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Supreme Ct. No. 97433-1
Ct. of Appeal No. 78121-9-I

SUPREME COURT OF THE STATE OF
OF THE STATE OF WASHINGTON

In re the Estate of: SASSAN SANAI,MD Deceased.	**ANSWER TO MOTION TO STRIKE AND FOR SANCTIONS**

OPPOSITION TO OCTOBER 1, 2019 MOTION

I. PROCEDURAL BACKGROUND

Astrid Sanai filed an Answer to the Petition for Review which included the following request for relief:

> (3) The Estate Is Entitled to Fees under TEDRA
>
> The Estate requests that the Court award the Estate its reasonable attorney fees in connection with Cyrus's petition. RAP 18.1; RCW 11.96A.150. See Appendix. **The Estate recognizes that Division I exercised its discretion and declined to award fees in connection with its review, but that does not foreclose this Court from awarding TEDRA fees**.
>
> RCW 11.96A.150 authorizes a court in its discretion to award reasonable attorney fees for "any and all factors that it deems to be relevant and appropriate ... " and "in such amount and in such manner as

> the court deems to be equitable." Fees may be awarded on appeal in will contest proceedings. *In re Estate of Muller,* 197 Wn. App. 477, 490, 389 P.3d 604 (2016). Cyrus's present petition, including its newfound constitutional argument, is meritless.

Answer at 13-14.

The Answer clearly acknowledged the Court of Appeals' opinion denying an award of fees under RCW 11.96A.150 and requested this Court to override that portion of the opinion by awarding her attorney fees.

Astrid was facially raising a new issue for this Court to review—whether the denial at the trial court and Court of Appeals level of fees under RCW 11.96A.150 was correct or not—so Petitioner filed a reply to that issue.

As Petitioner pointed out in the first page of his reply:

> Because the statute states that that "in exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved", in opposing the request for review of the decision by the Court of Appeal and an award of fees in this proceeding, Petitioner may raise any and all "factors" that a court might consider "relevant and appropriate". RCW 11.96A.150.

Reply to Answer at 1.

Astrid does not address the language or the logic of the grounds asserted by Petitioner that filing of a Reply that addressed the merits was proper. Instead, Astrid filed on October 1, 2019 a motion to strike the reply and for sanctions based on the manifestly false representation that she did not request attorney fees under RCW 11.96A.150 in her Answer, but rather "sanctions." Her attorney writes that:

> The Estate's answer did not raise new issues; it did not seek cross review, raising added issues for this Court to address upon granting review. It merely sought sanctions

Motion to Strike at 2.

That contention is a direct lie to this Court. Astrid's Answer did not request or argue for sanctions, which are awardable under RAP 18.9(a). Her attorneys

wrote in the Answer that: "**The Estate requests that the Court award the Estate its reasonable attorney fees in connection with Cyrus's petition.** RAP 18.1; RCW 11.96A.150." Answer at 13.

II. ARGUMENT

A. Astrid's Motion for Sanctions and to Strike the Reply has Three Glaring, Fatal Flaws.

Astrid's argument—that the Reply to the Answer is frivolous because she never requested review of the portion of the Court of Appeal opinion denying her attorney fees under RCW 11.96A.150—has three glaring flaws, each of which is fatal to the motion.

1. Astrid Did not Request Sanctions in her Answer.

First, Astrid's Answer did not request or argue for sanctions as she claims, which are awardable under RAP 18.9(a). Indeed RAP 18.9(a) is not cited anywhere in Astrid's Answer. She explicitly asked for attorney fees under RCW 11.96A.150, and cited RAP 18.1. She is therefore lying to this Court about the plain language of her Answer.

2. Astrid May Not Request Attorney Fees Under RCW 11.96A.150 in Her Answer under RAP 18.1(j) Because She Lost in the Court of Appeal.

Second, RAP 18.1, the rule Astrid cited in her Answer, which governs a request for attorney fees for opposing a petition for review, does not allow a LOSER to request fees in an answer without requesting review:

> **If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals,** and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for

review.

RAP 18.1(j) (bold emphasis added).

