IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA-21-0636

IN THE MATTER OF THE ESTATE OF

JIMMY LESLIE POSTON

Deceased

On Appeal from the Montana Nineteenth Judicial District Court,
Lincoln County Cause No. DP-20-23, The Honorable Matthew Cuffe

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APPELLANTS' REPLY BRIEF

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I. STANDARD OF REVIEW

The District Court's determination that Decedent's Children caused a legal challenge against the Estate is a conclusion of law. The Estate cites no legal authority to support its argument that it is a finding of fact. The cases the Estate cites merely articulate the standard of review for findings of fact.

The Estate points solely to the District Court's inclusion of this determination in the "findings of fact" section of the Order re Accounting. Notably, the Estate drafted that Order, including placing this determination in the "findings of fact" section, and the District Court adopted it verbatim. *See* Dkt. 51; Dkt. 56. Regardless, whether a determination is a conclusion of law versus a finding of fact does not depend on how it is couched in an order. *Cf. In re Estate of Kuralt*, 2000 MT 359, ¶ 17, 303 Mont. 335, 15 P.3d 931 (applying "clearly erroneous" standard to argument addressing finding of fact, even though "clothed as a legal argument"); *Aasheim v. Reum*, 277 Mont. 471, 475, 922 P.2d 1167, 1170 (1996) (analyzing determination "mislabeled as a conclusion of law" under standard of review for finding of fact).

Each of the cases Decedent's Children cited show the present issue is a question of law. In *Ecton v. Ecton*, the Court held, "judicial interpretation and construction of a will presents a question of law." 2013 MT 114, ¶ 15, 370 Mont. 52, 300 P.3d 706. Whether or not Decedent's Children's conduct triggered the no

contest provision requires judicial interpretation of the Will. Therefore, it is a question of law.

The Estate quotes paragraphs from *In re Estate of Edwards*, 2017 MT 93, 387 Mont. 274, 393 P.3d 639, to attempt to argue the case has nothing to do with the present issue. Decedent's Children, however, did not rely on those paragraphs in their initial brief. *Compare* Estate's Response Br., pp. 10-11 (citing *Estate of Edwards*, ¶¶ 14, 31-34), *with* Decedent's Children's Opening Br., p. 5 (citing *Estate of Edwards*, ¶ 89). Although the portion of the case Decedent's Children cited does not explicitly discuss standards of review, it analyzes the lower court's determination that a party contested a will as a conclusion of law, applying the "correctness" standard. *See id.* (concluding "court correctly determined that Verone contested the 2012 Will and that Schulz and Degel defended it," as opposed to concluding decision was not clearly erroneous) (emphasis added).

Similarly, in *In re Estate of McClure*, the Court analyzed the conclusion that siblings did not trigger a trust's no contest provision. 2016 MT 253, ¶¶ 31-34, 385 Mont. 130, 381 P.3d 566. Although the Court did not explicitly discuss standard of review in that analysis, it applied the "correctness" standard for conclusions of law. *See id.*, ¶ 34 (concluding, "We agree with the District Court," holding it "correctly determined" the no contest provision did not apply) (emphasis added).

As to the District Court's determination regarding probable cause, the parties

agree it is an issue of law when the material facts are undisputed. (*See McAtee v. Morrison & Frampton, PLLP*, 2021 MT 227, ¶ 22, 405 Mont. 269) ("where the material facts are not in dispute … the existence of probable cause become[s] an issue of law")). The material facts here are what Decedent's Children reasonably believed existed when they opposed Ms. Lindrose's Petition. *See McLeod v. State*, 2009 MT 130, ¶ 27, 350 Mont. 285, 206 P.3d 956 (defining "probable cause" as having reasonable belief in existence of facts that would support claim). That is distinct from what the facts ultimately were, as determined by the District Court.

Decedent's Children do not dispute what the District Court ultimately determined the facts to be. This is not a review of the District Court's decision that a common law marriage existed. This is a review that invokes what Decedent's Children reasonably believed, which is not disputed. Indeed, the Estate acknowledges the evidence Decedent's Children believed supported their position. Estate's Response Br., p. 5. The Estate summarily argues "the facts were disputed," but does not cite a single example. Because there are no material disputed facts, the determination regarding probable cause is an issue of law.

