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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

JOSEPH JACOBS, Personal Representative of the Estate of ALLAN B.
PRATT, deceased,

Appellant/Moving Party,

v.

BEVERLY SANDERS, et al.,

Respondent/Non-Moving Party.

BEVERLY SANDERS'S RESPONDENT'S BRIEF

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I. INTRODUCTION

Appellant Joseph Jacobs's appeal is premised on the faulty assumption that the purported codicil was admitted to probate, and Respondent Beverly Sanders is making an untimely will contest. The record does not support this assumption. Rather, this case is about whether the trial court abused its discretion in granting Sanders's motion to clarify the Order Admitting the Will when no reference was made regarding the Purported Codicil.

Jacobs, the appointed personal representative, submitted the Last Will of Allan Pratt to probate, and included a Purported Codicil that was filed the same day. The Purported Codicil drastically changed Pratt's Will, and Jacobs stood to financially benefit as the purported codicil for the first time included gifts to him personally.

There is no dispute that the Purported Codicil is invalid. There is no dispute that the Last Will and Testament of Allan B. Pratt and the Purported Codicil were filed at the same time, under the same case number, in Lewis County by Jacobs. There is also no dispute that the Petition for Order Admitting the Will fails to mention the Purported Codicil, and the Order Admitting the Will did not reference the Purported Codicil. Despite these defects, Jacobs attempted to follow the Purported

Codicil instead of the Will. Sanders timely filed a motion under CR 60 to correct the mistake in the Order Admitting the Will.

The trial court granted Sanders's motion and entered an Order Correcting Scrivener's Error pursuant to CR 60(a), dated February 1, 2019 ("CR 60 Order"). The Order clarified that the Purported Codicil appended to the back of Decedent's will was not admitted to probate as part of the original Order Admitting Will to Probate, Confirming Appointment of Personal Representative, Adjudicating Estate Solvent, Granting Non-Intervention Powers and For Letters Testamentary ("Order Admitting Will").

The arguments now asserted by Jacobs have been rejected by the Washington Supreme Court in *In re Estate of Bronson*, 185 Wash. 536 (1936) on nearly identical facts. To succeed on appeal, Jacobs must show that the trial court's decision was based on untenable grounds or for untenable reasons. Neither exist in this case as the trial court properly confirmed that the invalid Purported Codicil was not admitted to probate. The trial court did not abuse its discretion in correcting the Order Admitting Will, and the trial court's decision should be affirmed.

II. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A probate court has inherent authority and jurisdiction to correct errors arising out of fraud or mistake in its own decrees, even in a nonintervention probate. The court therefore had jurisdiction to issue its CR 60 Order, and the court did not abuse its discretion in granting the Motion for Clarification.
2. The probate court's ruling clarifying that the un-signed and un-witnessed Purported Codicil had never been admitted to probate did not constitute a will contest, and was thus not subject to the four-month statute of limitation.
3. A probate court has discretion and authority to waive a provision of its own local rule; the Lewis County Superior Court's decision to proceed with the January 25, 2019 hearing was appropriate and in accordance with the local practice and customs.

III. COUNTERSTATEMENT OF THE CASE

This case pertains to the administration and distribution of the Estate of Allan B. Pratt. Allen Pratt ("Decedent") died on December 12, 2017, having validly executed a Last Will and Testament (the "Will") on February 26, 2014. CP 1-3. The Will named four devisees—the decedent's three sisters (Narelle Bukala, Linda Pratt, and Cheryl Hayden), and his former fiancée, Beverly Sanders. CP 5-6. Each devisee was to receive 25

percent of the Decedent's Estate, which the Inventory values at approximately \$515,000. CP 5; SCP, Dkt. 15 (Inventory and Accounting). The Will named Joseph Jacobs to serve as Personal Representative. CP 5. Jacobs received nothing under the Will. *Id.*

Jacobs filed a Petition on February 14, 2018 in Lewis County to admit the Will to probate. CP 1-3. The Petition referenced the Will and the fact that it was executed in the presence of two witnesses when Decedent was of sound mind. CP 1. The Petition, however, made no mention of a document dated July 18, 2017 that drastically changed the distributions identified in the Will, naming some 15 devisees and eliminating the Decedent's three sisters. CP 1-3. The 2017 document ("Purported Codicil") is mostly typewritten, with some handwritten annotations that do not appear to match the handwriting from the Will, is unsigned and unwitnessed. CP 7. It therefore does not comply with the execution requirements for a codicil under Washington law (RCW 11.12.020(1)). Though not referenced in the Petition, the Purported Codicil was filed with the court with the Will. CP 4-7. Notably, the Purported Codicil benefited Jacobs, who was omitted from the Will. CP 7.

