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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

SUPREME COURT
STATE OF WASHINGTON

AARON L. LOWE, Son of Decedent

Petitioner/Appellant

v.

LONNIE LOWE, Individually and as Personal Representative of the Estate of Betty L. Lowe, Deceased.

Respondent/Appellee

Division III No. 34751-6-III

PETITION FOR REVIEW OF UNPUBLISHED COURT OF APPEALS OPINION DATED JANUARY 23, 2018

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I. IDENTITY OF PETITIONER

Aaron L. Lowe, Petitioner/Appellant, is the son of Donald and Betty L. Lowe, both deceased. Aaron is Trustee of the Donald E. Lowe Trust; the residuary beneficiary of the will of Donald E. Lowe and one of two or three residual beneficiaries of the will of Betty Lowe.

II. COURT OF APPEALS' DECISION

The review is sought on the Division III Opinion dated January 23, 2018, No. 34751-6-III. The Opinion, attached as Appendix A, is an unpublished opinion unofficially reported at 2018 WL 526720 (2018).

III. ISSUES PRESENTED FOR REVIEW

1. The decision of the Court of Appeals, Division III, on the right of a party to testify is in direct conflict with their own case, *In re Marriage of Ebbighausen,* 42 Wash.App. 99, 708 P.2d 1220 (Div. 3, 1985) and the Division I case of *State v. Cayetano-Jaimes*, 190 Wash.App. 286, 297-8, 359 P.3d 919 (Div 1, 2015) upholding constitutional rights to call witnesses in one's own behalf. At page 8, the Appellate Court Opinion held there was no abuse of discretion as "Aaron's lawyer was present and available to voice any objections." *Ebbighausen supra* at 103, holds the opposite. The lawyer cannot surrender the client's constitutional right. Therefore, RAP §§

13.4(b)(2) and 13.4(b)(4) allow acceptance under both subsections.

2. The decision of the Court of Appeals in this matter is in conflict with The Division III Decision of *August v. U.S. Bancorp*, 146 Wash.App. 328, 341, 190 P.3d 86 (Div. 3, 2008) holding that closing an estate on one issue is not res judicata to another issue where only evidentiary facts and not ultimate facts were reviewed in the first issue. It is also in conflict with the decision of this Court in *In re Peterson's Estate,* 12 Wash.2d 686, 123 P.2d 733 (1942), holding that a petition for final account can correct a prior decision in the probate, even if the statute provides that the prior decision is conclusive. Accordingly, review is acceptable under RAP § 13.4(b)(1) and § 13.4(b)(2).

IV. STATEMENT OF THE CASE

Procedure at the Hearing

The transcript of the August 26, 2016 hearing to close the Estate indicates that Petitioner's attorney asked: "Your Honor, excuse me I believe the court asked that Aaron L. Lowe be connected by telephone." The Court responded "Okay. And we'll get him on the line. I'm perfectly happy to do that." VRP 5. Aaron L. Lowe's cell phone was dialed by Tuija, the court bailiff. Tuija replied "Your Honor, I got Mr. Lowe's voice mail." The Court

stated "okay" and Tuija responded "And I left him a message." VRP 6.

Background

Donald E. Lowe and Betty L. Lowe had three sons: Larry Lowe, Aaron L. Lowe and Lonnie D. Lowe. CP 11. Donald E. Lowe died on April 16, 2003. CP 95. Betty Lowe died October 1, 2011. The abuser amendment was not allowed at the September 17-19, 2013 trial. *In re Estate of Betty Lowe*, 191 Wash.App. 216, 361 P.3d 789 (2015). CP 42. The Court never ruled on the ultimate abuser law. Aaron L. Lowe, if allowed, could establish all facts proving Lonnie Lowe was the financial abuser of Betty Lowe and not entitled to any of her estate. See CP 1-110. The hearing to close the Estate was in the same probate as the *Estate of Lowe*, 191 Wash.App. 216, 361 P.3d. 789 (2015). Appeals Opinion, page 1. An Order of Solvency had been entered but the Personal Representative reopened the Estate to make the distribution. Appeals Opinion, page 7. The Court approved the distribution.

V. ARGUMENT

A. The Failure to Grant a Continuance so that Petitioner Aaron Lowe could Testify was Reversible Error.

The Appellate Court Opinion, at pages 6, 7 held that the Court did not abuse its discretion by failure to allow Aaron L. Lowe to testify. The Court granted permission for Aaron Lowe to testify telephonically in accordance

with CR 43(a)(1). *In re Marriage of Ebbighausen,* 42 Wash.App. 99, 708 P.2d 1220 (1985) held that presence of the party's attorney was not sufficient "Any stipulation or agreement by counsel to grant sole custody, without his client's permission, without a hearing, compromised Mr. Ebbighausen's substantial right to present the merits of his request." *Id.* at 103-4. Aaron Lowe cited this case at page 16 of his Opening Brief. The Appeals Court never reviewed the case. Aaron L. Lowe had personal first-hand lifetime knowledge. Like *Ebbighausen,* his attorney could not substitute for lifetime personal knowledge. The Appeals Opinion, at page 8, relied on "Aaron's lawyer's" presence. The cases are in conflict. Another Division III case applies. *Baxter v. Jones*, 34 Wash.App. 1, 658 P.2d 1274 (Div III, 1983) reversed a civil case where testimony was terminated due to afternoon termination of time set by the court, "fundamental fairness" was violated. *Id.* at *5.

