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No. 53070-8-II

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

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*In re the Estate of Allan B. Pratt:*

Joseph Jacobs, Personal Representative,

Appellant,

v.

Beverly Sanders, et al.,

Respondents.

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**Brief of Appellant**

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## **1. Reply Argument**

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

Jacobs' opening brief reviewed the importance of finality of judgments—that a final order of a court is binding unless it is properly challenged on appeal or by a CR 60 motion. Br. of App. at 15-18 (citing, *e.g.*, *Suburban Janitorial Servs. v. Clarke Am.*, 72 Wn. App. 302, 313, 863 P.2d 1377 (1993)). Clerical errors in a judgment may be corrected under CR 60(a); errors due to fraud or other irregularities may be corrected under CR 60(b); but errors of law may only be corrected on appeal (or, in probate cases, through a properly initiated will contest). Br. of App. at 16 (citing CR 60; *In re Marriage of Tang*, 57 Wn. App. 648, 654, 789 P.2d 118 (1990)).

Jacobs pointed out the difference between clerical errors, which may be corrected under CR 60(a), and judicial errors, which may not. Br. of App. at 17-18 (citing *Marriage of Stern*, 68 Wn. App. 922, 927, 846 P.2d 1387 (1993)). If a proposed correction is consistent with the intent of the original order, discerned from the record at the time of the order, it is clerical in nature. Br. of App. at 17 (citing *Presidential Estates v. Barrett*, 129 Wn.2d 320, 326, 917 P.2d 100 (1996)). On the other hand, if

a proposed correction changes the substance of the order or involves a re-examination of the merits, it is judicial in nature and must be rejected. Br. of App. at 17-18 (citing *Barrett*).

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 it exceeds its authority under CR 60 and attempts to correct a judicial or legal error rather than a clerical one. *Id.* "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)." *Id.* at 328.

The burden, then, is on Sanders to demonstrate some expression by the original trial court of an intent to reject the codicil. In the absence of such an expression—and there was no such expression here—the second trial court's amendment of the order was an abuse of discretion.

Sanders' brief fails to point to any positive expression by the original trial court of an intent to reject the codicil. Instead she engages heavily in circular reasoning, arguing that the amendment was clerical because the second trial court said it was. *E.g.*, Br. of Resp. at 9-10. Sanders' arguments assume their

own conclusion and cannot stand. Sanders also relies on an alleged absence of any intent to accept the codicil, but this argument is not only insufficient under *Barrett*, but is not even supported by the record.

Sanders' argument that a probate court has "inherent authority" to vacate or revise prior orders fails to recognize that any such authority is still limited by the principle of finality and may only be exercised under the conditions set forth in CR 60. The cases upon which Sanders relies—*In re Estate of Bronson*, 185 Wash. 536, 55 P.2d 1075 (1936), and *In re Estate of Elliott*, 22 Wn.2d 334, 156 P.2d 427 (1945)—hold only that the offering of a later will to probate is not a contest of the first will and that a probate court may accept a later will even after the time for a will contest has expired. *Elliott*, 22 Wn.2d at 345-46 (analyzing the split opinions in *Bronson*) and at 355-56 ("We are in accord with those authorities which hold that the offer to probate a later will does not constitute a contest of a prior will already probated, and that therefore the six-month statute of limitations does not apply."). Sanders did not attempt to probate a later will or codicil, so this exception to the principle of finality does not apply here.

Rather, Sanders' motion remains subject to the restrictions of CR 60. The lead opinion in *Bronson* relied on the then-extant statutory analogue to CR 60, holding that the

probate court was powerless to amend its prior order because the proponent of the change had failed to bring a motion to vacate for mistake or fraud within one year. *Bronson*, 185 Wash. at 546-47. “No authority has been cited, and we have found none, which holds that statutes such as ours, limiting the time within which a judgment may be set aside on the ground of mistake or fraud, may be disregarded.” *Id.* at 547. As stated by the court in *Elliott*, “If the necessities of the case demand that the court revise its decrees in order to effect justice, it has the power to do so, **to the same extent that any court of general jurisdiction has such power.**” *Elliott*, 22 Wn.2d at 355 (emphasis added). In other words, the probate court’s authority to vacate or amend a prior order is the same as any other court of general jurisdiction: governed by the limitations of CR 60.

The second trial court’s amendment of the original order cannot be permitted under CR 60. As Jacobs argued in his opening brief, and will expand on below, 1) the record does not reflect any positive expression of intent to reject the codicil, rather it demonstrates an expression of intent to accept it; 2) Sanders’ new arguments must be viewed with skepticism given the fact that for ten months after the probate order she admitted that the codicil was accepted to probate and only changed her tune after it was too late to challenge the codicil in the ordinary course; and 3) Judge Lawler based his decision on untenable

reasons when he substituted his own judgment for that of Judge Toynbee instead of seeking to determine Judge Toynbee's 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 Toynbee's original, final, probate order.

