

Notice of Motion and Motion for Order to Correct Clerical Error in Judgment and Amend Judgment Nunc Pro Tunc and Alternatively to Modify Void Judgment

DOD: 7/13/1991	MARY S. WATSON is petitioner.	NEEDS/PROBLEMS/COMMENTS: Continued from 12/3/14. Minute Order states the Court signs an order appointing Greta Gregory as reporter for this proceeding. Counsel states no settlement agreement discussions have occurred and requests a hearing for oral arguments. Matter continued to 1/16/15.					
	Petitioner states she completed the probate of the decedent in pro per, enlisting the assistance of a paralegal to prepare the petition for final distribution.						
	An error occurred in the language of the testamentary trust. The paralegal failed to include language in the testamentary trust that identified the decedent's children.						
Cont. from 062314, 071014 081114, 101514, 120314	Decedent died survived by his wife, Mary S. Watson , his child, Cynthia D. Knott , who is the issue of a prior marriage, and his two stepchildren, Martin R. Claborn and Kimberly Claborn Miller (who was referred to in the Will as Kimberly D. Garrett), who are the children of Mary S. Watson.						
<input type="checkbox"/> Aff.Sub.Wit.	Article Second of Decedent's Will identifies his children to include his natural born child and his stepchildren.						
<input checked="" type="checkbox"/> Verified	Decedent's Will gives all of his personal property to his wife and Decedent's other assets consisting primarily of Decedent's 1/2 community property interest in certain farmland in trust for the benefit of his wife during her lifetime, and upon the death of Petitioner, to be divided into "as many equal shares as there are children of mine then living and children of mine then deceased leaving issue."						
<input type="checkbox"/> Inventory							
<input type="checkbox"/> PTC							
<input type="checkbox"/> Not.Cred.							
<input checked="" type="checkbox"/> Notice of Hrg							
<input checked="" type="checkbox"/> Aff.Mail	W/						
<input type="checkbox"/> Aff.Pub.							
<input type="checkbox"/> Sp.Ntc.							
<input type="checkbox"/> Pers.Serv.							
<input type="checkbox"/> Conf. Screen							
<input type="checkbox"/> Letters							
<input type="checkbox"/> Duties/Supp							
<input type="checkbox"/> Objections							
<input type="checkbox"/> Video Receipt							
<input type="checkbox"/> CI Report							
<input type="checkbox"/> 9202							
<input checked="" type="checkbox"/> Order							
<input type="checkbox"/> Aff. Posting							
<input type="checkbox"/> Status Rpt							
<input type="checkbox"/> UCCJEA							
<input type="checkbox"/> Citation							
<input type="checkbox"/> FTB Notice							
	Please see additional page		<table border="1"> <tr> <td>Reviewed by: KT</td> </tr> <tr> <td>Reviewed on: 1/13/15</td> </tr> <tr> <td>Updates:</td> </tr> <tr> <td>Recommendation:</td> </tr> <tr> <td>File 1A - Watson</td> </tr> </table>	Reviewed by: KT	Reviewed on: 1/13/15	Updates:	Recommendation:
Reviewed by: KT							
Reviewed on: 1/13/15							
Updates:							
Recommendation:							
File 1A - Watson							

Given the language in Article Two of the Will which provides that stepchildren are to be treated as children, upon the death of Petitioner, the Will provides that the assets in the testamentary trust are to be distributed in equal shares to **Cynthia D. Knott, Martin R. Claborn** and **Kimberly Claborn Miller**.

On April 11, 2014 Petitioner met with an estate planning attorney and was advised that the language of the order provided that **Cynthia D. Knott** was the sole remainderman beneficiary of the trust due to the omission of the language that the term "child" or "children" also refer to the Decedent's stepchildren. Petitioner took prompt action to cause this petition to be filed.

The error in the language of the judgment is readily apparent from the judgment roll consisting of the original will, the petition for probate, the order for probate and the judgment of final distribution which clearly does not conform to Decedent's wishes as expressed in the Will.

Alternatively, the Judgment of Final Distribution to Testamentary Trust is a void judgment and is subject to modification because the omission in the language of the judgment resulted in the court exceeding its authority, however unintentionally by rendering a judgment for distribution which was contrary to the intent of the Decedent as expressed in his Will.