Aaron L. Lowe, pursuant to RAP 10.8, sent an additional authority to the Court, *State v. Cayetano-Jaimes*, 190 Wash.App. 286, 359 P.3d 919 (Div. 1, 2015). *Cayetano* reversed a decision denying phone testimony "because the state cannot show the error was harmless beyond a reasonable doubt." *Id.* at 289. The Court also defined abuse of discretion. "A court

abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. A court bases its decision on untenable grounds or reasons when the court applies the wrong legal standard or relies on unsupported facts." *Id.* at 295. The Court applied the state constitutional due process clause. Wash. Const. art. 1, § 3. The due process clause does not limit its application to criminal cases.

The Appellate Court Opinion, at page 8, relied on federal cases, *Kulas v. Flores,* 255 F.3d 780 (9th Cir. 2001) and *Faucher v. Lopez,* 411 F.2d 992, 996 (9th Cir. 1969), cases that did not involve the Washington Constitution. Washington's Constitution, Art. 1, § 3, requires due process and is more proactive. See *State v. Foster,* 135 Wash.2d 441, 957 P.2d 712 (1998). "Live testimony is preferred because it is believed that face-to-face confrontation enhances the accuracy of factfinding." *Id.* at 465. See also, *State v. Gunwall,* 106 Wash.2d 54, 58, 720 P.2d 808 (1986). *Bellevue School District v. E.S.*, 171 Wash.2d 695, 257 P.3d 570 (Wash. 2011) states that Art. 1, § 3 of Washington's constitution "offers broader due process protection than its federal counterpart." *Id. at 703.* The failure to allow testimony violated the Washington Constitution art. 1 § 3 and the U.S. Const. Amendment 14. Here, Aaron L. Lowe, Appellant and beneficiary, due to

circumstances completely beyond his control could not be connected by telephone as he was in a hospital that prevented the connection of his cell phone. The reason for failure to connect was unknown to the Court or counsel. The hearing proceeded without the testimony of Aaron L. Lowe. He possessed extensive first person testimony to present based upon his own personal knowledge as a lifetime family member. The testimony would have proven that Lonnie Lowe purloined by far the largest asset of the Estate and was the financial abuser of his mother, Betty Lowe. The evidence would have returned Betty Lowe's assets for distribution to Larry Lowe, another brother and Aaron Lowe, equally. The provisions of RCW § 74.34.020 et seq, 11.84.010, 030 and *Gradinaru v. State of Washington Dept. of Social and Health Services*, 181 Wash.App. 18, 24, 325 P.3d 209 (Div. 1, 2014) and *Estate of Haviland*, 177 Wash.2d 68, 301 P.3d (2013) would have applied. The abuser statutes are to be applied broadly. RCW § 11.84.900. The court of appeals decided the case on procedural grounds and did not reach the merits. The Appeals court held that the right to be personally present was limited to criminal proceedings (page 7). It failed to recognize its own civil holding.

B. Closing of the Estate is not Barred by Res Judicata as a Probate is an Ongoing Proceeding.

In *August v. U.S. Bancorp,* 146 Wash.App. 328, 190 P.3d 86 (Div. 3, 2008) the court approved fees and claims against a sister but did not comment on Nick August's request to delay discharging the personal representative. The court did not apply res judicata to the subsequent suit brought three years later for breach of fiduciary duties. The court stated:

> *"Collateral Estoppel.* Collateral estoppel bans any subsequent action if (1) the issues decided in the prior adjudication would have been identical with the ones that were presented in the second action; (2) the prior adjudication ended in a final adjudication; (3) the party against whom the plea would have been asserted was a party in privity with a party in the prior adjudication and (4) application of the doctrine of collateral estoppel would not work an injustice. *Nielson v. Spanaway Gen. Med. Clinic Inc.,* 135 Wash.2d 255, 262-63, 956 P.2d 312 (1998). Under the fourth factor, the court must consider whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum." *Id.* at 339-40. ". . . When an issue is not reached in the prior adjudication, that issue can have no preclusive effect in the second adjudication. Moreover, collateral estoppel applies only to ultimate facts, those facts upon which the claim rests." *McDaniels v. Carlson,* 108 Wash.2d 299, 305, 738 P.2d 254 (1987). Collateral estoppel does not extend to evidentiary facts which are only collateral to the claim." *Id.* at 340-341.

The cited case, *McDaniels, supra* at 306 states "the issue of paternity was never actually litigated in the dissolution proceedings." The principle applies

here. The Appeals Opinion, page 12, merely commented that a number of findings would be fatal to the abuse claim. *August* also states: "The court did not refer to Nick's Declaration or other claims. Instead, the court made a finding concerning the lawsuit against Joanne Halverson and resolved that one issue." *Id.* at 341. Here, there were no factual findings of the ultimate abuser facts in the first suit.

