

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA-23-0666

IN THE MATTER OF THE ESTATE
OF MARTIN W. MACLAY,

Deceased.

ON APPEAL FROM THE MONTANA FOURTH JUDICIAL DISTRICT
COURT, MISSOULA COUNTY, CAUSE NO.: DP-21-270
THE HONORABLE JOHN LARSON

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUE

Whether Mont. Code Ann. § 72-3-915(1) must apply in a circumstance where two beneficiaries of an estate reach a settlement agreement which would revoke a specific devise made to a third beneficiary of the estate, and that third beneficiary never consented to the agreement.

STATEMENT OF THE CASE

Decedent, Martin Maclay, died testate on November 13, 2021.

Subsequent to his death, a will contest ensued wherein Appellee Jesse Maclay argued Decedent's November 8, 2021 Last Will and Testament was invalid. Pursuant to this Will, Appellant was entitled to a life estate in Decedent's home. Pursuant to the Rules of Civil Procedure, a settlement conference was held between the parties July 18, 2023. At this settlement conference, Appellees' reached agreement regarding resolution of the will contest. This agreement included a provision wherein the 2021 Will was set aside and Decedent's September 7, 2007 Last Will and Testament was revived. Appellant Shari Lynn Maclay was neither an active participant in the settlement negotiations, nor did she agree to or sign the settlement agreement between Appellees.

After mediation, Appellant filed her *Motion to Set Aside the Settlement Agreement*, the parties briefed the matter, a hearing was held on September 19, 2019, and additional briefing occurred after. The District Court entered its *Order Denying Motion to Set Aside Settlement Agreement* on November 2, 2023. This appeal stems from that decision.

STATEMENT OF FACTS

Decedent, Martin Maclay (“Marty”), died testate on November 13, 2021. At the time of death, Decedent had a wife, Appellant Shari Lynn Maclay (“Shari”), and two children, Appellees Jesse Maclay and Michael Maclay. Pet. for Formal Prob. to Determine Will and Heirs and Appointment of Pers. Rep., ¶¶ 1-3, Feb. 15, 2022 (CR 11), Appendix 1. Prior to his death, on November 8, 2023, Decedent executed his Last Will and Testament (the “Will”). *Id.* at ¶ 4. At the time of the Will’s execution Marty was admitted to St. Patrick’s Hospital due to complications with the Covid-19 virus. *Id.* at ¶ 11, Appendix 1. Ultimately, his health would worsen, he would have to be ventilated, and he would pass while in the ICU. *Id.* at ¶ 11.

Prior to his death, Decedent handwrote a document titled “Will & Testament.” Pet’r Jesse Maclay’s Mot. For Summ. J., Ex. 3, June 5, 2023 (CR 54), Appendix 2. The document directed Michael Maclay to “carry out [his] wishes”. Michael Maclay delivered the document to Kevin Jones, a Missoula attorney, who had done work for Decedent in the past. Pet’r Mot. For Summ. J., at pp. 3-4, Appendix 2. Upon seeing the document, Mr. Jones had a phone call with the Decedent wherein the Decedent told Mr. Jones his requests for his estate plan, and requested Mr. Jones to draft it.

Id. at p. 4. Mr. Jones drafted the Will, which was completed mere hours after the call with Decedent. *Id.* The drafted Will was delivered to Decedent for his signature on November 8, 2021. *Id.* at p. 5. The document was signed and dated by Decedent. *Id.* Additionally, a nurse who oversaw Decedent in the ICU, Emile Pribyl signed the Will on one of the two witness lines. *Id.* The 2021 Will states that Decedent devised a “life estate to my primary residence to my spouse, Sharilynn Maclay.” Last Will and Testament of Martin W. Maclay, November 18, 2021 (CR 1), Appendix 3. The remainder of the Estate was devised to Michael Maclay, solely. *Id.*

After Decedent’s passing, Michael Maclay opened an informal probate via application on November 18, 2021. Pet., ¶ 3, Appendix 1. This application included the original November 8, 2021 Will, which was admitted to Probate. Order of Informal Appointment of Pers. Rep., November 18, 2021 (CR 3), Appendix 4. On February 15, 2022, Jesse Maclay and Shari Maclay filed *their Petition for Formal Probate to Determine Will and Heirs and Appointment of Personal Representative*. Pet., Appendix 1. At the time of this filing, both parties were represented by Julie Sirrs, who would later withdraw as counsel of record citing a conflict of interests. Not. of Withdrawal, June 2, 2022 (CR 22), Appendix 5. While Shari was included in the initial *Petition*, she did not wish to contest the

