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No. 44548-4-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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

Appellant,

v.

MACK JEPSEN,

Respondent.

BRIEF OF RESOPNDENT

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I. INTRODUCTION

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

The trial court should be affirmed because service of the petition is a question of personal jurisdiction, not subject matter jurisdiction, and because the estate waived the defense by failing to preserve it in its Answer to the will contest Petition. The appellant's issue statement is incomplete: The issue on appeal is not whether the statutory requirements were met, but rather whether the estate *waived compliance* with those requirements.

Although some decisions refer to statutory requirements as being "jurisdictional," the legislature does not have the authority to abridge the court's subject matter jurisdiction. Accordingly, "jurisdictional" statutory requirements are at most limitations on a litigant's right to seek relief, not a limitation on the court's subject matter jurisdiction. Further, while some statutorily prescribed prerequisites are strictly applied, in many cases such prerequisites are subject to the doctrines of substantial compliance and waiver. Notably, statutory language relating to service and imposing a time limit for bringing a claim has repeatedly been held to be subject to waiver.

Applying these principles to the will contest statute, the first requirement in the statute relating to filing the petition is one that is absolutely required in order for a contestant to invoke the court's jurisdiction over the will contest. There is no dispute that Jepsen timely filed the will contest petition and did so in the proper court. The second statutory requirement relating to service on the personal representative exists for the purpose of providing notice and conferring personal jurisdiction over the estate's personal representative. As such, this requirement can be satisfied through waiver by the estate.

Personal service was waived in this case the moment the estate filed an answer that failed to raise any defenses to personal jurisdiction or service and when the estate's attorney participated in hearings relating to the will contest petition without raising any objection to service.

All statutory requirements for Jepsen's will contest have been satisfied. Jepsen timely filed the petition and the estate waived compliance with the service requirement. As such, Jepsen properly invoked the court's jurisdiction (both subject matter and personal) to hear his will contest petition, and the trial court properly granted the motion for reconsideration. The decision below should be affirmed.

II. RESPONSE TO STATEMENT OF THE ISSUE

If a petition to contest a will is timely filed under RCW 11.24.010 and the estate files an answer without asserting any objection to issues with service of the petition, has the estate waived the statutory requirement to serve the petition on the personal representative?

III. STATEMENT OF THE CASE

1) Filing of Petition to Contest and Invalidate Will and Acceptance of Service

On March 22, 2012, Respondent Mack Jepsen, the adult son of the deceased, filed a Petition to Contest and Invalidate Will. CP 1-3. A copy of the *Petition* and *Summons* was sent via email to Michael T. Smith, counsel for Appellant Personal Representative Julie Miles, that same day. CP 42-45. Jepsen's counsel also contacted, via telephone, Mr. Smith regarding the Petition and Summons and left a voicemail. CP 119-120.

To follow up the petition, Jepsen's counsel sent an email to Mr. Smith requesting a response to a letter for the inventory of the estate and also inquiring if Mr. Smith still represented Ms. Miles in the probate matter. This exchange took place on March 28, 2012. CP 174. That same afternoon, Jepsen's counsel received a phone call from Mr. Smith in response to that email. CP 174-176. Several issues were discussed during that phone conference regarding matters relevant to the Estate. CP 95. In

particular, Mr. Smith verbally agreed to accept service of the petition and summons on behalf of Personal Representative Julie Miles. CP 107-8.

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

2) The Estate Files Its Answer

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

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

accept the jurisdiction of the court. Furthermore, the estate's responsive pleading requests affirmative relief from the court, including a finding of bad faith on part of Jepsen and an award of attorneys' fees and costs. CP 32.

3) The Estate Appears at Initial Hearings and Engages in Subsequent Discovery

On May 2, 2012, the estate, by and through her counsel Mr. Smith, appeared at an initial hearing on the Petition. CP 158-59. The trial court entered an order which directed the parties to appear before Judge John McCarthy. *Id.* On May 18, 2012, the estate also appeared through counsel at the initial hearing on the petition. *Id.* At the second hearing, a case schedule was issued. CP 143-44.

Subsequent pleadings in this case continued to be served upon each party's respective counsel. Discovery had been ongoing, including service of the estate's Inventory on Jepsen's counsel on June 19, 2012. The period for serving the petition, according to the estate, occurred the next day. CP 42. The extension for filing said Inventory was granted by Jepsen's counsel as a result of several requests by the estate for more time to assemble the pleadings. CP 158-59; 42.

