No. 90874-5

[Court of Appeals No. 71732-4-I]

SUPREME COURT OF
THE STATE OF WASHINGTON

THE ESTATE OF VIRGINIA J. JEPSEN;
and **JULIE MILES,** Personal Representative,

Appellants,

v.

MACK JEPSEN,

Respondent.

ANSWER TO PETITION FOR REVIEW

DICKSON LAW GROUP PS

Robert P. Dickson, WSBA #39770
1201 Pacific Avenue, Suite 2050
Tacoma, WA 98402
Telephone: (253) 572-1000
Facsimile: (253) 572-1300
Attorneys for Mack Jepsen, Respondent

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I. REQUEST FOR RELIEF

Respondent, Estate of Mack Jepsen ("Jepsen"), opposes the Petition for Review filed by Julie Miles, personal representative of the estate of Virginia J. Jepsen ("the Estate"). The Estate has not shown any basis for this Court to accept review pursuant to RAP 13.4(b).

II. RESPONSE TO STATEMENT OF THE ISSUE

The Decision of the Court of Appeals was consistent with precedent regarding waiver of an objection to personal jurisdiction when not raised by affirmative defense in the Answer. Accordingly, there is no reason for this Court to accept review.

III. STATEMENT OF FACTS

Appellant is Julie Miles, personal representative of the estate of Virginia J. Jepsen ("the Estate"). Respondent is the Estate of Mack Jepsen ("Jepsen"), the estate of a deceased son.

On March 22, 2012, Respondent Mack Jepsen, the adult son of the deceased, filed a Petition to Contest and Invalidate Will. CP 1-3. A copy of the *Petition* and *Summons* was sent that same day via email to Michael T. Smith, counsel for Appellant Personal Representative Julie Miles and a voicemail was left for Mr. Smith. CP 42-45, 119-120.

About a week later, the Estate's counsel called Jepsen's counsel in response to an email. CP 174-76. Several issues were discussed during that

phone conference regarding matters relevant to the Estate. CP 95. In particular, Mr. Smith verbally agreed to accept service of the petition and summons on behalf of Personal Representative Julie Miles. CP 107-8.

The Estate's counsel disputes that he consented to service during the phone conference with Respondent's attorneys. CP 174-175. The Estate claims that the conversation was only "to discuss the status of the request for inventory" and that "Counsel for the Estate has never made any written acceptance or admission of service of original process on behalf of Julie Miles." CP 174-175.

On April 27, 2012, the estate filed an Answer (entitled "Response") to the petition. CP 31-32.[1] The Answer provides that it was for and on behalf of Personal Representative Julie Miles and contains a point-by-point response to the assertions posited in the initial will contest filing. CP 31-32; 208-209. Notably, the Estate's Answer to the will contest petition fails to identify an affirmative defense or objection regarding jurisdiction. In particular, the Answer failed to cite, discuss, or reserve an objection for insufficiency of process, insufficient service, or lack of personal jurisdiction. According to the text of the Answer, the Estate manifested her

[1] The estate's Answer is titled "Response to Petition to Invalidate and Contest Will," but identifies itself as having "answered the Petition" in the Prayer for Relief and appears in the format of an answer. CP 174-175.

consent to engage in the will contest action and to accept the jurisdiction of the court. Furthermore, the Estate's responsive pleading requests affirmative relief from the court, including a finding of bad faith on the part of Jepsen and an award of attorneys' fees and costs. CP 32.

After filing the Answer, the Estate appeared at hearings, CP 158-59, 143-44, served its Inventory on Jepsen's counsel, CP 42, 158-59, engaged in discovery, and discussed Jepsen's request to amend the Petition, CP 107-10 At no point did the Estate mention any objection based on lack of jurisdiction until its Motion to Dismiss was filed October 31, 2012, seven months from the date of filing of the Petition, and over six months since filing its Answer. CP 54-64.

The trial court granted the Estate's Motion to Dismiss on November 30, 2012. CP 231-233. On January 18, 2013, the trial court granted Jepsen's Motion for Reconsideration and entered an order to vacate the November 30, 2012 dismissal. CP 266-67. The trial court based its decision to grant Jepsen's Motion for Reconsideration on the fact that the Answer failed to preserve any objections or defenses to personal jurisdiction and thus waived them. CP 266-67.