RAP 18.1(j) only permits a request for fees in an answer for petition for review "[if] attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals"; here, they were **denied** by the Court of Appeals. The reason that a request for fees in an answer is only permitted if the Court of Appeals awarded fees should be obvious: due process. If the Court of Appeals awards fees, the issue has been finally determined as a matter of due process UNLESS this Court grants review. However, if the Court of Appeals DENIES attorney fees, then the issue has been finally determined as a matter of due process; if there are some different grounds for awarding fees to a party answering a petition for review, a petitioner must be given the opportunity to oppose the request for fees on the newly asserted grounds; if the grounds are the same, then awarding fees necessarily involves review of the Court of Appeals' opinion insofar as it denied fees.

For this reason, because Astrid LOST on this issue before the Court of Appeals, Astrid could not request attorney fees in her Answer unless it was by way of seeking review of the portion of the opinion denying attorney fees. For this reason, and because of the plain language of Astrid's request in her Answer, Petitioner correctly interpreted the request as a new issue for cross-review. Astrid's claim that this is not what she intended means she violated the Rules of Appellate Procedure, specifically RAP 18.1(j) and RAP 17.1(a).

3. Astrid's Request for Fees Outside the Scope of Review Could only be Legally Made by Separate Motion.

Astrid now denies the plain language of her request for fees under RCW 11.96A.150 made in her Answer and instead asks that her briefing in her Answer be read as a request for sanctions. This is the third glaring defect in her October

1, 2019 motion. She is not permitted to drop a request for sanctions in her answer to a petition for review. RAP 18.1(j) only allows a request for attorney fees in an answer if they were awarded by the Court of Appeals. As for sanctions, RAP 18.9(a) states that:

> (a) Sanctions. The appellate court …. **on motion of a party** may order a party or counsel…. who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.

RAP 18.9(a) (bold emphasis added).

Sanctions cannot be requested in an answer to a petition for review; they must be requested by separate motion. The reason sanctions must be requested by motion in this context is that if they are buried in the answer, the Petitioner, as a matter of due process, would have the right to file an opposition to the request for sanctions by way of reply. Since an opposition to sanctions necessarily must address the merits, any motion for sanctions would automatically allow for further argument on the merits in a reply. Because the Rules of Appellate Procedure intend to limit replies to answers to petitions for review only to new matters on review, in order to prevent a sanctions request from automatically triggering a reply on due process grounds, RAP 18.9(a) **requires** that a request for sanctions be put into a motion. The answer to the motion for sanctions can then be read or not read by the Court if it deems it necessary after determining the merits of the petition. This point is reiterated by RAP 18.1(j), which states that a request for attorney fees may only be included in the answer if fees were awarded by the Court of Appeals.

C. The Court Should not Strike the Reply, as it was Filed in Response to a Request for Fees that Could Only Be Made in the Answer as a Request for Review of the Court of Appeals Denial of Fees.

Because RAP 18.1(j) did not apply, as Astrid had lost the request for an award of attorney fees, Petitioner was entitled, as a matter of due process, to oppose the request for fees on the merits, whatever the basis of the request. Under the practice of this Court, when a motion is filed, this Court sets a briefing schedule. *See, e.g.,* letter of October 2, 2019 setting briefing for opposition to motion to strike and for sanctions; letter of October 4, 2019, setting briefing schedule on Petitioner's motion for sanctions and other relief. Accordingly, filing an opposition to the request for fees as a motion was not possible, and filing an opposition would also have presumed that Astrid's attorney, a former Justice of the Washington State Supreme Court, was ignorant of the operation of the Rules of Appellate Procedure. Petitioner therefore filed the opposition as a Reply to the Answer.

The conduct of Astrid's attorneys opened the door and invited the Reply. If Astrid's attorney had intended that the request for fees be treated as a request for sanctions, he should have filed a motion for sanctions citing RAP 18.9, instead of inserting a request for attorney fees in the Answer which cited RAP 18.1, a sub-section of which, RAP 18.1(j), explicitly restricts such requests for fees in an answer to a petition to the scenario where the Court of Appeals has awarded fees. Because Astrid's litigation misconduct and violation of the Rules of Appellate Procedure triggered, and indeed forced, the filing of the Reply, the Reply was properly filed.