The court entered the Order Admitting Will on the same date the Petition was filed. CP 9-12. Like the Petition, the Order Admitting Will specifically referenced the Will but was silent with regard to the Purported

Codicil. *Id.* The Order Admitting Will did not admit the Purported Codicil to probate, presumably because of the Purported Codicil's fatal defects. *Id.* The Certificate of Testimony and Proof of Last Will and Testament entered by the court on the same date as the Order Admitting Will does not certify the Purported Codicil or even mention it, again because the Purported Codicil was invalid. CP 8. The Order Admitting Will did contain several scrivener's errors: it listed the date of the Will as December 12, 2017 (which was in fact the date of Decedent's death), and listed all beneficiaries contained in both the Will and the Purported Codicil. CP 9-12.

Jacobs has administered the Estate as if the Purported Codicil is valid. CP 31. Jacobs's attorney, James Buzzard, sent Sanders a "Disclaimer/Renunciation of Interest" to sign that disclaimed her one-quarter interest in the Will in favor of what he called an "amendment." CP 20-21. On a phone call with Jacobs, who stands to receive more under the Purported Codicil, Sanders, who was not represented by counsel at the time, agreed to sign the disclaimer, unaware that the Purported Codicil was not valid under Washington law and was not admitted to probate. CP

20-21; 26-27; 195-196. Sanders never acknowledged that the Purported Codicil was admitted to probate, but only that it was filed.¹ CP 26-27.

On December 5, 2018, after obtaining counsel, Sanders filed a Motion for Clarification Regarding Order Admitting Last Will and Testament. CP 30-32. The Motion sought clarification of whether the Order Admitting Will intended to probate the Purported Codicil as the Purported Codicil was not admitted to probate, yet the Personal Representative was treating the Purported Codicil as valid. *Id.*

The Motion was noted for hearing on January 25, 2019. CP 54. Mr. Buzzard, attorney for the PR, did not attend the hearing because, he argues, the hearing had not been confirmed two days prior, as required by the local rule. CP 53. The court administrator called Mr. Buzzard, giving him an opportunity to appear. CP 60; RP, January 25, 2019, at 2. He refused to attend, and the Motion was heard one hour after its scheduled time. CP 60. On the record, the Court explained:

[Mr. Buzzard] apparently took the position with court administration that since this argument had not been confirmed by the moving party that under the local rule the case was dismissed or that the hearing was stricken. And that rule has never been allowed to be used offensively like that. The

¹ Jacobs discusses the Will Contest filed by Narelle Bukala, but Ms. Bukala was not a party to the Motion for Clarification Regarding Order Admitting Last Will and Testament, and was represented by a different attorney at the time, and is not a party to this Appeal. Thus Ms. Bukala's actions or litigation position has no relevance to this appeal. The same is true of the Personal Representative's earlier TEDRA Petition. The question before this Court is not whether the dispute *could* have been resolved in another manner, but whether the CR 60 Order was proper.

confirmation rule is for the court may strike it. But we normally hear all cases whether they're confirmed or not. It's more of a convenience for the court than anyone else. Mr. Buzzard knows that. He's raised that issue before. He's never been allowed to strike a case, an argument. So we're going to move ahead with this.

RP, January 25, 2019, at 2-3 (emphasis added). Thus, despite attempting to use the court rule offensively in the past and always having been rejected, Mr. Buzzard again chose to not attend with full knowledge that the Court intended on proceeding without him. The Court then addressed the Motion, and ruled that the Purported Codicil "is clearly not a codicil. It is not signed. It is not witnessed." *Id.* at 3. The Court continued the matter for one week to allow Sanders's counsel to present a written order confirming its oral ruling. *Id.* at 5-6.

