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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 314928 - III

In re the Matter of:

ESTATE OF QUENTIN J. PORTER, Deceased

SALMA ASSEMANY, Appellant

vs.

HELEN T. PORTER, Personal Representative of
The Estate of Quentin J. Porter, Respondent

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves the probate of the estate of the decedent, Quentin Porter, and appellant Salma Assemany's (hereainfter "Assemany") interest in Mr. Porter's estate. Quentin Porter (hereinafter "Porter") for at least the final 12 years of his life, resided in Onondaga County, New York. **CP Doc. 2, p. 32.** During that time, Assemany was his companion and Porter resided with her in her home. **CP Doc. 2, para. 3.2.** Porter passed away on October 10, 2011 in Onondaga County, New York. **CP Doc. 2, para. 3.9.** At the time of his death, Porter was a widower and had four adult children: Lawrence Porter, Helen Theresa Porter, Patricia B. Cummings and Maribeth Miles. **CP Doc. 21, p. 2, Doc. 2, para. 3.3.**

Porter had executed, in 2002, a Last Will and Testament which provided in part that Assemany was to received one-third of Porter's residuary estate. **CP Doc. 2, para. 3.4.** On September 29, 2011, Porter, being terminally ill, was admitted to a hospice facility in Syracuse, New York. **CP Doc. 2, para. 3.5.** On October 2, 2011, while on his deathbed, Porter allegedly executed a first codicil to his 2002 Last Will and Testament which among other things revoked Assemany's one-third interest in his residuary

estate. **CP Doc. 2, para. 3.6.** Porter passed away on October 10, 2011 in Syracuse, New York. **CP Doc. 2, para. 3.10.**

Both the 2002 Will and 2011 Codicil were consistent in devising to Assemany all of Porter's personal property existing in Manlius, New York at the time of his death with the exception of his gun collection. **CP Doc. 43, Ex. 1.**

On October 20, 2011, the October 1, 2002 Will and October 2, 2011 Codicil were filed for probate in Stevens County, Washington Superior Court, Cause No. 11-4-00087-2. **CP Doc. 2, para. 3.10.** On October 20, 2011 Porter's daughter, Helen T. Porter (hereinafter "the Personal Representative") was appointed as Personal Representative of the estate. **CP Doc. 2, para. 3.11.**

On January 24, 2012, Assemany filed in Stevens County Superior Court as Cause No. 12-4-00008-1, a petition for an order removing jurisdiction and venue of the probate to Onondaga County, New York, nullifying the validity of the First Codicil to the Last Will, and awarding reasonable attorney fees and costs. **CP Doc. 2.** An initial hearing was set to address the petition for Tuesday, February 28, 2012. **CP Doc. 3.** That hearing date was continued numerous times and was still pending on October 5, 2012 when respondent (hereafter "the estate") filed a motion to

dismiss the will challenge, award fees and costs, and to reserve the right to seek sanctions. Assemany's request for hearing in that regard was never reset. **CP Docs. 7, 8.** The sole basis of the estate's motion for dismissal was that Assemany had failed to serve the TEDRA petition on all devisees and legatees within 90 days of the filing of the petition. **CP Doc. 21.** Hearing on the estate's motion was originally scheduled for October 16, 2012 but was ultimately continued to December 18, 2012. **CP Docs. 20, 23, 24.** Assemany filed a response indicating that the 90-day requirement for serving the petition applied only to the personal representative and did not apply to legatees, heirs or devisees. **CP Doc. 26.** Assemany did serve the personal representative in this case within the 90 days. **CP Doc. 4.** The devisees, Lawrence Porter, Maribeth Miles and Patricia B. Cummings were all served with the TEDRA petition by December 22, 2012. **CP Docs. 28, 33, 49, 55.**

The estate also filed a motion and order to show cause directed toward Assemany requesting that she return personal property of the estate in her possession to the personal representative. **CP Docs. 22, 25.** Assemany responded to the show cause indicating that the motion and order to show cause

itself was defective and that the court had no jurisdiction over Assemany concerning Porter's property as Porter was a New York resident. **CP Doc. 29.** Assemany also responded that all the property subject to the order was and always remained in New York state and was devised to her under Porter's Last Will and the First Codicil. **CP Doc. 31.** In reply to Assemany's response, the estate submitted a reply memorandum containing as exhibits a number of statement/declarations which were filled with hearsay and in violation of RCW 5.60.030, the Deadman's Statute. **CP Doc. 43.** Assemany timely and clearly objected to those statements. **CP Doc. 34.** After Assemany had responded to the estate's motion for show cause for lack of proper service and included in that response the fact that the motion was improperly brought under the TEDRA matter and not the probate action, Cause No. 11-4-00087-2, the estate then filed a motion for order shortening time and a request to consolidate the two case numbers. **CP Docs. 36, 42.** Assemany objected to the consolidation as well based upon the fact that it was untimely and prejudicial. **CP Docs. 32, 44.**

After hearing the argument of the parties on December 18, 2012, the court took the matter under advisement. A written

order entitled "Hearing Findings of Fact, Conclusions of Law and Ruling" was signed by the trial court on January 10, 2013, and filed January 11, 2013. **CP Doc. 46.** In that order, the court denied the motion of the estate to dismiss Assemany's petition based upon lack of service on the legatees. However, the court went on to dismiss Assemany's TEDRA petition based upon the fact that Assemany had failed to provide a factual basis to invalidate the codicil. The court further ordered the consolidation of the probate and TEDRA cause of action. The trial court also entered an order requiring Assemany to provide to the personal representative the personal property of Porter in Assemany's possession. **CP Doc. 46.**

Assemany moved for reconsideration of the January 11, 2013 order arguing that she was never given an opportunity to present her case in chief to invalidate the codicil. **CP Docs. 47, 48, 49.** This was due in part to the fact that discovery had not been completed and an answer had just recently been filed to the petition by the estate. **CP Docs. 47, 49.** Assemany also objected to the consolidation of the cases as untimely, and the order allowing the estate to inventory personal property items in New York. The motion for reconsideration was denied on February 14,

2013, **CP Doc. 56**, and this notice of appeal was then filed on March 5, 2013. **CP Doc. 57.**

II. ASSIGNMENTS OF ERROR

A. The Court erred in dismissing Assemany TEDRA's petition.

B. The Court erred in asserting Assemany waived any objection to jurisdiction.

C. The Court erred in allowing the Personal Representative to inventory the personal property items bequeathed to Assemany.

D. The Court erred in consolidating the probate and the TEDRA cases.

E. Assemany should be allowed her reasonable attorney fees and costs incurred at Superior Court and on appeal.

III. STATEMENT OF FACTS

Salma Assemany is a single woman and a resident of Manlius, Onondaga County, New York. **CP Doc. 2, para. 1.1.** Quentin Porter, a widower, resided with Assemany in her home in New York state for approximately 10 years prior to his death. **CP Doc. 2, para. 3.2.** Assemany was the companion and confidante to Porter. On October 1, 2002, Porter executed his Last Will and

Testament in which the opening paragraph acknowledged his residence as Manlius, New York. In the same Will Porter also stated, at paragraph 3:

> All of my personal effects situate in the town of Manlius, with the exception of my gun collection, I give, devise and bequeath to my good friend, Salma Assemany. **CP Doc. 31.**

Porter had four adult children who are heirs to his estate. They are: Lawrence Porter, Helen Theresa Porter, Patricia B. Cummings and Maribeth Miles. Porter continued to reside in Onondaga County, New York until the time of his death on October 10, 2011. **CP Doc. 2, p. 2.**

On September 29, 2011, Porter being terminally ill was admitted to a hospice facility, known as Francis House, in Syracuse, New York. **CP Doc. 31, para. 14.** On or about October 2, 2011 Porter executed the First Codicil to the Last Will and Testament of Quentin J. Porter. That Codicil, at paragraph A. stated:

> I hereby revoke section a. of the Sixth Article which reads: . . .
>
> One-third to my friend, Salma Assemany, of Manlius, New York if she survives me. If Salma does not survive, then her share shall lapse and be paid over to my remaining named beneficiaries. **CP Doc. 43, Ex. 1.**

Porter in his Codicil left the provision in his original Will which granted all his personal property situated in Manlius, New York, except his gun collection, to Salma Assemany. **CP Doc. 31.** The Codicil also amended that the one-sixth portion of his estate originally granted to Assemany to be bequeathed to his children. **CP Doc. 43, Ex. 1.** The Last Will and First Codicil were filed for probate in Stevens County Superior Court under Cause No. 11-4-00087-2 on October 20, 2011. **CP Doc. 2, para. 3.10.** Porter's daughter, Helen T. Porter, was appointed personal representative. **CP Doc. 2, para. 3.11.** On January 24, 2012 Assemany filed her TEDRA action in Stevens County under Cause No. 12-4-00008-1. **CP Doc. 2.** That petition requested nullification of the validity of the First Codicil, removal of the probate to New York state, and attorneys fees and costs. **CP Doc. 2.**

Assemany initiated discovery in this matter due to the refusal of the estate to release any information concerning the circumstances surrounding Porter's execution of the Codicil to his Will. **CP Doc. 53.** The deposition of Helen T. Porter, the Personal Representative and heir of the estate, was taken on July 12, 2012. **CP Doc. 53, para. 6.** Ms. Porter had little information concerning

the execution of the codicil, including who drafted it. **CP Doc. 53, para. 6.**

As part of the subpoena duces tecum served upon Ms. Porter, a request was made for her to provide "all medical records of Quentin J. Porter from September 10, 2011 through October 10, 2011." **CP Doc. 53, para. 8.** Ms. Porter refused to provide those documents and a hearing was held on August 18, 2012 before Judge Nielson to compel the discovery of that information. **CP Doc. 53, para. 8.** Assemany could not obtain the records because she was not the legal spouse of Porter and the facilities would not release records directly to her. Ms. Porter as the personal representative had the authority to execute releases for that information to Assemany, but refused. **CP Doc. 9.** At that hearing, the court declined to order the estate to execute the necessary releases concerning those medical records, indicating that Assemany would have to obtain those through her own efforts. **CP Doc. 53, para. 9.** Subsequently, and just prior to the hearing subject to appeal in this matter, Ms. Porter provided those medical records through a sealed source filing to the court. **CP Doc. 46, footnote 5.** To date, Assemany has not been allowed to review those records.

