

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA-23-0666

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

Deceased.

APPELLEE MICHAEL MACLAY'S ANSWER BRIEF

On Appeal from the Fourth Judicial District Court,
Missoula County, Cause No. DP-21-270,
The Honorable John W. Larson, Presiding

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STATEMENT OF THE ISSUES

1. Whether the District Court correctly concluded Appellant Shari Lynn Maclay is judicially estopped from defending the validity of Martin W. Maclay's November 13, 2021 will?

2. Whether the District Court's conclusion that Appellant Shari Lynn Maclay waived her rights under Montana Code Annotated § 72-3-915 was clearly erroneous?

STATEMENT OF THE CASE

This appeal stems from the settlement of a will contest. Martin W. Maclay ("Marty") died on or about November 13, 2021. Marty's son, Michael Maclay ("Mike"), then sought to informally probate a will, dated November 9, 2021. Marty's wife, Shari Maclay ("Shari"), and his daughter, Jessica Maclay ("Jesse"), subsequently petitioned for formal probate, questioning the validity of the November 9, 2021 will. Shari was later dismissed from the formal probate petition.

Mike and Jesse litigated the validity of the November 9, 2021 will. On or about July 18, 2023, Mike and Jesse settled the active will contest, agreeing to, among other things, admit a prior will, dated September 7, 2007, to probate. Shari moved the District Court to set aside the settlement agreement contending it violated her rights under Montana Code Annotated § 72-3-915. The Parties briefed

the motion and, on or about September 19, 2023, the Court held a hearing. Following the hearing, the Parties submitted supplemental briefing, and, on or about November 2, 2023, the Court issued an Order denying Shari’s motion. Shari appeals.

STATEMENT OF FACTS

On or about November 13, 2021, Marty died while hospitalized with COVID-19. Dkt. 59 at 4, 8.¹ Prior to his death, and while hospitalized, Marty executed a will, dated November 8, 2021 (the “2021 Will”). *See generally* Appellant Shari Maclay’s Appx. 3; *see also* Dkt. 59 at 12. Under the terms of the 2021 Will, Marty devised a life estate in his “primary residence” to Shari, subject to certain terms, and left everything else to Mike. Appellant Shari Maclay’s Appx. 3 at 1–2. No devise was made to Jesse. Appellant Shari Maclay’s Appx. 3 at 1. Prior to executing the 2021 Will, Marty had executed a will, dated September 7, 2007, largely devising his estate to Jesse and Mike (the “2007 Will”) equally. Appellee Mike Maclay’s Appx. 1.² Shari receives nothing under the 2007 Will. *Id.*

¹ Pursuant to Montana Rule of Appellate Procedure 12(5), (9), Mike has not included documents filed in the underlying District Court record in a supplemental appendix and has instead cited to them based on their underlying docket number designation. Accordingly, the abbreviation “Dkt. 59” refers to Mike’s Combined Brief in Response to Jesse Maclay’s Motion for Summary Judgment and in Support of Michael Maclay’s Motion for Summary Judgment, filed on or about June 26, 2023.

² The 2007 Will makes certain devises to Marty’s former spouse, Shanna J. Maclay, but such devises were revoked by virtue of their divorce. *See* Mont. Code Ann. § 72-2-814.

Following Marty's death, Mike sought to informally probate the 2021 Will. *See generally* Dkt. 2. Jesse and Shari subsequently petitioned the Court for formal probate to determine the validity of the 2021 Will. Appellant Shari Maclay's Appx. 1. Shari was subsequently dismissed from the formal probate petition. Appellant Shari Maclay's Appx. 7. During the ensuing District Court proceedings, Jesse and Mike litigated the validity of the 2021 Will.

Notably, at multiple times during this litigation, Shari postured herself adversely to Mike and the 2021 Will—repeatedly taking the position that the 2021 Will was invalid. For example, during her deposition, Shari repeatedly testified that she did not believe the 2021 Will was valid either because Marty lacked capacity to execute it or because it contained provisions he never would have agreed to, such as those disinheriting Jesse. Dkt. 67 at 5–6 and Ex. 1. Critically, Shari intensified her opposition to the 2021 Will at the summary judgment stage.