II. ARGUMENT

A. Decedent's Children Did Not Trigger the Will's No Contest Provision because They Did Not Cause a Legal Challenge Against the Estate

The Estate does not argue that Decedent's Children's alleged animosity toward Ms. Parker triggered the no contest provision. *See, generally*, Estate's

Response Br. They have cited no legal authority in support of such a theory, whether in their appellate brief or in the underlying case. *See, generally*, Estate's Response Br.; Dkt. 44; Dkt. 51. The law does not support it. *See, e.g.*, *Donaldson v. State*, 2012 MT 288, ¶ 16, 367 Mont. 228, 292 P.3d 364 (equating filing or amending of pleading to "legal challenge"). Therefore, the District Court's Order re Accounting should not be upheld based on those allegations. *See* Dkt. 56, ¶ 10.

The Estate's sole argument is that Decedent's Children's objection to Ms. Lindrose's Petition triggered the no contest provision. *See* Estate's Response Br., pp. 17-19. The Estate contends there is no difference between a legal challenge against Ms. Lindrose as an inheriting party and a legal challenge against the Estate. *See id.*, pp. 15 ("a challenge to the inheriting parties is the very kind of challenge that triggers a no-contest provision"), 17 ("Whether the challenge was to the Will or the elective share is a distinction without a difference."). As an initial matter, the Court should not address this argument because the Estate did not raise it in the underlying case. *See* Dkt. 44; Dkt. 51; *see also Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶ 120, 325 Mont. 148, 104 P.3d 445 ("Our Court does not address new arguments or changes of argument on appeal."). Regardless, it is not supported by the law or the language of the no contest provision.

The no contest provision states, "I direct that <u>if my estate should be needlessly caused to suffer a legal challenge</u> that the person causing the legal

challenge shall pay the costs and attorney fees associated with such lawsuit if their effort should result in an unfavorable result to them." Dkt. 1, § IX (emphasis added). By the ordinary understanding of these words, the provision only applies to legal challenges to or against the Estate. *See Estate of Hedrick v. Lamach*, 2014 MT 118, ¶ 9, 375 Mont. 74, 324 P.3d 1202 ("The words used in a will are interpreted according to their ordinary, grammatical sense, unless there is evidence of a clear intent otherwise."); *see also Alexander v. Texaco, Inc.*, 530 F. Supp. 864, 871 (D. Mont. 1981) (noting plaintiffs were "caused to suffer damages," referencing damages to or against plaintiffs) (emphasis added); *Fowlie v. Cruse*, 52 Mont. 222, 228, 157 P. 958, 959 (1916) (noting plaintiff was "caused to suffer great pain," referencing pain to or against plaintiff) (emphasis added). The Estate cites no authority supporting a different interpretation.

Derringer v. Emerson, 435 Fed. Appx. 4, 5 (D.D.C. 2011), does not help the Estate's argument. There, the court held beneficiaries of a trust triggered a no contest clause when they filed a request asking the court to declare an amendment to the trust invalid. *Id.* Unlike this case in which the action taken was against an inheriting party, the legal challenge in that case was against the trust. *See id.* *Derringer* supports Decedent's Children's position that a legal challenge against someone other than the estate does not trigger a no contest clause.

Likewise, § 72-2-537, MCA, does not help the Estate's argument. The Court

must determine whether Decedent's Children are disinherited by the language of the no contest provision in this Will, not by the language in a statute referencing all potential no contest provisions. *See Estate of Hedrick*, ¶ 9. The provision at issue only proscribes legal challenges against the Estate. Dkt. 1, § IX. Unlike this statute, the Will does not reference all "proceedings relating to the estate." *See id.*

Construing the provision more broadly, to include all proceedings related to the Estate, would violate public policy and Decedent's expressed intent. *See Rafalko v. Georgiadis*, 777 S.E.2d 870, 879 (Va. 2015) (holding no contest clauses are strictly construed because testator drafted with opportunity to select language precisely fitting intent, and forfeiture provisions generally disfavored); *Estate of Kaila*, 114 Cal. Rptr. 2d 865, 870 (Cal. Ct. App. 2001) (holding no contest clauses disfavored by public policy against forfeitures and are therefore strictly construed); *In re Estate of Westfahl*, 674 P.2d 21, 24 (Okla. 1983) ("in terrorem clause must be strictly construed against forfeiture, enforced as written, and interpreted reasonably in favor of the beneficiary"); *cf. Estate of Gleason v. Cent. United Life Ins. Co.*, 2015 MT 140, ¶ 30, 379 Mont. 219, 350 P.3d 349 (contract provision involving forfeiture must be strictly interpreted against party for whose benefit it is created).