The next question, of course, is whether it should remain filed and be reviewed by this Court, given that Astrid has withdrawn her request for review of the Court of Appeals decision denying her attorney fees if review is granted on the Petition for Review. The answer is that it should remain filed and be reviewed by this Court. Astrid opened the door, indeed invited, the filing of the Reply by including in her Answer a request for attorney fees under RCW 11.96A.150 that was only properly made if it requested review of the order denying her fees. That request for attorney fees under RCW 11.96A.150 opened the door, and having raised the issue, she cannot bar further address of it. *See, e.g. State v. Gefeller,* 76 Wash.2d 449, 455, 458 P.2d 17 (1969) (party cannot seek to exclude testimony as an improper subject having raised the issue).

C. The Court Should Grant Leave to File an Opposition to the Recharacterized Request in the Answer and For Sanctions as Requested by Separate Motion.

Astrid's efforts to rewrite the procedural history of this case force Petitioner to make two separate oppositions. He has to file this opposition to the October 1, 2019 motion to strike the Reply and for sanctions. He also has to file an opposition to the revisionist request for attorney fees in the Answer to protect himself if this Court treats the motion for sanctions as some kind of post-facto amendment of the language in the Answer.

In addition, Petitioner had to file a motion for leave to file the opposition to the request for attorney fees in the Answer, as this Court has not issued a motion letter treating the request as a motion. In that motion he is also requesting sanctions under RAP 18.9(a) for the violation of the Rules of Appellate Procedure.

This Court should consider this opposition in tandem with those two documents. That being said, because Astrid has based her request for sanctions

on the contention that the Petition for Review was meritless, Petitioner must address, as he did in the Reply to Answer and his Answer to the Request for Attorney fees, the merits of his Petition.

A. The Issues Presented by Petitioner and Their Potential Disposition

Petitioner presented three issues, only two of which were argued in the briefing to the trial court and the Court of Appeals. The first issue is "must service of an appointed agent be hand-to-hand delivery as held by the Court of Appeal, or is personal service subject to evaluation under the substantial compliance?"? Petition at 1. The second issue is "[w]as the Court of Appeal correct in interpreting the Will Contest Statues to lack any requirement for a personal representative to (a) provide notice of the identity of any agent for service of process, (b) provide notice of the address for service of the agent for service of process, (c) provide notice of the address for agent of service of process of the personal representative, or (d) if a non-resident, to maintain any agent for service of process?" The third issue, neither presented to the Court of Appeals in the briefing nor ruled upon by the Court of Appeal, is whether "[a]s interpreted by the Court of Appeal, do the Will Contest Statutes violate the Fourteenth Amendment right to due process." Petition at 2.

Astrid's new attorney acknowledges that the third, constitutional, issue was not argued to the Superior Court or the Court of Appeal in the briefs, and was thus not decided by either, and contend further that it was not sufficiently "manifest" to qualify for review. This concession validates a successive challenge in a United States District Court of Washington State's Will Contest Statutes if this Court elects not to grant review on Issue 3. Under long-established United States Supreme Court precedent, a party who believes that a state statute may be unconstitutional must first ensure that the statute is not interpreted by the State

courts in a fashion that would make it constitutional. If the party leaps into federal court first, that party will face *Pullman* abstention. *Railroad Commission v. Pullman Company*, 312 U.S. 496 (1941). For many years it was believed that under *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964), a party could file a lawsuit in the United States District Court and then, if required to seek an interpretation under state law of the effect of the statute, make a reservation of jurisdiction in federal court, called an *England* reservation. However, in *San Remo Hotel, LP v. City and County of San Francisco,* 545 US 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), the United States Supreme Court held that the actual question is one of collateral estoppel under state law. If the plaintiff's constitutional claim was actually litigated and fully and finally determined so that collateral estoppel applies, even unintentionally, the constitutional claims cannot be brought again in federal court; if the claims were not actually litigated or some other exception to state collateral estoppel law applies, then the statute can be subsequently attacked. The other barrier to federal court jurisdiction, the *Rooker-Feldman* doctrine, does not apply in this situation either. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-483 (1983) ("To the extent that Hickey and Feldman mounted a general challenge to the constitutionality of Rule 461(b)(3), however, the District Court did have subject-matter jurisdiction over their complaints.") As the Ninth Circuit puts it, so long as the party does not argue that the state court judgment was wrongly decided, a state-court loser may file a constitutional attack on a statute after losing the argument in state court that application of the statute in a particular case was erroneous under state law. *Noel v. Hall,* 341 F. 3d 1148, 1159 (9th Cir. 2003). Raising the constitutional issue "belatedly" in this Court does not operate to foreclose subsequent adjudication in federal court if this Court denies review, since it will have decided nothing; likewise, the Court of Appeal decided

nothing on constitutional grounds. It is fully appropriate to request a state Supreme Court to address statutory interpretation to foreclose *Pullman* abstention. *See England, supra.*

