

FILED

APR 10 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 309959-III

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In Re: the Estate of:

THEODORE ROOSEVELT ALSUP

NICOLA J. WARREN,

Appellant,

v.

MICHAEL J. BRESSON, Respondent.

APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY
THE HONORABLE JEROME J. LEVEQUE, PRESIDING

APPELLANT'S REPLY BRIEF

Patrick Acres
WSBA 3197
Christopher M. Constantine
WSBA 11650
Attorneys for Appellant

1022 South Pioneer Way
Moses Lake, WA. 98837
(509) 765-9265

P. O. Box 7125
Tacoma, WA 98417-0125
(253) 752-7850

I.	TABLE OF CONTENTS	
II.	TABLE OF AUTHORITIES	ii
III.	ARGUMENT	1
	A. Respondent’s concession that he lacked standing to challenge the marriage of Theodore Alsup to appellant means that the trial court lacked jurisdiction to hear his motion to determine the validity of appellant’s marriage to Mr. Alsup.	1
	B. Appellant is entitled to her intestate share of Mr. Alsup’s Estate either as a pretermitted spouse under RCW 11.095 (3), or under Wash. Rev. Code § 11.04.015 if Mr. Alsup’s Will is invalid.....	2
	C. Respondent’s failure to issue notice required by RCW 4.24.020 deprived the trial court of jurisdiction to hear respondent’s motion to challenge the will.	2
	D. The trial court erred in finding that Mr. Alsup was not granted or given any rights or privileged under the 1997 Guardianship Order entered by the Grant County Superior Court, including the right to marry or make a Will.	4
	E. Respondent has failed to preverve any claim of error regarding invalidation of appellant’s marriage to the decedent for fraud.	6
	F. The trial court erred in denying appellant’s motions for summary judgment.	7
	G. The trial court erred in denying appellant’s motion for reconsideration.	7
	H. Appellant requests an award of costs and reasonable attorney fees on appeal.	7
IV.	CONCLUSION.....	8
V.	CERTIFICATE OF MAILING	9

II. TABLE OF AUTHORITIES

State Cases

<i>Adams v. Dep't of Labor & Indus.</i> , 128 Wash. 2d 224, 905 P.2d 1220 (1995)	8
<i>Ashenbrenner v. Dep't of Labor & Indus.</i> , 62 Wash. 2d 22, 380 P.2d 730 (1963)	6, 7
<i>Bob Pearson Const., Inc. v. First Cmty. Bank of Washington</i> , 111 Wash. App. 174, 43 P.3d 1261 (2002)	6
<i>Conom v. Snohomish County</i> , 155 Wash. 2d 154, 118 P.3d 344 (2005)	2
<i>Glass v. Stahl Specialty Co.</i> , 97 Wash. 2d 880, 652 P.2d 948 (1982)	6
<i>Hernandez v. Dep't of Labor & Indus.</i> , 107 Wash. App. 190, 26 P.3d 977 (2001)	4
<i>High Tide Seafoods v. State</i> , 106 Wash. 2d 695, 725 P.2d 411 (1986)	2
<i>Hoel v. Rose</i> , 125 Wash. App. 14, 105 P.3d 395 (2004)	7
<i>In re Bottger's Estate</i> , 14 Wash. 2d 676, 129 P.2d 518 (1942)	5
<i>In re Estate of Kordon</i> , 157 Wash. 2d 206, 137 P.3d 16 (2006)	4
<i>In re Marriage of Markowski</i> , 50 Wash. App. 633, 749 P.2d 754 (1988)	2
<i>Knight v. City of Yelm</i> , 173 Wash. 2d 325, 267 P.3d 973 (2011)	2
<i>Phillips Bldg. Co., Inc. v. An</i> , 81 Wash. App. 696 n. 3, 915 P.2d 1146 (1996)	7
<i>Postema v. Snohomish County</i> , 83 Wash. App. 574, 922 P.2d 176 (1996)	2
<i>Singletary v. Manor Health Care</i> , 166 Wn. App. 774, 271 P. 3d 356 (2012)	7

