IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of the Estate of LEROY G. BLACK, Deceased.	
WILLIAM FINK, A/K/A BILL FINK, Appellant vs. PHILLIP MARKOWITZ AS EXECUTOR OF THE ESTATE OF LEROY G. BLACK, Respondent.	Case No. 63960

APPEAL

from the Eighth Judicial District, Clark County,
The Honorable Gloria J. Sturman, District Judge,
District Court Case No. P-12-074745-E

RESPONDENT'S ANSWERING BRIEF

JONATHAN W. BARLOW
Nevada Bar No. 9964
AMY K. CRIGHTON
Nevada Bar No. 12421
CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

Attorneys for Respondent Phillip Markowitz as Executor of the Estate of Leroy G. Black

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

TABLE OF CONTENTS

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

TABLE OF AUTHORITIES

Cases

Statutes

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

Secondary Sources

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

STATEMENT OF ISSUES PRESENTED

Markowitz does not necessarily disagree with Fink's statement of the first and second issues presented. Markowitz proposes that the third issue presented should be phrased as, "Whether granting an extension of time to issue a citation would contravene the Legislature's stated legislative intent to construe all probate statutes "so that a speedy settlement of estates is accomplished at the least expense to the parties". NRS 132.010.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

STATEMENT OF THE FACTS

The following are the only legally relevant facts on this appeal:

- The District Court entered its Order admitting the decedent's March 7, 2012, will to probate on August 31, 2012. FINK000039-000040.
- Fink filed his Objection to the Admission of the Last Will and Testament on November 27, 2012. FINK000046-000048.
- The Citation to Plea to Contest was issued on January 3, 2013. FINK000063.
- The Petition to Enlarge Time Pursuant to NRCP 6(b) was filed on January 23, 2013. FINK000066-000072.
- Fink's basis for asserting excusable neglect is based entirely upon the allegations set forth in the Affidavit of Tassy Wolfe in Support of Petition to Enlarge Time Pursuant to NRCP 6(b). FINK000073-000075.

Respondent Phillip Markowitz as Executor of the Estate of Leroy G. Black ("Markowitz") urges the Court not to consider the myriad prejudicial allegations raised by Appellant William Fink ("Fink") that fall outside the scope of this appeal. Throughout this case, Fink has repeatedly attempted to prejudice Markowitz by raising inflammatory allegations arising from Fink's dispute with the March 7, 2012, will and from Fink's personal distaste for Markowitz. His Opening Brief is no different: Fink improperly sets forth numerous highly

disputed, legally irrelevant, and inflammatory accusations of what Fink calls the "suspicious circumstances" surrounding the execution of the March 7, 2012, will. App. Op. Brief, p. 13, l. 21 – p. 15, l. 5. Markowitz emphasizes that he strongly disputes all of these allegations. If a will contest proceeds, Markowitz will respond to these baseless allegations. However, Markowitz should not be forced to respond to false and prejudicial allegations when no will contest has been tried and is not pending at this time.

In the meantime, Fink's allegations in that section of his Statements of Facts are wholly irrelevant to the legal question of the effect of the failure to issue citation under NRS 137.090. In fact, Fink never relies on these allegations anywhere in his Opening Brief to support any principle of law in support of his position on appeal. The only conclusion is that Fink included these allegations in an attempt to induce the Court to look beyond the legally relevant facts and legal issues that are actually on appeal. As such, the Court should at least ignore this section of the Statement of Facts, but more preferably should strike this portion of Fink's Statement of Facts in his Opening Brief.

Furthermore, Fink incorrectly asserts in his Statement of Facts that it is not disputed that Fink timely filed his will contest. Appellant's Opening Brief, p. 13, l. 4-5. Markowitz emphasizes that he does not concede that Fink complied with the requirements of NRS 137.080. Markowitz acknowledges that Fink's Objection

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

was filed on November 27, 2012, but does not concede that the Objection complies with NRS 137.080. Markowitz raised this issue by petition to the District Court, but the District Court never entered an order either way regarding whether the Objection complies with NRS 137.080. Markowitz has proceeded in this appeal for the sake of argument on the basis that the Objection does comply with NRS 137.080. Respondent fully reserves the right to pursue his petition regarding the sufficiency of the November 27, 2012, Objection if necessary.

SUMMARY OF THE ARGUMENT

In this appeal, the Court is required to interpret the after-probate will contest statutes (NRS 137.080-.120) as a matter of first impression to determine whether the failure to issue a citation within three months after the entry of the order admitting a will to probate acts as a jurisdictional bar to proceeding with a will contest. Because the Nevada Legislature created the right to a will contest, a contestant is required to comply strictly with the statutory requirements to exercise that right. The plain and unambiguous meaning of the after-probate will contest statutes requires that a will contestant must both file a petition contesting the validity of the will and must issue a citation in order to contest a will. The plain language of the statutes requires that both acts must be done within three months of the entry of the order admitting the will to probate.

Fink urges an interpretation of the statutes that renders NRS 137.090

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

superfluous because failure to comply with the citation requirement would have no effect. Such an interpretation leads to the absurd result that the time limit in NRS 137.080 is material and mandatory, while the same time limit in NRS 137.090 is immaterial and permissive. The time limit in NRS 137.090 is clearly mandatory because it complies with the stated legislative priority of construing the probate statutes so that estates are settled in a speedy manner. Furthermore, the Legislature mandated the time limit set forth in NRS 137.090 because the citation is material to a will contest as it confers personal jurisdiction over the parties to the will contest. As such, failure to comply with the citation requirement deprives the district court of jurisdiction over the will contest and the will contest must be dismissed.