B. The Issues that the Motion for Sanctions Raises May be Addressed in an Opposition.

One factor for determining whether attorney fees or sanctions should be awarded, then, is whether it was reasonable and appropriate for Petitioner to raise the constitutional issue at this late stage, and whether the state law issues presented a real question of interpretation for this Court to address.

1. Whether There is a Conflict in the Law or Arguable Error in Interpretation

The Court of Appeals ruled that the ONLY method for service is hand-to-hand as follows:

> Cyrus asserts that the service of process statute, RCW 4.28.080, is not relevant to service of will contest petitions under RCW 11.24.010. **But since RCW 11.24.010 does not define "personally serve," the court properly looked to the general definition of personal service in RCW 4.28.080 and to case law interpreting that provision. RCW 4.28.080(16) authorizes service on an individual by personal service, which the statute defines as delivery of a copy of the summons to the person.**
>
> …..*Scanlan* involved hand-to-hand, but secondhand, service. The defendant's father was "competent to serve" his daughter and "delivered a copy of the summons and complaint personally" to her when she visited him in person. Here, by contrast, the receptionist simply left the documents in McCarthy's in-box and several days later, McCarthy found them.

Appendix A to Petition at A-6, A-8 (footnote deleted).

The Court of Appeal's analysis above has an obvious non-sequiter—it does not address whether "delivery of a copy of the summons to the person" includes or excludes actual receipt by the person of the copy of the summons by leaving it in a place that the person picks up mail and other documents. Under the general

definition of personal service in RCW 4.28.080, delivery does include leaving items with a secretary or leaving items for pickup in many instances:

> **Service made in the modes provided in this section is personal service.** The summons shall be served by delivering a copy thereof, as follows:
> …..
> (3) If against a school or fire district, to the superintendent or commissioner thereof or **by leaving the same in his or her office with an assistant superintendent, deputy commissioner, or business manager during normal business hours**.
> ….
> (9) If against a company or corporation other than those designated in subsections (1) through (8) of this section, to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof **or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent**.
> (10) If against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier **or secretary thereof**.
> …..
> (15) If against a party to a real estate purchase and sale agreement under RCW 64.04.220, **by mailing a copy by first-class mail, postage prepaid, to the party to be served at his or her usual mailing address or the address identified for that party in the real estate purchase and sale agreement.**
> (16) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.
> (17) **In lieu of service under subsection (16) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" does not include a United States postal service post office box or the person's place of employment.**

RCW 4.28.080

Under the statute, even leaving a summons "**at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof,**" constitutes "personal service." Thus equating "personal service" with "hand-to-hand" delivery under RCW 4.28.080 is simply wrong under the plain language of RCW 4.28.080.

There is thus an obvious logical gap in the Court of Appeals' reading of RCW 4.28.080. These issues are properly raised in by the Petition for Review, and thus sanctions cannot be awarded.

The Court of Appeals also ruled that the standard for evaluating whether personal service validly occurred is strict compliance. This Court and the Court of Appeals have held that the standard for evaluating whether personal service validly occurred is substantial compliance. "One interpretive distinction this court makes in construing service of process statutes and rules is between strict compliance and substantial compliance…personal service statutes require only substantial compliance." *Martin v. Triol,* 121 Wn.2d 135, 143, 847 P. 2d 471 (1993).

> The distinction, then, is that constructive and substituted service statutes require strict compliance, while personal service statutes require substantial compliance. *See Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.,* 66 Wn.2d 469, 403 P.2d 351 (1965).

Thayer v. Edmonds, 8 Wn. App. 36, 39-40, 503 P.2d 1110 (1972); *see also Golden Gate Hop Ranch, supra* ("substantial and not strict compliance is sufficient.").