The challenge to Ms. Lindrose's Petition was a legal challenge against Ms. Lindrose, not the Estate. *See* Dkt. 34, p. 1 ("THIS MATTER is before the court on the Petition … of Patsy Lindrose.") (underline added); Transcript, 7:13-18, 9:8-10.

Recognizing this, the Estate did not oppose it or attend the hearing. *See* Dkt. 19, p. 2; Dkt. 22; Transcript, 7:10-13; Dkt. 34, p. 1; *see also, generally,* Dkt. To claim it did so to be a "good steward" of Estate assets, as opposed to because the challenge did not concern the Estate, is not reasonably supported by the facts. Moreover, whether or not Decedent's Children's belief lacked probable cause, or was contrary to language in the Will, does not transform it into a challenge against the Estate. The Estate cites no authority to support that conclusion, there is none, and it defies the self-apparent posture of the proceedings.

B. Even if Decedent's Children Caused a Legal Challenge Against the Estate, They Did Not Trigger the No Contest Provision because Probable Cause Existed for Them to Do So

The Estate acknowledges Decedent's Children relied on the following evidence to support their position: (1) Decedent told Ms. Hunt he did not intend to marry Ms. Lindrose; (2) Decedent and Ms. Lindrose had separate bills and tax returns; (3) Decedent and Ms. Lindrose owned separate assets; (4) if Decedent and Ms. Lindrose married, Ms. Lindrose would lose her healthcare; (5) Ms. Lindrose used the last name, "Lindrose"; (6) Decedent and Ms. Lindrose did not celebrate an anniversary; and (7) Decedent did not call Ms. Lindrose his wife to his children. *Id*., p. 5. The Estate also does not contest that Decedent's Children relief on any of the additional evidence cited in their initial brief. *See, generally, id.* The Estate merely argues it was unreasonable to claim no common law marriage existed since

Decedent stated he was common law married in his Will. *See id.*, pp. 14-16.

The Estate does not respond to any of the caselaw Decedent's Children cited in their initial brief. That caselaw shows the common law marriage analysis is multifactorial and cannot be confined to any single fact, including language in a will. *See In re Marriage of Geertz*, 232 Mont. 141, 143, 755 P.2d 34, 35-36 (1988); *In re Estate of White*, 212 Mont. 228, 230-31, 686 P.2d 915, 916 (1984); *In re Estate of Sartain*, 212 Mont. 206, 208-10, 686 P.2d 909, 911-12 (1984).

Decedent's statement in his Will was not a judicial confession. *See State v. Staat*, 251 Mont. 1, 8, 822 P.2d 643, 644 (1991) (holding judicial confession is made before a magistrate or court in the course of legal proceedings). It did not have the automatic effect of creating a marriage, since a statement in a will cannot bypass the common law analysis required by Montana law. *See Matter of Estate of Hunsaker*, 1998 MT 279, ¶ 32, 91 Mont. 412, 968 P.2d 281 (discussing elements of common law marriage). It was a piece of evidence supporting the existence of a common law marriage, which Decedent's Children reasonably believed was outweighed by all the other evidence to the contrary. Moreover, although Decedent's Children did not contest the validity of the Will, they reasonably believed the weight of the language in it was reduced by the undisputed fact that Decedent signed it approximately one month before he died of a "degenerative brain disorder that leads to dementia." Transcript, 60:17-62:1.

C. Decedent's Children Should Not Be Responsible for All the Estate's Costs and Fees because Not All of Those Costs and Fees Relate to Decedent's Children's Conduct

The District Court's determination on the imposition of fees is ripe for review. The District Court ruled that Decedent's Children triggered the no contest provision. Dkt. 56, p. 3, ¶ 8. The Will forces them to pay the costs and attorney fees associated with doing so. Dkt. 1, § IX. The only aspect of the attorney fees award that is not settled is a determination of what the amount of such fees will be, but that does not render the fact of the award unripe.

The District Court did not make clear whether its award was for all of the Estate's attorney fees, as opposed to just those related to Decedent's Children's alleged legal challenge. When Decedent's Children asked for clarification on that issue, the District Court did not provide it. Dkt. 41, pp. 7-8. Decedent's Children are respectfully asking for a decision from this Court on that issue.

VIII. CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is proportionately spaced Times New Roman text typeface of 14 points, is double spaced, and the word count calculated by Microsoft Word 2010, is not more than 2,239 words, excluding the certificate of compliance.

Dated this 13th day of May, 2022.

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CERTIFICATE OF SERVICE

I, Thomas Alan Hollo, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 05-13-2022:

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