> "[T]he Doctrine of Collateral estoppel by judgment is confined to ultimate facts (facts directly at issue upon which the claim rests) and does not extend to evidentiary facts (facts which may be in controversy but rest on evidence and are merely collateral." *Seattle-First National Bank v. Kawachi,* 91 Wash.2d 223, 588 P.2d 725 (1978). An ultimate fact is one that is "essential to the verdict." *Id.* at 229.

In re Peterson's Estate, 12 Wash.2d 686, 123 P.2d 733 (1942) imposed a constructive trust on money distributed in the prior action. The holding states "Appellants further contend that the orders confirming the sales are now res judicata as to the adequacy of the prices paid, the fairness of the sales, and all other objections which might have been offered against the entry of those orders." *Id.* at 723. "Furthermore, the attack in this instance was made in the original probate proceeding in the same court, and the relief asked was not merely incidental nor material to the issues raised by the objections." *Id.* at 726. The court held "This section of the statute cannot

operate to immunize the particular transfers here in question against attack at this time in this manner." *Ibid* at 723.

> The probate court is not merely a referee in a contest between private disputants. Instead, it is the agency primarily charged with the important function of administering decedents' estates and of distributing to the proper parties in each case the balance left after paying the debts of the decedent, the expenses of his last illness and funeral, and the expenses of administration. This is done through its own duly appointed officers, acting, except in the case of nonintervention wills, under the close supervision of the court.
>
> Because of this peculiar position occupied by the probate court, it should accept direct responsibility for the proper administration of every estate. It may derive assistance from the activities of private parties having conflicting interests in the estate, but this fact should not be allowed to relieve it of the ultimate responsibility. *Id.* at 722.

The probate court is a court of equity. *Restatement of Judgment 2d § 28* applies.

> . . . relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . . (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or <u>otherwise to avoid inequitable administration of the laws.</u> (Underlining added)

Wash. Const. art. XXVII § 10 confers all powers of probate to the superior courts. "The superior courts shall have appellate and revisory jurisdiction over decisions of probate courts." RCW § 2. 08.010 grants original jurisdiction. . . . of all matters of probate." The controlling reason

that this case should be sent back to try the abuser issue is that until the estate set the matter for hearing, no decision as to distribution of the property of the probate occurred. The function of a probate is to inventory the assets, pay creditors, administer the property and determine the beneficiaries. "The first element for collateral estoppel require that the issue in the earlier proceeding is identical to the issue in the later proceeding." *Schibel v. Eymann*, 189, Wash.2d 93, 100, 399 P.3d 1129 (2017). The issue of who gets the distribution at closing was never decided in any prior proceeding. Whether Lonnie Lowe is disqualified from receiving the final distribution was not identical and never decided. The issue is one of ultimate fact. A probate unlike other civil litigation is under court supervision. If ongoing issues are disputed, the probate court decides the issue in order of occurrence. The distribution issue is the last in line. The traditional application of collateral estoppel and res judicata do not apply for the reason that a probate is an ongoing proceeding. See *In re Estate of Plance,* 175 A.3d 249 (S.C. Penn. 2017).

> "Administration of a trust or an estate continues over a period of time. Litigation in Orphan's Court may arise at some point during administration and when it does arise, the dispute needs to be determined promptly and with finality so that the guardianship on the estate or trust administration can then continue properly and orderly. Thus the traditional notions of

> finality that are applicable in the context of ongoing civil adversarial proceedings do not correspond to litigation in Orphan's Court." *Id.* at 272.

The court held that res judicata did not apply to a will contest. Here, in the Court of Appeal's Opinion at page 11, footnote 2, the court distinguished *Estate of Heater,* 24 Or.App. 777, 547 P.2d 636, 637 (1976.). *Heater* applies as it was a probate case and the probate court refused to consider the objections in the final account due to the prior litigation on removal of the personal representative. "Ruling that the prior determination was res judicata." *Id.* at 636. The probate court "erred in refusing to consider the merits of the objections to the final account on the grounds of res judicata." *Id.* at 638. See also, *Schibel v. Eymann*, 189 Wash.2d 93, 104, 399 P.3d 1129 (2017).