This Court has stated that the Will Contest Statutes are strictly enforced. *See, e.g. In re Estate of Jepsen,* 184 Wn.2d 376, 380, 358 P.3d 403 (2015), cited in Appendix to Petition at 4. However, the Will Contest Statutes do not govern what is or is not personal service. As acknowledged by the Court of Appeal, "…since RCW 11.24.010 does not define "personally serve," the court properly looked to the general definition of personal service in RCW 4.28.080 and to case law

interpreting that provision." Appendix A to Petition at A-6. The case law interpreting "that provision", RCW 4.28.080 , uniformly states "that provision" is to be interpreted on a substantial compliance basis. *See Martin, supra, Thayer, supra,* and *Golden Gate Hop Ranch, supra.* The Court of Appeals did not seem able to register this clear conflict in the case law. This difference in standards of compliance is dispositive; the service substantially complied, because the agent for service of process physically received the document by the deadline. This conflict in the legal standards for interpreting RCW 4.28.080 is precisely the kind of issue that is properly raised in a Petition for Review.

2. Petitioner Can Raise Constitutional Issue as a Matter of Right At This Stage

Astrid argues that review of constitutional issues raised at this level is not available under RAP 2.5(a)(3), citing *State v. WWJ Corp.,* 138 Wn.2d 595, 980 P.2d 1257 (1999). This is a case involving validity of service, and thus personal jurisdiction. The trial court ruled it lacked jurisdiction because service was not valid. Under RAP 2.5(a)(1), a trial court ruling regarding "lack of trial court jurisdiction" can be raised for the first time on appeal.

Putting aside that RAP 2.5(a)(1) applies, Astrid argues this the issue is not "manifest" under RAP 2.5(a)(3). This Court explained in *WWJ* that:

> *McFarland* held an error is manifest if it results in actual prejudice to the defendant. An equally correct interpretation of manifest error was given in *State v. Lynn,* 67 Wash.App. 339, 345, 835 P.2d 251 (1992), where the court stated, "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." Under *Lynn*, an alleged error is manifest only if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record. To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of

succeeding.

State v. WWJ Corp., supra, 980 P.2d at 1261.

As this Court wrote in an exactly similar situation:

> The Conners contend that the due process issue should not be addressed because Universal Utilities did not raise it at trial or in the Court of Appeals until its motion for reconsideration. RAP 2.5(a), however, provides that a party may raise a claim of "manifest error affecting a constitutional right" for the first time in the appellate court. It is consistent with RAP 2.5(a) for a party to raise the issue of denial of procedural due process in a civil case at the appellate level for the first time. *Esmieu v. Schrag,* 88 Wn.2d 490, 497, 563 P.2d 203 (1977). This court, therefore, may consider the due process issue.

Conner v. Universal Utils., 105 Wash.2d 168, 171, 712 P.2d 849 (1986).

In *Conner,* Universal Utilities did not raise the constitutional issue at trial or until the motion for reconsideration stage with the Court of Appeals. This Court held that this was fine under RAP 2.5(a). This is exactly how the issue was raised in this case.

Astrid's attorney argues that "if the record of an issue is insufficient to determine the merits of the issue, any error is not "manifest" and review need not occur…Cyrus made *no record* below on his belated constitutional claim." This argument is a non-sequitur. There is no record made of the constitutional claim because it was not raised in the trial court or the Court of Appeal briefing; that's why the issue of RAP 2.5(a) is being discussed. However, the factual record for evaluating the constitutional claim is in the record, and indeed is undisputed:

> An authorization for Sarah McCarthy, in her capacity as attorney for the estate, to act as agent for service of process was filed with the Court. CP 123-5. However, the document filed in the Court was never served on anyone. CP 126; CP 52-56.
>
> The Personal Representative, Astrid Sanai, served a notice to Petitioner that was file stamped via her attorneys, the Anderson Hunter Law Firm. A picture of the notice is attached as Exhibit 1 to the Declaration of Cyrus Sanai filed on January 3, 2018. CP 56. This notice identified the "Anderson Hunter Law Firm" as the "Attorneys for Personal Representative." Based on this notice, which provided the Anderson Hunter law firm as the only address for service of documents, the Personal Representative was served a copy of the summons and petition by two means and two capacities. First, Astrid