Parties continued to litigate the case as though acceptance of service and acquiescence of jurisdiction had occurred. After receiving the

Inventory, counsel for Jepsen repeatedly requested that the estate stipulate to allow Jepsen to amend the original Petition to include new claims identified in discovery. CP 107-8. Jepsen's counsel sent emails on August 2, 2012, September 4, 2012, and September 26, 2012. CP 109-10. Again, counsel for the estate requested additional time to confer with his client. CP 110. During this interaction, no mention or objection was made regarding a lack of jurisdiction. After several months, Jepsen filed his Motion for Leave to Amend on October 23, 2012.

4) Procedural History

A week later, on October 31, 2012, the estate filed its Motion to Dismiss or Alternatively for Summary Judgment. CP 54-64. This was the first time the estate raised any objection for lack of personal jurisdiction, which was over seven months from the date of filing of the Petition, and over six months since filing its Answer. The Motion to Dismiss was also in direct conflict with the indications made by her counsel (now disputed by him) regarding service a week after the Petition was originally filed.

The trial court granted the Motion to Dismiss on November 30, 2012. CP 231-233. Jepsen timely filed his Motion for Reconsideration on December 10, 2012. On January 18, 2013, the trial court granted the Motion for Reconsideration and entered an order to vacate the November 30, 2012 dismissal. CP 266-67. The trial court based its decision to grant

Jepsen's Motion for Reconsideration on the fact that the Answer failed to preserve any objections or defenses to personal jurisdiction and thus waived them. CP 266-67.

Since the appeal was filed, Mack Jepsen passed away. This action is now handled by the personal representative of his estate.

IV. ARGUMENT

The trial court properly decided on reconsideration to deny the estate's motion for summary judgment because all issues with service of the will contest petition were waived by the estate. The trial court's decision concerned an issue of personal jurisdiction, which is reviewed de novo. *E.g. In re Estate of Kordon*, 157 Wn.2d 206, 209, 137 P.3d 16 (2006).

The trial court properly rejected the estate's argument that service of the will contest petition implicates the court's subject matter jurisdiction. This court should affirm the lower court's ruling that service is an issue of personal jurisdiction and this defense was waived. Although the Legislature can enact procedural requirements in a statute, such requirements cannot abridge the superior court's subject matter jurisdiction. Further, courts have held in multiple contexts that so-called "jurisdictional" statutory requirements are not administered in a vacuum: these jurisdictional requirements are subject to the doctrines of substantial

compliance and waiver. Specifically, the service requirement of the will contest statute relates to personal jurisdiction and tolling the statute of limitations and is therefore subject to waiver by the party to be served. In this case, the estate waived any objections to service by failing to raise the defense in its answer to the petition. Any preservation of a personal jurisdiction objection evaporated the moment the answer was filed in response to the will contest petition. The estate had an opportunity to challenge service and personal jurisdiction, but failed to do so by not reserving those objections in its initial answer.

The trial court should be affirmed, and Jepsen is entitled to an award of attorney's fees.

A. Statutory Requirements Do Not Raise an Issue of Subject Matter Jurisdiction.

Generally, a court must have both subject matter jurisdiction over the controversy and personal jurisdiction over the parties in order to rule. *E.g. State v. B.P.M.*, 97 Wn. App. 294, 298, 982 P.2d 1208 (1999). Subject matter jurisdiction speaks to the authority of the court "to adjudicate the type of controversy involved in the action." *Shoop v. Kittitas County*, 108 Wn. App. 388, 393, 30 P.3d 529, 533 (2001), *aff'd on other grounds*, 149 Wn.2d 29, 65 P.3d 1194 (2003). Subject matter jurisdiction is not related to "the authority to grant the relief requested, or the correctness of the

(1964) (waiver by failing to assert affirmative defense); *Kuhlman Equipment Co. v. Tammermatic, Inc.*, 29 Wn. App. 419, 628 P.2d 851 (1981) (waiver by seeking affirmative relief); *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000) (waiver by dilatory conduct).

