

SUPREME COURT OF WASHINGTON

Carlton v. Black

153 Wn. 2d 152 (2004) · Decided December 9, 2004

SUMMARY

The Washington Supreme Court affirmed the reversal of summary judgment admitting Margaret Black's lost 1993 will to probate because genuine issues of material fact existed regarding its execution. The court held that execution and contents of a lost will must be proved by clear, cogent, and convincing evidence, and clarified the application of res judicata in probate proceedings. It also affirmed the instruction that all issues concerning the competing 1992 and 1993 wills be resolved in one proceeding.

OPINION

OWENS, J.

¶1 The Columbia County Superior Court admitted a 1992 will, signed by Margaret Black, to probate shortly after Margaret's death in October 2000. The court subsequently admitted a 1993 lost will, purporting to be *157Margaret's last will and testament, on summary judgment and awarded attorney fees to Richard Burns, the personal representative under the 1992 will.

On appeal, the Court of Appeals reversed the summary judgment and the attorney fee award and remanded the case with instructions that all issues pertaining to the will should be decided in one proceeding. We affirm the Court of Appeals but base our decision on the grounds that there are genuine issues of material fact as to the execution of the lost will that must be decided at a trial.

We also clarify the Court of Appeals' statements regarding the standard of proof necessary to admit lost wills and clarify the role of res judicata in probate proceedings. Owens, J. *157FACTS

¶2 On October 11, 2000, Margaret Black, a resident of Columbia County, Washington, died, leaving property subject to probate. A will executed on December 10, 1992, was admitted to probate on October 12, 2000, and Richard Burns was appointed as the personal representative.

The 1992 will requested Burns be appointed as the personal representative and left all of Margaret's farm property to Douglas William (Bill) Carlton. The residuary of the estate was split into thirds among Eugene Ayers or upon his death to his daughter, Bill Carlton, and the First Christian Church of Dayton.

The will explicitly excluded Myrna Black, Margaret's daughter. The 1992 will was signed by Margaret, signed by two witnesses, and included an attached affidavit of the subscribing witnesses. f3 Subsequently, Myrna Black petitioned the court to admit a 1993 lost will to probate.

Myrna also contested the 1992 will under RCW 11.24.010 to prevent the four-month statute of limitations from running in case her petition to probate was unsuccessful.

The 1993 will appointed Myrna as the personal representative and transferred all of Margaret's property to Myrna, which was in direct contradiction with the 1992 will. An unsigned draft of the will *158 included a place for Margaret to sign, an attestation clause with a place for two witnesses to sign, and a certificate of the subscribing witnesses describing the legal requirements of the will's execution.

On August 7, 2001, Myrna filed a motion for summary judgment to admit the 1993 lost will. ¶4 Affidavits by Robert Reiter, Janet Taylor, Paul Blauert, and Myrna Black were submitted in support of the lost will.¹ Robert Reiter's affidavit states the following. Reiter, a California attorney and Myrna's friend, accompanied Myrna to visit her mother in August 1993.

Myrna and Reiter obtained the unexecuted 1993 will from Paul Blauert in Seattle, Washington, and then continued to Walla Walla, Washington, where Margaret resided. Reiter discussed the 1993 will with Margaret, Margaret read the will, and Reiter verified that the will reflected her wishes. Myrna arranged for a notary public to attend the execution of the will in order to notarize the will and other documents.

After reviewing Margaret's notarized power of attorney, allegedly signed on the same day as the will, August 14, 1993, Reiter remembered the notary was Janet Taylor. After Margaret reviewed and discussed the will, she initialed each page and signed the will in the presence of Reiter and Taylor. Reiter and Taylor then signed as witnesses. Attached to his affidavit is a copy of the will Reiter remembers Margaret executing.

Reiter also submitted a declaration to the court stating that he personally read the signed will and that this was the will Myrna received in Seattle. Subsequently, Reiter and Myrna returned to Seattle, and Myrna gave Blauert the will. f 5 In his affidavit Blauert stated that he prepared the 1993 will at Myrna's request, and the provisions in the will *159 attached to his affidavit are the same as those in the will given to Myrna in August 1993.

Myrna returned this same document to Blauert on August 15, 1993. Blauert noticed the will was executed on August 14, 1993, and it was signed by two attesting witnesses. The original will and another document were placed in a file.

In October 2000, Myrna contacted Blauert requesting the will. Blauert could not find the file and stated that when he retired in January 1996 he had discarded most of his paper files. A computer disk with a copy of the will and a transmittal letter was found, and from this Myrna was sent an unsigned copy of the will.