> and Astrid's agent were served notice by mail in her capacity as an heir as required under RCW 11.24.020 in her capacity as " all persons interested in the matter, as defined in RCW 11.96A.030(5)." RCW 11.24.020 states that "notice shall be given as provided in RCW 11.96A.100." Such notice was given and is undisputed. She was served by mail in New York and to her agent for service of "all papers" on August 30, 2017. Service of notice by mail was admitted by McCarthy; the envelope in question shows a postmark the day after deposit in the mail. *See* McCarthy Decl. ¶4; CP 83-100.
>
> On November 21, 2017 at 1:10 p.m. a copy of the petition and summons on the agent of the Personal Representative at 2707 Colby Avenue #1001Everett, WA 98201. The person deliver the document asked for Sarah McCarthy, and the person accepting the delivery stated that she would take the document for McCarthy. CP 50-51 ¶¶1-2.
>
> Based on the notice furnished by the Personal Representative, the law firm of Anderson Hunter was served with a timely filed will contest petition by personal service on the receptionist, who accepted the package.
>
> According to the Respondent, the package was then left in McCarthy's in-box, and McCarthy physically received the petition package on the 90th day after filing of the petition. CP 83-100.

Opening Brief at 3-4.

The notice of the proceedings also did not provide an address for personal service upon Astrid. CP 56. The other relevant fact is that after being appointed personal representative, Sarah McCarthy ceased to act as counsel to the estate and thus is no longer the agent for service of process. *See* Exh. A and B to Motion for Reconsideration dated May 15, 2019. There is no agent for service of process for Astrid in Washington State, and no address for service of her in Washington State. The notice by which McCarthy ceased to act as attorney and agent for service of process was not served on anyone. This is also undisputed.

The record for evaluating the constitutional claims is thus fully set out in the Court of Appeal briefing.

3. The Due Process Issues are Valid and Unrebutted

Assuming that the Court of Appeal interpreted the statute correctly (without

regard to issues of constitutionality), the constitutional basis of the argument rests on *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), as interpreted and expanded upon by *City of New York v. New York, N. H. & H. R. Co.,* 344 U. S. 293, 73 S. Ct. 299, 97 L. Ed. 2d 333 (1953), *Hesthagen v. Harby,* 78 Wn.2d 934, 481 P.2d 438 (1971), and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

Nowhere in Astrid's Answer or her motion for sanctions does she dispute the merits of the constitutional arguments. She solely argued, falsely, that RAP 2.5(a) does not allow raising the constitutional issue. This is an effective concession that the constitutional issue raised in the Petition for Review is valid. The issue is extensively argued in the Reply to Astrid's answer; however, because Astrid is seeking to strike that document, it will be summarized here.

> In *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), the United States Supreme Court had before it the provisions of a New York statute concerning the administration of trust estates, which statute permitted notice of the settlement of accounts to be given to the beneficiaries of the trust by publication. In essence, the court held that such a notice was insufficient under the due process clause of the United States Constitution where the names and addresses of the beneficiaries were known to the trustee or could be ascertained by the exercise of reasonable diligence on the part of the trustee. The court went on to hold that under such circumstances written and mailed notice was required. In so holding, the court stated, at page 314:
>
> > An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is **notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections** (citing cases). The notice must be of such nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance....
>
> *Hesthagen, supra,* at 940-1(bold emphasis added).

The notice in this case which the Court of Appeal found acceptable was NOT "notice reasonably calculated, under all the circumstances, to….afford them an opportunity to present their objections", because the notice was not "of such nature as reasonably to convey the required information" of the address for service of process on Astrid, the exact name of the agent and address for service of process on the agent or the deadlines for a will contest. In order to exercise rights to challenge the will, a person entitled to challenge must have notice of a valid address for service of the personal representative. If the personal representative is a non-resident, then the person must be informed of the exact identity of any agent appointed by a non-resident personal representative and a valid address for personal service on the agent as well. This is the minimum information required. It is undisputed that no such information was provided.

In addition, the notices do not meet the due process standard for claim bar notices articulated by the United States Supreme Court:

> Section 77 (c) (8) of the Act states that "The judge shall cause reasonable notice of the period in which claims may be filed, . . .by publication or otherwise." 11 U. S. C. § 205 (c) (8). We hold that publication of the bar order in newspapers cannot be considered "reasonable notice" to New York under the circumstances of this case.
>
> …..
>
> Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.

City of New York v. New York, N. H. & H. R. Co., 344 U.S. at 296-7.