As part of further discovery, Assemany took the deposition of Lloyd B. Nickel, who is the husband of Helen T. Porter. **CP Doc. 53.** Lloyd Nickel is a licensed attorney in the state of Washington, but not New York. During his deposition, Mr. Nickel refused to answer many questions, asserting the attorney/client privilege, but did admit that he drafted the Codicil of Porter days before Porter's death based upon him being contacted by a relative and discussing Porter's alleged wishes over the telephone. **CP Doc. 53.** Shortly after Mr. Nickel's deposition was taken, the estate filed their Answer to the TEDRA petition. **CP Doc. 17.** A month after filing their Answer, the estate, on October 5, 2012, filed a Motion to Dismiss Will Challenge, Award Fees and Costs, and Preserve Right to Seek Sanctions Pursuant to CR 11. **CP Doc. 21.** The sole basis of the estate's motion to dismiss was predicated upon the allegation that pursuant to RCW 11.24.020 and 11.96A.100, Assemany was required to serve a citation on within 90 days of filing the TEDRA petition on all legatees, citing *In re Estate of Kordon v. Duke*, 157 Wn. 2d 206, 209-210, 137 P.3d 16 (2006). This was the only basis for the request to dismiss. **CP Doc. 21.** At that point in the time hearing on Assemany's

jurisdictional issues and/or a request to invalidate the First Codicil had not occurred.

Almost simultaneously, on October 9, 2012, the estate also filed a motion to show cause why Assemany should not return estate personal property in her possession to the personal representative. **CP Doc. 22.** For reasons unknown the order to show cause was not executed by the court until December 6, 2012. **CP Doc. 25.** The only order to show cause that Assemany's counsel received was an unsigned copy on November 30, 2012. **CP Doc. 49.** No signed order to show cause was ever personally served on Assemany. **CP Doc. 31, para. 9.**

There were no affidavits or declarations provided at the time the estate's motion to dismiss and the motion to show cause were filed to support either motion. **CP Docs. 21, 22.** On November 30, 2012 the parties agreed to continue respondent's motion to dismiss and order to show cause to Tuesday, December 18, 2012. **CP Doc. 24.** On December 11, Assemany filed a response to the motion to dismiss addressing the fact that RCW 11.24.010 and the *Kordon* case did not apply to this situation as the *Kordon* case only required that the executor or personal representative be served with the citation within 90 days of filing the petition, not

the legatees. **CP Doc. 29.** Assemany had in fact complied with this requirement. **CP Doc. 4.** There is no requirement under a TEDRA action that all legatees and devisees be served within a specified time period after filing the petition. **CP Doc. 26.**

On December 11, 2012 Assemany filed her own declaration in response to the order to show cause alleging that she was not served with an order to show cause. **CP Doc. 31.** She further indicated she was not able to appear in court for health reasons as evidenced by the declaration of her physician, Luke Rigolosi. **CP Docs. 30, 31.** In her December 11th response to the estate's show cause order, Assemany alleged the show cause was defective for a number of reasons including 1) failure of personal service on Assemany, 2) failure of the estate to have an affidavit or declaration supporting the motion, and 3) that in fact the items requested in the order to show cause were in fact Assemany's property as they all were personal property items situated in Manlius, New York. They had been bequeathed to her under both the Will and First Codicil and did not include a gun collection. **CP Docs. 29, 31.** Finally, as part of the response, Assemany again alleged Washington state had no jurisdiction over Porter's property which existed in New York state. **CP Docs. 29, 31.**

Assemany also raised the fact that the estate had filed the motion to show cause under the TEDRA action and not under the probate matter. **CP Doc. 29, para. 5.6.** Therefore the matter was improperly before the court. The estate responded on December 13, 2012 by filing a motion and order to consolidate the probate and TEDRA cases, and for an order shortening time. **CP Docs. 36, 42.**

The estate filed a reply memorandum on the same date in support of its motion to dismiss and motion for an order to show cause. **CP Doc. 43.** The reply memorandum contained a number of alleged statements/affidavits attached as exhibits. **CP Doc. 43, Exs. 3-9.** These alleged affidavits were the first statements of fact sworn under the penalty of perjury that had been filed in the matter. The reply memorandum itself, along with Exhibit 3/Affidavit of Larry Porter, Exhibit 4/Statement of Thomas Miles, Exhibit 5/Affidavit of Maribeth Miles, Exhibit 6/Affidavit of Patricia Porter Cummings, Exhibit 7/Affidavit of Peter B. Shea, and Exhibit 8/Affidavit of Margaret Paul were replete with hearsay and/or did not meet the requirements of sworn declarations or affidavits, and also contained numerous violation of the Deadman's Statute, RCW 5.60.030. **CP Doc. 43.**

On December 18, 2012 Assemany objected to respondent's motion for order shortening time and the motion to consolidate the probate and TEDRA actions as being untimely. **CP Doc. 32.**

On December 18, 2012 Assemany also filed a motion to strike substantial portions of the declarations and affidavits referenced in the estate's reply memorandum. **CP Doc. 32.**

A hearing was held on December 18, 2012 before Judge Nielson. The estate, in support of its motion, argued from the affidavits attached to its reply memorandum. **Transcript, p. 8, ll. 21-23.** Assemany's counsel informed the court prior to the estate's argument that there had been numerous objections to their declarations/affidavits based both upon the Deadman's Statute and hearsay. The court acknowledged this ongoing objection and continued to hear the argument of the estate. **Transcript, pp. 4-5.** Assemany's counsel argued in response to the specific pleadings that were filed by the estate, i.e., the motion to show cause for Assemany to produce items of personal property, and for dismissal of Assemany's petition based solely on the failure to serve all legatees. **Transcript p. 14, ll. 21-23; pp. 16-20.** All legatees were served with the TEDRA petition by December 22, 2012. **CP Doc. 49**. Counsel for Assemany did not

argue in support of the TEDRA petition because that matter was not set for hearing.

Judge Nielson took the matter under advisement and on January 11, 2013 entered Findings of Fact, Conclusions of Law and Ruling stating that 1) the probate and TEDRA actions would be consolidated; 2) the estate's motion to dismiss for failure to serve legatees was denied; 3) Assemany's petition for an order nullifying the validity of the First Codicil to the Last Will and Testament of Quentin J. Porter and requiring removal to New York state was dismissed; and 4) the personal representative was authorized to inventory the personal property in the possession of Salma Assemany to determine the items bequeathed to Salma Assemany and those items bequeathed to other heirs. **CP Doc. 46.**

Assemany was not prepared for nor did she argue the substantive basis for her petition to invalidate the codicil at the December 18, 2012. That hearing addressed only the show cause proceeding regarding personal property in New York state and dismissal of Assemany's petition solely on the basis of the failure to provide notice to the legatees. **CP Docs. 47, 49, 52.**

On January 22, 2013 a motion for reconsideration was filed by Assemany. **CP Doc. 47.** In that motion and accompanying declarations, Assemany again raised the fact that she had not been given an opportunity or proper notice that the hearing on December 18th was to be a hearing on the merits of her petition to invalidate the Codicil and/or object to jurisdiction of the case. **CP Docs. 49, 53.**

The court, on February 14, 2013, denied Assemany's request for reconsideration in its entirety. **CP Doc. 56.** On March 5, 2013 Assemany filed a notice of appeal to this court seeking review of the Findings of Court, Conclusions of Law and Ruling entered on January 10, 2013 as well as the Order Denying Petitioner's Motion for Reconsideration dated February 14, 2013. **CP Doc. 57.**

IV. STANDARD OF REVIEW

The trial court treated the estate's motions for hearing on December 18, 2012 as summary judgment proceedings. Summary judgment is reviewed *de novo* and, as such, the court must consider the facts and all reasonable inferences in the light most favorable to the non-moving party, i.e., Assemany. *Hearst*

Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005).

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Bulman v. Safeway, Inc.,* 144 Wn.2d 335, 357, 27 P.3d 1172 (2001).

Not only were there many disputable facts in this matter, the estate failed to properly provide proper affidavits and/or declarations with its respective motions to support any evidentiary findings by the court to dismiss Assemany's TEDRA petition. Assertions in support of a motion must be supported by the evidence and the facts. *Meyer v. Univ. of Washington,* 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

V. ARGUMENT

A. The Court erred in dismissing Assemany's TEDRA petition.

1. Assemany was never given the opportunity to present her case in support of her TEDRA petition.

It is abundantly clear from the documents filed by the estate that for purposes of the hearing on December 18, 2012, the only issues presented to the court were 1) the estate's motion to

dismiss Assemany's petition dismissed because of the alleged failure of Assemany to properly serve legatees, and 2) that Assemany should be required to assemble for inventory by the personal representative the personal property located in New York state. The estate's motion to dismiss based upon the failure to serve all parties was denied and not appealed. At no time was it presented in the estate's motion or was it intended by Assemany that the hearing was to be all encompassing on all issues regarding her TEDRA petition for removal of the case for lack of jurisdiction and/or to invalidate the codicil. **CP Docs. 47, 49, 53.** The hearing on that petition had been continued many times and was never actually heard. **Transcript, p. 8, ll. 14-15.** One reason the hearing was held in abeyance was because of discovery issues including but not limited to the estate's deposition of Assemany. **CP Docs. 53, para. 9; 21, p. 3.** The court *sua sponte* went on to determine without hearing all evidence regarding the matter that the petition for order nullifying the validity of the First Codicil to the Last Will and Testament of Quentin J. Porter dated October 2, 2011 should be dismissed because petitioner had shown no factual basis to invalidate the codicil. It is a fundamental precept of fairness that a court give the parties notice

and time to prepare for a hearing. This is so each party has the full opportunity to present their case. *Northwest Gas Assn. V. Washington Utilities and Transportation Commission,* 141 Wn. App. 98, 114-115, 168 P.3d 443 (2007). Unfortunately, Assemany was not given this opportunity by the trial court. The trial court stated in paragraph d., lines 4-7, of its Conclusions of Law:

> All of the admissible evidence not inadmissible hearsay or contrary to the Deadman's Statute, shows the codicil to be valid, i.e., not the result of undue influence, overreaching or fraud[5] **CP Doc. 46.**

The court acknowledged in a footnote that it had in its possession many hospital records which may reflect Porter's ability to execute a Codicil, but chose not to review them: "5. The court has yet to review the proffered medical records for the deceased." **CP Doc. 46.**

The problem with that analysis is that, first of all, there was no properly admissible evidence to show the codicil was valid. All such evidence was hearsay, in violation of RCW 5.60.030, the Deadman's Statute, or submitted for purposes of petitioner's motion to dismiss on jurisdictional grounds. There were no affidavits filed with the original motion to dismiss by the estate, or its show cause motion, to support a factual basis for those motions. **CP Doc. 21.** A specific affidavit or declaration based

upon personal knowledge and sworn under penalty of perjury is necessary to support the obtainment of an order or judgment. *Wilson v. Steinbach,* 98 Wn.2d 434, 656 P.2d 1030 (1982); also *Glesener v. Balholm,* 50 Wn. App. 1, 747 P.2d 475 (1987). The only facts that the court must have considered are the affidavits and exhibits attached to the estate's reply memorandum. Those affidavits were objected to as being replete with violations of the hearsay rule under ER 802 and the Deadman's Statute, RCW 5.60.030. **CP Doc. 34.**

ER 802 states:

> Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

RCW 5.60.030 states:

> No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of

record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

Most, if not all, of the exhibits to the reply memorandum were statements from interested parties as defined under the aforementioned statute.