Although Blauert may have sent Myrna the original will, currently the original 1993 will appears to be lost. ¶6 Janet Taylor, the notary public and the other witness to the 1993 will as identified by Reiter, does not recall witnessing the 1993 will or any of the people involved. Taylor was a notary public in 1993, and she recognized her signature on Margaret’s durable power of attorney, executed August 14, 1993.

She believed she personally witnessed Margaret sign this document because she did not notarize documents for people she did not know unless the person was present. However, Taylor has no recollection of witnessing the will, or speaking to Myrna, Margaret, or Reiter. ¶7 Despite Burns’ and the beneficiaries’ objections to summary judgment, Judge William Acey granted Myrna’s motion for summary judgment admitting the lost will to probate, awarded attorney fees to Burns, and denied Myrna’s attorney fees until after adjudication of any challenges to the lost will.

In his oral opinion, Judge Acey noted that the summary judgment was granted based on Reiter’s and Blauert’s affidavits, and he did not make a finding that Taylor had signed the will. Verbatim Report of Proceedings (VRP) (Sept. 26, 2001) at 15, 17.

The beneficiaries and Burns appealed the summary judgment order, and Myrna cross-appealed the attorney fee award. The Court of Appeals reversed summary judgment, reversed the attorney *160fee award to Burns, and remanded the case with instructions to resolve all issues regarding the will in one proceeding.

In re Estate of Black, 116 Wn. App. 476, 480, 488, 66 P.3d. 670 (2003). Myrna filed a petition for review with this court, and Burns and the beneficiaries filed cross-petitions for review. We granted review of all issues on December 24, 2003.² We affirm the Court of Appeals on different grounds and clarify the court’s statements regarding burdens of proof and res judicata in probate proceedings.

ISSUES ¶8 1. Whether the Court of Appeals erred regarding the necessary burden of proof required to admit lost wills. ¶9 2. Whether summary judgment admitting Margaret’s lost will was properly reversed in light of genuine issues of material fact regarding execution of the lost will. ¶10 3. Whether the Court of Appeals erred in its analysis of the role res judicata plays in probate proceedings. ¶11 4.

Whether the Court of Appeals erred in ordering all issues involving Margaret’s 1992 and 1993 wills resolved in one proceeding on remand. ¶12 5. Whether any party is entitled to attorney fees. STANDARD OF REVIEW ¶13 On summary judgment, we “engage [] in the same inquiry as the trial court.” *Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994).

We will not resolve factual issues, but rather must determine if a genuine issue as to any material fact exists. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). “A material fact is one

upon which the outcome of the litigation depends.” *Id.* The moving party has the burden of proving there is no genuine issue of material fact *161 and all inferences are construed in the light most favorable to the nonmoving party.

Id.; see also Civil Rules (CR) 56(c).³ If the moving party meets its burden, the nonmoving party must then “set forth specific facts showing that there is a genuine issue for trial.” *La Plante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975); *Snohomish County v. Rugg*, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002) (stating that a nonmoving party must set forth evidentiary facts, not suppositions, opinions, or conclusions); see also CR 56(e).

Only where there is no genuine issue of material fact and reasonable people could reach “but one conclusion” from all of the evidence is summary judgment appropriate. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980); *Balise*, 62 Wn.2d at 199. Further, it should be noted that proceedings where a will is being challenged are equitable in nature and are reviewed *de novo* upon the entire record.

In re Estate of Ney, 183 Wash. 503, 505, 48 P.2d 924 (1935). ANALYSIS A. Standard of Proof for Lost Wills ¶14 The Court of Appeals incorrectly stated that a lost will may be admitted to probate only if the will is in existence at the time of the testator’s death and the will’s contents are proved “ ‘clearly and distinctly by the testimony of at least two persons.” *Black*, 116 Wn.

App. at 484 (quoting *In re Estate of Nelson*, 85 Wn.2d 602, 605, 537 P.2d 765 (1975)). *Nelson* interpreted an earlier version of the lost will statute, RCW 11.20.070. *Nelson*, 85 Wn.2d at 605. Since *Nelson*, the legislature has amended the statute and deleted the requirement that the will must be in existence at the time of the testator’s death. See Laws of 1994, ch. 221, §§ 20, 75.

The current statute also states that the contents “must be proved by clear, cogent, and convincing evidence, consisting at least in part of a witness to either its contents *162 or the authenticity of a copy of the will.” RCW 11.20.070(2). While the legislature may amend a statute, the court must interpret the present language of the statute and may not “rewrite explicit and unequivocal statutes.” *State v. Mollichi*, 132 Wn.2d 80, 87-88, 936 P.2d 408 (1997).