The Estate appealed. After the appeal was filed, Mack Jepsen passed away (and the action is now handled by the personal representative of his estate).

On September 8, 2014, the Court of Appeals, Division I, in an unpublished opinion, affirmed the trial court and held that the trial court did not err in denying the Estate's motion for summary judgment and did not err in concluding that the trial court had jurisdiction.

IV. ARGUMENT

The Estate has not shown a basis for review because the decision below is consistent with precedent. Pursuant to RAP 13.4(b), Supreme Court review of the Court of Appeals' decision terminating review is appropriate only if the decision meets one of the following four criteria:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Estate proceeds under the second and fourth criteria, arguing review should be granted because the Court of Appeals decision "is in conflict" with another decision of the Court of Appeals or alternatively that

the petition "involves an issue of substantial public interest." Neither of these is true and the petition should be denied.

A. The Opinion Is Not in Conflict With another Opinion of the Court of Appeals.

The Estate attempts to fabricate a "conflict" where none exists. The amendments to RCW 11.24.010 are consistent with *In re Estate of Kordon*, 157 Wn.2d 206, 137 P.3d 16, 18 (2006). Further, the other special proceedings relied on by the estate are not analogous to the will contest statute.

1. The Opinion Is Consistent with Kordon and Statutory Amendments.

Kordon analyzed the former will contest statute and held that filing the petition in court was an issue of subject matter jurisdiction, while service is an issue of personal jurisdiction. 157 Wn.2d at 209-10. The amendments to RCW 11.24.010 do not change this fundamental rule. The amendment added a paragraph to clarify the time frame in which the petition should be served. The new paragraph provides:

> For the purpose of tolling the four-month limitations period, a contest is deemed commenced when a petition is filed with the court and not when served upon the personal representative. The petitioner shall personally serve the personal representative within ninety days after the date of filing the petition. If, following filing, service is not so made, the action is deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 11.24.010. Service is explicitly stated to be for the purpose of tolling the statute of limitations. The language is similar to that used in RCW 4.16.170. Nothing in the amended statute is inconsistent with *Kordon's* reiteration of the general legal principle that service of a lawsuit is an issue of personal jurisdiction and can implicate the statute of limitations. Defenses related to both service and the statute of limitations are routinely waived if not raised in an answer.

The Estate asks the Court to ignore *Kordon* entirely because the will contest statute was amended to remove the antiquated requirement that a citation be issued. The amendments to RCW 11.24.010 only updated and clarified the statute consistent with the Supreme Court's discussion in *Kordon*. The amendments did not change well-settled law that personal service is a question of personal jurisdiction that can be waived.

2. Other Statutes Are Not Analogous.

The Estate's reliance on LUPA and industrial insurance appeals is also misplaced. As the Court of Appeals noted, "those statutes, e.g. the Land Use Petition Act and various non-claim statutes, are not analogous to the will contest statute." Opinion, page 9. Reference to unrelated statutes does not highlight a conflict between the opinion below and another decision of the Court of Appeals.

Despite the seemingly strict language cited by the Estate regarding the consequences of failure to serve a LUPA petition, the Estate inexplicably ignores the specific reference in the Act confirming the general rule that a defense relating to service of the petition is "waived if not raised by timely motion." RCW 36.70C.080(3). The Estate also fails to note case law holding that circumstances implicating waiver are sufficient to meet the service requirement. *See Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 259, 108 P.3d 805 (2005). Analogizing the will contest statute to LUPA should lead to the conclusion that service under the will contest statute can be waived just as it can under LUPA.

Filing a notice of appeal under RCW 51.52 may be analogous to filing the petition for a will contest under the first paragraph of RCW 11.24.010. But the issue on this appeal is not filing of the petition with the court; it is service of the petition. Analysis of the failure to file, as discussed in *Corona v. Boeing Co.*, 111 Wn. App. 1, 46 P.3d 253 (2002), does not help resolve a situation where the petition was filed and where service of the petition was waived.