C. The Court of Appeals Erred by Concluding that the Separate Issue was Litigated in the First Proceeding.

Separate claims were not adjudicated. The principle of *Clark v. Baines*, 150 Wash.2d 905, 916-17, 84 p.3d 295 applies. An *Alford* plea was not a full presentation of a case. Res judicata did not apply to a later civil case for damages. Here, Aaron Lowe has never had a "full and fair opportunity" to litigate the abuser issue. In *Schibel*, the court only barred claims actively litigated but not other claims. *Seattle-First National Bank v. Kawachi,* 91

Wash.2d 223, 558 P.2d 725 (1978) is also in conflict. "Collateral estoppel by judgment is confined to ultimate facts (facts which may be in controversy but rest in evidence and are merely collateral) . . . it was not essential to the verdict. The fact that it was not adjudicated in itself renders the doctrine of equitable estoppel inapplicable." *Id.* at 229. The Appeals Court at page 9 relied on *Rains v. State*, 100 Wash. 660, 674 P.2d 165 (1983). *McDaniels v. Carlson*, 108 Wash.2d 299, 738 P.2d 254 (1987) cites *Rains* at 303. However, it holds the opposite, "it does not operate as a bar to matters which could have been raised [in prior litigation] but were not." (internal quotes omitted). *McDaniels* denied collateral estoppel where the paternity of a child was assumed but not adjudicated in the first action. "Moreover, paternity was only collateral to the real issues in controversy: custody, support and visitation rights. Therefore, there was no identity of issues between the paternity finding in the prior dissolution case and the present cause of action." *Id.* at 306. The Court's Opinion at page 9 applied res judicata "to what might or should have been litigated." This is reversible error as the issues were different. See *Storti v. University of Washington*, 181 Wash.2d 28, 40, 330 P.3d 159 (Wash. 2014). In *Storti*, res judicata did not apply for the reason that ongoing activity stated "different claims based on separate facts and

evidence." *Id.* at 166. The Appellant Court also failed to consider that, until the appeal of the estate of Betty Lowe was decided, the question of closing the estate had not yet matured. The Betty Lowe litigation occured in 2013. Appeals Opinion page 3. The personal representative reopened the estate in 2016 pursuant to RCW § 11.68.100. The question of the amount to distribute to the heirs and RCW § 11.84.010-030 was not ripe until distribution. The time to close the estate could not have been allowable since the proceedings to determine what was to be distributed had not yet occurred. If the cause was a new claim that had not occurred, res judicata does not apply. *JPAY, Inc. v. 10800 Biscayne Holdings LLC,* 225 So.3d 876, 880 (D.C.App. Fla. 2017) and *Gilbert v. Florida Power and Light Co.,* 981 So.2d 609, 614 (D.C.App. Fla. 2008) reject res judicata where the issue had not yet accrued. "Washington courts focus on whether the parties to the earlier proceeding had a full and fair hearing on the issue." *Maytown Sand and Gravel LLC v. Thurston County,* 198 Wash.App. 560, 582, 395 P.3d 149 (Div. 2, 2017), citing and quoting *Hadley v. Maxwell,* 144 Wash.2d 306, 311, 27 P.3d 600 (2001). The issue of what ought to have been included cannot be reached when the issue has not been ripe for hearing. Here, the order of the court in the prior proceeding refused to hear the issue and limited the trial. The claim

of abuser was refused. The estate was closed by the Personal Representative under RCW 11.68.100. The issue is was not ripe for adjudication until the decree of distribution is entered. *In re Estate of Haviland*, 177 Wash.2d 68, 301 P.3d 31 (2013) holds that only when "the estate has been fully completed" *Id.* at 80. In any event, the issue was not at issue until the decree of distribution was filed.

D. The Abuser Issue was not Decided as the Earlier Decision did not Resolve this Issue.

In order for res judicata to apply, there must be a final decision on the issue. In *Ofuasia v. Smurr,* 198 Wash.App. 133, 392 P.3d 1148 (Div. 2, 2017), the court stated "Here, the arbitrator's decision and their subsequent correspondence clearly show that they considered the adverse possession issue but did not make a final decision on it. *Id.* at 142. . . .Because the arbitrator's decision did not involve a final decision on the adverse possession claim, we conclude that res judicata does not bar the Ofuasia's adverse possession claim on their lawsuit." *Id.* at 143. Here, the Appeals Court, at page 9, concluded that the issue should have been litigated. It ignored the threshold requirement of identical causes of action. See *Storti v. University of Washington,* 181 Wash.2d 28, 40, 330 P.3d 159 (2014).

The prior adjudication did not rule on the abuser issue, it was not an

ultimate fact. In *Osborne v. Osborne,* 216 So.3d 1237 (Ala. 2016) the court denied res judicata where the husband was an abuser. The abuse was an issue in the divorce. The second action for damages in a tort action for assault "thus to the extent, if any, a claim alleging assault and battery was raised in the divorce was not barred. . . .We cannot say that a judgment was entered on the merits of that claim." *Id.* at 1245.

The Betty Lowe Estate was non intervention but the Personal Representative sought to reopen the Estate pursuant to RCW § 11.68.100. Aaron L. Lowe, an heir, entered an objection to determine under RCW § 11.68.100(a) persons entitled to take under the will including the effect of the abuser statutes RCW 11.84.010, 020, 030. This estate was not in process of distribution until 2016, three years after the Betty Lowe case was tried.