The Court of Appeals erred in reciting the statutory requirements to admit a lost will to probate and the burden of proof necessary to prove the contents of a lost will. ¶15 Further, the Court of Appeals erred in stating that “[p]roof of the execution of a lost will is by a preponderance of the evidence.” *Black*, 116 Wn. App. at 483 (citing *Nelson*, 85 Wn.2d at 607-08; *In re Estate of Peters*, 43 Wn.2d 846, 860, 264 P.2d 1109 (1953)).

The Court of Appeals cites *Nelson* and *Peters* for this proposition, but neither case supports this burden of proof. In *Nelson*, the formalities of execution of the will were not contested, and the court used the clear preponderance of the evidence standard to determine if the will was in

existence at the time of the testator's death, a requirement no longer applicable under the current statute.

85 Wn.2d at 606-08. Peters, interpreting a former version of RCW 11.20.070, states that the clear and distinct burden of proof relates only to the contents of the will, and proof as to the execution of the will is found in the first paragraph of the statute. 43 Wn.2d at 860.

However, the execution of the will was not contested in Peters, paragraph one of the statute does not provide a standard for the appropriate burden of proof, and the court provides no standard for proving the execution of a will. *Id.* Although the court later mentions the preponderance of the evidence standard, this is in regard to whether the testator lacked capacity and does not strongly support the proposition that that standard should apply to the execution of a will generally.

Id. at 861; see also *In re Estate of Gardner*, 69 Wn.2d 229, 235-36, 417 P.2d 948 (1966) (quoting Peters, 43 Wn.2d at 860, for the proposition that the “ ‘clear and distinct’ ” burden of proof refers only to proving the contents of the will, but not stating the applicable burden of proof to be applied to the execution of a will); *In re Estate of Neubert*, 59 Wn.2d 678, 685, 369 P.2d 838 (1962) (same). *163¶16 “A statute must be read as a whole giving effect to all of the language used,” and each provision must be harmonized with other provisions to “ ‘insure proper construction of every provision.’ ” *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995) (quoting *Addleman v. Bd. of Prison Terms & Paroles*, 107 Wn.2d 503, 509, 730 P.2d 1327 (1986)).

Reading RCW 11.20.070 as a whole supports using the “clear, cogent, and convincing” burden of proof for the execution and the content of a will. Case law does not support allowing a lower burden of proof for the execution of a lost will than is used for proving the contents of a lost will. See *In re Last Will & Testament of Borrow*, 123 Wash. 128, 130, 212 P. 149 (1923) (applying the same burden of proof to the execution and the contents of a lost will).⁴ Therefore, the appropriate burden of proof pertaining to the execution of a lost will should be “clear, cogent, and convincing.” B. Admission of the 1993 Lost Will ¶17 The Court of Appeals applied RCW 11.20.070 to determine if the 1993 will should be admitted to probate and found that Myrna had met the technical requirements of the statute.

Black, 116 Wn. App. at 484. However, the court concluded that summary judgment was not appropriate because, based on the doctrine of *res judicata*, summary judgment would not allow disputed issues to be argued in a later will contest, which would “inadvertently short circuit[] the statutory probate scheme.” *Id.* at 484-86.

The Court of Appeals correctly applied RCW 11.20.070 but incorrectly held that Myrna had met the technical requirements of the statute. The court also erred in its application of *res judicata*, and

that issue will be discussed below. See *infra* section C. *1641. Applicable Statutes ¶18 At the outset, we must determine which statutes apply to this case.

We decide issues of statutory construction *de novo*. In *re* Estate of Baird, 131 Wn.2d 514, 518, 933 P.2d 1031 (1997). Statutes relating to the same subject are construed together and, in “ ‘ascertaining legislative purpose... are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves.’ ” *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (quoting *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974)).

When more than one statute applies, the specific statute will supersede the general statute. See *Hallauer*, 143 Wn.2d at 146 (stating that when statutes conflict, the specific statute supersedes the general statute); *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994). ¶19 Here, we need consider only two statutes, RCW 11.20.070 and RCW 11.12.020.

Although RCW 11-.20.020 explains how a party may petition a court to admit a will to probate in an *ex parte* proceeding, here the 1993 will is a lost will; therefore, the specific lost will statute, RCW 11.20.070, and not the general statute applies.⁵ RCW 11.20.070(1) states that the court “may take proof of the execution and validity of the will and establish it” after notice has been given to all parties.