Most importantly, those affidavits were not filed for the purpose of attacking Assemany's petition to invalidate the Will. They were filed only for the purposes to support the actual motion before the court, which was that all legatees should have been served and were not properly served and therefore the case should be dismissed. These insufficient affidavits and declarations, some of which were not even sworn under the penalty of perjury, were reply declarations which in fact should have been stricken as they should have been filed as initial declarations in support of the motion. If they had been filed as part of the initial motions, then Assemany could have filed a response to them.

2. The Court was not required to rule on the merits of Assemany's TEDRA petition at the December 18, 2012 hearing.

The court in its Conclusions of Law stated in Footnote 4:

> The proceedings can be by way of affidavits and initial hearing must be on the merits to resolve all issues of fact and law. Neither party requests otherwise. RCW 11.96A.100(7) and (8). **CP Doc. 46, pp. 4-5.**

Assemany was never given the opportunity to present her case in chief on her TEDRA petition and therefore the statement is inaccurate. There was never an indication or intention by Assemany that the hearing on December 18, 2012 was to address her case in chief on her request to invalidate the codicil and/or change jurisdiction. **CP Docs. 26, 27, 29, 31.** The estate acknowledges that the hearing on December 18, 2012 was not to be on petitioner's request to invalidate the codicil and that it in fact the hearing on that motion was still pending, stating at **Transcript, p. 8, ll. 14-15**:

> To date petitioner has scheduled a hearing on the petition on five separate times and to date we've never had that hearing.

The attorney for the estate attempted to argue that Assemany has failed to prosecute her case. **Transcript, p. 14, ll. 13-20.** Counsel for Assemany immediately objected stating that in fact the basis of the motion concerned solely the failure to serve the legates under RCW 11.24.010 and .020. **Transcript, p. 8, ll. 21-23.** It was almost as an afterthought that the estate raised in its oral argument, the lack of prosecution of the case. That was not the basis of its motion to dismiss. The bulk of the argument was whether the legatees had been properly served.

Counsel for Assemany, in oral argument, clearly stated that she was not waiving her objection to jurisdiction. **Transcript, p. 16, ll. 11-18.** Counsel for Assemany properly argued against only the issues raised in the motion—the failure to serve all legatees and the motion and order to show cause requiring Assemany to provide the personal representative with personal property.

Counsel for Assemany did acknowledge that the motion of the estate to dismiss based upon lack of service, in effect, was a summary judgment motion in that if the relief was granted, the petition would be dismissed. **Transcript, p. 19, l. 24-p. 20, l. 6.** Assemany did not intend the hearing to be a summary judgment as to Assemany's case in chief on the TEDRA petition.

The court went into the issue of undue influence and counsel for Assemany indicated that "discovery has not been completed at this point to go forward with the petition to invalidate." **Transcript, p. 20, ll. 7-19.** This was also confirmed by the declarations filed with the court. **CP Docs. 49, 53.**

In the hearing on reconsideration, the court on February 12, 2013 the court denied the motion and reaffirmed its decision of January 11, 2013. **CP Doc. 56.** The court in its order indicated

the basis for its decision was that it was bound by RCW 11.96A.100(A)8) which reads:

> Unless requested otherwise by party in a petition or answer the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law. **CP Doc. 56.**

Assemany was not aware that the December 18th hearing was to be a hearing on the merits and should have been informed so. **CP Docc. 49, 53.** The motion by the estate was not on the merits, but on a procedural issue, i.e., service on parties. There was no indication to Assemany that the court would rule on the validity of the TEDRA petition on the merits until its order of January 11, 2013 was filed. **CP Doc. 46.**

There is no caselaw interpreting RCW 11.96A.100(A)(8). There is no reported case addressing whether the trial court is mandated to require that the first hearing in a TEDRA action be on the merits. However, if the court, which appears to be interpreting that section strictly is to have abided by that rule then this matter should have been dismissed at the initial hearing on August 28, 2012, which was a motion to compel discovery. **CP Docs. 9, 10.** It is not believed that was the intent of the drafters of RCW 11.96A.100(A)(8) was to be used to blindside counsel and prevent full discovery and presentation of the petitioner's case. It

makes no sense to require a hearing on the merits in a TEDRA action before all discovery is completed and the parties can present their case. There are a number of cases involving TEDRA petitions which involved preliminary hearings such as partial summary judgment, *Estate of Kanyer,* 2013 WL 3421914 July 8, 2013; appointment of trustees, *Irrevocable Trust v. McKean,* 144 Wn. App. 333, 338, 183 P.3d 317 (2008); or motions to dismiss, *Estate of Wegner v. Tesche,* 157 Wn. App. 554, 237 P.3d 387 (2010). These cases did not require the initial hearing to be on the merits.

The purpose of a TEDRA action is to provide a formula and procedure to address disputes regarding Wills. The court has adopted a literal interpretation of RCW 11.96A.100(A)(8) that defeats the very purpose of the TEDRA statute which is for an orderly resolution of all disputes regarding a person's estate. RCW 11.96A.010. Assemany should be entitled to present her case in full before the court and not be blindsided by a factually-unsupported motion to dismiss on procedural grounds, which in fact was denied.

The core issue of this case is whether the execution of the Codicil by Porter was the result of undue influence, overreaching,

or duress. **CP Doc. 2.** The estate has been less than forthcoming in providing information surrounding the circumstances of the few short days prior to Porter's death when the Codicil was executed. **CP Doc. 53.** The estate has claimed that Assemany has failed to prosecute the case. This is incorrect. Assemany timely filed the TEDRA petition and served the personal representative. **CP Docs. 2, 4.** She attempted to make discovery through the depositions of the personal representative Helen T. Porter, and of her husband, Lloyd B. Nickel. **CP Doc. 53.** Mr. Nickel admitted only the fact that he drafted the Codicil for Porter. He then asserted an attorney/client privilege and refused to provide records or memoranda regarding communication with Porter on his deathbed. **CP Doc. 53.**

Helen Porter, in her deposition, stated she did not know who had drafted the Codicil for her father even though that person was in fact her husband, did not know who was present at the signing of the Codicil, or the circumstances surrounding the preparation and execution of the Codicil. **CP Doc. 53.** She refused to provide medical records of Porter for the month prior to his death, but then deposited those records with the court. **CP Docs. 46, 53.** Assemany was unaware of this fact until the time of the hearing

on December 18, 2012. Assemany still has not had the opportunity to review those records.

The estate did not answer the TEDRA petition until September 5, 2012, only a month prior to filing its motion to dismiss. Assemany has worked feverishly to pursue her TEDRA petition considering the logistics between her residing in New York and the probate action in Stevens County, Washington. **CP Docs. 31, 53.**

B. The Court erred in holding Assemany waived any objections to jurisdiction.

Assemany's initial filing with the court was a request to change jurisdiction based upon the facts that essentially all assets of Porter's estate were located in New York, that he resided in New York, the Last Will was executed in New York, the Codicil was executed in New York, and he died in New York. **CP Doc. 2.** The TEDRA petition objects to the jurisdiction of the Stevens County court and preserved the right to argue that jurisdiction issue. The court deemed that Assemany waived this objection by filing her TEDRA petition. **CP Doc. 46.** The conclusion of law, page 7, paragraph e., of the court's Findings of Fact and Conclusions of Law and Ruling filed January 11, 2013, states:

> The petitioner has waived her right to question this court's jurisdiction over the deceased's personal property at her (the petitioner's) home in Manlius, New York. She waived this right when she filed a petition to challenge the validity of the codicil.

The court then cites in support of this proposition: *In re Stoops' Estate,* 118 Wash. 153, 203 Pac. 22 (1922) and *French v. Gabriel,* 116 Wn.2d 584, 593, 806 P.2d 1234 (1991). The TEDRA petition objects to the jurisdiction of the Stevens County court and preserved the right to argue that jurisdiction issue. **CP Doc. 46.** *Stoops* involved a party who filed a probate then asked the court to dismiss the action based upon lack of jurisdiction. Assemany did not file the probate in this case. She filed a TEDRA petition objecting to the probate. It is entirely appropriate to file a TEDRA action and question the jurisdiction of the court conducting the probate, which she did. In her initial pleading Assemany objected to jurisdiction, which clearly was not waived. *French* deals with the waiver of personal jurisdiction not subject matter jurisdiction. The court in *French* found that jurisdiction had not been waived because it had been preserved in an answer. *French,* at 593. *French* does support the proposition that once objection to jurisdiction is filed, the later acts of taking depositions and objecting to a trial date do not waive that objection. *French,* at

594. Assemany's objection to jurisdiction in her TEDRA petition is that the subject matter of the probate, i.e., the Will, Codicil, and substantially all of the property of the estate are in New York and should be subject to their laws. This involves subject matter jurisdiction, not personal jurisdiction over Assemany. Parties cannot confer or waive subject matter jurisdiction. *Sullivan v. Purvis,* 90 Wn. App. 456, 966 P.2d 912 (1998). Subject matter jurisdiction can be raised at any time. *Skagit Motel v. Department of L&I,* 107 Wn.2d 856, 734 P.2d 478 (1987). Subject matter jurisdiction relates to the power of the court not to the rights of the parties as between each other. *Wesley v. Schneckloth,* 55 Wn.2d 90, 93, 346 P.2d 658 (1959).

C. The Court erred in allowing the personal representative to inventory the personal property items bequeathed to Assemany.

1. Respondent's motion for order to show cause why petitioner should not return estate property was defective.

The estate filed its motion for order to show cause why the petitioner should not return the estate personal property on October 9, 2012. **CP Doc. 22.** Assemany's counsel did not receive said motion until November 30, 2012. **CP Doc. 49.** Assemany's counsel also received an unsigned/unfiled copy of the

amended order to show cause on November 30, 2012. **CP Doc. 49.** It was later determined that the amended show cause order was not signed on December 6, 2012. **CP Doc. 25.** That amended order to show cause stated

> The petitioner Salma Assemany shall appear in person before the court at the place and time below and show cause why the relief requested in the motion should not be granted. If you fail to appear in person and defend these proceedings, the court may grant all of the relief requested without further notice to you.