By enacting RCW 11.24.010, the Legislature could not limit the superior court's subject matter jurisdiction over matters of probate: "The constitution does not authorize the Legislature to prescribe or diminish the jurisdiction of the superior court." *Shoop*, 108 Wn. App. at 396 (citing *Seattle v. Hesler,* 98 Wn.2d 73, 77, 653 P.2d 631 (1982)). Where the Legislature has prescribed procedural requirements in a statute, compliance or noncompliance with those requirements does not rob a court of subject matter jurisdiction over a dispute. *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 254 n.9, 228 P.3d 1289 (2010) (highlighting the difference between subject matter jurisdiction conferred by the constitution and a litigant's right to invoke the court's jurisdiction); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 380 n.9, 223 P.3d 1172 (2009) (same). Further, while some statutory requirements are strictly applied, others are subject to the doctrines of substantial compliance and waiver. *E.g. James v. County of Kitsap*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005); *Shoop*, 108 Wn. App. at 401.

decision." *Bour v. Johnson,* 80 Wn. App. 643, 647, 910 P.2d 548 (1996). The superior court has subject matter jurisdiction to hear probate disputes pursuant to Washington's constitution, which provides the court may hear "all matters of probate." Wash. Const. Art. 4, § 6; *see also* RCW 2.08.010 (describing the original jurisdiction of the superior court); RCW 11.96A.020 (confirming that the superior court can hear "all matters concerning the estates and assets" of a deceased person, "including matters involving nonprobate assets"). Subject matter jurisdiction is independent of the parties' conduct and cannot be waived. *E.g. In re Ruff,* 168 Wn. App. 109, 116, 275 P.3d 1175 (2012).

Personal jurisdiction determines who may be subject to the court's authority. "In personam jurisdiction obtains upon the service of process." *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 483, 674 P.2d 1271 (1984). Proper service is a personal jurisdiction issue relating to due process. *E.g. In re Estate of Kordon*, 157 Wn.2d at 209. It ensures that a party receives notice "reasonably calculated to inform a party of the pendency of proceedings affecting her or her property and provide a meaningful opportunity to participate." *Dobbins v. Mendoza*, 88 Wn. App. 862, 871-72, 947 P.2d 1229 (1997). In contrast to subject matter jurisdiction, personal jurisdiction can be waived in several ways. *E.g. Sanders v. Sanders*, 63 Wn.2d 709, 288 P.2d 942

B. Some Seemingly "Jurisdictional" Statutory Requirements Can Be Waived.

Even where the Legislature enacts statutory conditions for maintaining a particular claim, it is common that these requirements can be waived by the conduct of the parties to the action. In fact, when a statute prescribes particular procedures to resolve a dispute, substantial compliance or satisfaction of the spirit of the procedural requirements (through waiver or other means, for example) can be sufficient to allow the court to exercise its jurisdiction. *James*, 154 Wn.2d at 588. In such cases, these procedural requirements are not intended to frustrate the broader purpose of the statute by creating traps or gimmicks which hinder parties and complicate the otherwise valid pursuit of recourse by an aggrieved party.

Shoop v. Kittitas County rejected an argument that "jurisdictional language" in a statute is equivalent to a statutory requirement that cannot be waived. 108 Wn. App. at 401. Although a statute uses mandatory language that a claim "shall be commenced," "a claimant's failure to properly file a claim is a defense that can be waived by failing to timely assert it." *Id. Shoop* concluded that "[i]f it is a defense that can be waived, then failure to file a claim does *not* deprive the superior court of subject matter jurisdiction, notwithstanding the use of 'jurisdictional language' in

the claim filing statute." *Id.* In other words, a statute's use of language that is "final," to use the estate's phrase, does not preclude the possibility that the particular procedural requirement is subject to waiver.

The estate's analysis of the issues presented on this appeal is incomplete and insufficient. The estate would have this court analyze this issue narrowly and limit its review to the surface of the statute without an examination into the broader legal context which informs its interpretation. Merely identifying a statutory provision with mandatory language is not the end of the inquiry. Rather, the court must determine whether the provision in question relates to a requirement that *can be waived.* As will be discussed in more detail below, the service provision of RCW 11.24.010 is an element that can be satisfied through waiver by the personal representative. *See* Section C, *infra.*

Service of process has also referred to as a "jurisdictional" statutory requirement, and yet it is clear that this requirement can be waived. There is no question that absent waiver, proper service is essential to a party's right to maintain an action: "First and basic to any litigation is jurisdiction, and first and basic to jurisdiction is service of process." *Dobbins*, 88 Wn. App. at 871. Compliance with this statutory requirement is necessary to enable a party to avail itself of the court's jurisdiction: "Proper service of the summons and complaint is essential to invoke

personal jurisdiction over a party." *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988); *see also Lee v. W. Processing Co., Inc.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983) ("Proper service of the summons and complaint was necessary to invoke the court's jurisdiction over Western.")