This court did not decide *in re Estate of Haviland*, 177 Wash.2d 68, 301 P.3d 31 (Wash. 2013) until March 14, 2013. That case established that "Further, a probate order is conclusive, *except* when there is a will contest. RCW 11.20.020. Accordingly Ms. Haviland cannot inherit until probate has been completed." *Id.* at 80. "Here, the abuser statutes do not have retroactive effect because only upon completion of probate would Ms. Haviland's interest be vested for this purpose." *Id.* at 81. *C.I.R. v. Sunnen*, 333 U.S. 591,

68 S.Ct. 715, 92 L.Ed 898 (1948) the seminal case on res judicata only applies "but if the later proceeding is concerned with a similar or unlike claim . . . the prior judgment acts as collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit." *Id.* at 598. "Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment. *Id.* at 601-2. Here, Aaron L. Lowe is presented with Hobson's choice. Meaning no choice at all. He raised the issue before it was ripe and was turned down by the trial and appellate court. Now the Court of Appeals apples res judicata as to "what might have been litigated". The court of appeals at page 10 stated "there was no agreed or court ordered reservation of claims here. Aaron simply moved to amend and supplement too late." *August v. U.S. Bancorp*, 146 Wash.App. 328, 341, 190 P.3d 86 (2008) holds that failure to reference the issue in the Order still prevents res judicata. The claim did not accrue until the decree of distribution was filed.

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VI.

CONCLUSION

The review should be accepted. The case should be sent back to review the facts and law on the abuser issue. Attorney's fees in all courts should be awarded to Petitioner.

DATED this 21st day of February, 2018

ROBERT E. KOVACEVICH, WSBA#2723
Attorney for Petitioner Aaron L. Lowe

CERTIFICATE OF SERVICE

This is to certify that a copy of the Petition for Review of Unpublished Court of Appeals Opinion dated January 23, 2018, was served on Counsel for Respondent by hand delivery on February 21st, 2018 as follows:

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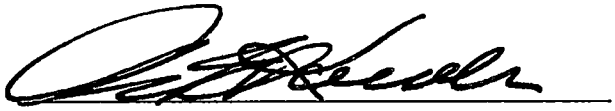
DATED this 21st day of February, 2018.



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FILED
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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

In the Matter of the Estate of	)	
	)	No. 34751-6-III
BETTY L. LOWE.	)	
	)	
	)	UNPUBLISHED OPINION
	)	

SIDDOWAY, J. — Aaron Lowe appeals the order approving the final report and petition for decree of distribution entered in the probate of the estate of his late mother, Betty Lowe. We find no error, affirm, and award fees and costs on appeal to the personal representative and the estate.

FACTS AND PROCEDURAL BACKGROUND

A 2013 trial in this same probate proceeding is the subject matter of our earlier decision in *In re Estate of Lowe*, 191 Wn. App. 216, 361 P.3d 789 (2015). Given the limited record in this appeal, we rely on that decision for many of the background facts.

Betty Lowe died on October 1, 2011. Her will, which she had executed in 2003, named her youngest son, Lonnie,[1] as personal representative. Lonnie was to serve without bond and with nonintervention powers. Her will directed that 80 percent of her estate be distributed among Lonnie and her two other sons, Aaron and Larry, and that the remaining 20 percent be distributed equally among her grandchildren. Article II of Betty's will stated, "If I leave a list of written instructions for disposition of any of my tangible personal property, I direct that such property listed in those instructions be distributed to the persons named to receive such property in the written instructions." *Id.* at 222.

Sometime in the 1980s, Donald Lowe, Betty's husband and her children's father, hid silver bars and coins in various places throughout the home. Lonnie and Aaron were aware that most of the silver was hidden in the flue of the fireplace in the basement. Between 2004 and 2007, Lonnie, at Betty's direction and in her presence, removed the silver bars and coins from the family home and placed them in a locked safe in his home in Olympia. Lonnie sold at least one of the silver bars at Betty's direction to pay her expenses. Lonnie admitted that he did not inventory or account for the silver, nor did he keep track of what Betty asked him to sell.

[1] Given the common last name, we refer to the Lowe family members by their first names. We intend no disrespect.

In September 2007, Betty's lawyer drafted and Betty signed written instructions, as contemplated by her will, stating that Lonnie had discretion whether to divide or retain the silver coins and bars remaining in her estate at the time of her death. Lonnie was aware of her intent to sign the instructions but was not present.

Lonnie later testified that his mother gifted him money at various times. Although Betty had executed a general power of attorney in favor of Lonnie in 2003, Lonnie testified that during his mother's lifetime, he never relied on his authority under the power of attorney to gift himself any of her money or property.

In late October 2011, Lonnie filed a petition for an order admitting Betty's will to probate and was appointed personal representative. After his mother's death, Lonnie sold some of the silver coins and kept the proceeds, relying on his mother's written instructions and his nonintervention powers.

In February 2012, Aaron filed suit against Lonnie individually and as personal representative of Betty's estate. In his petition and subsequent amended petitions, Aaron sought an order requiring Lonnie to account for all estate assets, including the silver. He also sought an order removing Lonnie as personal representative.

Less than a month before trial was to begin, on August 23, 2013, Aaron filed a motion seeking leave to file a second amended and supplemental petition. Included in that petition was an argument that Lonnie should not inherit anything because he

financially abused Betty. Aaron asked that all of the property removed by Lonnie be returned to the estate. The trial court denied Aaron's motion and proceeded to trial.