To determine whether the will was properly executed, the court must use RCW 11.12.020, which describes the proper execution of all wills. See *In re* Estate of Harris, 10 Wash. 555, 559, 39 P. 148 (1895) (discussing former RCW 11.12.020 and stating that a *165lost will must have the same RCW 11.12.020 requirements as all other wills); *Neubert*, 59 Wn.2d at 685 (finding evidence sufficient to establish execution of a lost will under RCW 11.12.020).⁶ The petitioner must prove the execution and the contents of the will “by clear, cogent, and convincing evidence.” RCW 11.20.070(2).

2. Technical Requirements: Execution of the Lost Will ¶20 RCW 11.12.020(1) requires all wills to be in writing, “signed by the testator or by some other person under the testator’s direction in the testator’s presence,” and attested to by two witnesses in the presence of the testator and at the testator’s request.

The witnesses may attest to the will by subscribing their names to the will or by signing an affidavit in compliance with RCW 11.20.020(2). Citing *In re* Estate of Campbell, 47 Wn.2d 610, 615-16, 288 P.2d 852 (1955), the Court of Appeals stated that “[a]n attestation clause is *prima facie* evidence that the [will] was signed by the witnesses in the presence of the testatrix and at her direction.” *Black*, 116 Wn.

App. at 484. However, in *Campbell*, it appears that the will presented to the court included the testator's signature and a signed attestation clause.⁷ 47 Wn.2d at 614-15; see *In re Estate of Chafey*, 167 Wash. 185, 189, 8 P.2d 959 (1932) (stating that an attestation clause with a genuine signature of the testator is prima facie evidence of the will's execution); see also *In re Estate of *166Alfaro*, 301 Ill. App.

3d 500, 504, 703 N.E.2d 620, 234 Ill. Dec. 759 (1998) (stating that an attestation clause with genuine signatures on the instrument is prima facie evidence that the will was properly executed). Here, the computer copy of the will does not contain any signatures by the testator or the witnesses.

Therefore, the unsigned will and unsigned attestation clause is not prima facie evidence of proper execution.⁸ ¶21 Absent a signed attestation clause, execution may also be proved if witnesses testify they signed the document in the presence of the testator and testify to facts showing attestation as a matter of law.

In re Estate of Chambers, 187 Wash. 417, 427-28, 60 P.2d 41 (1936); *In re Estate of Lindsay*, 91 Wn. App. 944, 949, 957 P.2d 818 (1998). The definition of witness as used in RCW 11.12.020 is "one who has personal knowledge of the fact that the will was signed by the testator." *In re Estate of Price*, 73 Wn. App. 745, 751, 871 P.2d 1079 (1994).

Here, Reiter submitted an affidavit stating that Margaret signed the will in his presence and he signed the will as a witness. This satisfies the RCW 11.12.020 requirement as to one witness. However, Myrna must prove two attesting witnesses signed the document.

Therefore, we must determine whether Taylor signed the document and, if so, if she did so as an attesting witness. f 22 A witness may testify only to events within his or her personal knowledge, and affidavits submitted during summary judgment proceedings must be based on the affiant's personal knowledge. Rules of Evidence (ER) 602; CR 56(e); *Visser v. Packer Eng'g Assocs.*, 924 F.2d 655, 659 (7th Cir.

1991) (interpreting Federal Rule of Evidence 602, which is the same as ER 602, and stating that testimony outside an affiant's personal knowledge is not admissible in an affidavit submitted during summary judgment proceed*167ings). A witness who personally observes an event can state an opinion, conclusion, or impression as to the event and may testify " 'about the state of mind of another, so long as the witness personally witnessed events or heard statements that are relevant to prove the other person's state of mind.' " *State v. Contreras*, 57 Wn.

App. 471, 477, 788 P.2d 1114 (1990) (quoting 5A Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 218(2), at 153 (3d ed. 1989)). ¶23 Here, Reiter stated that Margaret signed the will in Taylor's presence and he observed Taylor signing the document as a witness.

However, his recall of Taylor as the notary who was present was based on a review of the notarized power of attorney containing Taylor's signature. Further, in Reiter's declaration, submitted to the court to oppose summary judgment, he states that Margaret signed the will in the presence of witnesses and a notary, implying that Taylor was not a witness. Clerk's Papers (CP) at 112; see also CP at 1 (petition to probate the lost will stating the will was executed in the presence of two witnesses and a notary public); but see CP at 2, 31 (noting that Taylor was a witness).

Moreover, from Taylor's affidavits, it appears she was present for the notarization of Margaret's power of attorney, but it is not clear that she had personal knowledge that Margaret signed the will, as she does not recall any of the events associated with the execution of the will.