On February 1, 2019, the Court issued the Order at issue in this Appeal, correcting the scrivener's errors pursuant to CR 60(a). CP 54-55. The Order confirmed that the Purported Codicil was invalid and never admitted to probate. *Id.* Jacobs timely appealed the Order Correcting Scrivener's Error. CP 78.

IV. ARGUMENTS

A. Standard of Review

An appellate court reviews a trial court's decision to grant or deny a CR 60(a) motion for an abuse of discretion. *Shaw v. City of Des Moines*, 109 Wn. App. 896, 900, 37 P.3d 1255 (2002); *see also Presidential*

Estates v. Barrett, 129 Wn.2d 320, 325-26, 917 P.2d 100 (1996) (applying an abuse of discretion standard of review). “The decision will not be overturned on appeal unless it plainly appears that the trial court exercised its discretion on untenable grounds or for untenable reasons.” *Shaw*, 109 Wn. App. at 901.

B. The trial court properly corrected the mistake in the Order Admitting Will under CR 60(a) by clarifying and confirming that the invalid Purported Will was not admitted to probate.

Jacobs first argues that “finality of judgments” must preclude the trial court from correcting a mistake or error in the Order Admitting Will. Jacobs is mistaken. The underlying Order Admitting Will is not a final “judgment” that cannot ever be modified. Black’s Law Dictionary defines judgment as “[a] court’s final determination of the rights and obligations of the parties in a case.” *Black’s Law Dictionary* 858 (8th ed. 2004). The Order Admitting Will and the CR 60 Order make a ruling as to the *in rem* property of decedent’s Estate that must then be effectuated through the probate process (probate proceedings are *in rem*, not *in personam*).

“The probate of a will determines whether there is a will or not, not the rights of the parties under the will.” *In re Estate of Black*, 116 Wn. App. 492, 499, 66 P.3d 678 (2003). Ultimately it is the rights of the decedent, and not the rights of the beneficiaries, that the probate court is called upon to uphold. “To do so, the court must retain the full range of its

powers under the probate statutes to order the proceedings and determine all matters relative to the status of the will in the manner the court deems most likely to accomplish the testamentary wishes of the decedent.” *Id.* at 500. The Order Admitting Will was not the “final determination” and is not a judgment.

The trial court did not abuse its discretion when it granted the CR 60(a) motion as the Purported Codicil was not admitted to probate, yet Jacobs as personal representative was following the directives in the Purported Codicil. The trial court was well within his rights to look at the underlying circumstances and conclude that there were mistakes in the Order Admitting Will. CR 60(a) provides “[c]lerical mistakes in judgment, 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).

In determining whether a mistake was clerical (such that it can be corrected by CR 60(a)) or judicial, the court considers whether “the judgment, as amended, expressed the trial court’s intention, as expressed on the record at trial . . .” *Presidential Estates v. Barrett*, 129 Wn.2d 320, 325, 917 P.2d 100 (1996). In this case, the Order Admitting Will was admitted *ex parte*, so there is no oral record or ruling reflecting the court’s

original intent. However, the probate court's recitation at the hearing on the Motion for Clarification demonstrates that it was never the court's intent to admit the Purported Codicil to probate. The court notes that "[t]he 2017 document, the one that is apparently purported to be a codicil, 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. It appears to me that this is a document that was typed by someone else that refers—because at the very top line of it says—has the date and then “Allen Pratt changed will” and then a different disposition of assets is listed below that. So this does not constitute a valid codicil.” RP, January 25, 2019 at 3.

The court goes on to specify what needs to be corrected: “[T]his is where the scrivener's error comes in, it says that the ‘last will and testament of Allen Pratt dated the 12th day of December, 2018,’ which is not the date of the will or the alleged codicil, that is the date of death, so it should—that needs to be corrected to recite that the will dated February 26th, 2014, is admitted to probate. The order that was submitted does not even reference a codicil, does not list the—reference the July 18th, 2017 document.” *Id.* at 4.