Following the conclusion of trial, the trial court entered findings of fact and conclusions of law. It denied all relief sought by Aaron and ordered Aaron to pay Lonnie's and the estate's attorney fees.

Aaron appealed to this court. Although his opening brief did not identify the issues pertaining to the assignments of error (*see* RAP 10.3(a)(4)), the headings to his argument reflect the issues raised:

> Lonnie should be removed as Personal Representative as he totally secreted his mother's assets and diverted them to him personally from 2003 on. . . .
>
> One half of the hoard [of silver bars and coins] should have been distributed to Aaron as Don's residuary heir. . . .
>
> The Written Instructions could not transfer U.S. silver coins, the hoard left was all U.S. silver coins. . . .
>
> The Power of Attorney did not allow the gifts to Lonnie Lowe. . . .
>
> The abuser statute was violated; Lonnie Lowe receives nothing and must pay the estate. . . .
>
> The failure to allow the Second Amended and Supplemental Petition is reversible error. . . .
>
> . . . .
>
> Lonnie Lowe intentionally interfered with Aaron Lowe's right to inheritance. . . .

Br. of Appellant, *In re Estate of Lowe*, No. 32192-4-III, at ii (Wash. Ct. App. Dec. 10, 2014). This court affirmed the trial court in all respects. *Lowe*, 191 Wn. App. at 240. Aaron's petition for review by the Washington Supreme Court was denied. *Lowe v.*

Lowe, 185 Wn.2d 1019, 369 P.3d 500 (2016). This court issued its mandate on May 26, 2016.

Just over two months later, on August 3, 2016, Lonnie filed a final report and petition for decree of distribution and obtained a hearing date of August 26. The lawyer who had appeared in the probate on Aaron's behalf received timely notice. On August 15, Aaron moved to continue the hearing, claiming the date presented a conflict with his significant other's "long standing, critical surgery deadline . . . that cannot be rescheduled." Clerk's Papers (CP) at 276. Shortly thereafter, he filed an objection and motion for a stay, arguing Betty's estate could not be closed until claims whose merits "[t]he appellate court did not address" were resolved. CP at 291. In support of his objection, he filed nearly 100 pages of the transcript and exhibits from the 2013 trial.

The trial court denied Aaron's motion to continue and the hearing proceeded as scheduled. Aaron's lawyer was present. Although the trial court had agreed to allow Aaron to participate by telephone and the bailiff attempted to phone Aaron at the number provided by his lawyer, the call reached only Aaron's voicemail. The proceeding continued with oral argument by Lonnie's and Aaron's lawyers. Aaron claims that he was available for the call but was unaware that the medical facility he was visiting blocked cellular phone signals.

Aaron's lawyer argued to the trial court at the August 26 hearing that Aaron's claim that Lonnie financially abused Betty was "never tried." Verbatim Report of

Proceedings at 11. In response, the court observed that the evidence Aaron offered to support his "new" claim of financial abuse was all derived from the earlier trial. Asked if he had ever moved the court at the earlier trial to conform his complaint to the evidence, Aaron's lawyer could not remember.

The trial court rejected Aaron's objection, ordered the estate closed, and discharged Lonnie as personal representative. Aaron appeals.

ANALYSIS

Aaron assigns error to the trial court's (1) proceeding with the August 26 hearing without Aaron's participation, (2) refusing to permit trial on his claims of financial abuse and other wrongdoing by Lonnie (assignments of error 2 and 4-7), and (3) failing to enter findings and conclusions following the August 26 hearing. We address his arguments in the order stated.

Proceeding without Aaron's participation

Aaron contends that as a matter of constitutional due process and statute, he had a right to be present at the hearing on the final account. We can quickly dispense of his constitutional claim. "In a civil suit, the parties do not have a constitutional right to be *personally present* during trial." *Kulas v. Flores*, 255 F.3d 780, 786 (9th Cir. 2001) (emphasis added). *Kulas* cites *Faucher v. Lopez* for this proposition; *Faucher* was a bankruptcy case in which the alleged bankrupt could not attend a jury trial on the issue of her insolvency. *See* 411 F.2d 992, 996 (9th Cir. 1969). On appeal, she argued that her

due process rights were violated because she was unable to be present at the trial. The Ninth Circuit Court rejected this claim, noting that Faucher was ably represented at trial by counsel and that "[t]here is no constitutional right of a litigant to be personally present during the trial of a civil proceeding." *Id.* The right to appear and defend in person provided by the Washington Constitution likewise applies only "[i]n criminal prosecutions." WASH. CONST. Art. 1, § 22.

All of the cases Aaron cites for his purported due process right to be personally present deal with criminal proceedings, or the failure to give *notice* to a party, or with a party who was not represented in a proceeding personally *or* by counsel. Aaron received notice of the hearing in this civil matter and appeared by counsel.

