

No. 345009

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

In the matter of the Estate of

JOYCE IRENE SHORT,

Deceased.

On Appeal from Chelan County Superior Court

(Hon. T.W. Small)

APPELLANT'S OPENING BRIEF

MINNICK-HAYNER
MONA J. GEIDL WSBA #42455
249 West Alder
P.O. Box 1757
Walla Walla, Washington 99362
(509) 527-3500

Attorneys for Appellant
Lola Lanelle Taylor

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE CASE.....	2
	A. Factual Background.....	2
	B. Procedural History.....	5
III.	ARGUMENT.....	7
	A. Standard of Review.....	7
	B. Assignments of Error.....	7
	1. The trial court erred in dismissing Petitioner's Dispute Resolution Petition	
	2. The trial court erred by denying Petitioner's request that the parties to mediate pursuant to RCW 11.96A.300.....	8
IV.	CONCLUSION.....	13
V.	REQUEST FOR ATTORNEY FEES ON APPEAL.....	13

TABLE OF AUTHORITIES

STATUTES

RCW 11.96A.200.....	7
RCW 2.08.010.....	7
RCW 11.96A.040(1).....	8
RCW 11.96A.090.....	8
RCW 11.96A.100(1).....	8
RCW 11.96A.300.....	8
RCW 11.96A.260.....	11

I. INTRODUCTION

This case involves an ambiguity in the Last Will and Testament of Joyce Irene Short, specifically Ms. Short's "personal residence" at the time of her death. In her Last Will, Ms. Short left a specific bequest of her personal residence to her daughter, Lola Lanelle Taylor, Petitioner herein. At the time of her death, Ms. Short still owned the property considered her "personal residence." However, at the time of her death she was residing with her daughter, Lola Taylor, in Baker City, Oregon.

A probate was opened for the estate of Joyce Irene Short on or about April 24, 2015. On April 8, 2016, the personal representative, Thomas Overcast, through his attorney David Visser of Overcast Law Offices filed a Note for Special Setting to be heard by the Hon. T. W. Small, said hearing set on May 2, 2016. The personal representative also filed a Verified Motion for Order Construing Will of Decedent, and for Instructions. In response, Petitioner Lola Lanelle Taylor, one of two daughters of Joyce Irene Short and an heir to Ms. Short's estate, through her attorneys of record, filed a Dispute Resolution Petition pursuant to RCW 11.96A and a Notice of Mediation under RCW 11.96A.300, with hearing set to correspond with the same date and time as Mr. Overcast's hearing on May 2, 2016. The petitioner's pleadings were mailed to all heirs except the personal representative. Ms. Geidl, attorney for the Lola

Lanelle Taylor, did not know until oral argument at the hearing that pleadings had not been mailed to Mr. Overcast as directed. At the May 2, 2016 hearing, the Hon. T. W. Small dismissed Ms. Taylor's Dispute Resolution Petition and Notice of Mediation, and ruled on the personal representative's Motion for Order Construing the Will of the Decedent and for Instructions. Immediately after the hearing the Dispute Resolution Petition and Notice of Mediation were mailed to Mr. Visser at Overcast Law Offices.

II. STATEMENT OF THE CASE

A. Factual Background.

Joyce Irene Short died on December 28, 2014. Her estate is subject to probate administration in the above-captioned matter. A probate for her estate has been filed in Chelan County Superior Court, Cause Number 15-4-00110-0. Petitioner Lola Lanelle Taylor is a beneficiary under the Last Will and Testament of Joyce Irene Short and is Joyce Short's daughter. The Last Will is dated September 30, 2010, and was filed for probate on April 28, 2015, in the above-captioned matter. The decedent, Joyce Irene Short, owned a home at the time of her death in Grant County, Washington located at 16487 NW Road 3, Quincy Rural, Washington. CP 1-3.

Attorney, Thomas D. Overcast, the attorney who drafted Ms. Short's Last Will, was appointed and is acting as personal representative of the estate of Joyce Irene Short.

Joyce Short's Last Will states in Article VII.A:

"To Lola Lanelle Taylor, I leave my personal residence and all of the personal property in my residence that is not otherwise disposed of in this Will....It is my wish that Lola Lanelle Taylor maintain this specific bequest as her sole and separate property, using other funds of her own to pay the upkeep, maintenance, taxes and insurance on the property so that it maintains its character as her sole and separate property."