The CR 60 Order as corrected embodies the trial court's intention to admit the Will to probate, not the Purported Codicil, demonstrating

under *Presidential Estates* that the error was clerical, subject to correction under CR 60(a). There was no material alteration to the Order Admitting Will in this case. As discussed above, the Purported Codicil was never admitted to probate. The Order Admitting Will never referenced it. Thus, the clarification of the fact that it was not included, does not constitute a substantive or material change. The correction of the scrivener's error reciting the wrong date for the Will to the correct date of the Will, February 26, 2014, demonstrated that it was the Will that was always admitted, not the Purported Codicil. The CR 60 Order was a proper correction of a clerical mistakes arising from oversight or omission, as expressly authorized by CR 60(a).

The Washington Supreme Court addressed similar facts in *In re Estate of Bronson*, 185 Wash. 536 (1936). In that case, the last will of Ira Bronson was filed along with a petition asking that the will be probated. *Id.* at 537. At the same time, a purported codicil was also filed with the clerk's office. The codicil was executed three years after Mr. Bronson's will was executed, and the codicil changed certain bequests made in the will. *Id.* Similar to here, an order was entered admitting the will, but there was no mention of the codicil in the order. *Id.* However, unlike this case, the codicil in *Bronson* appeared to be valid. The nonintervention will

continued through probate until an issue about the codicil was raised by a beneficiary. *Id.* at 538.

A motion was made to probate the codicil three years after the will had been admitted to probate, and the codicil was admitted to probate. An appeal followed, and a motion to dismiss the appeal was filed and denied by the Court. *Id.* The Court noted that the will and codicil were filed at the same time and were numbered in the case, but the petition for the probate of the will did not refer to the codicil, nor was the codicil mentioned in the order admitting the will to probate. *Id.* at 545. “The will and codicil, being part of the record, were before the court and presumably known to the court when the decree was entered admitting the will to probate.” *Id.* The Court continued: “[w]e cheerfully assume for present purposes... that the petition for probate of the will and the filing of the will and the codicil therewith conferred upon the court jurisdiction to pass upon both the codicil and the will and to admit the will, with or without the codicil, according to the proof.” *Id.* at 546. The Court held that the proponents of the will knew of the codicil and its terms, and the Court did as well. *Id.* “With full knowledge, therefore, when the petitioner voluntarily asked the court to admit the will without the codicil, he, either properly or mistakenly, abandoned and waived the right to have the will modified in its terms by the terms of the codicil....” *Id.*

Importantly, the Court stated that the remedy for the will petitioner was to file a [CR 60] (Rem. Rev. Stat. § 464, renumbered to RCW 4.72.010) motion within one year to petition for the vacation or modification of that order. *Id.* at 546-47. The *Bronson* case is notable for several reasons: (1) if a will and codicil are filed at the same time, it is presumed that the court is aware of the codicil and its contents, and if the codicil is not mentioned in the order admitting the will, then the court declined to admit the codicil; and, (2) it confirmed that the proper process to seek clarification is a CR 60 motion. Accordingly, before proceeding to administer the codicil that was not admitted to probate, Jacobs should have sought clarification through a CR 60 motion. Because he failed to do so, Sanders properly filed the Motion for Clarification. CP 30-32.

Sanders did not make a legal challenge under CR 60(a), as Jacobs alleges. While the trial court correctly concluded that the Purported Codicil is invalid, a fact not challenged by Jacobs, this ruling was part of the overall clarification that the Purported Codicil was not admitted to probate, as reflected by the Order Admitting Will. Since Jacobs was following the directives from the invalid Purported Codicil, it was necessary to seek clarification.

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1. *The record demonstrates that both the Will and Purported Codicil were submitted to Judge Toynebee, but only the Will was admitted.*

Jacobs filed both the Will and the Purported Codicil in the same matter, and submitted both to Judge Toynebee *ex parte*. Whether or not the codicil was admitted is best viewed in light of what was submitted to the *ex parte* court. There was a Petition for probate of will. That Petition is utterly devoid of any mention of the Purported Codicil. The Petition spoke of the Last Will and Testament of Alan Pratt. It recited that it was properly executed and witnessed. When it set forth its requested relief, it requested that only the Last Will and Testament be admitted.