The mandatory language of a statute and waiver are not mutually exclusive. Despite the mandatory language, the requirement of service is met when the other party waives the requirement. Even in an action under LUPA (which the estate claims is analogous to the will contest statute) where the "statutory procedural requirements to commence a petition require more than substantial compliance," circumstances implicating waiver are sufficient to meet the service requirement. *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 259, 108 P.3d 805 (2005). The fact that service is an issue that can be waived even under LUPA is contained within the verbiage of the statute itself. Shortly after filing a land use petition, the petitioner must note an initial hearing at which the parties must address all "jurisdictional and procedural issues." RCW 36.70C.080(1), (2). The key portion of the statute provides: "The defenses of lack of standing, *untimely filing or service of the petition*, and failure to join persons needed for just adjudication *are waived if not raised by timely*

motion noted to be heard at the initial hearing, unless the court allows discovery on such issues." RCW 36.70C.080(3) (emphasis added).

This is significant, as the estate relies heavily on LUPA as being analogous to the will contest statute. However, even under LUPA, the Legislature has explicitly provided that waiver can play a key role in determining whether jurisdictional mandates were satisfied.

Waiver that applies to service of a land use petition is also confirmed in case law. The petitioner in *Quality Rock* filed its petition and served the county and attempted to serve the petition on a necessary third party, Black Hills Audubon Society, but the organization's address was incorrect. *Quality Rock*, 126 Wn. App. at 255-56. The petitioner then served the Conservation Chair for Black Hills, who delivered the documents to the organization's president. *Id.* at 256. The county filed a motion to dismiss in part because Black Hills had not been properly served, but the parties stipulated that the facts were sufficient to constitute effective service. *Id.* at 256-57. On appeal, the county again challenged service on Black Hills, but the court upheld the trial court's determination that service was effective based on the stipulation, the fact that the attorney for Black Hills appeared and participated in the litigation, and other factors. *Id.* at 262-63.

Failure to properly serve is clearly subject to waiver in a number of other contexts as well. The Civil Rules require that the defense of insufficient service of process be raised in the answer. CR 12(b) ("Every defense ... shall be asserted in the responsive pleading...."). When a respondent fails to object to personal jurisdiction in its answer, it waives that objection thereafter. *E.g. Sanders*, 63 Wn.2d 709; *O'Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 527, 125 P.3d 134 (2004); *see also Corona v. Boeing Co.*, 111 Wn. App. 1, 8, 46 P.3d 253 (2002) (although a party must file and serve within the 30-day appeal period provided for an industrial insurance appeal, "[s]ubstantial compliance with this statute is sufficient to invoke the superior court's jurisdiction.")

Like service of process, several statutes provide a time period within which a particular claim must be brought, but it is well-settled that failure to assert the statute of limitations as a defense constitutes a waiver of such statutory procedural requirements. For instance, RCW 11.11.070 provides that a testamentary beneficiary must submit a claim for a non-probate asset within one year of the date of death or be "forever barred from making such a claim or commencing such an action." RCW 11.11.070(3). However, a defendant *waives* the time bar as a defense if it is not raised as an affirmative defense in her answer. *In re Estate of Palmer*, 145 Wn. App. 249, 258-59, 187 P.3d 758 (2008). Similarly, RCW

4.24.010 requires that a parent must join a suit brought by the other parent within 20 days or be barred from recovery, but the bar is analogous to a statute of limitations and is therefore likely waived when not raised by the defendant. RCW 4.24.010; *Alexander v. Food Services of America, Inc.*, 76 Wn. App. 425, 428-29, 886 P.2d 231 (1994) (stating the rule that failure to raise the statute of limitations as an affirmative defense in a timely manner waives the defense). A plaintiff must timely file a notice of claim with a county before suing for damages, but a county can waive its defense that the claim was not timely filed by engaging in conduct inconsistent with its assertion of the defense. *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002). The statute of limitations is an affirmative defense separate from whether the court has subject matter jurisdiction. *Shoop*, 108 Wn. App. at 401 n.7 ("It is well established that the running of a statute of limitations does not affect the court's jurisdiction; it is simply a defense that can be waived.")