Although Blauert stated he noticed the will was signed by two attesting witnesses, he did not state the names of the witnesses. Therefore, it is unclear if Taylor's signature is the other witness signature on the will. ¶24 Additionally, even if Taylor signed the document, it is unclear if she signed it as a notary or as an attesting witness.⁹ A notary's signature may be "deemed *168the signature of an attesting witness" where all other requirements of a valid attestation are met.

Price, 73 Wn. App. at 752-53.¹⁰ In Price, a notary's signature met the legal requirements of attestation where the notary interacted with the testator and could judge his competency, the notary declared the testator signed the will in her presence, the testator requested she sign the will, and she was qualified to be a witness. Id. at 753; see also Alfaro, 301 Ill. App.

3d at 510 (stating that the main issue is whether the notary is attesting to the genuineness of the signature or if she is attesting to all acts necessary to properly execute a will). Here, based on Taylor's affidavits, she did not interact with Margaret, she did not declare that Margaret signed the will in her presence, and she did not state that Margaret requested her to sign the will.

Although Reiter states that the will was signed in the presence of himself and Taylor, there is no other evidence that Taylor had personal knowledge pertaining to whether Margaret signed the will. Further, as discussed above, the record contains contradictory evidence as to whether two witnesses and a notary were present, indicating Taylor was not a witness.

CP at 1, 2, 31, 112. Therefore, even if Taylor signed the will, her signature may be only that of a notary and not as an attesting witness. ¶25 On summary judgment, inferences are construed in the light most favorable to the nonmoving party. Balise, 62 Wn.2d at 199.

Here, there is evidence which creates a genuine issue of material fact as to the proper execution of *169the will and more than one conclusion could be drawn from the evidence.¹¹ Therefore, summary judgment is not appropriate.¹² C. Res Judicata ¶26 Although we have held that summary judgment is not appropriate in light of genuine issues of material fact regarding the execution of the will, we address the Court of Appeals' opinion discussing res judicata to clarify how this doctrine works in regard to probate proceedings.

The Court of Appeals stated that summary judgment admitting the 1993 lost will was not appropriate because it would preclude challenges to the will's validity. Black, 116 Wn. App. at 485-86. We grant Myrna's motion for leave to supplement the record and admit the trial court order limiting the issues at summary judgment to admission of the 1993 will (see Trial Court Order) in order to explain why the Court of Appeals is mistaken in this case.

See Rules of Appellate Procedure 9.10 (allowing the court to supplement the record in order to decide the merits of an issue on review). *170f27 The doctrine of res judicata prevents relitigation of the same claim where a subsequent claim involves the same subject matter, cause of action, persons and parties, and quality of persons for or against the claim made.

Seattle-First Nat'l Bank v. Kawachi, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978). Res judicata bars "every question which was properly a part of the matter in controversy, but it does not bar litigation of claims which were not in fact adjudicated." Id. at 226; DeYoung v. Cenex Ltd., 100 Wn. App. 885, 891-92, 1 P.3d 587 (2000) (stating that res judicata applies to matters actually litigated and those that could and should have been raised in the prior proceeding).

This doctrine applies to issues decided on summary judgment. Because "[a] grant of summary judgment is a final judgment on the merits with the same preclusive effect as a full trial," id. at 892, an unappealed summary judgment is res judicata as to rights determined during summary judgment. See Lowe v. Double L Props., Inc., 105 Wn. App. 888, 896, 20 P.3d 500 (2001) (stating that an unappealed summary judgment became res judicata as to a party's maintenance rights, which had been determined in the summary judgment proceeding). ¶28 Normally, the offer to probate a will is a non-adversary proceeding, and a hostile party waits until the will is admitted to probate to contest the will under RCW 11.24.010.

Campbell, 47 Wn.2d at 612-13. However, a will contest is not the exclusive way to contest a will, and "[u]nder certain circumstances, a hearing upon a petition to probate a will may properly become an adversary proceeding." Gordon v. Seattle-First Nat'l Bank, 49 Wn.2d 728, 736, 306 P.2d 739 (1957). Where a party raises issues regarding the jurisdiction of the court or other issues that could or should be determined at the hearing upon a petition to probate, the proceeding may be adversarial.