No order to show cause was ever personally served on Assemany. **CP Doc. 30.** In order to be an appropriate order to show cause and obtain jurisdiction a party must be personally served. *State v. Superior Court of King County,* 149 Wash. 478, 271 Pac. 823 (1928). The motion itself requested Assemany to personally appear and was unsupported by any type of affidavit or declaration supporting the factual basis for the motion. The recitation of facts which are not in the form of a sworn statement/affidavit are defective. *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 98 P.3d 1222 (2004). The purpose of the motion was why a show cause order should not be entered

> Requiring petitioner Salma Assemany to immediately return to the personal representative Helen T. Porter property of the estate of Quentin J. Porter.

CP Doc. 22, p. 2.

It has been the position of Assemany consistently throughout these proceedings that while she did have in her possession property of the estate of Porter, that property was vested in her pursuant to both the Last Will and Testament of Porter dated October 1, 2002 and the First Codicil to the Last Will and Testament of Porter dated October 2, 2011. All of the property listed in the motion to show cause was personal property. It did not include any of Porter's gun collection. **CP Doc. 22.** All the property in that list was located in New York state in Assemany's possession. **CP Doc. 31.** The estate and court somehow have attempted to turn the tables on this by referencing that Assemany had acknowledged in response to Requests for Admission that she possessed personal property of Porter's and that the personal property was part of the estate, both of which were true. **CP Doc. 46.** The court however failed to follow the proper interpretation of Porter's Will and Codicil which state that all the personal property located in New York was bequeathed to Assemany. Full effect should be given to a testator's clearly expressed wishes in his will and codicil. *In re Price's Estate,* 75 Wn.2d 884, 454 P.2d 411 (1969).

There really is no basis to require the return of the personal property. The property has been transferred to the rightful heir, Assemany, in correct interpretation of the Will and Codicil. The specific items requested to be returned in the estate's motion are all personal property items. Assemany is the owner of those items and has superior title to them over the personal representative who is demanding their return. *In re Boston's Estate,* 80 Wn.2d 70, 491 P.2d 1033 (1971).

The purpose of the return of those items is also somewhat muddled. The estate evidently knows which items of property are in Assemany's possession because they've listed them in the motion. **CP Doc. 22.** There is no need to "inventory" the items as ordered by the court as it appears that in fact they already have been inventoried (how else did they compile the list?). Also, what is the fundamental purpose in requiring Assemany to provide to the personal representative those items which clearly she was bequeathed. The relief requested in the order to show cause was that Assemany appear and bring to the personal representative the items of personal property listed. **CP Doc. 22.** The alleged basis for the motion and defective order to show cause was that the personal representative was authorized to "take all required

actions on behalf of the estate to recover possession of all personal property and real property belonging to the estate under RCW 11.48.020-.090." **CP Doc. 22.** This property properly bequeathed to Assemany no longer belongs to the estate.

The court references business and personal records that may be in that personal property. **CP Doc. 46.** There was no request in the motion by the estate to recover business records nor was there any indication by Assemany that she had any business records. **CP Docs. 22, 31.** The court's in its Findings of Fact and Conclusions of Law and Ruling of January 11, 2013, at page 7, lines 14-16, states:

> The respondent personal representative is obligated to identify and separate the personal property bequeathed to the petitioner and the personal property including business records bequeathed to the remaining heirs. RCW 11.48.020 and 11.48.010. There is no reason to have Ms. Assemany appear before this court rather the personal property can be inventoried by agreement. **CP Doc. 46.**

The court made this conclusion without ever a finding that Assemany had personal or business records of Porter. In effect, personal property is personal property and if there were personal or business records, they would also belong to Assemany under the provisions of the Last Will and Testament and First Codicil. The estate's motion didn't request business records. It requests

return of certain personal property items and makes no mention of any business records. There is no factual foundation for that conclusion by the court and there should be no requirement by Assemany to return any of the personal property items she was bequeathed.

2. The Court has no jurisdiction to enter an order requiring Assemany to produce the personal property.

Assemany, in her initial filing with the court of the TEDRA petition, raised the issue of lack of jurisdiction for the Stevens County, Washington to determine the probate of Porter's Last Will and Codicil. **CP Doc. 2.** The specific basis for this position was that Porter resided in New York state over the last 12 years of his life, most with Assemany. **CP Doc. 2.** He had executed a Will and then a Codicil to that Will, all in New York state. **CP Doc. 2.** Substantially all of Porter's assets were located in New York state. **CP Doc. 2.** Porter passed away in New York state. **CP Doc. 2.** Despite these factual assertions, and objections to the court's jurisdiction to command Assemany to assemble personal property, the court ordered her to provide that personal property to the personal representative. **CP Doc. 29.** The court had no authority to order Assemany, a New York resident, to turn over property

located in New York based upon a Will and Codicil executed in New York. *Estate of Stein,* 78 Wn. App. 251, 896 P.2d 740 (1995). In *Stein,* the decedent died in Washington state but his will was probated in Oregon. Most if not all of Mr. Stein's assets were in Washington at the time of his death and were transferred to Oregon after his death. The *Stein* court held

> The probate of a non-resident's will who dies leaving property within the state affects only the property within the jurisdiction and has no effect on the validity of the will itself beyond the limited purpose of the plenary power possessed by the state with respect to property within its domain.

Stein, at p. 261.

The court simply did not have jurisdiction either over Assemany or the subject matter, in order to pursue that issue. Probate of a will should be in the place of the testator's domicile. 95 C.J.S., Wills, §580 (1957). The law of the domicile governs the distribution of assets. *In re Olson's Estate,* 194 Wash. 219, 227, 77 P.2d 781 (1938). Porter's domicile clearly was in New York state.

D. **The court erred in consolidating the probate and TEDRA cases.**

Only after Assemany responded to the estate's motion to show cause alleging that it was incorrectly brought under the

TEDRA case did the estate at the last minute attempt to consolidate the cases and requested an order shortening time. **CP Docs. 29, 36, 42.** Assemany objected to that consolidation on the basis that it was untimely and that it would not serve the interest of either case to have them consolidated. **CP Doc. 32.** The act of consolidation is at the discretion of the court, however, the trial court abused its discretion in consolidating these matters. *National Bank of Washington v. Equity Investors,* 86 Wn.2d 545, 560-561, 546 P.2d 440 (1976), holding consolidation was not appropriate. Taking into consideration the consolidation, the court should look at the relative prejudice incurred by the parties and the circumstances surrounding the motion itself. *Hawley v. Mellem,* 66 Wn.2d 765, 405 P.2d 243 (1965). Here the motion was untimely and basically was an afterthought to cure a defect by the estate in their pleadings. CR 6(a). The estate should not be able to cure a procedural defect after the fact and have the cases consolidated. The estate's motion to consolidate the TEDRA with the probate action should have been denied on the basis that it was untimely filed and prejudiced to Assemany. The prejudicial impact to Assemany can clearly be seen in that the consolidation of the cases resulted in the dismissal of her TEDRA petition.

There is no prejudice in requiring the estate to refile its motion under the proper case while there is substantial prejudice in requiring Assemany to respond to an untimely motion.

E. Assemany should be awarded her reasonable attorney fees and costs incurred at Superior Court and on appeal.

A party who is successful in defending or filing a TEDRA action is entitled to their reasonable attorney fees and costs pursuant to RCW 11.96A.150(1) which states:

> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. 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 they litigation benefits the estate or trust involved.

This includes fees and costs incurred at the trial level; *Foster v. Gilliam,* 165 Wn. App. 33, 268 P.3d 945, rev. den'd 173 Wn.2d 1032, 277 P.3d 668 (2011); and on appeal, *In re Estate of Wegner v. Tesche, supra.* Assemany should be awarded her fees and costs at both the trial and appellate court levels.

VI. CONCLUSION

The trial court took a somewhat innocuous motion by the estate to dismiss the TEDRA petition on procedural grounds and transformed it to a complete full hearing on the merits. The trial court did not give Assemany the opportunity to develop, present her case, and properly set a hearing where all parties would have the opportunity to properly respond and address the question of whether Porter's Codicil executed on October 2, 2011 was the result of overreaching, undue influence, or other means. The court was under the mistaken belief that the December 18, 2012 hearing on the estate's motion to dismiss also required a full resolution of the substantive merits of Assemany's case. In most if not all TEDRA actions initial hearings are for held for dismissal, summary judgment, or discovery. The cases cited by Assemany in this brief support her petition that the initial hearing in a TEDRA petition does not need to be a full hearing on the merits. Assemany was blindsided by the court on its own accord turning a procedural motion to dismiss into a full blown hearing on the merits. Assemany's valid concern is that a decision on the merits was made without discovery being completed by both parties and actually giving her the opportunity to fully present her case.

There is no reportable case that could be found to support the position that strict compliance with RCW 11.96A.100(A)(8) is required or even been followed.

Assemany should not be required to provide personal property to the personal representative that she was devised under the Will and Codicil. The show cause motion was defective and the court granted relief which was not requested in that motion. The court also did not give Assemany the opportunity to fully develop her argument that the court lacked jurisdiction. She did not waive the jurisdiction requirement by filing the TEDRA petition, rather she preserved it. The court also erred in consolidating the probate and TEDRA cases without looking at the relative prejudice to either party.

Based upon the foregoing, Assemany requests that the court 1) overturn the trial court's decision dismissing her TEDRA petition and allow her to proceed fully through that action; 2) that the court overturn the trial court's consolidation of the probate and TEDRA action; 3) enter an order finding that Assemany did not waive her objection to jurisdiction of the court in this matter; 4) for an order overruling the trial court's requirement that Assemany provide personal property to the personal

representative for inventory; and 5) awarding Assemany her reasonable attorney fees and costs.

Dated this 18th day of July, 2013.

Respectfully submitted:

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FILED

JUL 18 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION III

In re the Matter of the ESTATE OF QUENTIN J. PORTER, Deceased SALMA ASSEMANY, Appellant, vs. HELEN T. PORTER, Personal Representative of the Estate of Quentin J. Porter, Respondent.	No. 314928-III CERTIFICATE OF MAILING

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III

No. 314928 - III

In re the Matter of:

ESTATE OF QUENTIN J. PORTER, Deceased

SALMA ASSEMANY, Appellant

vs.