Granting modification of the judgment nunc pro tunc is appropriate because Petitioner is still alive and the interests of any remainderman of the testamentary trust have not yet ripened into current interests.

Wherefore Petitioner prays for an order that the following language erroneously and mistakenly omitted for the judgment shall be added to the end of the judgment to conform to the Decedent's intent as expressed in his will: "The terms 'Decedent's child', 'Decedent's children', 'child of Decedent' and 'children of Decedent' as used in this Judgment of Final Distribution and Final Distribution to Testamentary Trust and in the testamentary trust set forth herein shall include Decedent's child Cynthia D. Knott, and step-children Martin R. Claborn and Kimberly Claborn Miller."

Points and Authorities attached to the Petition.

Response of Cynthia D. Watson to Petition for Order to Correct Clerical Error filed on 6/19/14. Respondent alleges the omission was not clerical and the Judgment is not void. The petition is not timely because the time to challenge a Judgment on direct appeal has passed. Respondent further alleges that the Petitioner does not have standing to prosecute this petition. The petition and each and every claim therein fails to state facts sufficient to constitute a cause of action or basis for relief. Petitioner is estopped by her own conduct from obtaining any relief under her Petition. Petitioner's acts, conduct and/or omissions were the proximate cause of Petitioner's alleged damages.

Respondent prays as follows:

1. Petitioner take nothing by way of the Petition;
2. That the Petition be dismissed with prejudice;
3. For costs of suit.

Please see additional page

Points and Authorities in Support of Opposition to Petition to Correct Clerical Error filed on 6/19/14.

Petitioner's Reply to Verified Response of Respondent Cynthia D. Watson filed on 6/20/14. Petitioner alleges Respondent has failed to file her opposition on a timely basis and the result is that she has waived any opportunity to oppose the Motion and has consented to the entry of the order requested in the motion. This is a motion to correct a clerical error in a judgment. The requirement for filing of papers opposing a motion are set forth in CCP 1005(b) which provides that all papers opposing a motion shall be filed with the court and a copy served on each party at least nine court days before the hearing. Respondent did not comply with this requirement. In fact, Respondent did not come close to complying with this requirement. It appears that Respondent's opposition was filed either Wednesday, June 18, 2014 or on Thursday June 19, 2014. Petitioner's attorney received a faxed copy of the response at 4:48 p.m. on Wednesday. In order for this response to be timely, it should have been filed at least by Tuesday, June 10, 2014, more than a week before it was filed. Opposing Counsel's late filing is prejudicial to Petitioner and other interested parties.

Petitioner further alleges that the cases cited by Respondent do not apply to an action to correct a clerical error pursuant to CCP §473(d). Respondent has misstated and misapplied the law. The case cited makes a clear distinction between the correction of a clerical error and the correction of a judicial error. The Court may correct by a nunc pro tunc order an inadvertent or clerical error. The distinction between a clerical error and a judicial error does not depend so much on the person making as it does on whether it was the deliberate result of judicial reasoning and determination. A clerical error in the judgment includes inadvertent errors made by the court which cannot be reasonably attributed to the exercise of judicial consideration or discretion. Clerical error is to be distinguished from judicial error which cannot be corrected by amendment.

Petitioner should be permitted to modify the order for Final Distribution to conform to the will because the order incorporates the terms of the will by reference.

Respondent's argument that the existence of Article Thirteenth B in the Will indicates that there is a different interpretation of the Decedent's intent is without merit.

In summary, it is clear from the evidence presented as well as the record in the court file that there was an error in the order which has an inadvertent mistake, not the result of judicial deliberation, but the result of an oversight. The law gives the court broad power to determine that an error was clerical rather than judicial, and therefore, this court has the opportunity to correct its error.

Petitioner has estimated that the property in trust has a value of approximately \$1,750,000.00. Obviously Decedent's daughter, Respondent, would like to receive those assets. However, her father clearly and expressed his intent that these assets be divided three ways among his daughter and step-children. Under the current order the assets will go entirely to Decedent's daughter completely in contravention of Decedent's intent as expressed in his Will. The Court has an opportunity and authority to prevent a great injustice.