**1.1.1 The record demonstrates that Judge Toynbee's original intent was to admit the Codicil to probate.**

Jacobs' brief noted that the first step in reviewing an order under CR 60(a) is to determine the intent of the original order, based on the record at the time of the order. Br. of App. at 17, 19. The Court must interpret the order as a whole, applying general rules of construction. Br. of App. at 19 (citing *In re Marriage of Thompson*, 97 Wn. App. 873, 988 P.2d 499 (1999)). This step of the analysis is a de novo review. *Id.*

Jacobs highlighted the evidence from the record that Judge Toynbee's original intent was to admit the Codicil. Br. of App. at 19-21. Per the language of the order, Judge Toynbee reviewed everything that was presented and was "in all things advised." CP 9-10. The judge was therefore aware of the Codicil, which had been offered to probate along with the Will. CP 4-7. Sanders' insinuation that Jacobs somehow slipped the Codicil in without the judge's knowledge is contradicted by the record and

not supported by any evidence. It is also contrary to the presumption established by the court in *Bronson*, 185 Wash. at 545 (presuming that the court had knowledge of a codicil that was part of the record at the time of the original probate order). In the absence of any evidence that Judge Toynbee was unaware of the Codicil, this Court must also presume that Judge Toynbee knew of it and passed judgment on its acceptance or rejection.

Judge Toynbee admitted the will “offered herein for probate.” CP 11. This was a positive reference to both the Will and Codicil, together, as they had been offered. Sanders’ argument that the Codicil was rejected because it was not mentioned by name as a separate document is unavailing. After all, when a codicil is accepted, “the testator's will is then the will proper together with the codicil, and the two stand together as one document.” *Bronson*, 185 Wash. at 549 (Beals, J., dissenting).<sup>1</sup> In determining a testator’s intent, a codicil and will are construed together as one. *Estate of Smith*, 40 Wn. App. 790, 793, 700 P.2d 1181 (1985). In admitting the will that was offered, which had the Codicil attached, Judge Toynbee necessarily admitted the whole.

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<sup>1</sup> The reasoning in this dissent was largely adopted by the unanimous court in *Elliott*, 22 Wn.2d at 350 (“we will in large part follow the line of reasoning advanced by Judge Beals in his dissenting opinion in the *Bronson* case”).

Sanders' reliance on *Bronson* is misplaced because the orders in *Bronson* were materially different from Judge Toynebee's order here. In *Bronson*, a will and codicil were offered in the probate court. *Bronson*, 185 Wash. at 537. Two petitions were made: one seeking the admission of the will and another seeking an order to take the testimony of the witnesses to the codicil by deposition. *Id.* Two orders were entered: one admitting the will but making no mention of the codicil and another directing the deposition of the witnesses to the codicil. *Id.* at 537-38. There is no indication that these depositions were ever taken or submitted to the court.

It appears that the estate was administered under the terms of the will alone for three years, until the executor petitioned to admit the codicil. *Bronson*, 185 Wash. at 538. After "various proceedings," the trial court admitted the codicil. *Id.* The lead opinion, signed by only four of the nine justices, found that the petitioner "voluntarily asked the court to admit the will without the codicil," and thereby "waived the right to have the will modified in its terms by the terms of the codicil." *Id.* at 546. The lead opinion reasoned that the resulting rejection of the codicil by the trial court "was final and conclusive against the whole world, except only in the event of a statutory [will] contest" or a motion to vacate for fraud or mistake. *Id.* at 546-47.

In *Bronson*, the executor proceeded, after the trial court's original orders, to administer the estate under the will without the codicil, demonstrating his complicity in asking the court to admit the will without the codicil. But there is nothing in the record in this case to suggest that Jacobs did the same here. In fact, both Jacobs and all other interested parties proceeded under the Will **and the Codicil**, demonstrating that Jacobs had asked the trial court to admit both. Because Jacobs did not voluntarily seek to admit the will without the codicil, the reasoning of the lead opinion in *Bronson* cannot apply here.

It must be noted here that the lead opinion in *Bronson* is not precedent. It was signed by only four of the nine justices. Two justices concurred in the result, "under the particular facts in this case," but apparently rejected the lead opinion's reasoning. *Bronson*, 185 Wash. at 547-48 (Steinert, J., concurring). Because there was no majority, *Bronson* is not authority for Sanders' arguments.

Another significant factual distinction is that the trial court in *Bronson* entered two original orders: one admitting the will and one requiring further proof of the validity of the codicil. The combined effect of these two orders would have been to admit the will without the codicil and to reject the codicil until or unless it could be proven by competent evidence.