Will, but rather the appointment of Michael Maclay as personal representative. Shari Lynn Maclay's Mot. To Set Aside Settlement Agreement, p. 2, Aug. 9, 2023 (CR 65), Appendix 6. Upon advice of new counsel, St. Peter Law Offices, and because she did not wish to contest the Will, she voluntarily moved to dismiss herself from the *Petition*. *Id.* She was dismissed via the *Order Granting Unopposed Motion to Dismiss* on August 30, 2022. (CR 36), Appendix 7.

Since this date, Appellees have continued to litigate the validity of the November 8, 2021 Will. Aff. Shari Lynn Maclay, ¶ 10, Aug. 9, 2023 (CR 66), Appendix 8. On April 21, 2022, the Parties stipulated to, and the Court ordered, the Western Montana Chapter for the Prevention of Elder Abuse (the "Chapter") to act as Personal Representative of the Estate. Stip. to Vacate Hr'g and Appoint Western Montana Chapter and Set Scheduling Order, April 21, 2022 (CR 17), Appendix 9. The Chapter has acted in that capacity from that day through current day. Order Adopting Stipulation, April 21, 2022 (CR 18), Appendix 10. On June 5, 2023, Jesse Maclay filed her *Motion for Summary Judgment and Brief in Support* requesting the Court deem the November 8, 2021 Will invalid. Appendix 2. On June 26, 2023, Michael Maclay filed a cross-motion, his *Motion for Summary Judgment*, requesting that the November 8, 2021 Will be deemed valid by

the Court. (CR 58), Appendix 11. To date, no judicial determination has been made on the validity of the Will, as it was rendered moot by the Court's *Order* at issue here. (CR 1-91).

On July 18, 2023, the parties, including Appellant and Appellees attended a mediation. Aff. Shari Maclay, ¶ 12, Appendix 8. During the course of this mediation, Michael and Jesse came to a resolution regarding their claims to the Estate (the "Agreement"). Aff. Shari Maclay, ¶ 14, Appendix 8. Shari was not included in this negotiation, did not consent to the resolution, and has signed no memorandum of understanding, nor a formal settlement agreement. Aff. Shari Maclay, ¶¶ 15-16, Appendix 8. Nonetheless, Appellees drafted and signed a formal settlement agreement. *Stipulation Regarding Settlement*, August 8, 2023 (CR 63), Appendix 12. Appellees filed their *Stipulation Regarding Settlement* on August 7, 2023. *Id.* Within this *Stipulation*, Appellees agreed that Jesse's *Petition for Formal Probate* be dismissed, that Decedent's September 7, 2007 Will be revived and admitted to probate, and that the Chapter would continue to serve as Personal Representative of the Estate. *Id.* Neither Appellant, nor her Counsel signed or were consulted regarding that the *Stipulation*. Aff. Shari Maclay, ¶¶ 15-16, Appendix 8. Appellant was not contemplated in the 2007 Will, nor was the life estate granted to her in the 2021 Will contained in the

2007 Will. Pet'r Mot. For. Summ. J., Ex. 1 and 6, Appendix 2. Additionally, Appellant's share of the Estate was not contemplated in the Agreement. *Id.*

On August 9, 2023, Appellant filed her *Motion to Set Aside Settlement Agreement*. (CR 65), Appendix 6. Briefing was completed on the *Motion* on August 28, 2023. (CR 65-69). Oral argument was held before the District Court during a hearing on September 19, 2023. At this hearing, the Court ordered additional briefing on the matter which was completed on October 10, 2023. (CR 78-80). The Court issued its *Order Denying Motion to Set Aside Settlement Agreement* on November 2, 2023. (CR 82), Appendix 13. Within its *Order*, the Court held that 1) the provisions of Mont. Code Ann. § 72-3-915(1) did not apply to settlement agreement; 2) Appellant was judicially estopped from objecting to the settlement agreement; and 3) Appellant had waived her right to object to the settlement agreement pursuant to Mont. Code Ann. § 72-3-915(1). *Id.*

As a result of this *Order*, the Chapter filed their *Motion to Admit Last Will of Martin W. Maclay A/K/A Marty Maclay, Executed September 7, 2007 to Formal Probate*. (CR 84), Appendix 14. The Court granted this motion and admitted the September 7, 2007 Will to probate on November 15, 2023. (CR 87), Appendix 15. Appellant filed her *Notice of Appeal* on November 14, 2023, and this appeal ensues. (CR 86), Appendix 16.