Despite Fink's attempt to shoehorn NRCP 6(b) into NRS 137.090, it is uniformly held across the country, and a plain language interpretation of NRCP 6(b) requires, that Rule 6(b) does not expand statutory time limits. Though the Nevada Rules of Civil Procedure do apply to probate matters, this merely means that procedural matters affected by the rules of civil procedure are subject to the rules of civil procedure, not that statutory probate time limits are open to enlargement under NRCP 6(b). To hold otherwise would lead to the absurd result that all statutory time limits of every kind are subject to enlargement under Rule 6(b). In any event, Fink has failed to show excusable neglect to justify relief under

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

NRCP 6(b).

Finally, the legislative priority of speedy settlement of estates must be given effect over the vague public policy of hearing matters on their merits.

Because it is undisputed that Fink failed to comply with NRS 137.090 within three months of the entry of the District Court Order admitting the decedent's will to probate, this Court must affirm the District Court order dismissing Fink's will contest.

ARGUMENT

I. FINK FAILED TO CONTEST THE VALIDITY OF THE ADMITTED WILL BECAUSE HE FAILED TO BOTH FILE A PETITION AND ISSUE A CITATION WITHIN THREE MONTHS OF THE WILL BEING ADMITTED TO PROBATE.

A. The Right to a Will Contest is Statutory and Requires Strict Compliance with the Statute in Order to Vest Jurisdiction in the District Court.

The right to a will contest in Nevada was created by the Legislature, as provided in NRS 137.080:

> After a will has been admitted to probate, any interested person … may, at any time within 3 months after the order is entered admitting the will to probate, contest the admission or the validity of the will.

Courts across the country have also stated that the right to contest a will is statutory and that the right did not exist at common law. Ex parte Floyd, 105 So.3d 1193, 1197 (Ala. 2012); In re Estate of Kordon, 137 P.3d 16, 18 (Wash.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

2006); Smith v. Estate of Mitchell, 841 N.E.2d 215, 218 (Ind. App. 2006); Langham v. Mann, 801 S.W.2d 394, 395 (Mo. App. 1990); Collins v. Nurre, 251 N.E.2d 621, 622 (Oh. App. 1969). Because the right to contest a will is statutory, courts require strict compliance with the statutory remedy of a will contest. Floyd, 105 So.3d at 105; Langham, 801 S.W.2d at 395; Willman v. Railing, 529 N.E.2d 122, 124 (Ind. App. 1988); Collins, 251 N.E.2d at 622.

This Court has also held that remedies created by statute require strict compliance in order to confer jurisdiction on the district court over the statutory remedy. In Washoe County v. Otto, this Court considered the effect of failure to comply strictly with requirements of a statutory remedy provided under the Nevada Administrative Procedure Act. 128 Nev. ___, 282 P.3d 719 (2012). The Court first noted that Nevada courts generally have no jurisdiction over acts of administrative agencies "'except where the legislature has made some statutory provision for judicial review.'" Id. at 724 (quoting Crane v. Continental Telephone, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989)). Thus, where the legislature has created a statutory right where none existed before the legislation, "'strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial review ….'" Id. at 725 (quoting Kame v. Employment Security Dep't, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989)). Applying these principles, the Court held that **even though the party**

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

seeking judicial review had filed a petition seeking judicial review, the party's failure to name all parties in the petition, as required by the statute, caused the district court to lack jurisdiction to consider the petition. Id.

In the context of an after-probate will contest, courts across the country have held that a trial court has no jurisdiction to consider the will contest if the will contestant has failed to strictly comply with the will contest statutes. Kordon, 137 P.3d at 210 (holding that "failure to issue a citation deprives the court of personal jurisdiction over the party denied process").[1] As in Otto regarding the APA, and as in states across the country regarding after-probate will contests, the Nevada Legislature here has conferred a statutory right to a will contest where no right existed at common law. Because the Legislature has granted this special remedy by statute, a will contestant must strictly comply with the provisions of the statutes granting the right to an after-probate will contest. If a will contestant fails to comply strictly with the statutory right, the district court lacks jurisdiction to hear the will contest, and the will contest must be dismissed for lack of jurisdiction.

[1] Accord Langham, 801 S.W.2d at 396; Willman, 529 N.E.2d at 124; Julia Rackley Perry Memorial Hosp. v. Peters, 401 N.E.2d 587, 589 (Ill. App. 1980); Collins, 251 N.E.2d at 622.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

B. The After-Probate Will Contest Statutes Unambiguously Require Both Filing a Petition and Issuing a Citation within Three Months of Entry of the Order Admitting a Will to Probate.

Having established that a will contestant must strictly comply with the requirements of NRS 137.080-.120 and that strict compliance is necessary to confer upon the district court jurisdiction to hear the will contest, this Court must now interpret NRS 137.080-.120 to determine what a will contestant must do to strictly comply with the after-probate will contest statutes. When conducting statutory analysis, the Court begins with an examination of the plain meaning of the statute. Clark County v. S. Nev. Health Dist., 128 Nev. ___, 289 P.3d 212, 215 (2012). "It is well-settled that: 'Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" Madera v. State Indus. Ins. System, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998) (quoting Erwin v. State of Nevada, 111 Nev. 1535, 1538-39, 908 P.2d 1367, 1369 (1995)). "A statute is ambiguous if it 'is capable of being understood in two or more senses by reasonably well-informed persons.'" Blaine Equip. Co. v. State Purchasing Div., 122 Nev. 860, 866, 138 P.3d 820, 824 (2006) (quoting Thompson v. District Court, 100 Nev. 352, 354, 683 P.2d 17, 19 (1984)).

"Statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory." Clark County, 289 P.3d at 215 (citation

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

omitted). This Court "should interpret statutes to give meaning to each of their parts, such that, when read in context, none of the statutory language is rendered mere surplusage." Stockmeier v. Psychological Review Panel, 122 Nev. 534, 540, 135 P.3d 807, 810 (2006). Further, "this Court's interpretation should not produce an absurd or unreasonable result." Id.