Id. However, if a party contests the admission of the will to probate, generally that same party may not file a later will contest. The party's only remedy is to appeal the order admitting the will. In re Estate of Hall, 34 Wn.2d 830, 833, 210 P.2d *171406 (1949); see also In re Estate of Godfrey, 164 Wash. 269, 270-73, 2 P.2d 894 (1931) (finding that where an executor under an earlier will appeared to contest the admission of a later will and did not appeal the decree admitting the later will the executor subsequently could not file a separate will contest). ¶29 However, it must be remembered that res judicata bars only claims actually adjudicated which were or should have been raised in the proceeding.

Here, the trial court specifically stated it would not address claims regarding competency or undue influence and limited the summary judgment trial to whether the lost will should be admitted to probate, which included whether the will was executed at all. See Trial Ct. Order; see also Judge's Oral Op. (Sept. 6, 2001) at 4, 10 (stating that although the court has suspicions about undue influence, the issue will be addressed at the will contest trial).

Because the trial court order limited the issues, the grant of summary judgment admitting the 1993 will would not bar claims regarding competency or undue influence because these claims were not addressed, nor could they be addressed, in the summary judgment trial.

Therefore, the Court of Appeals was incorrect in basing its denial of summary judgment on res judicata grounds, since unadjudicated issues regarding the will's validity precluded by the trial court order could be raised by the beneficiaries in a later will contest. D. One Proceeding ¶30 Although we base our reversal of summary judgment on different grounds, we affirm the Court of Appeals' reversal of summary judgment.

We also affirm the decision to remand the case with instructions to decide all issues pertaining to the 1992 and 1993 wills in one proceeding. Black, 116 Wn. App. at 488. ¶31 If a party challenges a will at probate, instead of waiting to file a will contest, and the challenge is not jurisdictional, it is within the court's discretion to *172decide whether to hear the issues at probate or reserve the issues.

Gordon, 49 Wn.2d at 736. Under an abuse of discretion standard, the trial court's decision should be upheld unless it is “ ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’ ” State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). When claims arise from the same “ ‘transactional nucleus of facts’ ” and the damages are “intimately related in time, origin, and motivation, because they arise out of the same interactions between the deceased and the respondents,” the claims make a “convenient trial unit” and should be decided in the probate proceeding.

Hadley v. Cowan, 60 Wn. App. 433, 442-43, 804 P.2d 1271 (1991). ¶32 Where the trial court has abused its discretion and should have heard all issues presented at probate, the court may remand the case with instructions to decide all issues regarding the will. Gordon, 49 Wn.2d at 736. Trying all claims in one proceeding furthers the purpose of the probate statutes “to avoid the trial of separate and distinct contests.” In re Estate of Larson, 187 Wash. 183, 188, 60 P.2d 19 (1936) (stating that a normal (e.g., not lost) will should be admitted in an ex parte proceeding and hostile parties should wait to contest the will until after admission). ¶33 Here, the trial court recognized problems regarding the competency of Margaret, the authenticity of the lost will, and the possibility of undue influence.

See Trial Court Order; Verbatim Report of Proceedings (Sept. 26, 2001) at 15-16. However, the court chose to reserve these issues for the will contest because the court found the issues went to the weight of the lost will and not to its admissibility. *Id.* We find that it was an abuse of the trial court's discretion not to hear all issues regarding the validity of the will at the probate proceeding.

See *Gordon*, 49 Wn.2d at 736-37 (finding the trial court abused its discretion by not hearing all objections in the probate proceeding because the court's action could cause a delay to a hearing on the contest and to an appeal).

We find that on *173remand it is more appropriate to hear all issues regarding the validity of both wills in one proceeding because the claims are interrelated and involve the same "transactional nucleus of facts." See *Hadley*, 60 Wn. App. at 442-43 (finding the claims of undue influence, abuse of confidence, fraud, and substitution of wills should be determined in the probate challenge).

On remand we trust that the court will hear claims in a sequential order, hold all parties to the appropriate burdens of proof, and determine which will is the last will and testament of Margaret Black. E. Attorney Fees ¶34 The Court of Appeals reversed the trial court's order awarding attorney fees to Burns and stated that the court should award fees to both parties or to neither.

Black, 116 Wn. App. at 491. We affirm the Court of Appeals and remand the attorney fee issue to the trial court. ¶35 The controlling statute in this case is RCW 11.96A.150. This statute leaves the award of attorney fees to the discretion of the court, and we will not interfere with a trial court's fee determination unless "there are facts and circumstances clearly showing an abuse of the trial court's discretion." *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985); RCW 11.96A.150; see also RCW 11.24.050 (attorney fee statute under the will contest chapter stating that where a will is revoked, assessment of costs shall be in the court's discretion).