State Statutes

RCW 11.04	9
RCW 11.04.015	i, 3
RCW 11.04.015 (1)	3
RCW 11.095 (3)	i, 3
RCW 11.12.095 (3)	3
RCW 11.24.010	4
RCW 11.24.020	3, 4, 8
RCW 11.24.050	9
RCW 11.88.030 (5)	6

RCW 11.88.095 (1).....	5
RCW 11.88.095 (1), (2) (a)	5
RCW 11.96A.100	4, 8
RCW 11.96A.150	9
RCW 4.24.020	i, 3
Court Rules	
RAP 5.1 (d).....	6

III. ARGUMENT

A. Respondent's concession that he lacked standing to challenge the marriage of Theodore Alsup to appellant means that the trial court lacked jurisdiction to hear his motion to determine the validity of appellant's marriage to Mr. Alsup.

Respondent concedes that he lacked standing to challenge the validity of appellant's marriage to Mr. Alsup. BR 19-22. Since respondent admittedly lacked standing, it follows that the trial court lacked jurisdiction to hear his motion to invalidate appellants' marriage to Theodore Alsup. *High Tide Seafoods v. State*, 106 Wash. 2d 695, 702, 725 P.2d 411 (1986) (“If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it.”); *Postema v. Snohomish County*, 83 Wash. App. 574, 579, 922 P.2d 176 (1996).

A judgment of a court that lacks jurisdiction is void. *In re Marriage of Markowski*, 50 Wash. App. 633, 635, 749 P.2d 754 (1988). A court lacking jurisdiction must enter an order of dismissal. *Knight v. City of Yelm*, 173 Wash. 2d 325, 337, 267 P.3d 973 (2011); *Conom v. Snohomish County*, 155 Wash. 2d 154, 157, 118 P.3d 344 (2005); *Crosby v. Spokane County*, 137 Wn. 2d 296, 300-01, 971 P. 2d32 (1999).

Therefore, the Court has no discretion here and must reverse the trial court's order and Findings 9, 10, 11, 12.

B. Appellant is entitled to her intestate share of Mr. Alsup's Estate either as a pretermitted spouse under RCW 11.095 (3), or under RCW 11.04.015 if Mr. Alsup's Will is invalid.

As Appellant's marriage to Mr. Alsup is not subject to challenge after his death, it follows that she is entitled to her intestate share of his estate under RCW 11.12.095 (3) if Mr. Alsup's Will is upheld.

Alternatively, if the Will is invalid, then appellant is entitled, as the surviving spouse, to her intestate share under RCW 11.04.015 (1):

The surviving spouse or state registered domestic partner shall receive the following share:

- (a) All of the decedent's share of the net community estate; and
- (b) One-half of the net separate estate if the intestate is survived by issue; or
- (c) Three-quarters of the net separate estate if there is no surviving issue, but the intestate is survived by one or more of his or her parents, or by one or more of the issue of one or more of his or her parents; ...

C. Respondent's failure to issue notice required by RCW 4.24.020 deprived the trial court of jurisdiction to hear respondent's motion to challenge the will.

Respondent argues that he was not required to serve the notice required by RCW 11.24.020 because this case is not a will contest. BR 8-11. To the contrary, respondent's Memorandum of Authorities in Support of Declaratory Judgment Regarding the Validity of Marriage and Will [sic] An Incapacitated Person leaves no question that respondent considered his pleadings to be a will contest: "The Estate contends that

the Decedent's will is null and void on the basis that it was procured by undue influence." CP 67. Respondent was therefore required to issue a summons in accordance with RCW 11.24.020 and RCW 11.96A.100. Because respondent made no attempt to comply with RCW 11.24.020 or RCW 11.96A.100 within the 4-month limitations period in RCW 11.24.010, the trial court therefore lacked jurisdiction to invalidate the Will. *In re Estate of Kordon*, 157 Wash. 2d 206, 214, 137 P.3d 16 (2006).