STANDARD OF REVIEW

Questions of law, and a District Court's conclusions of law are reviewed for correctness. *Smith v. Gen. Mills, Inc.*, 1998 MT 280, ¶ 11, 291 Mont. 426, 430, 968 P.2d 723, 726.

A district court's statutory interpretation is a question of law, which is also reviewed for correctness. *State v. Nelson*, 2019 MT 62, ¶ 4, 395 Mont. 134, 437 P.3d 127; *Mont. State Fund v. Simms*, 2012 MT 22, ¶15, 364 Mont. 14, 270 P.3d 64; *Briese v. Mont. Pub. Emps.' Ret. Bd.*, 2012 MT 192, ¶ 11, 366 Mont. 148, 285 P.3d 550.

SUMMARY OF THE ARGUMENT

The District Court erred, as a matter of law, in three distinct areas when it upheld Appellees' Settlement Agreement: 1) It erred in failing to apply Mont. Code Ann. § 72-3-915(1); 2) It erred in applying the doctrine of judicial estoppel; and 3) It erred in holding Appellant had waived her right to object to the Agreement on the basis of Mont. Code Ann. § 72-3-915(1).

First, the District Court should have applied Mont. Code Ann. § 72-3-915(1) to set aside Appellees' Agreement. The Agreement is a distribution agreement that impacts the rights of a third beneficiary without that beneficiary's written consent. This is in clear violation of the express terms of that statute.

Second, the District Court erred in applying judicial estoppel to the facts of this case. Judicial estoppel only applies to subsequent actions or proceedings, not to the proceeding where the statement was made. Additionally, the elements of judicial estoppel are not met here, specifically the Appellant had no knowledge or facts at the time she took the alleged original position, she did not succeed in taking any alleged position, the current position is not inconsistent with any alleged position, and the Appellees have not been misled.

Third, and finally, the Court erred in holding that Appellant had waived her right to object to the Agreement pursuant to the statute. In order to prove waiver, Appellees' must prove a then existing right. When Appellees argue the waiver occurred, no right existed to which Appellant could have waived. Her rights under the statute only triggered upon Appellees' Agreement being executed, and she took no actions inconsistent with that right.

Appellees' Agreement clearly violates the provisions of Mont. Code Ann. § 72-3-915(1) and should have been set aside by the District Court. This Court should reverse the *Order Denying Motion to Set Aside Settlement Agreement*, set aside the Appellees' Agreement, and remand for further proceedings consistent with this Court's Order.

ARGUMENT

I. **The District Court erred when it refused to apply Mont. Code Ann. § 72-3-915(1) to Appellees' Settlement Agreement.**

“Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent or under the laws of intestacy in any way that they provide in **a written contract executed by all who are affected by its provisions.**” Mont. Code Ann. § 72-3-915(1) (emphasis added). Successors to an estate have residual control over the way it is to be distributed. Mont. Code Ann. § 72-3-915, Comments. Distribution agreements are required to be in writing. *Id.* The role of courts in applying a statute has always been “to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” Section 1–2–101, MCA. Statutory language must be construed according to its plain meaning and if the language is clear and unambiguous, no further interpretation is required. *See, Lovell v. State Comp. Mut. Ins. Fund* (1993), 260 Mont. 279, 285, 860 P.2d 95, 99.

The District Court erred by failing to apply Mont. Code Ann. § 72-3-915(1) to the facts before it. The plain language of the statute is clear. If

two beneficiaries wish to enter into a distribution agreement, it must be signed by all individuals who are affected by its provisions. Here, two beneficiaries of the estate, Michael and Jesse, entered into an Agreement during mediation wherein they agreed to set aside the 2021 Will in favor of the 2007 Will, and additionally agreed to a split of certain pieces of the Decedent's property. Appellant Shari Lynn Maclay was entitled to a life estate in Decedent's primary residence pursuant to the 2021 Will, but would be entitled to no distribution under the terms of the 2007 Will.¹ This means Appellees agreeing to set aside the 2021 Will disinherits Shari from a specific devise she was otherwise entitled to absent the Agreement.