Based on the holdings in *In re Estate of Jolly*, 3 Wn.2d 615, 101 P.2d 995 (1940), and *In re Estate of Watlack*, 88 Wn. App. 603, 945 P.2d 1154 (1997), we find that the court abused its discretion by awarding attorney fees to Burns only. ¶36 In *Watlack*, the court ordered the estate to pay the attorney fees of all parties to the will dispute because the litigation involved all beneficiaries and affected the rights of all the beneficiaries.

88 Wn. App. at 612-13 (distinguishing *In re Estate of Niehenke*, 117 Wn.2d 631, 818 P.2d 1324 (1991), a case where the dispute did not *174involve all beneficiaries); see also *Niehenke*, 117 Wn.2d at 648 (noting that where all beneficiaries are not involved in litigation, an award from the estate would harm the uninvolved beneficiaries).

The court in *Jolly* found an award to an executor was appropriate where the executor unsuccessfully defended a will in good faith. 3 Wn.2d at 626-27.¹³ This case is analogous to *Watlack* and *Jolly*. ¶37 Here, like *Watlack*, the will dispute involves all the beneficiaries, affects

the rights of all beneficiaries, and an award against the estate would not harm any uninvolved beneficiaries.

The litigation benefits the estate by establishing the final wishes of Margaret and establishing which alleged beneficiaries have a right to Margaret's estate. See *Niehenke*, 117 Wn.2d at 647-48 (stating there are situations where attorney fees are properly assessed against the estate, but noting that generally the estate must be benefited if attorney fees are assessed against it).

Further, although one party will be unsuccessful in the will dispute, if it is shown that the party had a duty to oppose the will and acted in good faith, under *Jolly* the party may still be entitled to attorney fees. 3 Wn.2d at 626-27.

Therefore, we affirm the Court of Appeals and remand this issue to the trial court. CONCLUSION ¶38 We clarify that the statutory requirements as currently written in RCW 11.20.070 must be followed and that the execution and content of a will must be proved by "clear, cogent, and convincing evidence." We affirm the Court of Appeals' reversal of summary judgment on the grounds that there are genuine issues of material fact regarding the execution of the 1993 lost will.

While *res judicata* may apply to summary judgment proceedings regarding probate, here the Court of Appeals improperly applied the doctrine in light of the trial court's order limiting the issues in the *175probate proceeding.

We remand this case to be decided in one proceeding, with all issues regarding the 1992 and 1993 wills to be decided in that proceeding. Finally, we affirm the Court of Appeals reversal of attorney fees and remand all issues regarding fees to the trial court. Alexander, C.J., and Johnson, Madsen, Ireland, Bridge, and Fairhurst, JJ., concur.

Although Myrna Black's affidavit is part of the record, the lower courts did not consider the affidavit in order to avoid potential problems with the deadman's statute, RCW 5.60.030. Clerk's Papers (CP) at 18-27; see generally *In re Estate of Shaughnessy*, 97 Wn.2d 652, 648 P.2d 427 (1982) (explaining and applying the deadman's statute), *aff'd* 104 Wn.2d 89, 702 P.2d 132 (1985).

Whether Myma's affidavit should be considered was not properly raised in the petition for review or cross-petitions to this court. Therefore, we will not consider Myma's affidavit. The petition and cross-petition for review were mistakenly denied on December 2, 2003. Our December 24, 2003, order amended the previous order and granted review. It should be noted that the trial court erroneously and specifically stated that inferring language in the light most favorable to the nonmoving party did not technically apply to this case.

VRP (Sept. 26, 2001) at 32. See also R.D. Hursh, Annotation, Proof of Due Execution of Lost Will, 41 A.L.R.2d 393 § 4 (1955) (noting that "[t]he judicial consensus as to the quantum of proof

which a proponent of a lost will must bring forth to prove that an alleged lost will was duly executed would appear to be that evidence of due execution must be clear and satisfactory”).

Although RCW 11.20.020, the statute used to admit new wills, is inapplicable here, we note that the Court of Appeals incorrectly stated that “the petition to probate the new will should not be granted ‘ “except upon the clearest evidence.” ’ ” Black, 116 Wn. App. at 484 (quoting *In re Estate of Elliott*, 22 Wn.2d 334, 352, 156 P.2d 427 (1945) (quoting *Waters v. Stickney*, 94 Mass. (12 Allen) 1,15 (1866))).

The Court of Appeals failed to note that only *Waters*, a Massachusetts case quoted in *Elliott*, and not *Elliott*, held that the “clearest evidence” standard should be used. *Elliott*, 22 Wn.2d at 352. Further, the language of RCW 11.20.020 does not require petitioners to meet a “clearest evidence” standard.