Respondent argues that he substantially complied with the citation requirement in RCW 11.24.020. BR at 10 n. 3. To the contrary, the Motion for Hearing on Declaratory Judgment filed by respondent bears no resemblance to the statutory summons set forth in RCW 11.96A.100. CP 177-79. "Substantial compliance is generally defined as actual compliance with the "substance essential to every reasonable objective" of a statute." *Hernandez v. Dep't of Labor & Indus.*, 107 Wash. App. 190-196, 26 P.3d 977 (2001). Respondent did not substantially comply with either RCW 11.24.020 or RCW 11.96A.100.

D. The trial court erred in finding that Mr. Alsup was not granted or given any rights or privileged under the 1997 Guardianship Order entered by the Grant County Superior Court, including the right to marry or make a Will.

Respondent argues that the imposition of a full guardianship automatically resulted in the loss of Mr. Alsup's right to make a will. BR 11-14. Respondent's argument is not supported by either Washington decisions or RCW Title 11. In a guardianship, the trial court is required under RCW 11.88.095 (1), (2) (a) to make findings of fact regarding the capacities, condition, and needs of the alleged incapacitated person. In the Order Appointing Guardian and authorizing Expenditures in Grant County Cause No. 97 4 00099 1, the trial court made the findings required by RCW 11.88.095 (1), (2) (a), but made no finding as to Mr. Alsup's testamentary capacity. CP 200-01.

Without such a finding, the Order Appointing Guardian cannot be construed as depriving Mr. Alsup of the right to make his will. *In re Bottger's Estate*, 14 Wash. 2d 676, 697, 129 P.2d 518 (1942)("[W] are of the opinion that the fact that a guardian has been appointed to conserve the estate of one adjudged incompetent to manage it herself does not necessarily tend to establish lack of capacity on the ward's part to execute a will (whether the adjudication of incompetency precedes or follows the execution of the will), unless the order appointing the guardian is based

upon an express finding of some mental defect inconsistent with the possession of the capacity required for the execution of a will.”).

Respondent argues that Bottger’s Estate was legislatively overruled by the passage of RCW 11.88.030 (5). BR 15-16. Respondent points to no language in RCW 11.88.030 (5) to support his argument. Nor does Respondent offer any evidence of legislative intent to overrule existing case law. Washington cases follows a rule of statutory construction that presumes the Legislature in enacting a statute was aware of its prior legislative enactments and the case law interpreting those earlier enactments, and the Legislature intended its subsequent enactment to be consistent with the earlier legislation and case law, in the absence of clear legislative intent to the contrary. *Bob Pearson Const., Inc. v. First Cmty. Bank of Washington*, 111 Wash. App. 174, 179, 43 P.3d 1261 (2002); 111 Wn. App. 174, 179, 43 P. 3d 1261 (2002); *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 887-88, 652 P.2d 948 (1982); *Ashenbrenner v. Dep’t of Labor & Indus.*, 62 Wash. 2d 22, 380 P.2d 730 (1963). Respondent’s argument therefore fails.

It is worthy of note that the attorney who drafted Mr. Alsup’s January 2, 2001 Will was the same attorney who presented the February 16, 2001 order appointing a limited guardian. CP 23-28; CP 167-76.

E. Respondent has failed to preserve any claim of error regarding invalidation of appellant's marriage to the decedent for fraud.

Respondent acknowledges that he challenged appellant's marriage to Mr. Aslup in the trial court on grounds of fraud. BR 22. Respondent also acknowledges that the trial court declined to rule on that issue. *Ibid*. If respondent wished to preserve that issue on appeal, it was incumbent upon him to timely file a notice of cross review. RAP 5.1 (d) ("*Cross review means review initiated by a party already a respondent in an appeal or a discretionary review. A party seeking cross review must file a notice of appeal or a notice for discretionary review within the time allowed by rule 5.2(f).*"). Respondent did not file a cross review of the trial court's failure to rule in his favor on the issue of fraud. The remand requested by respondent constitutes affirmative relief. *Singletary v. Manor Health Care*, 166 Wn. App. 774, 787, 271 P. 3d 356 (2012) ("*A respondent requests affirmative relief if it seeks anything other than an affirmation of the lower court's ruling.*"). Respondent's request for an order of remand to retry the issue of fraud, or any other affirmative relief, is therefore not entitled to consideration. *Hoel v. Rose*, 125 Wash. App. 14, 22, 105 P.3d 395 (2004); *Phillips Bldg. Co., Inc. v. An*, 81 Wash. App. 696, 699 n. 3, 915 P.2d 1146 (1996).