Please see additional page

Petitioner's Supplemental Reply to Verified Response filed on 7/2/14 states the court may upon motion of the injured party correct clerical errors to cause a decree of distribution to conform to decedent's Will. Petitioner should be permitted to modify the Order for Final Distribution to conform to the Will because the order incorporates the terms of the Will by reference. (Cases cited in support of argument)

Respondent's Additional Memorandum of Points and Authorities in Opposition to Petition filed on 7/1/14. Respondent states in this case, the decedent's Will provides in Article SECOND "that the terms, "my child" and "my children" as used in this Will shall include my child and stepchildren . . ." and also includes Article THIRTEENTH B., which provides in part as follows: ""Issue" of a person means of such person's lawful descendants of every degree . . . However, nothing in this Will shall include foster children or step-children in the term "issue" "lineal descendant," or "ancestor.""

Neither Article SECOND nor Article THIRTEENTH B., are included in the Petition for Distribution or in the Judgment of Final Distribution. The two articles conflict and provide different definitions for "child" and "children."

Petitioner contends that the provisions of Article SECOND of the Will are incorporated into the Judgment. This is not the case. As Petitioner points out, the trust is to be held, administered and distributed only "in accordance with the provisions of Paragraphs SIXTH, SEVENTH, and EIGHTH of Decedent's Will." There is no mention in the Judgment of Article SECOND. (Cases cited in support of argument)

Petitioner's Reply to Respondent's Additional Memorandum of Points and Authorities in Opposition filed on 7/8/14 states Article Second and Article Thirteenth B do not conflict. Article Second and Article Thirteenth B are mutually exclusive. Article Second defines the terms "my child" and "my children". The parenthesis surrounding the terms in each of these sections make it clear that the respective definitions apply when the specific terms are used. Both terms "children" and "issue" are used in different places in the will. The terms are neither conflated nor used interchangeably as Respondent suggests. When the terms "child" or "children" are used, step-children are included in the definition. When the term "issue" is used, step-children are excluded. There is no judicial interpretation necessary here, nor is there any evidence whatsoever that the court was required to make, nor made, judicial interpretations regarding this issue. There is no evidence that there was a judicial interpretation made, but there is ample evidence presented that there was a clerical error.

In addition, the judgment makes sufficient reference to the will to incorporate the terms of the will into the order. The language in the order states, in "accordance with the provisions of Paragraphs SIXTH, SEVENTH, and EIGHTH of Decedent's Will. . ." In the will, the terms of Article Second are incorporated into the rest of the will, including, Articles, Sixth, Seventh and Eighth. The reference to Decedent's Will in the order would have no meaning if Articles Sixth, Seventh and Eighth are to be construed differently in the Judgment than in the will.

Please see additional page

Respondent's Supplemental Memorandum of Points and Authorities in Opposition filed on 11/13/14.

Objector alleges Petitioner's motion is an improper attack on a final judgment. Petitioner seeks to materially alter the Judgment even though the Judgment is *exactly* what Petitioner asked the Court to enter more than twenty years ago.

Law and argument included in the pleading.

Simply put, the distribution expressly and unambiguously requested in the prayer of the Petition for Final Distribution was the exact distribution that was granted and entered by the Court in its Judgment. Now, more than twenty years later, Petitioner has discovered her error and files the instant Motion asking this Court to issue an order nunc pro tunc in contravention of the well established and binding authorities cited. Petitioner has not submitted any evidence that there was an error in recording the Judgment. Indeed, the undisputed facts show that the Judgment entered in 1991 was precisely what Petitioner asked the Court to enter. The principle of finality of judgments prevails over changing a judgment to what "ought to have" provided. The instant motion should be denied.

Petitioner's Supplemental Points and Authorities filed on 11/26/14. Petitioner states contrary to what Respondent Cynthia D. Watson argues, Petitioner is not asking the Court to alter the Judgment in this case in 1992. Rather, Petitioner seeks to have this Court correct the record of Judgment to reflect the actual Judgment rendered, i.e. that the Estate of Dennis I. Watson be distributed in accordance with the terms of the Will admitted to probate, and avoid any future confusion with respect to those terms.