Therefore, the Court of Appeals’ “clearest evidence” standard is not supported by the cited authority. RCW 11.12.020 incorporates RCW 11.20.020(2)’s affidavit requirements as a way a party may attest to the will. Therefore, RCW 11.20.020(2) applies for this purpose only. If a witness is unable or incompetent to testify, or is absent from the state, RCW 11.20.040 may apply.

However, here no witnesses are absent, incompetent, or unable to testify. Finally, once the will is admitted to probate, any interested person may contest the will within four months of admission under RCW 11.24.010.

However, technically this proceeding is not a will contest, since the parties are challenging the admission of the 1993 will during the offer to probate the will (e.g., it has not been decided whether the 1993 will is admitted yet).

Therefore, RCW 11.24.010 does not apply. The testimonial clause and attestation clause had dates written in them. *Campbell*, 47 Wn.2d at 614-15. Although it appears the dates had been altered or written in a different ink than the body of the will, it may be inferred that the clauses were signed, since no date at all would appear -unless the clauses had been signed (i.e., the date is filled in at the same time the clause is signed).

See *id.* The dissent argues there is enough evidence that the attestation clause was signed to prove execution. Dissent at 181. However, whether or not the will and clause were signed by two attesting witnesses is the very issue in dispute. Since we conclude that there are genuine issues of material fact as to whether the clause and/or will were signed, it is inappropriate to rely on the attestation clause as proof of execution.

Although the dissent believes assuming three people were present during execution of the will is ludicrous, at least three people visited Margaret on August 14, 1993: Reiter, Taylor, and Myrna. CP at 30-31, 119, 124; Dissent at 183-84.

Therefore, it is probable that at least three people were present during execution of the will and if Taylor was present, she served as a notary and not as a witness. Further, the dissent assumes that Myrna may be the other witness. Dissent at 184 *168n.20.

However, Rieter's, Blauert's, and Taylor's affidavits do not provide clear, cogent, and convincing evidence of this. In short, the identity of the second witness, whether it be Myrna, Taylor, or an unknown person, has not been proved by clear, cogent, and convincing evidence.

Therefore, execution has not been proved. However, a notary's signature can serve only one function, so if a notarial certificate is necessary on the document, the signature cannot also serve as a witness signature. Price, 73 Wn. App. at 753 n.4.

Here it is unclear if a notary's signature would be necessary since the document contains a certificate of subscribing witnesses that seems to conform to RCW 9A.72.085. However, even if a notary's signature was unnecessary, Taylor's signature may not be that of a witness if she lacked personal knowledge regarding Margaret's signature. See *id.* at 751. Myrna and the dissent reference several lost will cases, specifically Harris, Gardner, and Neubert, in support of admission of the 1993 lost will.

Br. of Resp't and Cross-Appellant Myrna Black at 21-27; Dissent at 182-83. These cases are distinguishable. In Harris, one witness testified, and the other witness was dead; therefore, the court applied a former version of RCW 11.20.040 and found the will admissible. Harris, 10 Wash, at 558-59.

Here, neither witness is dead, so RCW 11.20.040 is inapplicable. The Gardner court found appropriate execution of a destroyed will where the two attesting witnesses testified as to the execution of the will, albeit differing as to the time the will was executed. 69 Wn.2d at 235-36.

Here, only one attesting witness, Reiter, testified. Although Taylor and Blauert also submitted affidavits, it is arguable whether or not Taylor was an attesting witness and Blauert was not an attesting witness. Finally, in Neubert, the court found the testimony of the only live attesting witness, a purported conformed copy of the will, and testimony regarding how conformed copies are made to be sufficient evidence to prove execution of the will.

59 Wn.2d at 681-84, 686. Here, the court has an unsigned computer copy, and only one definite attesting witness who was present, Reiter, testified. Therefore, Harris, Gardner, and Neubert do not support admission of the 1993 lost will.

Because we have determined that there is a genuine issue of material fact regarding execution of the 1993 will, barring summary judgment, we decline to address the second requirement necessary under RCW 11.20.070(2) regarding whether the contents of the will were proved by "clear,

cogent, and convincing evidence.” On the same basis, we also find it unnecessary to address other grounds the Court of Appeals relied on to support the reversal of summary judgment.

See *Black*, 116 Wn. App. at 486-87. Although *Jolly* is treated like a will contest, the facts are very similar to our case. In *Jolly* a will was admitted to probate, a party petitioned to admit a new will, and the executor unsuccessfully defended the prior will. 3 Wn.2d at 616-20.