Aaron also argues that a statute—RCW 11.76.050—provides that "[a]ny person interested [in a final report and petition for distribution] may file objections to the said report and petition for distribution, or may appear at the time and place fixed for the hearing thereof and present his or her objections thereto." If the statute applied, we fail to see how it was violated. But it does not apply, since an earlier chapter of Title 11, chapter 11.68 RCW, deals with the settlement of estates without administration by personal representatives with nonintervention powers, and Lonnie applied to close the estate under RCW 11.68.100. That statute requires notice "given as provided for in the settlement of estates by a personal representative who has not acquired nonintervention powers." RCW 11.68.100(2). The notice given by Lonnie in compliance with that

requirement provided Aaron with the information needed to exercise his opportunity to be heard.

The only issue presented is whether the trial court should have continued the hearing when Aaron, for a reason unknown at the time, could not be reached at the telephone number provided by his lawyer. "Whether a motion for continuance should be granted or denied is a matter of discretion with the trial court, reviewable on appeal for manifest abuse of discretion." *Trummel v. Mitchell*, 156 Wn.2d 653, 670, 131 P.3d 305 (2006). In exercising its discretion, a court may properly consider "the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the court." *Id.* at 670-71. Discretion is abused only where no reasonable person would take the view adopted by the trial court. *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584 (1970).

Given that the hearing in the then almost five-year-old estate was not an evidentiary hearing and that Aaron's lawyer was present and available to voice any objections, there was no abuse of discretion.

Res judicata and law of the case

"Res judicata applies when '[a] valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.'" *Hadley v. Cowan*, 60 Wn. App. 433, 440-41, 804 P.2d 1271 (1991) (alteration in original) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 19 (Am. Law Inst. 1982)). For the doctrine to apply, there must be a substantial identity of subject matter, causes of action, persons and parties, and the quality of the persons for or against whom the claim is made. *Id.* (citing *Rains v. State*, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)). In determining whether there is identity of causes of action, res judicata applies to what might or should have been litigated as well as what was litigated. *Id.* Among the criteria considered in determining the identity of several causes of action are

> "[w]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts."

Rains, 100 Wn.2d at 664 (alteration in original) (quoting *Constantini v. Trans World Airlines, Inc.*, 681 F.2d 1199, 1201-02 (9th Cir.), *cert. denied*, 459 U.S. 1087, 103 S. Ct. 570, 74 L. Ed. 2d 932 (1982)).

In *Hadley*, this court held that following the conclusion of a will challenge, an action by beneficiaries of an estate that alleged undue influence, abuse of confidence, fraud, and substitution of one will for another "are of a single 'transactional nucleus of

facts' that could and should have been determined in the probate challenge." 60 Wn. App. at 442. The damages in both proceedings "are substantially the same and are intimately related in time, origin, and motivation, because they arise out of the same interactions between the deceased and the respondents," and, "[i]t is also obvious that the claims in the present proceedings would have constituted a convenient trial unit in the probate proceeding." *Id.* at 442-43.

While it is true that claims can be reserved from one action by agreement of the parties or an order of the court, a claim must be "'plainly reserved.'" *Cummings v. Guardianship Servs. of Seattle*, 128 Wn. App. 742, 754, 110 P.3d 796 (2005) (quoting *Case v. Knight*, 129 Wash. 570, 574, 225 P. 645 (1924)). There was no agreed or court-ordered reservation of claims here. Aaron simply moved to amend and supplement too late. "It is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late." RESTATEMENT § 25, cmt. b. As elaborated further in Section 26, comment b. of the *Restatement*,

> It is emphasized that the mere refusal of the court in the first action to allow an amendment of the complaint to permit the plaintiff to introduce additional material with respect to a claim, even where the refusal of the amendment was urged by the defendant, is not a reservation by the court within the meaning of Clause (b). The plaintiff's ordinary recourse against an incorrect refusal of an amendment is direct attack by means of appeal from an adverse judgment.

The mere fact that Aaron sought to pursue his original petition and later claims in the same probate proceeding does not change the result. "A judgment may be final in a res judicata sense as to part of an action although the litigation continues as to the rest." *Id.* § 13, cmt. e.[2] Examples given by the *Restatement* comments are bankruptcy or receivership proceedings in which one party's claim may be finally adjudicated although the proceeding is not closed. *Id.* Probates present a similar situation. "[W]hen res judicata is in question a judgment will ordinarily be considered final in respect to a claim (or a separable part of a claim . . .) if it is not tentative, provisional, or contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent upon the particular type of adjudication." *Id.*, cmt. b. Washington courts have recognized that a summary judgment determination can be res judicata as to matters sought to be asserted later in the same case if it meets this criteria. *E.g.*, *Ensley v. Pitcher*, 152 Wn. App. 891, 899, 222 P.3d 99 (2009) (citing *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000)).

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[2] For this reason, we disagree with the court in *In re Estate of Heater*, 24 Or. App. 777, 547 P.2d 636, 637 (1976), which believed it had to apply the related law of the case doctrine to reach the result we reach here, because successive claims were asserted in a probate proceeding. Like the Kansas Supreme Court in *In re Estate of Reed*, 236 Kan. 514, 693 P.2d 1156 (1985), we believe that both res judicata and the law of the case doctrine have application.