Specifically, when Jesse solicited positions on her summary judgment motion—communicating to Shari it sought a ruling that the 2021 Will was invalid—Shari responded that she was “in total agreement with” the motion. Dkt. 67 at Ex. 5. Conversely, when Mike solicited positions on his summary judgment motion—communicating to Shari he was seeking a ruling that the 2021 Will was valid—she actively opposed it. Dkt. 67 at Ex. 2.

On or about July 18, 2023, the parties attended a mediation. Appellant Shari Maclay's Appx. 13 at 2. At the mediation, Jesse and Mike successfully settled the will contest and entered into a settlement agreement that, subject to certain terms, provided for probating of the 2007 Will. Appellant Shari Maclay's Appx. 12. Relevant here, under the 2007 Will, Shari does not receive the life estate set forth in the 2021 Will. Compare Appellant Shari Maclay's Appx. 3 to Appellee Mike Maclay's Appx. 1.

Shari moved to set aside the settlement agreement, contending that, because she did not sign it, it violated Montana Code Annotated § 72-3-915, by undoing a devise made to her under the 2021 Will. Appellant Shari Maclay's Appx. 6. The Parties' briefing on Shari's Motion addressed whether Shari's attempt to set aside the settlement agreement—which would necessarily require her to defend the validity of the 2021 Will in order to save her life estate—was barred by the doctrines of judicial estoppel and waiver. *See generally* Dkts. 65, 67, 68, and 69.

On or about September 19, 2023, the Court held a hearing on Shari's motion. Tr. Hr'g, Sept. 19, 2023. Following the hearing, the parties submitted supplemental briefs on the judicial estoppel and waiver issues. *See generally* Dkts. 79, 80. On or about November 2, 2023, the Court issued an order denying Shari's motion, concluding that the doctrines of judicial estoppel and waiver precluded her from upending Shari's and Jesse's settlement agreement. Appellant Shari Maclay's

Appx. 13. The District Court then admitted the 2007 Will to probate, to be administered in accordance with the terms of Jesse's and Mike's settlement agreement. Appellant Shari Maclay's Appx. 15. Shari now appeals.

STANDARD OF REVIEW

A District Court's conclusions on the application of judicial estoppel are reviewed for correctness. *Fiedler v. Fiedler*, 266 Mont. 133, 137–141, 879 P.2d 675, 678–680 (1994).

Application of the doctrine of waiver generally presents questions of fact, reviewed for clear error. *Id.*; see also *McGregor v. Mommer*, 220 Mont. 98, 109–110, 714 P.2d 536, 543–44 (1986). Clear error requires a showing that the District Court's factual findings were unsupported by substantial evidence, and, if so, whether the District Court misapprehended the effect of the evidence. *James Talcott Const., Inc. v. P & D Land Enters.*, 2006 MT 188, ¶ 26, 333 Mont. 107, 141 P.3d 1200. “This standard is deferential,” and generally there need just be “more than a scintilla of evidence” to support the District Court's factual findings. *In re Eldorado Coop Canal Co.*, 2016 MT 94, ¶ 18, 383 Mont. 205, 369 P.3d 1034.

ARGUMENT SUMMARY

Shari is judicially estopped from asserting, and has waived any right to assert, that the 2021 Will is valid or that the settlement agreement violates any rights she might have under Montana Code Annotated § 72-3-915. Indeed, Shari's

conduct during the litigation *invited* the outcome she now contests. For example, Shari repeatedly testified she thought the 2021 Will was invalid, opposed Mike’s efforts to have the 2021 Will validated, and actively supported Jesse’s summary judgment motion to have it declared invalid. Because of this, Shari has no cognizable challenge to the settlement agreement, which would necessarily require her to establish the 2021 Will is valid to obtain her life estate. Consequently, the District Court correctly concluded the doctrines of both judicial estoppel and waiver preclude Shari from upending Jesse’s and Mike’s settlement.

ARGUMENT

I. The District Court Correctly Held that Judicial Estoppel Prevents Shari From Challenging the Settlement Agreement.

A. The Elements of Judicial Estoppel are Satisfied.

At its core, judicial estoppel exists to “prevent parties from playing fast and loose with the court,” by barring “a litigant from asserting a position that is inconsistent, conflicts with, or is contrary to one that she has previously asserted in the same or in a previous proceeding.” *Nelson v. Nelson*, 2002 MT 151, ¶ 20, 310 Mont. 329, 50 P.3d 139 (alterations and citations omitted). The goal of judicial estoppel is to stop “chameleonic litigants who seek to prevail, twice, on opposite theories.” *Id.* That is precisely what Shari seeks to do here and what the District Court properly prevented.