Pursuant to the terms of Mont. Code Ann. § 72-3-915(1), in order for Appellees' Agreement to be valid and enforceable, they would have had to have Shari consent and sign the Agreement, as her share of the Estate is affected by its provisions. They did neither. Shari was neither allowed to be an active participant at mediation, and further, was never asked to consent to, nor sign any agreement during mediation. She has never since signed any agreement. Pursuant to the 2021 Will, Shari is just as much a

¹ Appellees contended in briefing that Appellant was not effectively disinherited by their Agreement because she was still entitled to her spousal rights under the Probate Code. Appellees argument ignores that if the 2021 Will was to stand, she would be entitled to both her specific devise as well as her spousal rights. Stripping her of the specific devise is a disinheritance given she would not be entitled to any specific devise in the 2007 Will. Additionally, the plain language of Mont. Code Ann. § 72-3-915(1) requires a beneficiary to be a part of the distribution agreement if their share is merely "affected," which clearly is the case here.

beneficiary of the Estate as Michael and Jesse, but they negotiated their resolution as if she did not exist, and in one fell swoop attempted to rip Shari's inheritance from her without so much as involving her in the discussion. This was wrong, completely undermines the purpose of distribution agreements, and was the exact reason that Mont. Code Ann. § 72-3-915 was enacted.

The District Court's refusal to set aside the Agreement for violating Mont. Code Ann. § 72-3-915 was an error of law that was incorrect then, and is incorrect now. It would be manifestly unjust to allow two beneficiaries the right to agree to impact a third beneficiary's share of the Estate.

II. The District Court erred when it held Shari Maclay was judicially estopped from objecting to Appellees' Agreement.

Appellant makes two distinct arguments as to why the doctrine of judicial estoppel should not apply on this issue: 1) Appellant's statements are not being used in a subsequent action or proceeding; and 2) The elements of judicial estoppel have not been met.

a. Appellees attempt to hold Appellant's statements against her in the same case in which the statements were made.

This Court has consistently held that the doctrine of judicial estoppel binds a party to his or her judicial declarations and precludes a party from

taking a position inconsistent with them in a **subsequent action or proceeding**. *Fiedler v. Fiedler*, 266 Mont. 133, 139, 879 P.2d 675 (1994) (emphasis added). The tenant of judicial estoppel only applies to “subsequent actions or proceedings.” *Stevens v. Novartis Pharms. Corp.*, 2010 MT 282, ¶ 76, 358 Mont. 474, 500, 247 P.3d 244, 262.

Here, this Court erred by applying judicial estoppel because the statements Appellees seek to hold against Appellant occurred within the same case at bar, not in a prior action or proceeding which is the only situation in which judicial estoppel could apply. In support of this position, Appellees cited, and the District Court relied on, a Federal District Court Case from the District of Montana, *BNSF Ry. Co. v. Toltz*. U.S. Dist. Lexis 52148 at 8. This case has no precedential weight for this Court, nor did it have any weight for the District Court, especially when Appellant cited this Court’s holding in *Stevens v. Novartis Pharms. Corp.*, wherein this Court held in pertinent part, and could not have been more clear in doing so:

We conclude that the doctrine of judicial estoppel is not applicable here. **First, the present case is not a “subsequent action or proceeding”—it is the same proceeding, as Stevens correctly observes** [emphasis added]. Furthermore, there is nothing to suggest that Novartis was “misled” by Stevens' alleged prior positions. Nor has Novartis shown that Stevens had knowledge of the facts surrounding Novartis' prior warnings to Dr. Schmidt at the time—to the contrary, the record suggests that Stevens believed that

the failure to warn was attributable to Dr. Schmidt rather than Novartis.

Stevens, 210 MT at ¶ 77, 358 Mont. at 500, 247 P.3d at 263. This Court has conclusively held, that judicial estoppel shall only apply in subsequent actions or proceedings, not the same action wherein the statement was made. While the Court acknowledges that Novartis was not “misled,” the first contention, and the reason judicial estoppel did not apply was because the case was not a “subsequent action or proceeding,” but rather, the same proceeding. This exact same analysis applies to the case before this Court. There is no subsequent action or proceeding here, the parties are still within the action where the statements were made. Pursuant to Montana precedent, judicial estoppel cannot apply. The District Court erred by finding otherwise.

b. The elements of judicial estoppel have not been satisfied.