The Decedent's Will, which calls for a testamentary trust, was admitted to probate on 9/24/1991. Petitioner hired a paralegal to assist in drafting the necessary documents to manage the probate process without the assistance of an attorney. The Judgment of Final Distribution and Final Distribution to Testamentary Trust, as drafted by the paralegal, includes Articles Sixth, Seventh and Eighth of Testator's Will, but does not contain Article Second, which provides key definitions relevant to the later provisions. Article Second reads as follows:

I am married to Mary S. Watson and all references in this Will to "my wife" or "my spouse" are to her. I have one (1) child now living, whose name is Cynthia D. Knott. I have two (2) stepchildren now living whose names are Martin R. Claborn and Kimberly D. Garrett.

I have no other children, living or deceased. **The terms, "my child" and "my children" as used in this Will shall include my children and my stepchildren**, as named above, as well as any other children hereafter born to me. (emphasis added)

The record of Judgment, due to a clerical error in drafting, omits this key definitional provision. Although the quoted provision makes it undeniably clear that the Decedent intended the term children to include stepchildren, Respondent now opposes correction of this clerical error and contends that the term should be given a different meaning in the Judgment than it does in the Will, to her benefit. The failure to include the definition of children to make clear the intent to distribute the decedent's estate in accordance with the Will is plainly a clerical error and the Court may correct the record to conform to the judgment intended to be entered in 1992.

Please see additional page.

Dept. 303, 9:00 a.m. Friday, January 16, 2015

Petitioner's Supplemental Points and Authorities filed on 11/26/14 (cont.).

Law and argument in support.

Conclusion: Petitioner does not contend that the Court did not intend to make the order it made, but only that the record of the judgment does not reflect that order, i.e. to distribute, Dennis I Watson's estate in accordance with the terms of his Will. Accordingly, this Court should grant Petitioner's request to correct the clerical error, i.e. omission of the definitional provision at Article Second of Dennis Watson's Will, and enter judgment *nunc pro tunc* in accordance with Dennis Watson's wishes, as such was the original intent of the Court.

Request for Judicial Notice filed on 11/26/14. Requests the Court take judicial notice of the Order dated August 3, 1992, granting the Petition for Final Distribution on Waiver of Account by the Honorable Stephen R. Henry, Fresno County Superior Court case No. 444557-3, in the Matter of the Estate of Dennis I. Watson, Deceased.

Status Conference

DOD: 7/13/1991	<p>MARY S. WATSON filed a Petition to Correct Clerical Error in the Judgment for Final Distribution.</p> <p>Petitioner prayed for an order that the language erroneously and mistakenly omitted for the judgment be added to the end of the judgment to conform to the Decedent's intent as expressed in his will: "The terms 'Decedent's child', 'Decedent's children', 'child of Decedent' and 'children of Decedent' as used in this Judgment of Final Distribution and Final Distribution to Testamentary Trust and in the testamentary trust set forth herein shall include Decedent's child Cynthia D. Knott, and step-children Martin R. Claborn and Kimberly Claborn Miller."</p> <p>CYNTHIA D. WATSON responded alleging the omission was not clerical and the Judgment was not void. In addition, the respondent alleged the petition is not timely because the time to challenge a Judgment on direct appeal had passed. Finally Respondent alleged that the Petitioner did not have standing to prosecute this petition.</p> <p style="text-align: center;">Please see additional page</p>	<p>NEEDS/PROBLEMS/COMMENTS:</p> <p>Continued from 12/3/14. Minute Order states the Court signs an order appointing Greta Gregory as reporter for this proceeding. Counsel states no settlement agreement discussions have occurred and requests a hearing for oral arguments. Matter continued to 1/16/15.</p>	
Cont. from 101514, 120314			
Aff.Sub.Wit.			
Verified			
Inventory			
PTC			
Not.Cred.			
Notice of Hrg			
Aff.Mail			
Aff.Pub.			
Sp.Ntc.			
Pers.Serv.			
Conf. Screen			
Letters			
Duties/Supp			
Objections			
Video Receipt			
CI Report			
9202			
Order			
Aff. Posting			
Status Rpt			
UCCJEA			
Citation			
FTB Notice			
			<p>Reviewed by: KT</p> <p>Reviewed on: 1/13/15</p> <p>Updates:</p> <p>Recommendation:</p> <p>File 1B - Watson</p>

Status Report of Mary S. Watson filed on 10/9/14 states the motion is ready for ruling by the court. The issue for the court is simply whether omitting the definition of the testator's children from the Judgment of Final Distribution was a clerical error or a judicial error. If it was a clerical error, as the Moving Party contends, then the court may now correct the clerical error under CCP§473(d).