Here, the provisions of NRS 137.080-.090 are clear and explicit and capable of being understood in only one sense. As such, the Court must give the statutes their plain effect. The plain interpretation of NRS 137.080 is not in dispute in this matter. All parties agree that the statute requires the filing of a petition containing the allegations of the contestant against the validity of the will within three months of entry of the order admitting the will to probate.

The next statute in the after-probate will contest statutes, NRS 137.090, provides,

> Upon filing the petition, and within the time allowed for filing the petition, a citation must be issued, … directing [the designated interested parties] to plead to the contest within 30 days after service of the citation.

There is no ambiguity in this statute. After filing the petition set forth in NRS 137.080, a citation **must** be issued directed to the interested parties set forth in the statute. Importantly, the citation must be issued "**within the time allowed for filing the petition**," which is an unambiguous reference to the three month time

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

limit set forth in NRS 137.080. The only reasonable reading of this statute is that a citation must be issued within three months after entry of the order admitting the will to probate. Fink does not question the plain language of NRS 137.090. In fact, Fink admits that NRS 137.090 "require[s] the issuance of a citation 'within the time allowed for filing the petition.'" App. Op. Brief, p. 24, l. 12-13 (quoting NRS 137.090). As such, there is no dispute that the plain language of NRS 137.090 requires that a citation must be issued within three months of the entry of the order admitting the will to probate.

C. Fink's Interpretation of NRS 137.120 Violates the Plain Language of NRS 137.090 and Renders NRS 137.090 Superfluous and Mere Surplusage.

Fink's only argument concerns his strained reading of NRS 137.120. Fink argues that the only action required under NRS 137.120 in order to "contest[] the validity of a will or of the probate thereof" is to file the petition under NRS 137.080. App. Op. Brief, p. 24, l. 17-19 and p. 26, l. 9-15. Fink asserts that NRS 137.120 does not apply to NRS 137.090 and, therefore, there is no "particular punishment or remedy for the failure to [issue the citation] …." App. Op. Brief, p. 24, l. 15. Thus, while acknowledging that NRS 137.090 requires the issuance of the citation, Fink asserts that it has no purpose because it does not matter whether it is done.

Fink's interpretation of NRS 137.120 renders the portion of NRS 137.090

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

that states "within the time allowed for filing the petition" mere surplusage, having no effect or purpose as a time limit for the accomplishment of the act required by the statute. Rather than acting as a mandatory requirement, under Fink's interpretation, the command in NRS 137.090 that the citation "must be issued" would be merely permissive because failure to comply with it would carry no penalty. Thus, Fink takes out a red marker and crosses out the phrase "within the time allowed for filing the petition" within NRS 137.090, thus rendering this phrase mere surplusage and rendering NRS 137.090 superfluous to the statutory scheme.

Contrary to Fink's errant assertion, properly interpreted NRS 137.120 means that a will contestant must both file the petition under NRS 137.080 and issue the citation under NRS 137.090 in order to "contest[] the validity of a will or of the probate thereof." Further, NRS 137.120 reinforces that both acts must be performed "within the time specified in NRS 137.080". Giving NRS 137.080 and NRS 137.090 their plain meaning as described above, and reading the entire after-probate will contest statutory scheme as a whole, this Court must determine that both the filing of the petition and the issuance of the citation within three months are mandatorily required in order to contest the validity of the will.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

D. The Time Limit in NRS 137.090 is Mandatory because the Issuance of a Citation is Material to the Jurisdiction of the District Court.

This Court has made clear that "'Must' is mandatory, as distinguished from the permissive 'may'." In re Nev. State Engineer Ruling No. 5823, 128 Nev. ___, 277 P.3d 449, 454 (2012); see also NRS 0.025 ("'Must' expresses a requirement …."); Otto, 282 P.3d at 725 ("The word 'must' generally imposes a mandatory requirement."). When the Legislature required that a citation "must be issued," the Legislature mandated that a citation must, not may, be issued. Not only has the Legislature prescribed the act that must be done (issuance of citation), but the Legislature also prescribed the time limit within which it must be done (within three months of the entry of the order admitting the will to probate). In doing so, the Legislature mandated that the act must, not may, be done within the prescribed time limit.

The mandatory nature of NRS 137.090 is further supported by this Court's interpretation of statutes that include time requirements. "This Court has long held that when a statutory time limit is material, it should be construed as mandatory unless the Legislature intended otherwise." Village League to Save Incline Assets, Inc., v. State ex rel. Board of Equalization, 124 Nev. 1079, 1086, 194 P.3d 1254, 1259 (2008). "It follows, then, that statutes creating time or manner restrictions are generally construed as mandatory." Id. at 1086-87, 194 P.3d at 1259.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

The purpose of a citation is material because it performs the function of granting the court personal jurisdiction over the parties to a will contest. In upholding a dismissal of a will contest for failure to timely issue a citation, the Supreme Court of Washington stated, "A citation is equivalent to a civil summons, conferring personal jurisdiction over a party to a will contest. Proper service of process 'is essential to invoke personal jurisdiction over a party.'" Kordon, 137 P.3d at 18 (quoting In re Marriage of Markowski, 749 P.2d 754 (Wash. App. 1988) (internal citation omitted)). "Accordingly," the court concluded, "failure to issue a citation deprives the court of personal jurisdiction over the party denied process." Id. Numerous other courts across the country have also held that the failure to issue a citation or to otherwise comply with the statutory summons or service requirement was fatal to the jurisdiction of the trial court **even when the contestant had timely filed a petition or complaint**. See In re Fiedler's Estate, 140 Mont. 22, 26-27, 367 P.2d 560, 562-63 (1962); Estate of Mitchell, 841 N.E.2d at 218-19; Langham, 801 S.W.2d at 396; Willman, 529 N.E.2d at 125; Collins, 251 N.E.2d at 623. Though each state's statutory requirements are slightly different, the unifying principle is that in order to confer jurisdiction on the trial court over an after-probate will contest, the contestant must **both** file a timely petition or complaint **and** comply with the citation, summons, or service requirement within the established timeframe. Thus, the

material purpose of the citation is to provide the court with personal jurisdiction over the parties, not simply to provide notice of the proceeding as Fink errantly asserts. App. Op. Brief, p. 29, l. 7-8, and p. 37, l. 10-13.