The Certificate of Testimony followed the same pattern. No mention of the Purported Codicil, only that the will had the proper formalities. CP 8. The Order, which was presented to the Court for signature, did not state that the Purported Codicil was admitted to probate. CP 9-12. In fact, the only mention in the Petition or Order is of the beneficiaries under the Purported Codicil. The Order also mentions beneficiaries under the Will that were omitted in the Purported Codicil—the Decedent’s sisters. This serves only to demonstrate the confusion surrounding the Order Admitting Will.

As stated in *Bronson*, the proponent of the will knew of the Purported Codicil and its terms, and the Court did as well. “With full

knowledge, therefore, when the petitioner voluntarily asked the court to admit the will without the codicil, he, either properly or mistakenly, abandoned or waived the right to have the will modified in its terms by the terms of the codicil....” *Bronson*, 185 Wash. at 546.

The Purported Codicil was not admitted to probate, likely because it is invalid as it fails to meet the statutory formalities. A codicil must be executed with the same testamentary formalities as a will. RCW 11.12.020 requires a will to be in writing, signed by the testator, and attested by two or more competent witnesses. It is undisputed that this codicil does not satisfy the statutory requirement and is not subject to probate.

In response, Jacobs asserts that because the codicil was neatly tucked into the court record, there should be a presumption that not only was the court aware of it, but the court intended to admit it to probate. This novel theory is contrary to *In re Estate of Bronson* and is submitted with no authority supporting his position. Jacobs also assumes that because the Purported Codicil was not rejected, it was admitted. There is also no authority for this rule. To the contrary, RCW 11.20.020 requires a court to accept or reject each document separately. A codicil is not admitted to probate by virtue of being attached to a will that was admitted. There was neither an order admitting nor rejecting the codicil—this is precisely why the Order Admitting Will required clarification.

2. *Judicial estoppel does not apply in this case, and Sanders is not precluded from arguing that the Purported Codicil is invalid and was never admitted to probate.*

Jacobs makes a new argument on appeal that Sanders was precluded from arguing the Purported Codicil is invalid because she took a contrary position when she signed the Disclaimer/Renunciation of Interest prepared by Jacobs's attorney. Br. Of App., p. 22. Generally, "appellate courts will not address arguments on appeal that were not asserted by the appellant before the trial court." *State v. Lazcano*, 188 Wn. App. 338, 354 (2015); RAP 2.5(a). "The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal." *Id.* at 356. Jacobs's new argument should not be considered on appeal since it was not raised before the trial court. However, if the court entertains the new argument, it will find that the argument fails because judicial estoppel simply does not apply in this situation.

Judicial estoppel only applies if a party's prior opinion benefited the party or was adopted by the court. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 904 (2001). As Jacobs admits in his Brief, the will contest was

dismissed for failure to serve, and Jacobs dismissed the TEDRA proceeding. At no point did a court adopt or rely upon any position advanced by Sanders. Further, Sanders's declaration in fact says "I never agreed to the admission of the purported Codicil" and that she "contests the admission of the purported Codicil to probate." CP 26-27. Neither of those statements are an admission that the codicil was admitted to probate.

Similarly, the Disclaimer/Renunciation of Interest was solely based upon the mistaken impression that the Purported Codicil was admitted to probate by Judge Toynbee. Once she realized this was not the case, she filed the Motion for Clarification. CP 30-32. Contrary to Jacobs's unsupported position, Sanders did not file a will contest, and the TEDRA statute of limitations was inapplicable. *See In re Estate of Bronson*, 185 Wash. 536 (1936). Sanders's position in the Disclaimer did not benefit a party and it was never adopted by any court. Jacobs's newly raised judicial estoppel argument fails as a matter of law.

3. *A probate court retains inherent authority to make decisions even in a nonintervention probate.*

A superior court sitting in probate matters retains all of its powers as a court of general jurisdiction. *In re Estate of Elliott*, 22 Wn.2d 334, 354, 156 P.2d 427 (1945). "[P]robate courts have been given full and ample power and authority to administer and settle all estates of decedents . . . and they have full power and authority to proceed with such

administration and settlement in any manner and way which to the court seems right and proper . . .” *Id.* . . . To further that end, the probate court is “authorized to make, issue, and cause to be filed or served, any and all manner and kinds of orders . . .” *Id.* . . .