HELEN T. PORTER, Personal Representative of
The Estate of Quentin J. Porter, Respondent

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves the probate of the estate of the decedent, Quentin Porter, and appellant Salma Assemany's (hereainfter "Assemany") interest in Mr. Porter's estate. Quentin Porter (hereinafter "Porter") for at least the final 12 years of his life, resided in Onondaga County, New York. **CP Doc. 2, p. 32.** During that time, Assemany was his companion and Porter resided with her in her home. **CP Doc. 2, para. 3.2.** Porter passed away on October 10, 2011 in Onondaga County, New York. **CP Doc. 2, para. 3.9.** At the time of his death, Porter was a widower and had four adult children: Lawrence Porter, Helen Theresa Porter, Patricia B. Cummings and Maribeth Miles. **CP Doc. 21, p. 2, Doc. 2, para. 3.3.**

Porter had executed, in 2002, a Last Will and Testament which provided in part that Assemany was to received one-third of Porter's residuary estate. **CP Doc. 2, para. 3.4.** On September 29, 2011, Porter, being terminally ill, was admitted to a hospice facility in Syracuse, New York. **CP Doc. 2, para. 3.5.** On October 2, 2011, while on his deathbed, Porter allegedly executed a first codicil to his 2002 Last Will and Testament which among other things revoked Assemany's one-third interest in his residuary

estate. **CP Doc. 2, para. 3.6.** Porter passed away on October 10, 2011 in Syracuse, New York. **CP Doc. 2, para. 3.10.**

Both the 2002 Will and 2011 Codicil were consistent in devising to Assemany all of Porter's personal property existing in Manlius, New York at the time of his death with the exception of his gun collection. **CP Doc. 43, Ex. 1.**

On October 20, 2011, the October 1, 2002 Will and October 2, 2011 Codicil were filed for probate in Stevens County, Washington Superior Court, Cause No. 11-4-00087-2. **CP Doc. 2, para. 3.10.** On October 20, 2011 Porter's daughter, Helen T. Porter (hereinafter "the Personal Representative") was appointed as Personal Representative of the estate. **CP Doc. 2, para. 3.11.**

On January 24, 2012, Assemany filed in Stevens County Superior Court as Cause No. 12-4-00008-1, a petition for an order removing jurisdiction and venue of the probate to Onondaga County, New York, nullifying the validity of the First Codicil to the Last Will, and awarding reasonable attorney fees and costs. **CP Doc. 2.** An initial hearing was set to address the petition for Tuesday, February 28, 2012. **CP Doc. 3.** That hearing date was continued numerous times and was still pending on October 5, 2012 when respondent (hereafter "the estate") filed a motion to

dismiss the will challenge, award fees and costs, and to reserve the right to seek sanctions. Assemany's request for hearing in that regard was never reset. **CP Docs. 7, 8.** The sole basis of the estate's motion for dismissal was that Assemany had failed to serve the TEDRA petition on all devisees and legatees within 90 days of the filing of the petition. **CP Doc. 21.** Hearing on the estate's motion was originally scheduled for October 16, 2012 but was ultimately continued to December 18, 2012. **CP Docs. 20, 23, 24.** Assemany filed a response indicating that the 90-day requirement for serving the petition applied only to the personal representative and did not apply to legatees, heirs or devisees. **CP Doc. 26.** Assemany did serve the personal representative in this case within the 90 days. **CP Doc. 4.** The devisees, Lawrence Porter, Maribeth Miles and Patricia B. Cummings were all served with the TEDRA petition by December 22, 2012. **CP Docs. 28, 33, 49, 55.**

The estate also filed a motion and order to show cause directed toward Assemany requesting that she return personal property of the estate in her possession to the personal representative. **CP Docs. 22, 25.** Assemany responded to the show cause indicating that the motion and order to show cause

itself was defective and that the court had no jurisdiction over Assemany concerning Porter's property as Porter was a New York resident. **CP Doc. 29.** Assemany also responded that all the property subject to the order was and always remained in New York state and was devised to her under Porter's Last Will and the First Codicil. **CP Doc. 31.** In reply to Assemany's response, the estate submitted a reply memorandum containing as exhibits a number of statement/declarations which were filled with hearsay and in violation of RCW 5.60.030, the Deadman's Statute. **CP Doc. 43.** Assemany timely and clearly objected to those statements. **CP Doc. 34.** After Assemany had responded to the estate's motion for show cause for lack of proper service and included in that response the fact that the motion was improperly brought under the TEDRA matter and not the probate action, Cause No. 11-4-00087-2, the estate then filed a motion for order shortening time and a request to consolidate the two case numbers. **CP Docs. 36, 42.** Assemany objected to the consolidation as well based upon the fact that it was untimely and prejudicial. **CP Docs. 32, 44.**

After hearing the argument of the parties on December 18, 2012, the court took the matter under advisement. A written

order entitled "Hearing Findings of Fact, Conclusions of Law and Ruling" was signed by the trial court on January 10, 2013, and filed January 11, 2013. **CP Doc. 46.** In that order, the court denied the motion of the estate to dismiss Assemany's petition based upon lack of service on the legatees. However, the court went on to dismiss Assemany's TEDRA petition based upon the fact that Assemany had failed to provide a factual basis to invalidate the codicil. The court further ordered the consolidation of the probate and TEDRA cause of action. The trial court also entered an order requiring Assemany to provide to the personal representative the personal property of Porter in Assemany's possession. **CP Doc. 46.**

Assemany moved for reconsideration of the January 11, 2013 order arguing that she was never given an opportunity to present her case in chief to invalidate the codicil. **CP Docs. 47, 48, 49.** This was due in part to the fact that discovery had not been completed and an answer had just recently been filed to the petition by the estate. **CP Docs. 47, 49.** Assemany also objected to the consolidation of the cases as untimely, and the order allowing the estate to inventory personal property items in New York. The motion for reconsideration was denied on February 14,

2013, **CP Doc. 56**, and this notice of appeal was then filed on March 5, 2013. **CP Doc. 57.**

II. ASSIGNMENTS OF ERROR

A. The Court erred in dismissing Assemany TEDRA's petition.

B. The Court erred in asserting Assemany waived any objection to jurisdiction.

C. The Court erred in allowing the Personal Representative to inventory the personal property items bequeathed to Assemany.

D. The Court erred in consolidating the probate and the TEDRA cases.

E. Assemany should be allowed her reasonable attorney fees and costs incurred at Superior Court and on appeal.

III. STATEMENT OF FACTS

Salma Assemany is a single woman and a resident of Manlius, Onondaga County, New York. **CP Doc. 2, para. 1.1.** Quentin Porter, a widower, resided with Assemany in her home in New York state for approximately 10 years prior to his death. **CP Doc. 2, para. 3.2.** Assemany was the companion and confidante to Porter. On October 1, 2002, Porter executed his Last Will and

Testament in which the opening paragraph acknowledged his residence as Manlius, New York. In the same Will Porter also stated, at paragraph 3:

> All of my personal effects situate in the town of Manlius, with the exception of my gun collection, I give, devise and bequeath to my good friend, Salma Assemany. **CP Doc. 31.**

Porter had four adult children who are heirs to his estate. They are: Lawrence Porter, Helen Theresa Porter, Patricia B. Cummings and Maribeth Miles. Porter continued to reside in Onondaga County, New York until the time of his death on October 10, 2011. **CP Doc. 2, p. 2.**

On September 29, 2011, Porter being terminally ill was admitted to a hospice facility, known as Francis House, in Syracuse, New York. **CP Doc. 31, para. 14.** On or about October 2, 2011 Porter executed the First Codicil to the Last Will and Testament of Quentin J. Porter. That Codicil, at paragraph A. stated:

> I hereby revoke section a. of the Sixth Article which reads: . . .
>
> One-third to my friend, Salma Assemany, of Manlius, New York if she survives me. If Salma does not survive, then her share shall lapse and be paid over to my remaining named beneficiaries. **CP Doc. 43, Ex. 1.**

Porter in his Codicil left the provision in his original Will which granted all his personal property situated in Manlius, New York, except his gun collection, to Salma Assemany. **CP Doc. 31.** The Codicil also amended that the one-sixth portion of his estate originally granted to Assemany to be bequeathed to his children. **CP Doc. 43, Ex. 1.** The Last Will and First Codicil were filed for probate in Stevens County Superior Court under Cause No. 11-4-00087-2 on October 20, 2011. **CP Doc. 2, para. 3.10.** Porter's daughter, Helen T. Porter, was appointed personal representative. **CP Doc. 2, para. 3.11.** On January 24, 2012 Assemany filed her TEDRA action in Stevens County under Cause No. 12-4-00008-1. **CP Doc. 2.** That petition requested nullification of the validity of the First Codicil, removal of the probate to New York state, and attorneys fees and costs. **CP Doc. 2.**

Assemany initiated discovery in this matter due to the refusal of the estate to release any information concerning the circumstances surrounding Porter's execution of the Codicil to his Will. **CP Doc. 53.** The deposition of Helen T. Porter, the Personal Representative and heir of the estate, was taken on July 12, 2012. **CP Doc. 53, para. 6.** Ms. Porter had little information concerning

the execution of the codicil, including who drafted it. **CP Doc. 53, para. 6.**

As part of the subpoena duces tecum served upon Ms. Porter, a request was made for her to provide "all medical records of Quentin J. Porter from September 10, 2011 through October 10, 2011." **CP Doc. 53, para. 8.** Ms. Porter refused to provide those documents and a hearing was held on August 18, 2012 before Judge Nielson to compel the discovery of that information. **CP Doc. 53, para. 8.** Assemany could not obtain the records because she was not the legal spouse of Porter and the facilities would not release records directly to her. Ms. Porter as the personal representative had the authority to execute releases for that information to Assemany, but refused. **CP Doc. 9.** At that hearing, the court declined to order the estate to execute the necessary releases concerning those medical records, indicating that Assemany would have to obtain those through her own efforts. **CP Doc. 53, para. 9.** Subsequently, and just prior to the hearing subject to appeal in this matter, Ms. Porter provided those medical records through a sealed source filing to the court. **CP Doc. 46, footnote 5.** To date, Assemany has not been allowed to review those records.