The Court of Appeal's view that Petitioner could have inquired about the exact identify of the agent for service of process and was charged with knowledge

of the deadlines because he was aware of the probate proceedings does not, under *City of New York v. New York, N. H. & H. R. Co.,* excuse the lack of notice of the exact deadlines or the agent for service of process.

> These rules of notice apply to state probate proceedings. *Mullane v. Central Hanover Bank & Trust Co., supra,* at 314, established that state action affecting property must generally be accompanied by notification of that action: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In the years since *Mullane* the Court has adhered to these principles, balancing the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." Ibid. The focus is on the reasonableness of the balance, and, as Mullane itself made clear, whether a particular method of notice is reasonable depends on the particular circumstances.

Tulsa Professional Collection Services, supra, at 484.

The United States Supreme Court explained that a state cause of action, such as Petitioner's cause of action to invalidate the will and obtain his intestate share, is a protected property interest under the Fourteenth Amendment. *Tulsa Professional Collection Services, supra,* at 485. US Const. amend. XIV, §1. It further explained that that there was state action allowing a claim for deprivation under the Fourteenth Amendment because of the involvement of the trial court in the operation of the probate system in Oklahoma; every single element mentioned by the Supreme Court in the Oklahoma system is present in Washington State:

> Here, in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. **The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or executrix to publish notice "immediately" after appointment**…. **The form of the order indicates that such orders are routine. Record 14. Finally, copies**

> **of the notice and an affidavit of publication must be filed with the court. § 332. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial that it must be considered state action subject to the restrictions of the Fourteenth Amendment.**

Tulsa Professional Collection Services, supra, at 485-8 (bold emphasis added).

The Court in the extract from *Tulsa* immediately preceding identified the following characteristics of the limitations period as creating state action:

1. The executor (i.e. personal representative) in Oklahoma must be appointed by the Court; in Washington, the personal representative (i.e. the executor of the estate) must be appointed by the Court upon application under RCW 11.20.020.
2. The appointment of the executor in Oklahoma triggers the limitations period; in Washington the acceptance of the will to probate or its rejection triggers the four months limitations period under RCW 11.24.010.
3. Notice must be given to potential claimants in Oklahoma; the same is true in Washington under RCW 11.28.237
4. In Oklahoma, copies of the notice and proof of publication must be filed with the Court; in Washington the notice and proof of service of the notice must be filed with the Court under RCW 11.28.237.

Each of the elements demonstrating that state action by Oklahoma occurred in probate proceedings sufficient to implicate the Fourteenth Amendment identified in *Tulsa Professional Collection Services, supra,* is also present in Washington State probate proceedings. The Washington State claim deadlines are not self-executing, because the trigger is an action of the Superior Court—the

acceptance or rejection of the will to probate. RCW 11.24.010. As for the contents of the notice, it must, according to the United States Supreme Court, include, among other things, the actual deadline to make a claim:

> *See also Memphis Light, Gas & Water Div. v. Craft,* 436 U. S. 1 (1978) (termination of utility service); *Schroeder v. City of New York,* 371 U. S. 208 (1962) (condemnation proceeding); ***City of New York v. New York, N. H. & H. R. Co., supra*** **(Bankruptcy Code's requirement of "reasonable notice" requires actual notice of deadline for filing claims).**

Tulsa Professional Collection Services, supra, at 484, 487, 488-9 (bold emphasis added).

The notice provisions to potential heirs under the Will Contest Statutes do not meet the minimum due process requirements under *Tulsa Professional Collection Services, supra* and the cases upon which it relies and cites, including *City of New York v. New York, N. H. & H. R. Co, supra* and *Mullane v. Central Hanover Bank & Trust Co., supra.*

V. CONCLUSION

Astrid's motion to strike the reply and for sanctions must be denied because she opened the door and invited the filing of the Reply by, as she now confesses, filing a request for attorney fees in her Answer to the Petition in violation of RAP 18.1(j) and RAP 17.1(a), then attempting to mislead this Court and argue it was a request for sanctions; however, under RAP 17.1(a) and RAP 18.9(a) such a request for sanctions, also had to have been made by separate motion, so even then she admittedly violated the Rules of Appellate Procedure with no excuse.

Dated this 16th Day of October, 2019

Cyrus Sanai

CYRUS SANAI - FILING PRO SE

October 16, 2019 - 3:44 PM

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