Judicial estoppel applies when: (1) the estopped party “had knowledge of the facts at the time” they took the position at issue; (2) the estopped party succeeded in maintaining that position; (3) the position they are estopped from advancing “is inconsistent with the original position;” and (4) “the original position misled” others “so that allowing the estopped party to change” their position would injuriously affect those parties. *Vogel v. Intercontinental Truck Body, Inc.*, 2006 MT 131, ¶ 10, 332 Mont. 322, 137 P.3d 573. All elements are present in this case.

As a threshold matter, the position at issue for the judicial estoppel analysis is Shari’s apparent assertion that the 2021 Will is valid. Otherwise, Shari would not be deprived of any rights she ostensibly possesses under Montana Code Annotated § 72-3-915, by virtue of Jesse’s and Mike’s settlement agreement, because the only devise she receives is the life estate provided under the 2021 Will. Put another way, Shari complains that Jesse’s and Mike’s settlement agreement—which probates the 2007 Will lacking any life estate for Shari—violates Montana Code Annotated § 72-3-915 because it deprives her of the life estate provided to her through the 2021 Will. Such a position can only be maintained if Shari can successfully take the position that the 2021 Will is a valid testamentary instrument under Montana law (a question raised, but never resolved, by Jesse’s will contest).

As to the first element, Shari was aware of the pertinent facts at the times she maintained the 2021 Will was invalid. First, even in Shari’s original petition

for formal probate, she raised concerns regarding the 2021 Will's validity, including Marty's hospitalization with COVID-19, Jesse's disinheriting, and the lack of two witnesses. Second, Shari expressed the same concerns during her deposition, testifying that Marty's competency was questionable when he executed the 2021 Will and that he never would have signed a document disinheriting Jesse. Notably, Shari also recognized during her deposition that invalidation of the 2021 Will would result in the loss of her life estate.

Third, when Shari opposed Mike's summary judgment motion (actively contesting a judicial ruling that the 2021 Will was valid), she had already reviewed the facts set forth in Jesse's summary judgment motion (seeking to invalidate the 2021 Will) and communicated she was "in total agreement with" the motion and "love[d] it!" Based on the foregoing, when Shari took the position that the 2021 Will was invalid in her original probate petition, during her deposition, and at the summary judgment stage, she had the same knowledge of the factual circumstances surrounding the 2021 Will's execution as when she suddenly sought to reverse that position and upend Jesse's and Mike's settlement agreement. As such, the first element of judicial estoppel is satisfied.

As to the second element, Shari succeeded in taking the position that the 2021 Will was invalid because Mike and Jesse settled the active will contest, electing to probate the 2007 Will instead. Currently, there are no active

proceedings seeking admission of the 2021 Will to probate—an outcome Shari directly sought, and outright invited, by taking the position it was invalid. *See Kauffmann-Harmon v. Kauffman*, 2001 MT 238, ¶ 17, 307 Mont. 45, 36 P.3d 408.

In other words, Shari’s position that the 2021 Will should not be probated as Marty’s last will and testament prevailed, as soon as Jesse and Mike agreed to settle their dispute over the 2021 Will and probate an older will instead.

Accordingly, the second element is satisfied.

Third, the position Shari advances now—that the settlement agreement violates Montana Code Annotated § 72-3-915 because it deprives her of the life estate set forth in the 2021 Will—directly contradicts her position that the 2021 Will is invalid. Shari’s entire argument is that Jesse and Mike cannot agree to abandon the 2021 Will and instead probate the 2007 Will, because doing so would deprive her of the life estate she is provided under the 2021 Will. Of course, this is only true if the 2021 Will is a valid testamentary instrument, a position Shari has actively opposed at multiple stages of this litigation. Shari’s desire to have the 2021 Will invalidated was especially pronounced when she supported Jesse’s summary judgment motion and opposed Mike’s summary judgment motion.³ In

³ In the District Court, Shari argued she only opposed Mike’s summary judgment motion because it sought to hold her liable for his attorneys’ fees under Montana Code Annotated § 72-12-206. But, not only did Shari oppose Mike’s summary judgment motion based solely on his explanation that it would seek to validate the 2021 Will, as explained at the hearing, Mike only

short, because Shari seeks to advance a position that is diametrically opposed to her previous position, the third element of judicial estoppel is satisfied.