1. Joyce Short's Last Will states in Article VII.C:

"I give, devise and bequeath all of the rest, residue and remainder of my estate, both real and personal property, to be divided into eight (8) equal shares and distributed as follows:

<u>Beneficiary</u>	<u>Share</u>
Lola Lanelle Taylor	1.5 Shares
Maxine Sue Milton	1.5 Shares
Deborah Brynn Graham	1 Share
Teri Anne Wisdom	1 Share
Mark Alan Shart	1 Share
Gretchen Elaine Young	1 Share
In trust to Wiley Hurt, Trustee of the Emma Katherine Sasser Educational Trust, under the terms and conditions specified below in Article VIII	1 Share"

CP 3-4.

In 2014, Joyce Short, because of her age and failing health, moved to Baker City, Oregon to live with her daughter, Lola Taylor. Joyce Short

paid for a home located at 3345 Estes Street, Baker City, Oregon, but titled it solely in the name of Lola Taylor and treated it as Lola's home. Lola Taylor thereafter cared for her mother in that home until Ms. Short's death on December 28, 2014.

At the time of her death, Joyce Irene Short still owned her home located at 16487 NW Road 3, Quincy Rural, Washington. At the time of her death, the Grant County Assessor listed the 2016 market value of Ms. Short's home as \$131,235.00. She was unmarried and left two surviving daughters, Lola Lanelle Taylor (Petitioner) and Maxine Sue Milton. CP 4.

On or about May 1, 2015, Overcast Law Offices opened a probate for the Estate of Joyce Irene Short. Thomas Overcast was appointed personal representative of the estate. CP 4.

On or about November 19, 2015, while the estate was being probated, the Grant County Treasurer foreclosed on the property at 16487 NW Road 3, Quincy Rural, Washington. Omar Mendez purchased the property at the foreclosure sale for \$68,000.00. CP 4.

On or about November 21, 2015, the property was transferred from Omar Mendez back to the personal representative, Thomas Overcast. CP 4.

The personal representative now asserts that an ambiguity exists as to whether the home located at 16487 NW Road 3, Quincy Rural, Washington was Ms. Short's "personal residence" at the time of her death.

This home was her personal residence at the time she executed her Last Will. The personal representative now requests that the Court find the Quincy property not be considered Ms. Short's "personal residence" to be distributed to Petitioner and that it instead be part of the residue of Ms. Short's estate.

B. Procedural History.

On September 30, 2010, decedent signed a Last Will drafted by attorney Thomas D. Overcast directing that Thomas D. Overcast serve as her Personal Representative. CP 3.

Decedent Joyce Irene Short died from lung cancer on December 28, 2014 in her daughter's home at 3345 Estes Street, Baker City, Oregon. CP 1.

On or about May 1, 2015, Overcast Law Offices filed for probate of the estate of Joyce Irene Short, and Thomas Overcast was appointed Personal Representative. CP 4.

On April 8, 2016, attorney David Visser of Overcast Law Offices filed a Verified Motion for Order Construing Will of Decedent and for Instructions, as well as a Note for Special Setting for hearing on May 2, 2016.

On April 4, 2016, attorney Mona J. Geidl of Minnick Hayner, P.S. filed a Dispute Resolution Petition and Notice requesting mediation and

set the hearing date as May 2, 2016 in order to coincide with Mr. Visser's motion. CP 7-8.

On April 1, 2016, Petitioner's Dispute Resolution Petition and Notice of Mediation was mailed to all interested parties except to David Visser of Overcast Law Offices due to a clerical error, despite the notice being addressed primarily to Mr. Visser. Petitioner's attorney, Ms. Geidl, did not know until the hearing that Mr. Visser had not received the pleadings.

On May 2, 2016, the Chelan County Superior Court heard arguments of counsel on attorney David Visser's Motion for Order Construing Will of Decedent and for Instructions, at which time the Honorable Judge T.W. Small ruled to dismiss Petitioner's Dispute Resolution Petition and granted Mr. Visser's Motion.

On May 2, 2016, after hearing, Petitioner's Dispute Resolution Petition and Notice of Mediation were mailed to attorney David Visser.