E. The Time Limit in NRS 137.090 is Mandatory because it is Material to the Legislative Intent to Settle Estates Quickly.

Similarly, the time limit in NRS 137.090 is material to the will contest statutes because it promotes the stated legislative intent to construe the probate statutes "so that a speedy settlement of estates is accomplished at the least expense to the parties." NRS 132.010. A strict time limit is essential and material to ensure that the will contestant promptly proceeds with an after-probate will contest and brings the necessary parties before the court so that the court may exercise jurisdiction over the parties and move the will contest forward expeditiously. See Julia Rackley Perry Memorial Hosp., 401 N.E.22 at 589 (stating that the basic justification for strict compliance with time limit is "the necessity to expedite the administration and distribution of estates and to prevent undue delay in the settlement and determination of property interests created by a will").

This interpretation of the citation requirement and time limit set forth in NRS 137.090 comports with this Court's stated procedure to construe time requirements strictly and as mandatory requirements. In Leven v. Frey, this Court concluded that the statute under review required mandatory, strict compliance

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

with the time limits set forth in the statute. 123 Nev. 399, 400-01, 168 P.3d 712, 713-14 (2007). In making this determination, the Court determined that strict compliance with the timing requirement of the statute "is consistent with the general tenet that 'time and manner' requirements are strictly construed …." Id. at 408, 168 P.3d at 718. The Court further found, "The Legislature did not provide for any deviations from this requirement, and we perceive no reason to extend this period in contravention of the Legislature's clear and express language." Id. at 409, 168 P.3d at 719 (citations omitted). Furthermore, allowing "substantial compliance" rather than strict compliance "would **undermine the Legislative intent** …." Id. (emphasis added).

Here, too, the Legislature has not provided for any deviation from the requirement that the citation must be issued within three months after entry of the order admitting the will to probate. There is no language anywhere in NRS 137.080-.120 that could be used to circumvent or circumscribe the time limit set forth in NRS 137.090. The Legislature has stated its clear intent that the probate statutes be construed "so that a speedy settlement of estates is accomplished at the least expense to the parties." NRS 132.010. Requiring mandatory, strict compliance with the time limit in NRS 137.090 furthers this legislative intent by ensuring that the settlement of estates is accomplished quickly without the delay that would be inherent in the failure to issue a citation in a timely manner. Fink's

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

interpretation of NRS 137.090 allows precisely the kind of uncertainty and delay that the statute exists to prevent: a contestant could file a petition to contest the will and then wait to take any action to bring the interested parties before the court. At some point, perhaps when the estate is ready for final distribution, the contestant could then step forward, issue the citation, and proceed with the will contest having effectively delayed the speedy settlement of the estate. As the Court in Leven required mandatory, strict compliance with the time limits of the statute in question there, so too should this Court require mandatory, strict compliance with the time limits of NRS 137.090 here.

F. Fink's Interpretation Produces an Absurd Result by Treating Identical Language in Two Successive Statutes Differently.

Fink's self-serving interpretation of the statutes would also lead to an unreasonable and absurd result. The plain language of both NRS 137.080 and 137.090 requires that both of the given acts "must" be done within the same three month time limit. However, under Fink's interpretation, the time limit in NRS 137.080 would be mandatory, while the time limit in NRS 137.090 is read out of the statute. Under Fink's interpretation, the failure to file the petition within three months under NRS 137.080 would result in a jurisdictional bar to the will contest, while the failure to issue the citation under NRS 137.090 within the same three month time limit would have no such jurisdictional effect. The same language and

same time limits in two successive statutes would thus be given wholly contradictory interpretations resulting in an unreasonable and absurd interpretation of these statutes where one statute means one thing while the next statute with the same language means something totally different.

This Court has previously dismissed the suggestion that a party can pick and choose when acts subject to a "must" time limit are or are not mandatory when used in reference to more than one requirement within a statutory scheme. In Otto, Washoe County timely filed a petition for judicial review of an administrative decision as required by the statute. 282 P.3d at 723. However, the petition failed to name all parties of record in the petition as required by the statute within the statutory time limit. Id. at 724. The statute provided that both acts "must" be performed within a thirty day time limit. Id. The Court determined that even though Washoe County had timely complied with the filing requirement, its failure to comply with the naming requirement was a jurisdictional bar to proceeding. Otto, 282 P.3d at 725.

The Court stated, "Nothing in the language of that provision suggests that its requirements are anything but mandatory and jurisdictional. … Given that the word 'must' applies to both the filing requirement … and the naming requirement …, **we see no reason to treat the naming requirement any differently**. We thus conclude that … it is mandatory to name all parties of record in a petition for

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

judicial review of an administrative decision, and **a district court lacks jurisdiction to consider a petition that fails to comply with this requirement**." Id. (citations omitted) (emphasis added).

Here, too, the Court must construe the filing requirement of NRS 137.080 and the citation requirement of NRS 137.090 as mandatory and requiring strict compliance with both requirements within the stated time limit in order to confer jurisdiction on the district court to hear the will contest. Otherwise, the absurd result will occur that "must" in one statute is mandatory, while "must" in the corresponding, following statute is merely permissive, and compliance with the time limit in one statute is mandatory, while compliance with the same time limit in the corresponding, following statute is not mandatory.

G. The California Approach is Distinguishable and is Contrary to the Requirement of Strict Compliance with Will Contest Statutes.