On the other hand, if the court determines the error was judicial, and cannot be corrected under CCP§473(d), then we are left with an ambiguity in the Judgment as to the definition of "children" under the circumstances. Moving Party contemplates if this occurs, her daughter would petition the court to resolve the ambiguity. In that case, discovery to search for additional extrinsic evidence would be proper, even though the will itself seemingly conclusively resolves the ambiguity.

Respondent argues that Moving Party is not an "injured party," even though she was the decedent's personal representative and was duty-bound to execute the decedent's estate plan as stated in his will. This standing issue can be mooted by either the court correcting the error on its own as permitted under CCP §473(d), or by Moving Party's daughter joining the motion, which she is willing to do.

Accordingly, Moving Party requests that the court rule on the pending motion as soon as possible.

Status Report of Respondent Cynthia D. Watson filed 10/9/14 states while the Petitioner contends that there is a clerical error in the Judgment, Respondent maintains that the error is a judicial error, which cannot be corrected by a nunc pro tunc order. The Judgment is unambiguous. The claimed error is not a clerical error. Judith A. Ward, the paralegal who assisted Mary Watson in Mary Watson's pro per probate of the Will, states in her declaration filed with the court on August 7, 2014, that she "neglected to include in the petition of the proposed judgment the recitation . . ."

Although Judith A. Ward, by her own admission, may have been negligent, the real error in this case were the result of the Decedent and Mary Watson's neglect by not timely consulting with an attorney prior to the execution of a 24-page death bed trust will; not timely seeking legal advice from an attorney on how to provide for a blended family; by using a will that created a testamentary trust (requiring probate of the Will – which was done pro per) rather than using a revocable living trust (each spouse could have had his or her own living trust to deal with the disposition of his or her own property or share of the community property). The Decedent and Mary did change the title of joint tenancy property to community property thereby achieving the favorable income tax benefit of a step-up in basis of both halves of the depreciable farm property on Decedent's death.

Most applicable case authority is the *Estate of Eckstrom* (1960) 54 C.2d. 540, 7 Cal.Rptr. 124. In *Eckstrom* the Supreme Court held that clerical errors do not include those errors made by the court because of its failure to correctly interpret the law or apply the facts. It is only when the form of the judgment fails to coincide with the substance thereof, as intended at the time of the rendition of the judgment, that it can be reached by a corrected nunc pro tunc order.

No settlement offers have been commenced as of the date of the signing of this Status Report. Respondent believes that it is in the best interest of Petitioner, Petitioner's children, and Respondent that the parties engage in settlement discussions.

Status Hearing Re: Filing of the First Account and/or Petition for Final Distribution

DOD: 7-13-05	<p>EUGENE E. GLENDENNING, Son, was appointed Executor with Full IAEA without bond on 11-13-13 and Letters issued on 11-14-13.</p> <p>At the hearing on 11-13-13, the Court set this status hearing for the filing of the first account or petition for final distribution.</p> <p>The Final I&A was filed 8-21-14.</p>	<p>NEEDS/PROBLEMS/COMMENTS:</p> <p>1. Need first account or petition for final distribution pursuant to Probate Code §12200 or verified written status report pursuant to Local Rule 7.5.</p>
Aff.Sub.Wit.		
Verified		
Inventory		
PTC		
Not.Cred.		
Notice of Hrg		
Aff.Mail		
Aff.Pub.		
Sp.Ntc.		
Pers.Serv.		
Conf. Screen		
Letters		
Duties/Supp		
Objections		
Video Receipt		
CI Report		
9202		
Order		
Aff. Posting		
Status Rpt		
UCCJEA		
Citation		
FTB Notice		
		Reviewed by: skc
		Reviewed on: 1-13-15
		Updates:
		Recommendation:
		File 2 - Glendenning