Jacobs argues that because the probate court allowed the PR to proceed with nonintervention powers, the court had no authority to clarify its prior order. Jacobs argues that the only way to invoke the court’s jurisdiction in this case was through the initiation of a TEDRA proceeding, RCW 11.96A. Jacobs cites *In re Estate of Rathbone* for the proposition that the nonintervention statutes grant superior courts limited authority to address the specific issue addressed in those statutes and therefore must be invoked by a moving party. *In re Estate of Rathbone* 190 Wn.2d 332, 341, 412 P.3d 1283 (2018).

But *Rathbone* stands for the proposition that when a specific statutory authority is invoked, a probate court may not take actions that exceed the authority of that statute. It does not hold that the statutes cited in that case (RCW 11.68.110; .070; and RCW 11.96A) are the only statutes that grant authority or jurisdiction in a nonintervention will case. It also does not hold that a court lacks authority or jurisdiction under the probate statutes to correct mistakes or errors in its rulings. To the contrary, the statutes that grant a court authority to probate a will in the first place

confer certain authority and jurisdiction to the probate court so long as the estate is open.

For instance, in the case *In re Estate of Elliott*, the Washington Supreme Court considered whether a probate court had the authority to admit a later will to probate, after the time for a will contest passed. *Id.* at 338. The Court, explaining in detail the authority of a probate court, unambiguously held that such a court has inherent authority to probate a later will, so long as the estate was still open. *In Re Elliott*, 22 Wn.2d at 361.

These statutes confer upon the probate court plenary jurisdiction and power over the probate of wills, and in consequence thereof, the probate court may do any and all things essential to make its action effective in the premises. 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 as incidental to its general powers. So long as the court retains its grip upon the assets of an estate, it has the power to control their distribution, and if, in order to distribute the assets to the parties lawfully entitled thereto, it is necessary to vacate an earlier order or decree rendered *ex parte*, the court has that power.

Elliott, 22 Wn.2d at 355 (citing *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 P. 502 (1903)) (emphasis added). “Under the probate statutes, the court is empowered to receive information and argument about the estate until final distribution is completed.” *In re Estate of Black*, 116 Wn. App. at 499 (2003).

Jacobs's argument in this case is akin to that rejected in *Elliott*—that case made clear that the probate statutes constitute a statutory exception (to use the language of *Rathbone*) to the court's limited authority that may be invoked by a party, and was invoked by Sanders in this case. This authority exists even in a nonintervention probate. "So long as the court retains its control over the assets of an estate, it may vacate an earlier order rendered *ex parte*, if the necessities of the case demand that previous orders be vacated or revised in order to effect justice." *See In re Estate of Campbell*, 46 Wn.2d 292, 295, 280 P.2d 686 (1955) (probate case with nonintervention will) (probate case with nonintervention will).

The adoption of the TEDRA statute does not change the applicability of the court's reasoning in *Elliott*. The TEDRA statute specifies that its provisions "shall not supersede, but shall supplement, any otherwise applicable provisions and procedures" contained in Title 11 RCW. RCW 11.96A.080(2). Thus, none of the court's inherent authority under the probate statutes has been superseded or supplanted by TEDRA. *See, e.g., In re Estate of Kordon*, 157 Wn.2d 206, 211-12, 137 P.3d 16 (2006) (TEDRA does not replace other probate statutes but adds to them) (TEDRA does not replace other probate statutes but adds to them); *Rathbone*, 190 Wn.2d at 345 (TEDRA does not independently give trial

courts authority when there is another statute through which a beneficiary must invoke authority).

It is undisputed that the Estate remains open in this case, and the probate court retains control over the Estate's assets. Sanders properly invoked the court's inherent authority under the probate statutes in this case by filing her CR 60 Motion for Clarification.² "It is impossible to deny the power of a court of probate to . . . correct errors arising out of fraud or mistake in its own decrees." *Elliott*, 22 Wn.2d at 352 (citing *Waters v. Stickney*, 94 Mass (12 Allen) 1, 90 AM. Dec. 122 (1866)). This is certainly a case of mistake, and very possibly fraud as well, as the manner in which Jacobs attached the clearly invalid codicil that materially benefited him to the Will, while purposefully declining to mention its existence in any pleading, smacks of intentionality. But regardless, the court need not make such a finding; the fact of the mistake in the Order Admitting Will is enough to enable the probate court to invoke its inherent authority to correct the error.