F. The trial court erred in denying appellant's motions for summary judgment.

Appellant argued that the trial court erred in denying appellant's motions for summary judgment. BA 31-32. Respondent presents no contrary argument in his brief. The Court may decide this issue on the argument and record before it. *Adams v. Dep't of Labor & Indus.*, 128 Wash. 2d 224, 229, 905 P.2d 1220 (1995).

G. The trial court erred in denying appellant's motion for reconsideration.

Appellant argued that the trial court erred in denying appellant's motion for reconsideration. BA 32. Respondent presents no contrary argument in his brief. The Court may decide this issue on the argument and record before it. *Adams*, 128 Wash. 2d, 229.

H. Appellant requests an award of costs and reasonable attorney fees on appeal.

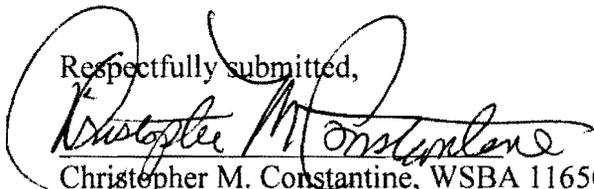
Respondent burdened appellant and the Estate with the cost of a post-death challenge to the validity of appellant's marriage to Mr. Alsup which respondent now concedes he lacked standing to bring. Respondent further burdened appellant and the Estate with a challenge to Mr. Alsup's Will for undue influence, yet he failed to serve the summons required by RCW 11.24.020 and RCW 11.96A.100 for such a challenge, thereby depriving the court of jurisdiction to hear his challenge. Respondent offered a construction of the 1997 guardianship order that is contrary to

applicable statutes and case law. Neither appellant nor the Estate should be forced to bear the cost of litigating respondent's failed arguments. Respondent should be ordered to pay appellant's attorney fees and costs pursuant to RCW 11.96A.150 and RCW 11.24.050.

IV. CONCLUSION

Findings 2, 4, 5, 9, 10, 11, 12 and the trial court's order of June 22, 2012 should be reversed. The order denying appellant's motions for summary judgment and reconsideration should also be reversed, appellant should be declared a pretermitted spouse of the deceased, and the Will should be revoked against her. Alternatively, if revocation of the Will is upheld, then appellant is entitled to her intestate share under RCW 11.04.015 (1). Appellant is therefore entitled to inherit her intestate share of the Estate, and the specific bequests in the Will should be adeemed accordingly. Appellant should be awarded costs and reasonable attorney fees on appeal.

Respectfully submitted,



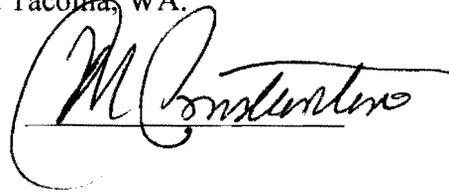
Christopher M. Constantine, WSBA 11650
Of Attorneys for Appellant

V. CERTIFICATE OF MAILING

The undersigned does hereby certify that on April 8, 2013, he served a copy of Appellant's Reply Brief upon Respondent, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

Benjamin Compton
Steven Jones
Eymann Allison Hunter Jones, P.S.
2208 West Second Avenue
Spokane, WA 99201

Dated this 8th day of April, 2013, at Tacoma, WA.

A handwritten signature in black ink, appearing to read "M. Compton", written over a horizontal line.