It is also necessary to address a line of cases from California on which Fink relied in the District Court.[2] California courts have construed a statute similar to NRS 137.090 in a manner that makes the issuance of the citation not necessary to confer jurisdiction over a will contest. Instead, a California court obtains jurisdiction upon only the filing of the petition. The court may dismiss the will

[2] Fink does not rely on these cases in his Opening Brief, though he does mention one of these cases (In re Withenbury's Estate) in passing. App. Op. Brief, p. 37, l. 20-21.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

contest for failure to issue the citation, but the court may also relieve the will contestant of the failure to do so. In re Simmons' Estate, 143 P. 697 (Cal. 1914); In re Logan's Estate, 153 P.388 (Cal. 1915); In re Withenbury's Estate, 204 P. 385 (Cal. 1922).

On first glance, this line of cases seems compelling. However, the California approach is easily distinguishable because the California courts rely on a statute, California Code of Civil Procedure §473, to justify the extension of time to issue the citation.[3] The Nevada Revised Statutes do not include any parallel statute to California's §473. The only basis on which Fink relies in his request to enlarge the time to issue the citation is NRCP 6(b). As set forth below, it is uniformly held that Rule 6(b) does not apply to statutory time limits. See *infra*, Section II, p. 21. Therefore, because Nevada does not have a statute corresponding to California's §473 and because NRCP 6(b) is inapplicable to NRS 137.090, the California approach is distinguished and unpersuasive for the interpretation of Nevada law.

Furthermore, the very few states that have followed the California approach

[3] Neither Markowitz nor the Westlaw research department (upon counsel's request) have been able to locate the exact text of §473 as it existed in 1915-1922 when these cases were decided. The Editor's and Revisor's Notes to §473 are reproduced as Addendum 2 to this Brief. The Notes set forth the statute as originally enacted in 1872 with notes regarding various amendments to the statute in 1873-1874, 1880, and 1917.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

note that the basis for the failure to issue citation not acting as a jurisdictional bar is **because their statutes did not fix a definite time for the issuance of the citation**. See Merrill v. District Court, 272 P.2d 597, 600 (Wyo. 1954); In re Shields' Estate, 489 P.2d 294, 296-97 (Ariz. App. 1971); contra Fiedler, 367 P.2d at 562-63 (discussing and declining to follow California cases); C. De Baca v. Baca, 388 P.2d 392, 395-97 (N.M. 1964) (discussing and declining to follow California cases and Merrill). In addition to being distinguishable on statutory grounds, the California cases hold contrary to the majority of other states that have reviewed the issue regarding the effect of the failure to issue the citation or to otherwise comply with the particular service requirement and all of which have determined that the failure to do so is a jurisdictional bar to proceeding with the will contest. The approach adopted by the majority of states, not California's approach, is the soundest approach that gives effect to all provisions of NRS 137.080-.120 and that comports with the generally held principles of law discussed above.

H. Fink Undisputedly Failed to Comply with Both Statutory Requirements and, therefore, the District Court Does Not Have Jurisdiction Over the Will Contest.

When interpreting the plain language of NRS 137.080-.090, and considering the entire after-probate will contest statutory scheme as a whole, the only conclusion that gives effect to all portions of the statutes is that in order to

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

"contest[] the validity of a will or of the probate thereof" (NRS 137.120) a will contestant must both file the petition under NRS 137.080 **and** issue a citation under NRS 137.090, both of which must occur within three months of the entry of the order admitting the will to probate. Thus, both acts are necessary to vest jurisdiction in the district court to hear the will contest and failure to adhere with the citation requirement within the statutory time limit is a jurisdictional bar to proceeding with a will contest.

Here, Fink failed to issue a citation within three months after entry of the order admitting the will to probate. The Order Admitting Last Will and Testament to Probate was entered on August 31, 2012. FINK000039-000040. Thus, the plain meaning of NRS 137.090 required that Fink must have issued a citation to the interested parties by no later than November 30, 2012. Fink undisputedly did not do so. A Citation was not issued until January 3, 2013. FINK000063. Fink's failure to timely issue a citation pursuant to NRS 137.090 is a jurisdictional bar to proceeding with a will contest. As such, this Court must uphold the District Court Order dismissing the will contest.

II. RULE 6(b) DOES NOT APPLY TO STATUTORY TIME LIMITS.

A. The Plain Language of NRCP 6(b) and the Uniform Application of this Rule Make Clear that Rule 6(b) Does **NOT** Apply to Statutory Time Limits.

Though Fink admittedly failed to comply with the mandatory time limit of

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

NRS 137.090, Fink urges this Court to allow an enlargement of time to issue the citation pursuant to NRCP 6(b). Contrary to Fink's argument, NRCP 6(b) does not apply to time limits set forth in statutes. The District Court, therefore, correctly determined that NRCP 6(b) cannot be used to enlarge the time limit set forth in NRS 137.090.[4]

The plain language of NRCP 6(b) makes it clear that the rule can be used only to enlarge time limits set forth in the rules of civil procedure or in an order of the court. NRCP 6(b) provides, "When **by these rules** or by a notice given **thereunder** or by order of court an act is required or allowed to be done at or within a specified time …." (Emphasis added.) The references to "these rules" and "thereunder" are clear, unmistakable references to the Nevada Rules of Civil Procedure and to acts required to be done by the rules of civil procedure. Applying the plain language rule of interpretation, there is no plausible argument that the references to "these rules" also include acts required or allowed to be done by the Nevada Revised Statutes.

Fink's suggested interpretation of NRCP 6(b) would cause an absurd result in addition to violating the plain language of the rule. If Rule 6(b) could be used to enlarge the time to perform an act required by the Nevada Revised Statutes, Rule

[4] In the District Court, Fink asserted arguments related to equitable tolling and extrinsic fraud as additional bases for extending the time limit of NRS 137.090. Fink has abandoned these arguments on appeal.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

6(b) would open literally all statutes of limitation and all acts statutorily required to be done within a certain time limit to extension of time to perform the statutorily required act upon proof of excusable neglect. There is no support for such a result in the statutes, the rules of civil procedure, or this Court's own decisions. In fact, Markowitz has been unable to locate any decision of this Court in which the Court applied NRCP 6(b) to enlarge the time to perform an act required under a statute.