4. Sanders's Motion for Clarification did not constitute an untimely Will contest.

Jacobs also argues that the CR 60(a) Motion for Clarification should not have been ruled upon because it constituted an untimely will

² The court also has inherent authority under the Civil Rules to correct errors in its rulings *sua sponte*, or upon request of a party. The court's ruling was also proper under that authority.

contest. Not every judicial action which has the act of invalidating a will constitutes a will contest. For instance, “[t]he offer to probate a later will does not constitute a contest of a prior will already probated . . . therefore the six month statute of limitations does not apply.” *Elliott*, 22 Wn.2d at 356. This is despite the fact that the impact of the probate of a later will is to invalidate the prior will.

Sanders’s Motion seeking clarification regarding the court’s original Order Admitting Will does not constitute a will contest. It is a misrepresentation of the facts to claim that the Purported Codicil was “admitted” to probate in the first instance. The Order Admitting Will does not mention the Purported Codicil, and neither does the Certificate of Testimony and Proof of Last Will and Testament entered by the Court on the same date. In the Order Correcting Scrivener’s Error Pursuant to CR 60(a) (so titled at the request of the probate court) the court clarified that “[t]he document dated July 18th, 2017, is not a codicil and is not admitted to probate.”

RCW 11.24.010 provides that a person interested in a will “shall appear within four months immediately following the probate or rejection thereof.” This statute does not apply because there was neither a probate of the Purported Codicil in this case, nor a rejection of it. The original Petition to Admit Will referenced only the Will. The Order Admitting Will

specifically referenced the Will but was silent with regard to the Purported Codicil. The Certificate of Testimony and Proof of Last Will and Testament entered by the Court on the same date as the Order does not certify the Purported Codicil or even mention it. There was no rejection of it, because Jacobs never actually sought to have the Purported Codicil admitted to probate—no doubt because he knew that the unsigned and unwitnessed document was inadmissible as a valid codicil. Instead, he covertly attached the Purported Codicil, which financially benefited him, to the Will but not mentioning it, thereby allowing his argument that it had been “admitted” without the probate court ever having considered the document.

But when this was brought to the probate court’s attention, the court clarified that document was not a codicil and was not admitted to probate. The request for clarification—which was brought due to a genuine question over the impact of the attachment of the Purported Codicil to the Order—was not a Will Contest. While Jacobs complains that the Court’s Order “removes” sixteen beneficiaries from entitlement to assets of the Estate, the fact is that these beneficiaries never had any rights under the Will, and the Purported Codicil is patently deficient under Washington law. The probate court’s purpose is ensure that the probate is conducted in accordance with Washington law. Clarifying that an

unsigned, unwitnessed document with hand-written interlineations was not admitted to probate is consistent with that purpose.

Jacobs also argues that the fact that the Order Admitting Will recites all of the individuals listed in the Will and all of the individuals listed on the Purported Codicil as beneficiaries demonstrates that the Purported Codicil was admitted to probate. Yet this only demonstrates Jacobs's attempt to try and have the Purported Codicil admitted without the court ever reviewing the patently invalid Codicil. If the Purported Codicil was in fact valid and admitted, as Jacobs claims, then it would act to remove Decedent's three sisters—Narelle Bukala, Linda Pratt, and Cheryl Hayden—as beneficiaries. Yet they were also listed as beneficiaries in the Order Admitting Will, undermining his argument. If the Purported Codicil had been valid, it should have been the sole document admitted to probate, and beneficiaries under it the only individuals entitled to receive Estate distributions. But it was not, and they were not. Jacobs instead admitted the Will, and sought to slide the Purported Codicil in on its coat tails. This was not effective in the first instance.

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5. *The trial court had discretion to waive the confirmation requirement of the Local Rule and hold hearing on Sanders's Motion for Clarification.*

A trial court has inherent power and discretion to waive local rules. *Foster v. Carter*, 49 Wn. App. 340, 343, 742 P.2d 1257 (1987); *Ashley v. Superior Court*, 83 Wn.2d 630, 636, 521 P.2d 711 (1974). “Where the issue is the interpretation of a local rule by the trial court, that court is the best exponent of its own rules . . .” *Snyder v. State*, 19 Wn. App. 631, 637, 577 P.2d 160 (1978).