A party claiming judicial estoppel must show that: (1) the estopped party had knowledge of the facts at the time he or she took the original position; (2) the estopped party succeeded in maintaining the original position; (3) the position presently taken is inconsistent with the original position; and (4) the original position misled the adverse party so that allowing the estopped party to change its position would injuriously affect

the adverse party. *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 16, 307 Mont. 45, 36 P.3d 408 (citing *In re Raymond W. George Trust*, 1999 MT 223, ¶ 51, 296 Mont. 56, 986 P.2d 427).

Within the District Court's *Order Denying Motion to Set Aside Settlement Agreement*, the District Court held that Shari was "judicially estopped from changing her position," because "Shari has maintained that Marty's 2021 Will is invalid and that she is merely an 'interested party' that simply wanted to be kept informed." The District Court made this holding based on three main arguments from Appellees: 1) Shari was included in the initial *Petition*; 2) Statements made during Shari's deposition; and 3) That Shari opposed Michael Maclay's *Motion for Summary Judgment* and did not oppose Jesse's.

First, Shari, by definition, is an "interest party" to this Estate because she is a devisee, surviving spouse, and beneficiary. Montana defines an "interested person" as heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. Mont. Code Ann. § 72-1-103(25). Up until the point that two beneficiaries decided to make an Agreement to strip her of a specific devise, Shari has been content to let the legal process play out, and have the court make a

determination regarding the validity of the Will. This does not change the fact that Shari, as an interested party, had a legal right to interject herself into the Estate proceeding if something was going to impact her rights, like Appellees' Agreement has. The District Court's holding otherwise is an error of law.

Additionally, while Shari was included in the initial *Petition for Formal Probate to Determine Will and Heirs and Appointment of Personal Representative*, this was in error, and done with incorrect legal advice from prior counsel who had an inherent conflict of interest between her two clients, Shari and Jesse. None-the-less, Shari, on numerous occasions, has stated that it was never her intent to contest the Will, which is why when she retained new counsel who made her aware that was the result of her being a party to the *Petition*, she immediately voluntarily moved to dismiss herself from the case, which the Court granted without any objection from the Appellees. A position she did not intend to take, cannot now be held against her. Since that time, Shari has consistently stated her wish to retain her life estate, as recently as her *Response to Michael Maclay's Motion for Summary Judgment* wherein she reiterated her wish to retain the life estate, and reiterated her intention to fight any attempts to

limit the scope of the same. There is no inconsistency with this stance and her stance with regards to the Agreement.

Jesse, throughout the briefing, on the *Motion to Set Aside Settlement Agreement* took Shari's deposition answers out of context and warped them to paint her as inconsistent in her stances. She first includes a portion of Shari's deposition that states:

Q. You did testify previously that it's your opinion Marty was not competent to execute the will; is that correct?

A. I believe under the circumstances of the influence of the drugs he was under, his competency would have been questionable.

Q. His competency would have been questionable is your testimony?

A. Right.

Q. You're not testifying he was incompetent?

A. I wasn't there, so I can't pass judgment.

Q. And you understand if the November 8, 2021, will was invalidated, you would lose your life estate; is that correct?

A. I understand.

(Pet'r Jesse Maclay's Resp. to Shari Maclay's Mot. To Set Aside

Settlement Agreement, Ex. 1, 99:13-100:4, August 16, 2023 (CR 67),

Appendix 17). These specific answers by Shari are general statements of opinion, not positions which can be estopped. She begins her answer by saying "I believe," which is a general statement of opinion. When pressed further, opposing counsel asks, "you're not testifying he was incompetent?"

To which Shari replies, “I wasn’t there, so I can’t pass judgment.” This is not a statement of position.

Jesse continued and tried to misrepresent Shari’s statements by saying in her response that “Shari testified in detail that after reviewing the medical records and seeing the drugs Marty was on, that she does not believe he was thinking clearly on the day he signed the purported Will.” In reviewing this section of the deposition transcript, it states as follows:

Q: Do you have any beliefs as to what you think happened that made Marty sign a will that said that?

A: I don’t know. I just – I feel – After having reviewed the medical records and seeing the drugs that he was on that day, I don’t believe that he was thinking clearly. And the reason that I can say that - - because I know that Riley’s going to say, do you have medical training and blah, blah, blah.