It has been uniformly held that Rule 6(b) applies only to time limits set out in the rules of civil procedure and does not apply to time limits set forth in statutes. This principle was properly stated in O'Malley v. Town of Egremont, where the court stated, "It is well-established that 'Rule 6(b) governs the enlargement of time periods prescribed by the federal rules or by an order of the district court.' … 'The rule does not apply to time periods set out in statutes'. " 453 F.Supp.2d 240, 247-48 (D. Mass. 2006) (quoting 4B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure 3d §1165 (2005)).[5] Despite Fink's attempt to shoehorn NRS 137.090 into the reach of NRCP 6(b), this Court must interpret the plain language of NRCP 6(b) to apply only to acts required

[5] Accord Stone Street Capital v. McDonald's Corp., 300 F.Supp.2d 345, 350 (D. Md. 2003); Parker v. Marcotte, 975 F.Supp. 1266, 1268-69 (C.D. Cal. 1997); Hammons v. Int'l Playtex, Inc., 676 F. Supp. 1114, 1118 (D. Wyo. 1988); Lusk v. Lyon Metal Products, 9 F.R.D. 250, 251 (W.D. Mo. 1949).

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

under the rules of civil procedure or by an order of court and that the rule does not apply to requirements set forth in statutes. See Moseley v. Eighth Jud. Dist. Ct., 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008) ("NRCP 6(b)(2) applies to most acts **required by the rules of civil procedure** unless they are specifically excluded.") (citation omitted) (emphasis added).

B. The Rules of Civil Procedure Apply Only to Procedural Matters in Probate Matters.

Despite the uniform and well-settled application of Rule 6(b) only to acts required under the rules of civil procedure, Fink urges this Court to make Nevada the first state to apply Rule 6(b) to a time limit set forth in a statute. To do so, Fink relies on NRS 155.180 and asserts that this statute requires that Rule 6(b) be applied to enlarge the time under NRS 137.090. Markowitz does not dispute (and never has disputed) that the Nevada Rules of Civil Procedure apply to probate matters as the plain language of NRS 155.180 makes clear. However, such an assertion cannot and does not mean that the rules of civil procedure reach statutes of limitations in probate matters while the same rules do not reach statutes of limitations in civil matters. The obvious effect of NRS 155.180 is to make clear that when issues affected by the rules of civil procedure arise in a pending probate matter, the rules of civil procedure apply to those procedures. For instance, there is no dispute that in a probate matter if a party sought an enlargement of time to

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

oppose a motion or for additional time to respond to discovery requests or to take any other action "required or allowed to be done at or within a specific time" "**by these rules**" (NRCP 6(b) (emphasis added)), the court could, upon proper showing, enlarge the time to perform such act.

However, there is nothing in NRS 155.180 that suggests that NRCP 6(b) applies to time limits set forth in the statutes in Title 12. Fink's assertion would grant Title 12 special treatment from NRCP 6(b) while the other 58 titles remain unaffected by NRCP 6(b). It strains reason to assert that NRS 155.180 should be interpreted to mean that NRCP 6(b) could be used to allow a creditor to avoid the effect of NRS 147.040 (requiring the filing of a creditor claim within either 60 or 90 days after notice to creditors is provided) or NRS 147.130 (requiring a creditor to file suit within 60 days after notice that the creditor's claim was rejected). Further, Fink's interpretation would allow a will contestant to extend the time not only to issue a citation under NRS 137.090, but also to file the petition to contest the validity of a will admitted to probate under NRS 137.080. There is nothing in the statute that would suggest that NRCP 6(b) is intended to be used to extend these statutory timeframes. Instead, the plain and clear meaning of NRS 155.180 is that the rules of civil procedure apply to probate matters when a matter upon which a rule of civil procedure applies is in question.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

C. Application of Rule 6(b) to NRS 137.090 Would Cause an Absurd Result by Subjecting All Statutory Time Limits to Rule 6(b).

Arguing that because Rule 6(b) includes a specific list of rules where time may not be enlarged under Rule 6(b), and because NRS 137.090 is not specifically included in that list of excluded rules, Fink asserts that the Legislature thereby intended to bring NRS 137.090 within the reach of NRCP 6(b). App. Op. Brief, p. 29, l. 16-19. The logical conclusion of Fink's argument is that every instance of a time limitation wherever found (whether in the rules of civil procedure or in the statutes) that is not specifically included in the list of excluded rules would be subject to Rule 6(b). For instance, all periods of limitation set forth in NRS 11.190 would be subject to enlargement upon showing of excusable neglect because NRS 11.190 is not specifically included in the list of excluded matters in Rule 6(b). Hundreds of other instances of time limits throughout the Nevada Revised Statutes could also be cited as examples of the absurdity of Fink's argument, all of which would be subject to enlargement under Rule 6(b) under Fink's interpretation because each and every other one of those statutes is not specifically included in the list of specifically excluded matters in Rule 6(b). This assertion is quite simply absurd.

D. Fink Has Failed to Show Excusable Neglect.

In the event that the Court is inclined to make Nevada the first state to allow

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

time limits in statutes to be enlarged by Rule 6(b), Fink nevertheless has failed to show excusable neglect to justify enlarging the time to issue the citation under NRS 137.090. Fink did not cause a citation to be issued until thirty-four days past the three month time limit of NRS 137.090. In addition, Fink did not file his petition seeking an enlargement of time under NRCP 6(b) until fifty-four days past the expiration of the three month time limit, which petition did not come on for hearing until seventy days past the expiration of the three month time limit. Thus, at the earliest, an order granting an enlargement of time to issue the citation would not have been entered until over two months after the expiration of the time limit. Furthermore, Fink asserts that it was not until "[Markowitz's] counsel took the position that the citations were not timely issued" that Fink took steps to issue the citation. App. Op. Brief, p. 36, l. 13-14. Apparently had Markowitz's counsel not raised this concern, citation may have never been issued, or citation may have been issued only at some point long after expiration of the three month time limit.