Fourth, Mike and Jesse would both be prejudiced if Shari were permitted to suddenly advance the position that the 2021 Will is valid. Specifically, Mike and Jesse incurred the cost of a settlement conference and negotiated a resolution of Jesse's will contest in good faith, agreeing to probate the 2007 Will, subject to certain terms. In reaching this settlement, they relied on Shari's prior conduct in the underlying litigation, wherein she questioned the validity of the 2021 Will, actively supported efforts to have it invalidated, and actively opposed efforts to have it validated. They also relied on Shari's statement that she understood losing her life estate would be the consequence of those actions and that she was inviting this outcome. Now, if Shari's sudden attempt to champion the 2021 Will is permitted, Jesse and Mike will be injured, because their settlement agreement will be upended and contested litigation regarding the 2021 Will's validity will be reinstated, including the cost, stress, and uncertainty associated with the same.

In short, all four elements of judicial estoppel are present here. Shari contested the 2021 Will's validity with full knowledge of the facts surrounding its execution and the consequences of its invalidation. She succeeded in advancing

decided to make his attorneys' fees request *after* Shari opposed his motion, not before. Tr. Hr'g 21:22–23:10, Sept. 19, 2023.

that position, as Mike abandoned his attempts to defend its validity and instead settled the active will contest, in favor of probating the 2007 Will. Shari misled Jesse and Mike and now seeks to contend that the 2021 Will is valid and that the life estate devised to her under it cannot be altered absent her written consent.

Consequently, there is nothing incorrect about the District Court's conclusion that judicial estoppel bars Shari from taking this inconsistent position. Without the ability to seek validation of the 2021 Will, Shari has no cognizable challenge to the settlement agreement under Montana Code Annotated § 72-3-915, and her Motion was properly denied.

B. Judicial Estoppel Applies to Inconsistent Positions Advanced Within a Single Proceeding.

In seeking to avoid the foregoing, Shari argues judicial estoppel only applies to inconsistent positions advanced in subsequent proceedings. This is incorrect—as the Montana Supreme Court has previously applied judicial estoppel to inconsistent positions advanced in the same proceeding. *Nelson*, ¶ 20 (recognizing judicial estoppel applies to positions inconsistent with one previously advanced “*in the same* or in a previous proceeding”) (emphasis added); *Fiedler*, 266 Mont. at 139–41, 879 P.2d at 679–80 (holding that judicial estoppel barred litigant from adopting conflicting positions at different stages of the same lawsuit); *Big Sky Civil & Env'tl., Inc. v. Dunlavy*, 2018 MT 236, ¶ 30, 393 Mont. 30, 429 P.3d 258

(“Judicial estoppel is an equitable principle that bars a party from taking inconsistent positions of fact and law at different points in the same litigation”) (emphasis added).

To the extent there is tension between *Nelson*, *Fiedler*, *Big Sky*, and the authority Shari points to, *Stevens v. Novartis Pharmaceuticals Corporation*, 2010 MT 282, ¶ 77, 358 Mont. 474, 247 P.3d 244, such tension should be resolved in favor of applying judicial estoppel to conflicting positions advanced in both the same *or* a subsequent proceeding. For example, an estoppel treatise, on which this Court has previously relied, confirms this approach, explaining that judicial estoppel is properly applied to bar advancement of conflicting positions within a single proceeding. 31 C.J.S. Estoppel and Waiver § 186 (2024) (“[P]rovided the essential elements of estoppel against inconsistency in judicial proceedings are present,” a party is estopped from controverting a prior position, “or from adopting a position necessarily inconsistent with them, in the same proceeding”); *Rowland v. Klies*, 223 Mont. 360, 367–68, 726 P.2d 310, 315 (1986) (citing C.J.S Estoppel). Persuasive authority from the United States Supreme Court is in accord. *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000) (judicial estoppel may prevent position changes by litigant at different phases of the same case); *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (same).