This case is significantly different from *Bronson*. Here, the trial court entered only one original order. That order admitted to probate the will that was offered, which included the attached Codicil. The conduct of Jacobs and all interested parties subsequent to the order demonstrates that Jacobs sought to have both the Will and the Codicil admitted. The trial court signed Jacobs' order without modification. *See* Br. of App. at 21.

Read as a whole, the original order expressed an intent to admit the entirety of what was "offered herein for probate": the Will and the Codicil, together. Sanders' arguments that such an intent was not expressed are unavailing. Her burden is to present evidence that Judge Toynbee expressed an intent to **reject** the Codicil. She has failed to do so. Contrary to her arguments, the record demonstrates that Judge Toynbee intended to admit both the Will and the Codicil.

Judge Lawler's subsequent order was contrary to the intent of the original order. Therefore it was beyond the scope of the trial court's authority under CR 60(a) and was an abuse of discretion. This Court should reverse the CR 60(a) order and remand for administration of the estate under the Will and Codicil.

**1.1.2 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.**

Jacobs argued in his opening brief that Sanders’ new-found argument that the Codicil was never admitted to probate was disingenuous because it contradicted her own prior positions and sworn statements. Br. of App. at 22-25. Jacobs recounted the history and context of those statements, demonstrating that Sanders always believed and acted as though the Codicil had, in fact, been admitted to probate. Br. of App. at 22-23. It was only after she slept on her rights and lost the opportunity to challenge the Codicil that she finally concocted the theory that the Codicil had never been admitted.<sup>2</sup> Br. of App. at 23-24.

Jacobs asked this Court to reject Sanders’ arguments on the basis of judicial estoppel. Br. of App. at 24-25. Sanders argues that judicial estoppel does not apply. But even if the formal elements of judicial estoppel are not strictly met, this

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<sup>2</sup> Sanders herself admits as much in her response brief, stating that at the time she signed her Disclaimer/Renunciation of Interest, she believed that the Codicil had been admitted to probate, and that she filed her motion “once she realized” she could argue the opposite. Br. of Resp. at 17. How convenient for her that this realization occurred to her after she had lost all other options to challenge the Codicil.

Court is still justified in viewing Sanders' arguments with skepticism and her interpretation of the facts with a grain of salt.

Sanders knew from the beginning that the Codicil was admitted. She never once intimated that she held a contrary belief. In fact, she **relied** on the admission of the Codicil when she renounced her interest in the Will but retained her rights under the Codicil. She cannot escape from this binding disclaimer.

Vacation or amendment of a final judgment is an equitable remedy. But Sanders comes before the Court with unclean hands. There is no equity in allowing Sanders to escape the effect of the Codicil after having slept on her rights until her opportunity to challenge the Codicil's validity had passed.

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

Jacobs also pointed out in his opening brief that there was no indication that Judge Lawler made any attempt to discern Judge Toynebee's intent in the original order. *See* Br. of App. at 26 and citations to the record therein. This, in itself, was an

abuse of discretion. Because Judge Lawler did not seek to discern the original intent, his CR 60(a) decision was based on untenable grounds.

Judge Lawler went straight to the merits of the original decision and substituted his own judgment of the Codicil for the original judgment of Judge Toynbee. Such an amendment to a final judgment is forbidden under CR 60(a).

As noted above, Sanders attempts to rely on Judge Lawler's reasoning as proof of Judge Toynbee's original intent. In essence, she says, "Judge Toynbee intended to reject the Codicil because Judge Lawler says it is invalid." The argument assumes its own conclusion and therefore cannot stand. Sanders asks this Court to conclude that the amendment was clerical because Judge Lawler says it is. But that would be abdicating this Court's duty to review Judge Lawler's decision. Even the abuse of discretion standard is not that deferential.

As outlined above, this Court must determine, de novo, the intent of the original order. If Judge Lawler's amendment was inconsistent with the original order, the amendment was beyond the scope of the trial court's authority and therefore was an abuse of discretion. This Court should reverse Judge Lawler's order and remand for administration of the estate under the Codicil.

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

Jacobs argued in his brief that the trial court erred in even considering Sanders' motion because it was an improper and untimely challenge to the validity of the Codicil. Br. of App. at 28-32 (citing, *e.g.*, *In re Estate of Jepsen*, 184 Wn.2d 376, 379-80, 358 P.3d 403 (2015)). If no party brings a proper and timely contest, the admission to probate is binding and final. RCW 11.24.010; *Jepsen*, 184 Wn.2d at 380.

Sanders' "Motion for Clarification" was nothing more than a thinly-veiled challenge to the validity of the Codicil. Br. of App. at 30 and citations to the record therein. The motion did not even mention CR 60. It did not set forth grounds for any change under CR 60(a) or (b). The only argument was that the Codicil failed to meet legal requirements for a valid will.