The Legislature has stated its legislative intent that the probate statutes be construed "so that a speedy settlement of estates is accomplished at the least expense to the parties." NRS 132.010. Most probate proceedings can be concluded and assets of the estate distributed shortly after the conclusion of the applicable 60- or 90-day notice to creditor period. Therefore, it is not mere coincidence that the Legislature allowed a will contestant three months to bring a will contest after

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

a will is admitted to probate, a time limit that corresponds with the 90-day notice to creditor period. The entirety of Title 12 makes clear that the Legislature intends there to be no delay in the settlement of estates and to bring finality to estate proceedings as quickly as possible.[6]

Here, Fink's over two month delay before bringing his petition to enlarge time to issue the citation to a hearing nearly doubled the amount of time that is allowed under NRS 137.090. For all intents and purposes, but for Fink's actions that caused this delay, the estate could have and should have been closed and the assets distributed. In light of the legislative priority in probate matters, Fink's delay is unreasonable and contravenes the stated legislative priority.

Fink also fails to recognize the inherent prejudice to the parties who are the beneficiaries of a will admitted to probate. Contrary to the stated legislative intent in probate matters, a will contest essentially grinds the administration of an estate to a halt while the will contest proceeds. Here, rather than accomplishing a speedy settlement of the estate by the end of 2012, Markowitz was required to delay the settlement of the estate to first deal with Fink's attempt to pursue the will contest. It is now over two more years after Fink's petition to enlarge time came on for hearing and there is still no settlement of the estate. Enlarging the time to issue the

[6] See, e.g., NRS 143.035 (providing that a personal representative is subject to removal if an estate is not closed within six months after appointment).

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

citation now in this case will cause an even more extended delay as the will contest proceeds through discovery, evidentiary hearing, and appeal. Further delay is likely to deprive Rose Markowitz, a 91 year old beneficiary of the will, of any enjoyment or use of her devise under the will. The prejudice to the beneficiaries of the will could not be more pronounced than the delay that will be caused by allowing Fink's will contest to proceed.

Because Fink unreasonably delayed seeking enlargement of time and because the beneficiaries of the will are entitled to a speedy settlement of the estate, Fink has failed to show excusable neglect under NRCP 6(b). Thus, even if NRCP 6(b) applies (which it does not), Fink has failed to show he is entitled to relief under NRCP 6(b).

III. THE LEGISLATIVE INTENT TO AFFECT A SPEEDY SETTLEMENT OF ESTATES MUST BE GIVEN EFFECT OVER THE PUBLIC POLICY OF HEARING MATTERS ON THEIR MERITS.

Finally, Fink urges as a last ditch plea that the Court allow the will contest to be heard on the merits. App. Op. Brief, p. 38-39. Ignoring the requirements of NRS 137.090 simply to allow the will contest to be heard would contravene this Court's extensive and well-settled rules of statutory interpretation and persuasive case law throughout the country. Rather than the public policy urged by Fink, this Court must give effect and intent to the legislative intent that is actually stated in the probate statutes to construe the probate statutes "so that a speedy settlement of

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

estates is accomplished at the least expense to the parties." NRS 132.010.

To the extent that Fink is concerned that it is unjust to prevent him from having his will contest heard on the merits, this Court has made clear that it is not this Court's prerogative to "correct any injustice occasioned by a literal reading of the statute." Breen v. Caesars Palace, 102 Nev. 79, 87, 715 P.2d 1070, 1075 (1986). Instead, that prerogative rests solely with the Legislature. Id.; Holiday Retirement Corp. v. State DIR, 128 Nev. ___, 274 P.3d 759, 761 (2012). Thus, this Court should apply the interpretation of the after-probate will contest statutes as set forth in this Answering Brief and leave to the Legislature any rewriting of the statutes if the Legislature deems it necessary to do so.

IV. CONCLUSION.

Fink undisputedly failed to issue the citation within three months of the entry of the order admitting the will to probate. The Court must give plain effect to NRS 137.080-.120 and find that the District Court does not have jurisdiction to hear the will contest. Also, the time limit in NRS 137.090 cannot be enlarged under NRCP 6(b). This Court must give effect to the legislative intent to construe the probate statutes so that estates are settled in a speedy manner. This Court must enter an order upholding the District Court's dismissal of Fink's will contest.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

DATED this 17th day of February, 2015.

CLEAR COUNSEL LAW GROUP

JONATHAN W. BARLOW
Nevada Bar No. 9964
AMY K. CRIGHTON
Nevada Bar No. 12421
Attorneys for Respondent

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. I certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

I certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

/ / /

/ / /

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

DATED this 17th day of February, 2015.

CLEAR COUNSEL LAW GROUP

JONATHAN W. BARLOW
Nevada Bar No. 9964
AMY K. CRIGHTON
Nevada Bar No. 12421
Attorneys for Respondent

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on the 17th day of February, 2015, a copy of the foregoing Respondent's Answering Brief was deposited in the US Mail by first class mail, postage fully prepaid, to the following:

Michael A. Olsen
Thomas R. Grover
Goodsell & Olsen
10155 W. Twain, Ste. 100
Las Vegas, NV 89147

/s/ Sarena Faranesh
An employee of Clear Counsel Law Group

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

ADDENDUM 1

Reproduction of Statutes and Rules

NRS 132.010: This title must be liberally construed so that a speedy settlement of estates is accomplished at the least expense to the parties.