Tellingly, Shari fails to recognize the foregoing binding authority, such as *Nelson, Fiedler, and Big Sky*, that conflicts with *Stevens*, and certainly fails to articulate why judicial estoppel—which exists to protect the integrity of the judicial system—should apply only to conflicting positions advanced in successive proceedings. *See LeMond v. Yellowstone Dev., LLC*, 2014 MT 181, ¶ 39, 375 Mont. 402, 336 P.3d 345. Stated differently, the purpose underlying judicial estoppel is no less important simply because the inconsistent position is advanced in the same proceeding, as opposed to a subsequent one. Shari provides no contrary argument.

Even then, Shari may very well have to advance the inconsistent position at issue—that the 2021 Will is valid—in a proceeding subsequent to this one. This is because Shari currently has no active challenge to the validity of the 2007 Will. The only parties actively litigating the validity of the 2021 Will have settled that litigation, electing to have the 2007 Will probated instead, subject to certain terms. To that end, the formal probate petition—challenging the 2021 Will—has been dismissed. The only active probate proceedings that exist are the ones initiated following the settlement to probate the 2007 Will. If the settlement agreement is undone, Shari will have to initiate her own will contest—an entirely new proceeding—seeking probate of the 2021 Will instead of the 2007 Will. Otherwise, Mike’s and Jesse’s settlement agreement will have no adverse impact

on her at all. As such, even assuming Shari is correct that judicial estoppel only applies to subsequent proceedings (which it does not), that does not render it inapplicable to the inconsistent position Shari seeks to advance in this dispute.

II. The District Court’s Finding that the Doctrine of Waiver Barred Shari’s Motion Was Not Clearly Erroneous.

It is well established that statutorily created rights, such as those ostensibly afforded to Shari under Montana Code Annotated § 72-3-915, are waivable.

Collection Bureau Servs., Inc. v. Morrow, 2004 MT 84, ¶ 9, 320 Mont. 478, 87 P.3d 1024 (citing Mont. Code Ann. § 1-3-204). “[W]aiver is the voluntary and intentional relinquishment of a known right, claim or privilege, which 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.” *Hurly v. Lake Cabin Dev., LLC*, 2012 MT 77, ¶ 27, 364 Mont. 425, 276 P.3d 854 (citation omitted). Shari’s declarations and conduct in this case have effectuated a waiver of any rights she has to enforce the 2021 Will, and, consequently, her rights to contest the settlement agreement under Montana Code Annotated § 72-3-915.

The facts supporting waiver are largely identical to the facts supporting application of judicial estoppel, as set forth above. Specifically, Shari filed a petition questioning the validity of the 2021 Will. Although she was subsequently dismissed from that petition, at her deposition Shari repeatedly called into question

the 2021 Will's validity—testifying that medication Marty was on likely affected his competency and that he never would have knowingly signed a testamentary instrument disinheriting Jesse. Shari's adversarial posture to the 2021 Will only intensified at the summary judgment stage, when she *supported* Jesse's motion to invalidate the 2021 Will and *opposed* Mike's motion to validate the 2021 Will. Dkt. 67 at Exs. 2 and 5.

Now, after continually and repeatedly posturing herself adversely to the 2021 Will, and actively acknowledging its invalidation would result in the loss of her life estate, Shari suddenly seeks to enforce the 2021 Will by contending her rights under Montana Code Annotated § 72-3-915 were violated because she was not a party to the settlement agreement. Shari's conduct at multiple successive stages of this litigation, however, reasonably induced the belief in Mike and Jesse that Shari intended to waive her rights under the 2021 Will, and consequently, her rights to contest a settlement agreement that elected to probate the 2007 Will instead. Put another way, Shari cannot complain her statutory rights were violated by the settlement agreement unless she can successfully assert the 2021 Will is valid. Her conduct and prior testimony in this case prevent her from doing so.

CONCLUSION

Based on the foregoing, Mike respectfully requests that this Court affirm the

District Court's Order Denying Shari's Motion to Set Aside Settlement Agreement.

DATED this 26th day of April, 2024.

LAIRD COWLEY, PLLC

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4) of the Montana Rules of Appellate Procedure, I certify that Appellee's Response Brief is printed in a proportionally spaced Times New Roman text typeface of 14 points; is double spaced; and word count calculated by Word for Microsoft 365 Version 3202 is 3595 words, excluding the Table of Contents, the Table of Authorities, the Certificate of Service, and this Certificate of Compliance.

DATED this 26th day of April, 2024.

LAIRD COWLEY, PLLC

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