(*Id.*, 41:5-11.) By Counsel’s own question, she was attempting to elicit Shari’s opinion. She begins the question by asking, “do you have any beliefs as to what you think happened?” Shari responds by saying “I don’t know. I just – I feel . . .” This is not a judicial position that can be estopped, and is a blatant mischaracterization of her testimony by Appellee. Jesse continued in her *Response* to the motion to set aside that “Shari understood that if the 2021 Will was invalidated, she would be an omitted spouse,” and “Shari also understood that testifying that Marty was not

competent to sign a new will is not in her best interest.” Not only does this wildly misrepresent the portions of Shari’s deposition that were included, but they are not judicial positions that can be held against Shari through estoppel.

Finally, Appellees tried to allege that Shari objecting to Michael Maclay’s *Motion for Summary Judgment*, and not to Jesse’s is a legal declaration which entitles them to their relief. Appellees argument wholly ignores the context and substance of Shari’s response to Michael’s *Motion*, wherein she stated “Shari Lynn Maclay does not intend to give a substantive response to Michael Maclay’s Motion, nor does she take any stance with regards to Jesse Maclay’s Motion. At this juncture, Shari is a bystander to Jesse and Michael’s fight over the validity of the Will.” Shari Lynn Maclay’s Resp. to Michael Maclay’s Mot. for S.J., pp. 1-2, July 14, 2023 (CR 62), Appendix 18. The only reason that Shari filed a formal objection to his *Motion* is because he sought attorney’s fees against her, and his *Motion* intentionally attempted to limit the scope of her life estate. Neither of which are inconsistent positions with her request to set aside the Agreement.

None of these three arguments made by Appellants satisfy the elements of judicial estoppel. First, it cannot be said that Appellant had

knowledge of the facts at the time she took the original position. As outlined above Shari did not have knowledge of the fact that she would lose her life estate as a party to the initial Petition, nor was she aware that by being included in the initial Petition, that she was contesting the validity of the Will. She relied on incorrect legal advice from an attorney who had a substantial conflict of interest in representing both Shari and Jesse. Since her dismissal from the *Petition*, she has continuously voiced her wish to keep her life estate, and has fought Michael to prevent his consistent attempts to limit its scope.

Additionally, it cannot be said that Shari succeeded in maintaining the original position. As the parties sit today, no judicial determination has been made regarding the will's validity, and if the Will is deemed invalid, Shari would lose her life estate in the property. This cannot be considered a success for her. By contrast, in *Kauffman-Harmon v. Kauffman*, the Court held that Defendant's prior position in the case prevented additional claims from being brought against him, which would not have been the case absent the inconsistency. 2001 MT at ¶¶ 17-18, 307 Mont. at 51, 36 P.3d at 413. No such benefit exists for Appellant.

The third element judicial estoppel, that the position presently taken is inconsistent with the original position, must also fail. As outlined above

Appellant has not taken inconsistent positions in this case, but even if she had, whether the 2021 Will is valid, and whether two beneficiaries can agree to a distribution agreement affected a third beneficiary are wholly separate legal issues with different standards and law applicable. Shari's *Motion to Set Aside Settlement Agreement* is the first time the latter's distinct issue was raised in this case.

Finally, no party has been misled with regards to Shari Maclay's position in this matter. Shari is a beneficiary to the 2021 Will, every party in this matter is aware of that fact. As stated above, since Shari was dismissed from the *Petition* she has continuously requested and protected her right to her life estate in the Decedent's residential premises. When she was invited to the mediation, she expected to be an active participant in the settlement discussions, and hoped the mediation would lead to a global resolution. Instead, what happened is Appellees wholly bypassed her, made an Agreement which impacted her substantive rights under the 2021 Will, and stripped her of her specific devise, all without her consent and involvement.

Applying judicial estoppel in this matter would be a gross injustice to Appellant, and would severely undermine the purposes of Mont. Code Ann.

§ 72-3-915(1). The District Court erred by applying the doctrine as a matter of law.

III. The District Court erred when it held Shari Maclay had waived her right to object to Appellees' Agreement.

Waiver is a voluntary and intentional relinquishment of a known right or claim. It may be proved by express declarations or by a course of acts and conduct which induces the belief that the intent and purpose was waiver. *R.C. Hobbs Enterprises, LLC v. J.G.L. Distributing, Inc.*, 2004 MT 396, ¶ 24, 325 Mont. 277, 284, 104 P.3d 503, 507. To establish a waiver, the party asserting waiver must demonstrate: 1) the other party's **knowledge of the existing right**; 2) acts inconsistent with that right; 3) and resulting prejudice to the party asserting waiver. *VanDyke Const. Co. v. Stillwater Mining Co.*, 2003 MT 279, ¶ 15, 317 Mont. 519, 522, 78 P.3d 844, 847 (emphasis added).