NRS 137.080: After a will has been admitted to probate, any interested person other than a party to a contest before probate or a person who had actual notice of the previous contest in time to have joined therein may, at any time within 3 months after the order is entered admitting the will to probate, contest the admission or the validity of the will. The contestant must file with the court in which the will was proved a petition containing the allegations of the contestant against the validity of the will or against the sufficiency of the proof, and requesting that the probate be revoked.

NRS 137.090: Upon filing the petition, and within the time allowed for filing the petition, a citation must be issued, directed to the personal representative and to all the devisees mentioned in the will, and the heirs, so far as known to the petitioner, including minors and incapacitated persons, or the personal representative of any such person who is dead, directing them to plead to the contest within 30 days after service of the citation.

NRS 137.120: If no person contests the validity of a will or of the probate thereof, within the time specified in NRS 137.080, the probate of the will is conclusive.

NRCP 6(b): When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the parties, by written stipulation of counsel filed in the action, may enlarge the period, or the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 50(c)(2), 52(b), 59(b), (d) and (e) and 60(b), except to the extent and under the conditions stated in them.

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

CLEAR COUNSEL LAW GROUP
50 S. Stephanie St., Ste. 101
Henderson, NV 89012
(702) 476-5900

ADDENDUM 2

Editor's and Revisor's Notes to California Code of Civil Procedure §473

Editor's and Revisor's Notes (16)

HISTORICAL AND STATUTORY NOTES

1979 Main Volume

As originally enacted in 1872, the section read: "The Court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; and may, upon like terms, enlarge the time for answer or demurrer. The Court may likewise, upon affidavit showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may, upon like terms, allow an answer to be made after the time limited by this Code; and may, upon such terms as may be just, and upon payment of costs, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect; and when, for any cause satisfactory to the Court, or the Judge at chambers, the party aggrieved has been unable to apply for the relief sought during the term at which such judgment, order, or proceeding complained of was taken, the Court, or the Judge at chambers, in vacation, may grant the relief upon application made within a reasonable time, not exceeding five motions after the adjournment of the term. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the Court may allow, on such terms as may be just, such defendant, or his legal representative, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action."

By the amendment of 1873-74, the court was authorized, in furtherance of justice and on such terms as might be proper, to "allow a party to" amend any pleading, etc.; the court was given discretion to allow amendment in other particulars; the requirement "upon payment of cost" was deleted from the provision for relief against mistake, inadvertence, etc.; reference to the judge at chambers was omitted; provision was made for the relief of a party who "failed" instead of "has been unable", to apply for relief during the term, upon application made within "six" months, instead of "five" months, after adjournment of the term. A defendant who was not personally served was given one year, instead of six months, after rendition of judgment to answer to the merits. A sentence was added dealing with the procedure where the person making an affidavit in an action to recover possession of personal property did not truly state the value of the property.

In 1880, a six month's limitation was added to the provision for relief from judgment or order taken by mistake, etc., and the provision for the answer of a defendant not personally served was rewritten to avoid reference to terms of court.

In 1917 a proviso was added to the provision for relief from judgment or order taken by mistake, etc., which required that the application for relief be accompanied with a copy of the answer or other pleading proposed to be filed therein.

The 1933 amendment partially rewrote this section to include therein material formerly contained in repealed §§ 859 and 900a. The amendment divided the section into paragraphs. It added the paragraph dealing with continuance, based upon former § 859, and added the paragraph relating to clerical mistakes, based upon former § 900a. It revised the sentence structure in the paragraph relating to relief from judgment or order taken by mistake, etc. The material which had been added by the amendment of 1873-74 was deleted and reenacted as new § 437d. The provision relating to answer of a defendant not personally served was deleted and reenacted as new § 473a.

The 1961 amendment added the proviso at end of the third paragraph.

2015 Electronic Pocket Part Update

1981 Legislation

Stats.1981, c. 122, inserted "or her" following "his" and "him" throughout the third paragraph and added the third sentence of the third paragraph.

1988 Legislation

The 1988 legislation added the fourth sentence in the third paragraph; inserted the fourth paragraph; and made nonsubstantive changes.

1991 Legislation

The 1991 amendment rewrote the fourth sentence in the third paragraph, which sentence had read:
"Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is timely, in proper form, and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

inserted "or default" preceding "judgment based on any" in the fourth paragraph; inserted a new fifth paragraph; and made nonsubstantive changes.

1992 Legislation

The 1992 amendment by c. 876 inserted references to "dismissal" where it occurs throughout the section; inserted the sentence relating to lengthening the time in which an action is brought to trial at the end of the third paragraph; substituted "party" for "defaulting party" in the fourth paragraph; and made other nonsubstantive changes.

Section 1 of Stats.1992, c. 53 (A.B.56), provides:

"The municipal courts of the County of Los Angeles shall take judicial notice that a state of emergency existed in the County of Los Angeles beginning April 30, 1992, which interfered with the operation of the judicial system and the delivery of public services. The municipal courts of the County of Los Angeles shall not count the dates of April 30, 1992 to May 4, 1992, inclusive, for purposes of determining any time period to respond to an unlawful detainer complaint filed in those courts. Any default judgment entered in an unlawful detainer proceeding in Los Angeles County municipal courts during that time period as a result of a defendant's nonappearance shall be set aside on the court's own motion. These courts shall also liberally construe the provisions of Section 473 of the Code of Civil Procedure to vacate any default judgment entered in an unlawful detainer action where the state of emergency interfered with the tenant's ability to make a timely response to the proceeding."

Subordination of legislation by Stats.1992, c. 427 (A.B.3355), see Historical and Statutory Notes under Business and Professions Code § 472.3 .

Section affected by two or more acts at the same session of the Legislature, see Government Code § 9605 .

1996 Legislation

The 1996 amendment inserted subd. and par. designations; and made corresponding nonsubstantive changes to facilitate the redesignation.