When a respondent fails to object to personal jurisdiction in its answer, it waives that objection thereafter. *E.g. Sanders v. Sanders,* 63 Wn.2d 709, 288 P.2d 942 (1964); *O'Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 527, 125 P.3d 134 (2004); *see also Corona*,

111 Wn. App. at 8. (although a party must file and serve within the 30-day appeal period provided for an industrial insurance appeal, "[s]ubstantial compliance with this statute is sufficient to invoke the superior court's jurisdiction.").

The Court of Appeals, below, correctly held that, "failure to timely serve a party is a defense that may be waived. Proper service of the summons and complaint is a prerequisite to the court obtaining personal jurisdiction over a party. Under CR 12(h), a challenge to personal jurisdiction must be asserted either by motion filed before filing the answer or in the answer." Opinion, pages 5-6 (internal quotes omitted) (*citing Scanlan v. Townsend*, 178 Wn. App. 609, 617, 315 P.3d 594 (2013); *Adkinson v. Digby*, Inc., 99 Wn.2d 206, 208-10, 660 P.2d 756 (1983); *Clark v. Falling*, 92 Wn. App. 805, 965 P.2d 644 (1998); *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002); *Meade v. Thomas*, 152 Wn. App. 490, 493-94, 217 P.3d 785 (2009)).

In the instant matter, there is no "conflict" with another Court of Appeals' decision. Here, Jepsen complied with the absolute jurisdictional requirement by filing the petition, and the Estate waived any defense relating to service or the statute of limitations by failing to raise it in its Answer. Therefore RAP 13.4(b)(2) is not a valid basis for granting review.

B. There Is No Issue of Substantial Public Interest at Stake to Warrant Review.

There is nothing extraordinary about this case to warrant review of the Court of Appeals decision.

> "**A defense** of lack of jurisdiction over the person, improper venue, insufficiency of process, or **insufficiency of service of process is waived** (A) if omitted from a motion in the circumstances described in section (g), or (B) **if it is neither made by motion under this rule nor included in a responsive pleading** or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

CR 12(h)(1) (emphasis added).

It is undisputed that Jepsen brought his petition and the Estate failed to raise its defenses relating to service or the statute of limitations in its Answer. Pursuant to CR 12(h), the defense of the Estate is waived as to Jepsen's petition. The Estate's failure to raise lack of service as a defense and the resulting waiver of that defense does not create a substantial public interest to warrant review. Therefore RAP 13.4(b)(4) is not a valid basis for granting review.

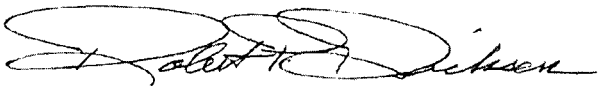
V. CONCLUSION

The Court of Appeals correctly affirmed the trial court. The Estate's petition for review should be denied. Jepsen should recover attorney's fees incurred in responding to the Petition for Review pursuant to RCW

11.96A.150 because there are no ground for further review of the opinion of the Court of Appeals.

Respectfully submitted this 7th day of November, 2014.

DICKSON LAW GROUP PS



ROBERT P. DICKSON, WSBA 39770
Attorneys for Respondent

CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the foregoing Brief of Respondent to counsel of record as follows:

Susan L. Caulkins
Davies Pearson, PC
PO Box 1657
920 Fawcett Avenue
Tacoma, WA 98402
(253) 620-1500

Service was made by:
___ First class mail
___ Facsimile
XX Hand delivery
___ Digital transmission (email)

DATED this 7th day of November, 2014.

MOISES BEJARANO

OFFICE RECEPTIONIST, CLERK

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Subject: RE: Answer to Petition for Review - Supreme Court Cause No. 90874-5

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Subject: Answer to Petition for Review - Supreme Court Cause No. 90874-5

The Estate of Virginia J. Jepsen, et al Appellants v. Mack Jepsen, Respondent
Supreme Court Cause No. 90874-5

Greetings Clerk:

Attached please find for filing Respondent's Answer to Petition for Review in the above-referenced matter.

Please call or email with any questions or concerns.

Thank you.

Daniel J. Frohlich | ATTORNEY | **DICKSONLAWGROUP PS**
SEATTLE: (206) 621-1110 | TACOMA: (253) 572-1000
www.dicksonlegal.com | www.warealestatelawblog.com