“[A] superior court may, for good reason, relax and suspend its own special rules of procedure; observation of local rules is largely discretionary in the trial court.” *Snyder*, 19 Wn. App. at 637. A trial court’s application of a local rule will not be disturbed on appeal absent evidence of an injustice. *Foster*, 49 Wn. App. at 343. To the contrary, the court will presume that the superior court disregarded its own rule for sufficient cause. *Snyder*, 19 Wn. App. at 637.

It was within the probate court’s inherent power and discretion in this case to waive the local rule requiring confirmation of a hearing two days’ prior. There was no injustice here, as Jacobs and his counsel, Mr. Buzzard, had received proper notice of the hearing on the Motion and were aware of its date and time. Jacobs’s counsel could have called Sanders’s counsel if there was a legitimate question regarding whether the

hearing was set to move forward, but he did not, instead making a calculated decision to attempt to use the local rule offensively and not appear at the hearing. This is despite the fact that Mr. Buzzard knew the superior court did not permit use of the local rule in an offensive matter, and that non-confirmed hearings regularly went forward. Further, Mr. Buzzard had ample opportunity to make it to court once the court administrator contacted him to advise him that the hearing was proceeding, and he did not. There is no injustice here.

Jacobs's argument before the superior court, and again before this court, attempts to exalt form over substance—insisting on the letter of the local rule rather than the substance of getting the matter heard. The superior court was fully within its discretionary authority to dispense with the requirement of its own local rule and hear the matter. That decision should not be disturbed on appeal. There is no error at all, and there was no departure from the accepted and usual course of proceedings, the probate court explained on the record that the confirmation rule is commonly dispensed with, and Washington appellate courts have affirmed the right of a superior court to waive its own local rules.

As the trial court explained, the Local Rule is for the benefit of the Court, and it is the Court's practice to hear matters that are not confirmed. This is a well-known practice in Lewis County, as the trial court made

statements that Jacobs's counsel has attempted to use the rule to his strategic advantage and has been rejected every time. This case should not be any different. An attorney that has tried several times in the past to use the Local Rule in an offensive manner, and been rejected every time, takes an extreme gamble when he continues the same unsuccessful approach without regard to the consequences. The fault does not lie with the trial court—it lies with Jacobs's counsel who took a gamble and lost.

6. Sanders is entitled to her fees and costs on appeal pursuant to RCW 11.96A.150 and RCW 11.24.050.

In a TEDRA action, the court may award reasonable attorneys' fees to any party from any other party or from the assets of the estate. RCW 11.96A.150.³ Under this statute, a court may award attorney fees to any party as part of any Title 11 RCW action, not just those arising in a TEDRA action. *See In re Guardianship of Matthews*, 156 Wn. App. 201,

³ RCW 11.96A.150 provides:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

213 (2010). As the prevailing party, Sanders is entitled to her reasonable attorneys' fees and costs on appeal because this is a matter arising under Title 11 RCW.

V. CONCLUSION

The Purported Codicil was not admitted to probate, yet the personal representative administered the Pratt Estate according to the terms of the Purported Codicil, which materially and significantly benefited him personally. The trial court did not abuse its discretion in granting the CR 60 Motion to Clarify that the Purported Codicil was not admitted to probate and that the document is invalid. The trial court's ruling should be affirmed and attorneys' fees and costs granted to Sanders.

DATED this 9th day of December, 2019.

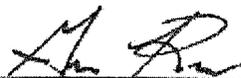
Respectfully Submitted,

LANDERHOLM, P.S.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 9th day of December, 2019, a true and correct copy of the foregoing **RESPONDENT BEVERLY SANDERS'S REPLY BRIEF** was delivered via first class United States Mail, postage prepaid, to the following:

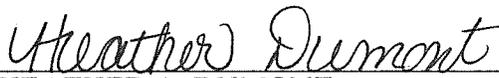
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: December 9, 2019

At: Vancouver, Washington


 HEATHER A. DUMONT

LANDERHOLM, P.S.

December 09, 2019 - 1:46 PM

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