Sanders' argument that the motion was not a will contest does not hold water. A timely initiated will contest is required in order to challenge the "validity" of a will or codicil. *See Elliott*, 22 Wn.2d at 357. The statutory term, "validity" means "the genuineness or legal sufficiency of the will under attack, raising the question whether the will is legally sufficient in form, contents, and compliance with the statutory requirements as to execution." *Elliott*, 22 Wn.2d at 357. Thus, here, Sanders' motion attacking the legal sufficiency of the codicil was a will contest

and was required to be brought within the statute of limitations for a will contest.

As has already been addressed above, Sanders' argument that the Codicil was not admitted to probate finds no support in the record. As all the parties knew from the beginning, the Codicil was admitted. Sanders should not be allowed now to escape the consequences of sleeping on her rights while the statute of limitations passed. Her late, disingenuous motion was a will contest. The trial court erred in even considering the motion. This Court should reverse and remand for administration of the estate under the Codicil.

**1.3 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).**

Even if the trial court could have validly considered the merits of Sanders' motion, the trial court erred in holding the hearing without Jacobs' consent when Sanders had failed to confirm the hearing as required by local rule. Br. of App. at 32-35. A superior court may waive its own rules, but only where it does not result in injustice. *Foster v. Carter*, 49 Wn. App. 340, 343, 742 P.2d 1257 (1987).

Sanders' allegation that Jacobs' counsel has "attempted to use the rule to his strategic advantage and has been rejected every time" is irrelevant and not even supported by the record.

The record only reflects that Mr. Buzzard had “raised the issue before” and Judge Lawler had denied it. Sanders’ insinuation of bad faith is unsupported.

Additionally, counsel’s prior experience with Judge Lawler’s interpretation of the local rule has no bearing on the proper interpretation of the rule. Apparently this is an ongoing disagreement between Judge Lawler and Mr. Buzzard. Now this Court has the opportunity to settle the matter.

The local rule speaks in mandatory terms. It specifically provides for waiver of those mandatory terms only when the court and all parties agree. Under the plain language of the rule, there simply is no room for the trial court to waive the rule unless all parties are present and the court is prepared to hear the matter, in which case there is no reason why they should not consent to the hearing, satisfying the rule’s waiver provision.

But if a party is not present or not prepared for an unconfirmed hearing, in reasonable reliance on the plain language of the rule, and the court holds the hearing anyway, the party is necessarily prejudiced by being deprived of an opportunity to be heard. Such a unilateral waiver of the rule by the trial court should not be permitted.

If the trial court can hold an unconfirmed hearing in the absence of one of the parties and without their consent, the local rule itself becomes meaningless. This Court should interpret the

rule according to its plain, mandatory language and should hold that the trial court cannot waive that mandatory language in the absence of one of the parties and without the party's consent. This Court should reverse the trial court decision resulting from the improper hearing and remand for further proceedings.

**1.4 The Court should grant Jacobs' request for an award of attorney's fees and deny Sanders' request.**

Jacobs requested an award of attorney's fees under RCW 11.24.050 and RCW 11.96A.150, which give this Court discretion to award fees to any party from a variety of sources, as the court deems equitable, considering any factors the court finds relevant. Br. of App. at 35-36.

Jacobs argued that it would be equitable to award fees to him for having to fight Sanders' improper and untimely will contest. Sanders knew that the Codicil had been admitted to probate. She knew that she had slept on her rights and failed to timely challenge the Codicil. She knew that her motion was nothing more than a last-ditch, thinly veiled attempt to escape the consequences of the Codicil. Her motion was not brought in good faith.

Sanders does not respond to Jacobs' arguments, except to make her own request for an award of fees, claiming that she will be "entitled" to such an award as a prevailing party.

Sanders also cites RCW 11.96A.150 but apparently does not understand it. The statute does not “entitle” any party to an award of attorney’s fees. Rather, the statute grants the court broad discretion to award fees (or not) “in its discretion,” “to any party,” “from any party” or from the assets of the estate, “as the court determines to be equitable.” RCW 11.96A.150. Nowhere does the statute mention prevailing party or any entitlement.

Sanders fails to explain to the Court how an award of fees to her from any source would be equitable. Because her request is based solely on an erroneous interpretation of the statute, this Court should deny her request.

Jacobs has been up-front with all interested parties from the beginning. He requested the trial court admit both the Will and the Codicil only after believing he had obtained consent of the original beneficiaries. CP 87. After the trial court’s original order, Jacobs immediately notified the parties that the Codicil had been admitted. After they expressed concerns, Jacobs gave them ample opportunities to challenge the validity of the Codicil. The parties slept on their rights, and the original order became final. Sanders’ late “Motion for Clarification” was nothing more than an untimely will contest that the estate should never have had to face. Balancing the equities, this Court should order Sanders to pay Jacobs’ reasonable attorney’s fees incurred in the trial court and on appeal.

## **2. 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 29<sup>th</sup> day of January, 2020.

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