On May 16, 2016, the Honorable Judge T.W. Small signed Findings of Fact, Conclusions of Law and Order Instructing the Personal Representative Regarding Interpretation of the Decedent's Will in the underlying probate and an order dismissing the Dispute Resolution Petition as presented by David Visser.

III. ARGUMENT

A. Standard of Review.

This is an appeal from an Order dismissing Petitioner's Dispute Resolution Petition and denying mediation under RCW 11.96A.300.

An interested party may seek appellate review of a final order, judgment, or decree of the court respecting a judicial proceeding under RCW 11.96A. RCW 11.96A.200. The appellate court reviews de novo questions of a court's subject matter jurisdiction. Cole v. Harveyland, LLC, 163 Wn.App. 199, 205, 258 P.3d 70 (2011).

In Washington, "[t]he superior court shall have original jurisdiction ... of all matters of probate." RCW 2.08.010. Furthermore, under **TEDRA**, "[t]he superior court of every county has original subject matter jurisdiction over the probate of wills and the administration of estates of incapacitated, missing, and deceased individuals in all instances." RCW 11.96A.040(1). This includes when a nonresident of the state dies outside the state. RCW 11.96A.040(1)(c). Appointing a personal representative invokes the court's jurisdiction. In re Estate of Pugh, 22 Wn.2d 514, 523, 156 P.2d 676 (1945).

B. Assignments of Error

1. **The trial court erred in dismissing Petitioner's Dispute Resolution Petition.**

A judicial proceeding under RCW 11.96A.090 is to be commenced by filing a petition with the court. RCW 11.96A.100(1). If the proceeding is commenced as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset, the notice must be provided by summons only with respect to those parties who were not already parties to the existing judicial proceedings. In this case, all heirs were parties to the underlying probate action and were all served with the personal representative's Motion for Order Construing the Will of the Decedent and for Instructions that was argued and decided on May 2, 2016.

2. The trial court erred by denying Petitioner's request that the parties to mediate pursuant to RCW 11.96A.300.

Under TEDRA, a party may cause the matter to be subject to mediation by service of written notice of mediation. RCW 11.96A.300. An heir's Notice of Mediation complies with the statutory requirements of the Trust and Estate Dispute Resolution Act provision that governs required notice (when a hearing has been set) when (1) the heir serves written notice on all parties, (2) the notice of mediation including the statutory language set forth in RCW 11.96A.300, and (3) the heir nominates his or her proposed mediators in the notice. RCW 11.96A.300.

A Notice of Mediation may also be served before a hearing is set. The procedure when notice of mediation is served before a hearing is set allows for written notice to be served at any time without leave of court. RCW 11.96A.300(2). A party may object to the notice of mediation by filing and serving the objection no later than 20 days after receipt of the written notice of mediation. Id.

If the written notice of mediation is timely filed and served by a party and another party objects to mediation, by petition or orally at the hearing, **the court shall order that mediation proceed except for good cause shown.** Such order shall not be subject to appeal or revision. If the court determines that the matter should not be subject to mediation, the court shall dispose of the matter by: (a) deciding the matter at that hearing, (b) requiring arbitration, or (c) directing other judicial proceedings. RCW 11.96A.300(3).

In the present case, Petitioner substantially complied with the requirements of 11.96A.300. Petitioner's Notice of Mediation stated as follows:

“NOTICE is hereby given that the following matter shall be resolved by mediation under RCW 11.96A.300: Specifically, the Personal Representative's distribution of any portion of the Estate of Joyce Irene Short, deceased.

This matter must be resolved using the mediation procedures of RCW 11.96A.300 unless the Superior Court determines at the hearing set for 1:30pm on May 2, 2016, at the Chelan County Superior Court, 350

Orondo Avenue, Suite 501, Wenatchee, WA 98801-2885, that mediation shall not apply pursuant to RCW 11.96A.300(3). If the Court determines that mediation shall not apply, the court may decide the matter at the hearing, require arbitration, or direct other judicial proceedings.

Our list of acceptable mediators is as follows:

1. David Thorner, Thorner Kennedy & Gano, P.S., 101 South 12th Avenue, P.O. Box 1410, Yakima, WA 98907, (509) 575-1400;
2. Francois Forgette, Rettig Forgette Iller Adamson, 6725 West Clearwater Avenue, Kennewick, WA 99336, (509) 783-6154;
3. Frank Hoover, Law Offices of Frank Hoover, P.S., 1402 West Broadway, Spokane, WA 99201, (509) 323-9575.”