As part of further discovery, Assemany took the deposition of Lloyd B. Nickel, who is the husband of Helen T. Porter. **CP Doc. 53.** Lloyd Nickel is a licensed attorney in the state of Washington, but not New York. During his deposition, Mr. Nickel refused to answer many questions, asserting the attorney/client privilege, but did admit that he drafted the Codicil of Porter days before Porter's death based upon him being contacted by a relative and discussing Porter's alleged wishes over the telephone. **CP Doc. 53.** Shortly after Mr. Nickel's deposition was taken, the estate filed their Answer to the TEDRA petition. **CP Doc. 17.** A month after filing their Answer, the estate, on October 5, 2012, filed a Motion to Dismiss Will Challenge, Award Fees and Costs, and Preserve Right to Seek Sanctions Pursuant to CR 11. **CP Doc. 21.** The sole basis of the estate's motion to dismiss was predicated upon the allegation that pursuant to RCW 11.24.020 and 11.96A.100, Assemany was required to serve a citation on within 90 days of filing the TEDRA petition on all legatees, citing *In re Estate of Kordon v. Duke*, 157 Wn. 2d 206, 209-210, 137 P.3d 16 (2006). This was the only basis for the request to dismiss. **CP Doc. 21.** At that point in the time hearing on Assemany's

jurisdictional issues and/or a request to invalidate the First Codicil had not occurred.

Almost simultaneously, on October 9, 2012, the estate also filed a motion to show cause why Assemany should not return estate personal property in her possession to the personal representative. **CP Doc. 22.** For reasons unknown the order to show cause was not executed by the court until December 6, 2012. **CP Doc. 25.** The only order to show cause that Assemany's counsel received was an unsigned copy on November 30, 2012. **CP Doc. 49.** No signed order to show cause was ever personally served on Assemany. **CP Doc. 31, para. 9.**

There were no affidavits or declarations provided at the time the estate's motion to dismiss and the motion to show cause were filed to support either motion. **CP Docs. 21, 22.** On November 30, 2012 the parties agreed to continue respondent's motion to dismiss and order to show cause to Tuesday, December 18, 2012. **CP Doc. 24.** On December 11, Assemany filed a response to the motion to dismiss addressing the fact that RCW 11.24.010 and the *Kordon* case did not apply to this situation as the *Kordon* case only required that the executor or personal representative be served with the citation within 90 days of filing the petition, not

the legatees. **CP Doc. 29.** Assemany had in fact complied with this requirement. **CP Doc. 4.** There is no requirement under a TEDRA action that all legatees and devisees be served within a specified time period after filing the petition. **CP Doc. 26.**

On December 11, 2012 Assemany filed her own declaration in response to the order to show cause alleging that she was not served with an order to show cause. **CP Doc. 31.** She further indicated she was not able to appear in court for health reasons as evidenced by the declaration of her physician, Luke Rigolosi. **CP Docs. 30, 31.** In her December 11th response to the estate's show cause order, Assemany alleged the show cause was defective for a number of reasons including 1) failure of personal service on Assemany, 2) failure of the estate to have an affidavit or declaration supporting the motion, and 3) that in fact the items requested in the order to show cause were in fact Assemany's property as they all were personal property items situated in Manlius, New York. They had been bequeathed to her under both the Will and First Codicil and did not include a gun collection. **CP Docs. 29, 31.** Finally, as part of the response, Assemany again alleged Washington state had no jurisdiction over Porter's property which existed in New York state. **CP Docs. 29, 31.**

Assemany also raised the fact that the estate had filed the motion to show cause under the TEDRA action and not under the probate matter. **CP Doc. 29, para. 5.6.** Therefore the matter was improperly before the court. The estate responded on December 13, 2012 by filing a motion and order to consolidate the probate and TEDRA cases, and for an order shortening time. **CP Docs. 36, 42.**

The estate filed a reply memorandum on the same date in support of its motion to dismiss and motion for an order to show cause. **CP Doc. 43.** The reply memorandum contained a number of alleged statements/affidavits attached as exhibits. **CP Doc. 43, Exs. 3-9.** These alleged affidavits were the first statements of fact sworn under the penalty of perjury that had been filed in the matter. The reply memorandum itself, along with Exhibit 3/Affidavit of Larry Porter, Exhibit 4/Statement of Thomas Miles, Exhibit 5/Affidavit of Maribeth Miles, Exhibit 6/Affidavit of Patricia Porter Cummings, Exhibit 7/Affidavit of Peter B. Shea, and Exhibit 8/Affidavit of Margaret Paul were replete with hearsay and/or did not meet the requirements of sworn declarations or affidavits, and also contained numerous violation of the Deadman's Statute, RCW 5.60.030. **CP Doc. 43.**

On December 18, 2012 Assemany objected to respondent's motion for order shortening time and the motion to consolidate the probate and TEDRA actions as being untimely. **CP Doc. 32.**

On December 18, 2012 Assemany also filed a motion to strike substantial portions of the declarations and affidavits referenced in the estate's reply memorandum. **CP Doc. 32.**

A hearing was held on December 18, 2012 before Judge Nielson. The estate, in support of its motion, argued from the affidavits attached to its reply memorandum. **Transcript, p. 8, ll. 21-23.** Assemany's counsel informed the court prior to the estate's argument that there had been numerous objections to their declarations/affidavits based both upon the Deadman's Statute and hearsay. The court acknowledged this ongoing objection and continued to hear the argument of the estate. **Transcript, pp. 4-5.** Assemany's counsel argued in response to the specific pleadings that were filed by the estate, i.e., the motion to show cause for Assemany to produce items of personal property, and for dismissal of Assemany's petition based solely on the failure to serve all legatees. **Transcript p. 14, ll. 21-23; pp. 16-20.** All legatees were served with the TEDRA petition by December 22, 2012. **CP Doc. 49**. Counsel for Assemany did not

argue in support of the TEDRA petition because that matter was not set for hearing.

Judge Nielson took the matter under advisement and on January 11, 2013 entered Findings of Fact, Conclusions of Law and Ruling stating that 1) the probate and TEDRA actions would be consolidated; 2) the estate's motion to dismiss for failure to serve legatees was denied; 3) Assemany's petition for an order nullifying the validity of the First Codicil to the Last Will and Testament of Quentin J. Porter and requiring removal to New York state was dismissed; and 4) the personal representative was authorized to inventory the personal property in the possession of Salma Assemany to determine the items bequeathed to Salma Assemany and those items bequeathed to other heirs. **CP Doc. 46.**

Assemany was not prepared for nor did she argue the substantive basis for her petition to invalidate the codicil at the December 18, 2012. That hearing addressed only the show cause proceeding regarding personal property in New York state and dismissal of Assemany's petition solely on the basis of the failure to provide notice to the legatees. **CP Docs. 47, 49, 52.**

On January 22, 2013 a motion for reconsideration was filed by Assemany. **CP Doc. 47.** In that motion and accompanying declarations, Assemany again raised the fact that she had not been given an opportunity or proper notice that the hearing on December 18th was to be a hearing on the merits of her petition to invalidate the Codicil and/or object to jurisdiction of the case. **CP Docs. 49, 53.**

The court, on February 14, 2013, denied Assemany's request for reconsideration in its entirety. **CP Doc. 56.** On March 5, 2013 Assemany filed a notice of appeal to this court seeking review of the Findings of Court, Conclusions of Law and Ruling entered on January 10, 2013 as well as the Order Denying Petitioner's Motion for Reconsideration dated February 14, 2013. **CP Doc. 57.**

IV. STANDARD OF REVIEW

The trial court treated the estate's motions for hearing on December 18, 2012 as summary judgment proceedings. Summary judgment is reviewed *de novo* and, as such, the court must consider the facts and all reasonable inferences in the light most favorable to the non-moving party, i.e., Assemany. *Hearst*

Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005).

Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Bulman v. Safeway, Inc.,* 144 Wn.2d 335, 357, 27 P.3d 1172 (2001).

Not only were there many disputable facts in this matter, the estate failed to properly provide proper affidavits and/or declarations with its respective motions to support any evidentiary findings by the court to dismiss Assemany's TEDRA petition. Assertions in support of a motion must be supported by the evidence and the facts. *Meyer v. Univ. of Washington,* 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

V. ARGUMENT

A. The Court erred in dismissing Assemany's TEDRA petition.

1. Assemany was never given the opportunity to present her case in support of her TEDRA petition.

It is abundantly clear from the documents filed by the estate that for purposes of the hearing on December 18, 2012, the only issues presented to the court were 1) the estate's motion to

dismiss Assemany's petition dismissed because of the alleged failure of Assemany to properly serve legatees, and 2) that Assemany should be required to assemble for inventory by the personal representative the personal property located in New York state. The estate's motion to dismiss based upon the failure to serve all parties was denied and not appealed. At no time was it presented in the estate's motion or was it intended by Assemany that the hearing was to be all encompassing on all issues regarding her TEDRA petition for removal of the case for lack of jurisdiction and/or to invalidate the codicil. **CP Docs. 47, 49, 53.** The hearing on that petition had been continued many times and was never actually heard. **Transcript, p. 8, ll. 14-15.** One reason the hearing was held in abeyance was because of discovery issues including but not limited to the estate's deposition of Assemany. **CP Docs. 53, para. 9; 21, p. 3.** The court *sua sponte* went on to determine without hearing all evidence regarding the matter that the petition for order nullifying the validity of the First Codicil to the Last Will and Testament of Quentin J. Porter dated October 2, 2011 should be dismissed because petitioner had shown no factual basis to invalidate the codicil. It is a fundamental precept of fairness that a court give the parties notice

and time to prepare for a hearing. This is so each party has the full opportunity to present their case. *Northwest Gas Assn. V. Washington Utilities and Transportation Commission,* 141 Wn. App. 98, 114-115, 168 P.3d 443 (2007). Unfortunately, Assemany was not given this opportunity by the trial court. The trial court stated in paragraph d., lines 4-7, of its Conclusions of Law:

> All of the admissible evidence not inadmissible hearsay or contrary to the Deadman's Statute, shows the codicil to be valid, i.e., not the result of undue influence, overreaching or fraud[5] **CP Doc. 46.**

The court acknowledged in a footnote that it had in its possession many hospital records which may reflect Porter's ability to execute a Codicil, but chose not to review them: "5. The court has yet to review the proffered medical records for the deceased." **CP Doc. 46.**

The problem with that analysis is that, first of all, there was no properly admissible evidence to show the codicil was valid. All such evidence was hearsay, in violation of RCW 5.60.030, the Deadman's Statute, or submitted for purposes of petitioner's motion to dismiss on jurisdictional grounds. There were no affidavits filed with the original motion to dismiss by the estate, or its show cause motion, to support a factual basis for those motions. **CP Doc. 21.** A specific affidavit or declaration based

upon personal knowledge and sworn under penalty of perjury is necessary to support the obtainment of an order or judgment. *Wilson v. Steinbach,* 98 Wn.2d 434, 656 P.2d 1030 (1982); also *Glesener v. Balholm,* 50 Wn. App. 1, 747 P.2d 475 (1987). The only facts that the court must have considered are the affidavits and exhibits attached to the estate's reply memorandum. Those affidavits were objected to as being replete with violations of the hearsay rule under ER 802 and the Deadman's Statute, RCW 5.60.030. **CP Doc. 34.**

ER 802 states:

> Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

RCW 5.60.030 states:

> No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of

record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

Most, if not all, of the exhibits to the reply memorandum were statements from interested parties as defined under the aforementioned statute.