The trial court's decision following the 2013 trial met this criteria for finality. It was even self-characterized as final: it was entitled "Order Confirming Final Trial Judgment and Accepting Formal Appraisal." *See* Amended Notice of Appeal, *In re Estate of Lowe*, No. 32192-4-III, (Wash. Ct. App. Sept. 17, 2014). The order confirmed "the final Trial Judgment entered on May 30, 2014." *Id.* at 4 (alteration in original). While finality for appeal and res judicata purposes are not identical, they are "quite similar." *Ensley*, 152 Wn. App. at 900. By appealing the trial result in 2014, Aaron treated the trial court's order as final. *See* RAP 2.2. This court did not question its finality and appealability.

As Lonnie argues, the trial court's refusal to entertain further challenges by Aaron to Betty's will and Lonnie's actions can also be affirmed on the basis of futility. After denying leave to amend and supplement in 2013, the trial court characterized Aaron's proposed fiduciary abuse claim as futile. While we did not reach the issue of futility in our decision in the prior appeal, a number of the trial court's findings of fact that supported rejecting Aaron's request for Lonnie's removal as personal representative would be fatal to his proposed financial abuse claim.

Failure to enter findings and conclusions

Finally, Aaron argues that the trial court was required by CR 52(a) to enter findings of fact and conclusions of law in support of its order closing the estate but failed to do so.

CR 52(a)(1) provides generally that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law." Yet "[f]indings of fact and conclusions of law are not necessary . . . [o]n decisions of motions under rules 12 or 56 or any other motion." CR 52(a)(5)(B). Black's defines "motion" as "[a] written or oral application requesting a court to make a specified ruling or order." BLACK'S LAW DICTIONARY 1168 (10th ed. 2014).

The key distinction is whether a matter is "tried" before the court. *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 424, 367 P.2d 985 (1962) (emphasis omitted). A matter cannot be regarded as a trial if issues of fact are not tried. *Id.* While the record and supporting materials required review at the August 26 hearing, nothing was tried upon the facts. Findings and conclusions were not required.

Attorney fees

Lonnie asks on behalf of himself and the estate that we award reasonable attorney fees and costs against Aaron. Under RAP 18.1(a) and RCW 11.96A.150(1) we may award costs, including attorney fees, to any party from any party to the proceedings, after considering any and all factors we deem relevant and appropriate. We exercise our discretion to award fees and costs to Lonnie and the estate from Aaron, subject to the respondents' timely compliance with RAP 18.1(d).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Lawrence-Berrey, A.C.J.

Pennell, J.

Renee S. Townsley
Clerk/Administrator

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January 23, 2018

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CASE # 347516
In re the Estate of: Betty L. Lowe
SPOKANE COUNTY SUPERIOR COURT No. 114013946

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Enc.

c: **E-mail**—Hon. Maryann C. Moreno

OPINION FACT SHEET

Case Name: *In re the Estate of Betty L. Lowe*

Case Number: 34751-6-III

1. TRIAL COURT INFORMATION:

A. SUPERIOR COURT: Spokane County
Judgment/Order being reviewed: Order approving final report, decree of distribution, and closing probate
Judge Signing: Hon. Maryann C. Moreno
Date Filed: August 26, 2016

B. DISTRICT COURT:
Judgment/Order being reviewed:
Judge Signing:
Date Filed:

2. COURT OF APPEALS INFORMATION:
Disposition* Check only 1

(X)	**Affirmed**	( )	Other
( )	Affirmed as Modified	( )	Reversed and Dismissed
( )	Affirmed in Part/Remanded**	( )	Remanded**
( )	Affirmed/Reversed-in part and Remanded**	( )	Reversed
( )	Affirmed/Vacated in part	( )	Reversed in part
( )	Affirmed in part/Reversed in part	( )	Remanded with Instructions**
( )	Denied (PRP, Motions, Petitions)	( )	Reversed and Remanded**
( )	Dismissed (PRP)	( )	Reversed, Vacated & Remanded**
( )	Granted/Denied in part	( )	Vacated and Remanded**
( )	Granted (PRP, Motions, Petitions)		

* These categories are established by the Supreme Court
** If remanded, is jurisdiction being retained by the Court of Appeals? ( ) YES (X) NO

3. SUPERIOR COURT INFORMATION (IF THIS IS A CRIMINAL CASE, CHECK ONE)

Is further action required by the superior court?
( ) YES
(X) NO

LLS

Authoring Judge's Initial

Log Number: U-018
Oral Argument Date:

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 34751-6
Title of Case: In re the Estate of: Betty L. Lowe
File Date: 01/23/2018

SOURCE OF APPEAL

Appeal from Spokane Superior Court
Docket No: 11-4-01394-6
Judgment or order under review
Date filed: 08/26/2016
Judge signing: Honorable Maryann C. Moreno

JUDGES

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