Within the District Court's *Order Denying Motion to Set Aside Settlement Agreement* it stated "Shari also has waived her rights afforded to contest the Settlement Agreement by Mont. Code Ann. § 72-3-915(1)." The District Court's application of waiver is an error of law, which should be reversed on appeal. As outlined above, a party can only waive a right if it has knowledge of a then existing right. In support of their argument that

Appellant waived her right to object to the Agreement, Appellees focus on her actions leading up to the Agreement which they viewed as waiver. This is a flawed analysis that is not in line with Montana's standard of waiver.

As the Court held in *Vandyke Const. Co v. Stillwater Mining Co.*, a party can only waive an “**existing right**,” meaning any actions that occurred prior the right's existence cannot be considered waiver. For purposes of this analysis, the right Appellees claim Appellant waived, was the right to object to the distribution agreement pursuant to the statute. That right only came into existence when Appellees executed the Agreement. There was no right to waive prior to that action, meaning none of Appellant's prior actions could have waived that right under Montana Law. For that reason, and because Appellant took no action after the right arose to waive that right, element one of the analysis must fail.

Appellant additionally took no actions inconsistent with her right to object pursuant to Mont. Code Ann. § 72-3-915(1). In fact, it was quite the opposite. Mediation between the parties was held on July 18, 2023, Appellees filed their *Stipulation Regarding Settlement* on August 7, 2023, and Appellant filed her *Motion to Set Aside Settlement Agreement* on August 9, 2023. Immediately upon her right to object to the Agreement

vesting, Appellant filed her *Motion* to act. As a result, element two of waiver must fail.

Finally, there is no doubt that Appellees would be prejudiced if the Agreement was set aside, but it is not Appellants acts which caused that prejudice, but their own. Appellees willingly entered into a settlement agreement knowing full well, Appellant was an interested party and intentionally did not include the Appellant, and stripped Appellant of the specific devise she was entitled to under the terms of the 2021 Will. That is their inappropriate action, not Appellants. She did not cause them prejudice, they caused themselves prejudice. As a result, element three of waiver must fail.

Appellant was present at the mediation, and although she was denied the opportunity to negotiate, she was ready to. Appellant has now been forced to reengage in this legal process because the parties present at the mediation decided to take action affecting her life estate that she did not consent to. This appeal, the *Motion to Set Aside*, the resulting briefing and the time, effort and cost expended are all a result of Appellees' inappropriate actions. They took actions that by statute they were not allowed to take, and now attempt to hide behind waiver and judicial estoppel to protect their wrongs.

Because the elements of waiver fail, the District Court made an error of law in determining that Appellant had waived her right to object to the Agreement pursuant to Mont. Code Ann. § 72-3-915(1). This Court should reverse the *Order* on these grounds.

CONCLUSION

The District Court in this case made three grievous errors of law which substantially altered Appellant's rights in this Estate. It made an error of law in holding Mont. Code Ann. § 72-3-915(1) did not apply to Appellees Agreement because it was a distribution agreement which impacted the rights of a beneficiary who did not consent, nor execute the agreement in writing. It additionally made errors of law in holding that the doctrines of judicial estoppel and waiver foreclosed Appellant's right to object to the Agreement based on the statute. Judicial estoppel may not apply in the same proceeding wherein the statements were made, but rather may only apply in subsequent actions or proceedings. Additionally, the elements of judicial estoppel are not met. Finally, the doctrine of waiver cannot apply because the actions which Appellees allege constitute waiver occurred prior to the statutory rights existence, and an individual can only waive "existing rights." Further, the remaining elements of waiver also fail. For these reasons, and those included within this brief, Appellant respectfully requests that this Court issue a holding reversing the District Court's *Order Denying Motion to Set Aside Settlement Agreement*, and remand this proceeding for decisions consistent with that holding.

Dated this 27th day of March, 2024.

ST. PETER LAW OFFICES, P.C.

By: /s/ Logan Nutzman
Logan Nutzman

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11, Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Arial text, typeface of 14 points, is double spaced, and the word count does not exceed 10,000 words, excluding Certificate of Service and the Certificate of Compliance.

Dated this 27th day of March, 2024.

ST. PETER LAW OFFICES, P.C.

By: /s/ Logan Nutzman
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CERTIFICATE OF SERVICE

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Dated: 03-27-2024