Most importantly, those affidavits were not filed for the purpose of attacking Assemany's petition to invalidate the Will. They were filed only for the purposes to support the actual motion before the court, which was that all legatees should have been served and were not properly served and therefore the case should be dismissed. These insufficient affidavits and declarations, some of which were not even sworn under the penalty of perjury, were reply declarations which in fact should have been stricken as they should have been filed as initial declarations in support of the motion. If they had been filed as part of the initial motions, then Assemany could have filed a response to them.

2. The Court was not required to rule on the merits of Assemany's TEDRA petition at the December 18, 2012 hearing.

The court in its Conclusions of Law stated in Footnote 4:

> The proceedings can be by way of affidavits and initial hearing must be on the merits to resolve all issues of fact and law. Neither party requests otherwise. RCW 11.96A.100(7) and (8). **CP Doc. 46, pp. 4-5.**

Assemany was never given the opportunity to present her case in chief on her TEDRA petition and therefore the statement is inaccurate. There was never an indication or intention by Assemany that the hearing on December 18, 2012 was to address her case in chief on her request to invalidate the codicil and/or change jurisdiction. **CP Docs. 26, 27, 29, 31.** The estate acknowledges that the hearing on December 18, 2012 was not to be on petitioner's request to invalidate the codicil and that it in fact the hearing on that motion was still pending, stating at **Transcript, p. 8, ll. 14-15**:

> To date petitioner has scheduled a hearing on the petition on five separate times and to date we've never had that hearing.

The attorney for the estate attempted to argue that Assemany has failed to prosecute her case. **Transcript, p. 14, ll. 13-20.** Counsel for Assemany immediately objected stating that in fact the basis of the motion concerned solely the failure to serve the legates under RCW 11.24.010 and .020. **Transcript, p. 8, ll. 21-23.** It was almost as an afterthought that the estate raised in its oral argument, the lack of prosecution of the case. That was not the basis of its motion to dismiss. The bulk of the argument was whether the legatees had been properly served.

Counsel for Assemany, in oral argument, clearly stated that she was not waiving her objection to jurisdiction. **Transcript, p. 16, ll. 11-18.** Counsel for Assemany properly argued against only the issues raised in the motion—the failure to serve all legatees and the motion and order to show cause requiring Assemany to provide the personal representative with personal property.

Counsel for Assemany did acknowledge that the motion of the estate to dismiss based upon lack of service, in effect, was a summary judgment motion in that if the relief was granted, the petition would be dismissed. **Transcript, p. 19, l. 24-p. 20, l. 6.** Assemany did not intend the hearing to be a summary judgment as to Assemany's case in chief on the TEDRA petition.

The court went into the issue of undue influence and counsel for Assemany indicated that "discovery has not been completed at this point to go forward with the petition to invalidate." **Transcript, p. 20, ll. 7-19.** This was also confirmed by the declarations filed with the court. **CP Docs. 49, 53.**

In the hearing on reconsideration, the court on February 12, 2013 the court denied the motion and reaffirmed its decision of January 11, 2013. **CP Doc. 56.** The court in its order indicated

the basis for its decision was that it was bound by RCW 11.96A.100(A)8) which reads:

> Unless requested otherwise by party in a petition or answer the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law. **CP Doc. 56.**

Assemany was not aware that the December 18th hearing was to be a hearing on the merits and should have been informed so. **CP Docc. 49, 53.** The motion by the estate was not on the merits, but on a procedural issue, i.e., service on parties. There was no indication to Assemany that the court would rule on the validity of the TEDRA petition on the merits until its order of January 11, 2013 was filed. **CP Doc. 46.**

There is no caselaw interpreting RCW 11.96A.100(A)(8). There is no reported case addressing whether the trial court is mandated to require that the first hearing in a TEDRA action be on the merits. However, if the court, which appears to be interpreting that section strictly is to have abided by that rule then this matter should have been dismissed at the initial hearing on August 28, 2012, which was a motion to compel discovery. **CP Docs. 9, 10.** It is not believed that was the intent of the drafters of RCW 11.96A.100(A)(8) was to be used to blindside counsel and prevent full discovery and presentation of the petitioner's case. It

makes no sense to require a hearing on the merits in a TEDRA action before all discovery is completed and the parties can present their case. There are a number of cases involving TEDRA petitions which involved preliminary hearings such as partial summary judgment, *Estate of Kanyer,* 2013 WL 3421914 July 8, 2013; appointment of trustees, *Irrevocable Trust v. McKean,* 144 Wn. App. 333, 338, 183 P.3d 317 (2008); or motions to dismiss, *Estate of Wegner v. Tesche,* 157 Wn. App. 554, 237 P.3d 387 (2010). These cases did not require the initial hearing to be on the merits.

The purpose of a TEDRA action is to provide a formula and procedure to address disputes regarding Wills. The court has adopted a literal interpretation of RCW 11.96A.100(A)(8) that defeats the very purpose of the TEDRA statute which is for an orderly resolution of all disputes regarding a person's estate. RCW 11.96A.010. Assemany should be entitled to present her case in full before the court and not be blindsided by a factually-unsupported motion to dismiss on procedural grounds, which in fact was denied.

The core issue of this case is whether the execution of the Codicil by Porter was the result of undue influence, overreaching,

or duress. **CP Doc. 2.** The estate has been less than forthcoming in providing information surrounding the circumstances of the few short days prior to Porter's death when the Codicil was executed. **CP Doc. 53.** The estate has claimed that Assemany has failed to prosecute the case. This is incorrect. Assemany timely filed the TEDRA petition and served the personal representative. **CP Docs. 2, 4.** She attempted to make discovery through the depositions of the personal representative Helen T. Porter, and of her husband, Lloyd B. Nickel. **CP Doc. 53.** Mr. Nickel admitted only the fact that he drafted the Codicil for Porter. He then asserted an attorney/client privilege and refused to provide records or memoranda regarding communication with Porter on his deathbed. **CP Doc. 53.**

Helen Porter, in her deposition, stated she did not know who had drafted the Codicil for her father even though that person was in fact her husband, did not know who was present at the signing of the Codicil, or the circumstances surrounding the preparation and execution of the Codicil. **CP Doc. 53.** She refused to provide medical records of Porter for the month prior to his death, but then deposited those records with the court. **CP Docs. 46, 53.** Assemany was unaware of this fact until the time of the hearing

on December 18, 2012. Assemany still has not had the opportunity to review those records.

The estate did not answer the TEDRA petition until September 5, 2012, only a month prior to filing its motion to dismiss. Assemany has worked feverishly to pursue her TEDRA petition considering the logistics between her residing in New York and the probate action in Stevens County, Washington. **CP Docs. 31, 53.**

B. The Court erred in holding Assemany waived any objections to jurisdiction.

Assemany's initial filing with the court was a request to change jurisdiction based upon the facts that essentially all assets of Porter's estate were located in New York, that he resided in New York, the Last Will was executed in New York, the Codicil was executed in New York, and he died in New York. **CP Doc. 2.** The TEDRA petition objects to the jurisdiction of the Stevens County court and preserved the right to argue that jurisdiction issue. The court deemed that Assemany waived this objection by filing her TEDRA petition. **CP Doc. 46.** The conclusion of law, page 7, paragraph e., of the court's Findings of Fact and Conclusions of Law and Ruling filed January 11, 2013, states:

> The petitioner has waived her right to question this court's jurisdiction over the deceased's personal property at her (the petitioner's) home in Manlius, New York. She waived this right when she filed a petition to challenge the validity of the codicil.

The court then cites in support of this proposition: *In re Stoops' Estate,* 118 Wash. 153, 203 Pac. 22 (1922) and *French v. Gabriel,* 116 Wn.2d 584, 593, 806 P.2d 1234 (1991). The TEDRA petition objects to the jurisdiction of the Stevens County court and preserved the right to argue that jurisdiction issue. **CP Doc. 46.** *Stoops* involved a party who filed a probate then asked the court to dismiss the action based upon lack of jurisdiction. Assemany did not file the probate in this case. She filed a TEDRA petition objecting to the probate. It is entirely appropriate to file a TEDRA action and question the jurisdiction of the court conducting the probate, which she did. In her initial pleading Assemany objected to jurisdiction, which clearly was not waived. *French* deals with the waiver of personal jurisdiction not subject matter jurisdiction. The court in *French* found that jurisdiction had not been waived because it had been preserved in an answer. *French,* at 593. *French* does support the proposition that once objection to jurisdiction is filed, the later acts of taking depositions and objecting to a trial date do not waive that objection. *French,* at

594. Assemany's objection to jurisdiction in her TEDRA petition is that the subject matter of the probate, i.e., the Will, Codicil, and substantially all of the property of the estate are in New York and should be subject to their laws. This involves subject matter jurisdiction, not personal jurisdiction over Assemany. Parties cannot confer or waive subject matter jurisdiction. *Sullivan v. Purvis,* 90 Wn. App. 456, 966 P.2d 912 (1998). Subject matter jurisdiction can be raised at any time. *Skagit Motel v. Department of L&I,* 107 Wn.2d 856, 734 P.2d 478 (1987). Subject matter jurisdiction relates to the power of the court not to the rights of the parties as between each other. *Wesley v. Schneckloth,* 55 Wn.2d 90, 93, 346 P.2d 658 (1959).

C. The Court erred in allowing the personal representative to inventory the personal property items bequeathed to Assemany.

1. Respondent's motion for order to show cause why petitioner should not return estate property was defective.

The estate filed its motion for order to show cause why the petitioner should not return the estate personal property on October 9, 2012. **CP Doc. 22.** Assemany's counsel did not receive said motion until November 30, 2012. **CP Doc. 49.** Assemany's counsel also received an unsigned/unfiled copy of the

amended order to show cause on November 30, 2012. **CP Doc. 49.** It was later determined that the amended show cause order was not signed on December 6, 2012. **CP Doc. 25.** That amended order to show cause stated

> The petitioner Salma Assemany shall appear in person before the court at the place and time below and show cause why the relief requested in the motion should not be granted. If you fail to appear in person and defend these proceedings, the court may grant all of the relief requested without further notice to you.