Petitioner’s Notice of Mediation substantially complied with the governing language of RCW 11.96A.300, it proposed acceptable mediators, set the hearing date, and Petitioner notified the parties (except the personal representative). Petitioner’s attorney did not discover that the personal representative had not been served until time of hearing, and then immediately served written Notice of Mediation on the personal representative, which notice was mailed on May 2, 2016.

Although petitioner substantially complied with the requirements of 11.96A.300, the trial court dismissed petitioner’s request.

a. Substantial Compliance

Substantial compliance with the procedural requirements of the statute is generally sufficient because delay or loss of lawsuits should not be the result of complex procedural technicalities. In re Estate of Harder, 185 Wash.App. 378 (2015); In re Saltis, 94 Wash.2d 889, 895-96, 621

P.2d 716 (1980). A party substantially complies with procedural requirements of his or her pleadings satisfy the substance essential to the statutes purpose. Crosby v. Spokane County, 137 Wash.2d 296, 302, 971 P.2d 32 (1999). It was error for the trial court to dismiss the Notice of Mediation at the May 2, 2016 hearing where Petitioner substantially complied with the statute, the personal representative had the opportunity to participate at the hearing as did the heirs, and notice was validly provided to the personal representative on May 2, 2016, less than 30 days after the date of filing of the notice on April 4, 2016.

b. No Good Cause for Dismissal

RCW 11.96A.300 provides that the Court order mediation to proceed except for good cause shown. Respondent fails to show good cause for the court not to order mediation. The personal representative, Thomas Overcast, in this matter is the same attorney that drafted Ms. Short's last will and testament. Mr. Overcast drafted himself into the Last Will as the nominated personal representative, a practice disfavored by Washington state estate planning counsel. Mr. Overcast's drafting of the Last Will and Testament led to the ambiguity involving Ms. Short's "personal residence." During this probate, the residence was not adequately protected and was lost briefly due to a tax lien. Additional questions will remain as to Mr. Overcast's billing for his services as David

Visser of Overcast Law Offices is the attorney of record in this matter. No evidentiary hearing took place to resolve factual questions such as residency in conjunction with the Motion for Order Construing the Will of the Decedent and for Instructions. CP 1-5. For these reasons, Petitioner has shown good reason why the parties should proceed mediation to resolve these controversies.

c. Legislative Intent Favors Mediation

The legislature has found that it is beneficial to allow parties to disputes involving trusts, estates, and nonprobate assets to have access to a process for required mediation followed by arbitration using mediators and arbitrators experienced in trust, estate, and nonprobate matters. RCW 11.96A.260.

A party may cause the matter to be presented for mediation and then arbitration, as provided under RCW 11.96A.260 through 11.96A.320. If a party causes the matter to be presented for resolution under RCW 11.96A.260 through 11.96A.320, then judicial resolution of the matter, as provided in RCW 11.96A.060 or by any other civil action, is available only by complying with the mediation and arbitration provisions of RCW 11.96A.260 through 11.96A.320. RCW 11.96A.280.

Given this plain language of legislative intent in the statute, the legislature specifically provides the parties with a process to invoke mediation during the course of a probate.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to reverse the trial court's ruling, and she respectfully requests this Court to order the respondent estate to pay the Petitioner's attorney's fees on this appeal.

V. REQUEST FOR ATTORNEY FEES ON APPEAL

Pursuant to RCW 11.96A.150 and RAP 18.1, Petitioner requests that the Court award attorney's fees in her favor and against the estate for this action.

DATED this 2 day of December, 2016.

MINNICK-HAYNER

By: Mona Geidl
Mona J. Geidl, WSBA #42455
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 5 day of December, 2016, I caused to be served a true and correct copy of **APPELLANT'S OPENING BRIEF** by the method indicated below, and addressed to the following:

David Visser
Overcast Law Offices
23 South Wenatchee, Ave. Ste. 320
Wenatchee, WA 98801

U.S. Mail, Postage Prepaid



JUDY LIMBURG

Signed this 5 day of December, 2016
at Walla Walla, Walla Walla County, WA