intent is apparent." *Eugster v. City of Spokane*, 118 Wn. App. 383, 407, 76 P.3d 741 (2003) (citing *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)).

There is no contrary legislative intent apparent in Lewis County LCR 3(A)(5). It sets a mandatory requirement that motions “shall be confirmed,” with a mandatory consequence that “motions not confirmed will [be] stricken.” The only exception is drawn with specific bounds: an unconfirmed motion can only be heard **if the parties and the Court agree** to have it heard. Contrary to the trial court’s interpretation, this language requires the agreement of everyone involved; the trial court cannot hear and decide an unconfirmed motion over the objection of one or more of the parties.

A superior court has inherent power to waive its own rules, but an appellate court will only permit such a waiver where it does not result in injustice. *Foster v. Carter*, 49 Wn. App. 340, 343, 742 P.2d 1257 (1987). The trial court’s waiver of the local rule here was unjust, depriving Jacobs of the opportunity to appear and respond to the motion.

The Local Rule exists to promote efficiency for both the court and the parties. If a motion is not confirmed, the judge does not need to prepare for it. The rule gives a nonmoving party the assurance that they do not need to appear at the hearing only to find that the moving party had abandoned the motion and did not appear themselves. The rule creates a standard operating procedure in Lewis County Superior Court. Parties know that they only need to appear if the motion was confirmed.

If, by chance, the parties do appear for an unconfirmed motion, and the judge has prepared to hear and decide it, the parties and the court may agree to waive the confirmation requirement and hold the hearing. A waiver in this situation does not cause injustice because everyone is present and prepared for the hearing. But a waiver of the rule over the objection of one of the parties necessarily causes injustice by depriving that party of the opportunity to be present or prepared for the hearing.

The injustice is even more pronounced here. The evening before the hearing, counsel for Jacobs verified that the hearing had still not been confirmed. CP 56-57. In reliance on the Local Rule and the standard operating procedure it establishes, counsel set an appointment, at a time he would otherwise have set aside for the hearing, to meet with another client to deal with that client's emergency. CP 56-57. Counsel for Jacobs became unavailable to appear for the hearing. CP 57. The trial court's waiver of the rule, knowing that Jacobs' counsel was unavailable to appear, worked a profound injustice on Jacobs. At the subsequent hearing on presentation of the order, the trial court refused to hear Jacobs' arguments on the merits of Sanders' motion. RP, Feb. 1, 2019, at 6. Jacobs was deprived of his right to be heard.

The Local Rule unequivocally requires that motions be confirmed or they will be stricken. The trial court's waiver of the Local Rule, to Jacobs' prejudice, was patently unreasonable and an abuse of discretion. This Court should reverse the resulting order.

4.4 Jacobs requests an award of attorney's fees for opposing Sanders' improper motion in the trial court and on appeal.

Jacobs requested an award of attorney's fees in the trial court for having to oppose Sanders' improper and untimely will contest. CP 38. The trial court did not address the request, most likely because Jacobs did not prevail. Jacobs continues his request in this Court.

In a will contest, if the contested will or codicil is sustained, the court has discretion to award costs against the contestant, including "such reasonable attorney's fees as the court may deem proper." RCW 11.24.050. The court should not award fees against a party who acted with probable cause and in good faith. *Id.* In any TEDRA action, the court has discretion to award costs, including reasonable attorneys' fees, to any party from any other party or from the assets of the estate, as the court determines to be equitable, considering any and all factors the court deems relevant. RCW 11.96A.150.

Sanders slept on her rights and failed to initiate a proper challenge to the Codicil before the statute of limitations expired. She knew about the Codicil from the beginning, and not only acknowledged that it was admitted to probate but adopted it herself when she disclaimed her interest under the original Will. Despite later expressing concerns about the Codicil's validity, she never took the steps to contest it.

Sanders should have known that the result of her failure to act was that the original order admitting the Codicil became binding and final. She should have known that her "Motion for Clarification" was nothing more than an improper and untimely challenge to the Codicil. Her last-ditch attempt to invalidate the Codicil, based on a revisionist history in which she claims the Codicil was never actually admitted to probate, was not brought with probable cause or in good faith. The estate should not have had to defend itself against Sanders' improper and untimely challenge. This Court should order Sanders to pay Jacobs' reasonable attorney's fees incurred in the trial court and on appeal.

5. Conclusion

The original probate order admitted the Codicil to probate. The parties have all known it from the beginning, yet nobody challenged the validity of the Codicil while they had the

chance. In response to Sanders' last-ditch effort to avoid the Codicil, the trial court impermissibly removed the Codicil under the guise of a clerical error under CR 60(a). This Court should honor the finality of the original probate order and reverse the "Order Correcting Scrivener's Errors."

Respectfully submitted this 26th day of September, 2019.

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I certify, under penalty of perjury under the laws of the State of Washington, that on September 26, 2019, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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