No order to show cause was ever personally served on Assemany. **CP Doc. 30.** In order to be an appropriate order to show cause and obtain jurisdiction a party must be personally served. *State v. Superior Court of King County,* 149 Wash. 478, 271 Pac. 823 (1928). The motion itself requested Assemany to personally appear and was unsupported by any type of affidavit or declaration supporting the factual basis for the motion. The recitation of facts which are not in the form of a sworn statement/affidavit are defective. *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 98 P.3d 1222 (2004). The purpose of the motion was why a show cause order should not be entered

> Requiring petitioner Salma Assemany to immediately return to the personal representative Helen T. Porter property of the estate of Quentin J. Porter.

CP Doc. 22, p. 2.

It has been the position of Assemany consistently throughout these proceedings that while she did have in her possession property of the estate of Porter, that property was vested in her pursuant to both the Last Will and Testament of Porter dated October 1, 2002 and the First Codicil to the Last Will and Testament of Porter dated October 2, 2011. All of the property listed in the motion to show cause was personal property. It did not include any of Porter's gun collection. **CP Doc. 22.** All the property in that list was located in New York state in Assemany's possession. **CP Doc. 31.** The estate and court somehow have attempted to turn the tables on this by referencing that Assemany had acknowledged in response to Requests for Admission that she possessed personal property of Porter's and that the personal property was part of the estate, both of which were true. **CP Doc. 46.** The court however failed to follow the proper interpretation of Porter's Will and Codicil which state that all the personal property located in New York was bequeathed to Assemany. Full effect should be given to a testator's clearly expressed wishes in his will and codicil. *In re Price's Estate,* 75 Wn.2d 884, 454 P.2d 411 (1969).

There really is no basis to require the return of the personal property. The property has been transferred to the rightful heir, Assemany, in correct interpretation of the Will and Codicil. The specific items requested to be returned in the estate's motion are all personal property items. Assemany is the owner of those items and has superior title to them over the personal representative who is demanding their return. *In re Boston's Estate,* 80 Wn.2d 70, 491 P.2d 1033 (1971).

The purpose of the return of those items is also somewhat muddled. The estate evidently knows which items of property are in Assemany's possession because they've listed them in the motion. **CP Doc. 22.** There is no need to "inventory" the items as ordered by the court as it appears that in fact they already have been inventoried (how else did they compile the list?). Also, what is the fundamental purpose in requiring Assemany to provide to the personal representative those items which clearly she was bequeathed. The relief requested in the order to show cause was that Assemany appear and bring to the personal representative the items of personal property listed. **CP Doc. 22.** The alleged basis for the motion and defective order to show cause was that the personal representative was authorized to "take all required

actions on behalf of the estate to recover possession of all personal property and real property belonging to the estate under RCW 11.48.020-.090." **CP Doc. 22.** This property properly bequeathed to Assemany no longer belongs to the estate.

The court references business and personal records that may be in that personal property. **CP Doc. 46.** There was no request in the motion by the estate to recover business records nor was there any indication by Assemany that she had any business records. **CP Docs. 22, 31.** The court's in its Findings of Fact and Conclusions of Law and Ruling of January 11, 2013, at page 7, lines 14-16, states:

> The respondent personal representative is obligated to identify and separate the personal property bequeathed to the petitioner and the personal property including business records bequeathed to the remaining heirs. RCW 11.48.020 and 11.48.010. There is no reason to have Ms. Assemany appear before this court rather the personal property can be inventoried by agreement. **CP Doc. 46.**

The court made this conclusion without ever a finding that Assemany had personal or business records of Porter. In effect, personal property is personal property and if there were personal or business records, they would also belong to Assemany under the provisions of the Last Will and Testament and First Codicil. The estate's motion didn't request business records. It requests

return of certain personal property items and makes no mention of any business records. There is no factual foundation for that conclusion by the court and there should be no requirement by Assemany to return any of the personal property items she was bequeathed.

2. The Court has no jurisdiction to enter an order requiring Assemany to produce the personal property.

Assemany, in her initial filing with the court of the TEDRA petition, raised the issue of lack of jurisdiction for the Stevens County, Washington to determine the probate of Porter's Last Will and Codicil. **CP Doc. 2.** The specific basis for this position was that Porter resided in New York state over the last 12 years of his life, most with Assemany. **CP Doc. 2.** He had executed a Will and then a Codicil to that Will, all in New York state. **CP Doc. 2.** Substantially all of Porter's assets were located in New York state. **CP Doc. 2.** Porter passed away in New York state. **CP Doc. 2.** Despite these factual assertions, and objections to the court's jurisdiction to command Assemany to assemble personal property, the court ordered her to provide that personal property to the personal representative. **CP Doc. 29.** The court had no authority to order Assemany, a New York resident, to turn over property

located in New York based upon a Will and Codicil executed in New York. *Estate of Stein,* 78 Wn. App. 251, 896 P.2d 740 (1995). In *Stein,* the decedent died in Washington state but his will was probated in Oregon. Most if not all of Mr. Stein's assets were in Washington at the time of his death and were transferred to Oregon after his death. The *Stein* court held

> The probate of a non-resident's will who dies leaving property within the state affects only the property within the jurisdiction and has no effect on the validity of the will itself beyond the limited purpose of the plenary power possessed by the state with respect to property within its domain.

Stein, at p. 261.

The court simply did not have jurisdiction either over Assemany or the subject matter, in order to pursue that issue. Probate of a will should be in the place of the testator's domicile. 95 C.J.S., Wills, §580 (1957). The law of the domicile governs the distribution of assets. *In re Olson's Estate,* 194 Wash. 219, 227, 77 P.2d 781 (1938). Porter's domicile clearly was in New York state.

D. **The court erred in consolidating the probate and TEDRA cases.**

Only after Assemany responded to the estate's motion to show cause alleging that it was incorrectly brought under the

TEDRA case did the estate at the last minute attempt to consolidate the cases and requested an order shortening time. **CP Docs. 29, 36, 42.** Assemany objected to that consolidation on the basis that it was untimely and that it would not serve the interest of either case to have them consolidated. **CP Doc. 32.** The act of consolidation is at the discretion of the court, however, the trial court abused its discretion in consolidating these matters. *National Bank of Washington v. Equity Investors,* 86 Wn.2d 545, 560-561, 546 P.2d 440 (1976), holding consolidation was not appropriate. Taking into consideration the consolidation, the court should look at the relative prejudice incurred by the parties and the circumstances surrounding the motion itself. *Hawley v. Mellem,* 66 Wn.2d 765, 405 P.2d 243 (1965). Here the motion was untimely and basically was an afterthought to cure a defect by the estate in their pleadings. CR 6(a). The estate should not be able to cure a procedural defect after the fact and have the cases consolidated. The estate's motion to consolidate the TEDRA with the probate action should have been denied on the basis that it was untimely filed and prejudiced to Assemany. The prejudicial impact to Assemany can clearly be seen in that the consolidation of the cases resulted in the dismissal of her TEDRA petition.

There is no prejudice in requiring the estate to refile its motion under the proper case while there is substantial prejudice in requiring Assemany to respond to an untimely motion.

E. Assemany should be awarded her reasonable attorney fees and costs incurred at Superior Court and on appeal.

A party who is successful in defending or filing a TEDRA action is entitled to their reasonable attorney fees and costs pursuant to RCW 11.96A.150(1) which states:

> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. 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 they litigation benefits the estate or trust involved.

This includes fees and costs incurred at the trial level; *Foster v. Gilliam,* 165 Wn. App. 33, 268 P.3d 945, rev. den'd 173 Wn.2d 1032, 277 P.3d 668 (2011); and on appeal, *In re Estate of Wegner v. Tesche, supra.* Assemany should be awarded her fees and costs at both the trial and appellate court levels.

VI. CONCLUSION

The trial court took a somewhat innocuous motion by the estate to dismiss the TEDRA petition on procedural grounds and transformed it to a complete full hearing on the merits. The trial court did not give Assemany the opportunity to develop, present her case, and properly set a hearing where all parties would have the opportunity to properly respond and address the question of whether Porter's Codicil executed on October 2, 2011 was the result of overreaching, undue influence, or other means. The court was under the mistaken belief that the December 18, 2012 hearing on the estate's motion to dismiss also required a full resolution of the substantive merits of Assemany's case. In most if not all TEDRA actions initial hearings are for held for dismissal, summary judgment, or discovery. The cases cited by Assemany in this brief support her petition that the initial hearing in a TEDRA petition does not need to be a full hearing on the merits. Assemany was blindsided by the court on its own accord turning a procedural motion to dismiss into a full blown hearing on the merits. Assemany's valid concern is that a decision on the merits was made without discovery being completed by both parties and actually giving her the opportunity to fully present her case.

There is no reportable case that could be found to support the position that strict compliance with RCW 11.96A.100(A)(8) is required or even been followed.

Assemany should not be required to provide personal property to the personal representative that she was devised under the Will and Codicil. The show cause motion was defective and the court granted relief which was not requested in that motion. The court also did not give Assemany the opportunity to fully develop her argument that the court lacked jurisdiction. She did not waive the jurisdiction requirement by filing the TEDRA petition, rather she preserved it. The court also erred in consolidating the probate and TEDRA cases without looking at the relative prejudice to either party.

Based upon the foregoing, Assemany requests that the court 1) overturn the trial court's decision dismissing her TEDRA petition and allow her to proceed fully through that action; 2) that the court overturn the trial court's consolidation of the probate and TEDRA action; 3) enter an order finding that Assemany did not waive her objection to jurisdiction of the court in this matter; 4) for an order overruling the trial court's requirement that Assemany provide personal property to the personal

representative for inventory; and 5) awarding Assemany her reasonable attorney fees and costs.

Dated this 18th day of July, 2013.

Respectfully submitted:

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By_____

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION III

In re the Matter of the ESTATE OF QUENTIN J. PORTER, Deceased SALMA ASSEMANY, Appellant, vs. HELEN T. PORTER, Personal Representative of the Estate of Quentin J. Porter, Respondent.	No. 314928-III CERTIFICATE OF MAILING

The undersigned certifies that a copy of the foregoing Opening Brief of Appellant was transmitted by email and regular mail, postage prepaid, on July 18, 2013 to the following persons:

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