As mentioned by the estate, another category of statutory requirements that do not require strict compliance are those that relate to form and content. *E.g. Keep Watson Cutoff Rural v. Kittitas County*, 145 Wn. App. 31, 38-39, 184 P.3d 128 (2008) (on LUPA appeal, failure to attach copies of land use decision to petition was excused where petitioner substantially complied with requirement by clearly identifying and

summarizing the decisions being appealed). Not all legislatively prescribed procedural requirements are "jurisdictional." *Conom v. Snohomish County*, 155 Wn.2d 154, 118 P.3d 344 (2005) (although required by LUPA statute, petitioner's failure to note initial LUPA hearing did not require dismissal of the petition); *Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 910 P.2d 1284 (1996) (delivery of notice of appeal to Board of Industrial Insurance Appeals by FedEx substantially complied with statutory requirement to deliver "by mail").

Contrary to the estate's argument, procedural requirements contained in a statute are not inviolate. The estate would have the court read the personal service component of the will contest statute and go no further. However, as demonstrated above, it is rare that the narrow view of a jurisdictional component is dispositive. It is not enough that will contest statute uses "final" language when describing the consequences for failure to file and serve. Similar language is used in other contexts, such as RCW 36.70C.040(2)(2) ("A land use petition is barred ..."), RCW 11.11.070(3) ("beneficiary ... shall be forever barred ..."), and regarding service in general, *In re Marriage of Markowski*, 50 Wn. App. at 635-36 ("Proper service ... is essential ...."). However, the law provides that such instances do not preclude waiver of the defense. *E.g.* RCW 36.70C.080(3); *In re Estate of Palmer*, 145 Wn. App. at 258-59; *Sanders*, 63 Wn.2d 709. Even

where the Legislature has imposed statutory requirements for service, such requirements can be satisfied through waiver by the party to be served.

C. Filing the Will Contest Petition Combined with the Estate's Wavier of Objections to Service Was Sufficient to Invoke the Court's Subject Matter Jurisdiction.

The service requirement in RCW 11.24.010 relates to the trial court's acquisition of personal jurisdiction over the estate through the personal representative, and can therefore be waived. Significantly, while the estate's brief discusses the statutory requirements in RCW 11.24.010 at length, it fails to address the fact that the estate *filed an answer* to the will contest Petition. This event waived any issue with service by failing to assert the lack of service as an affirmative defense.

The statute in question provides as follows:

> If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he or she shall file a petition containing his or her objections and exceptions to said will, or to the rejection thereof. Issues respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of the last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or a part of it, shall be tried and determined by the court.
>
> For the purpose of tolling the four-month limitations period, a contest is deemed commenced when a petition is filed with the court and not when served upon the personal

> representative. The petitioner shall personally serve the personal representative within ninety days after the date of filing the petition. If, following filing, service is not so made, the action is deemed to not have been commenced for purposes of tolling the statute of limitations.
>
> If no person files and serves a petition within the time under this section, the probate or rejection of such will shall be binding and final.

RCW 11.24.010. The two statutory requirements, *filing* and *service* of the petition, are contained in separate paragraphs and are subject to different standards.

1. Filing the Petition Is Required to Invoke Jurisdiction.

The first statutory requirement, filing the will contest petition, must be met in order for the petitioner to invoke the court's subject matter jurisdiction. Where a contestant fails to file a petition within the statutory four-month period, the will contest is "absolutely barred." *In re Estate of Toth*, 138 Wn.2d 650, 656, 981 P.2d 439 (1999); *see also In re Estate of Peterson*, 102 Wn. App. 456, 9 P.3d 845 (2000). *State ex. rel Wood v. Superior Court of Chelan County* also held that a petition that was not filed within the statutory time frame could not proceed, stating "the court has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute." 76 Wash. 27, 30-31, 135 P. 494 (1913). As discussed above, although the opinions use language indicating that the failure to file is "jurisdictional," this must be construed not as a

limitation on the court's subject matter jurisdiction, but rather on the party's right to avail itself of the court's jurisdiction. *See* Section A, *supra.*

The significance of timely filing the petition is highlighted by *In re Estate of Crane*, 15 Wn. App. 161, 548 P.2d 585 (1976). A petition to contest the will was timely filed but the contesting party's attorney failed to tender the filing fee. *Id.* at 161-62. In denying the estate's motion to dismiss for lack of jurisdiction, the court held that "the act of filing nevertheless vested jurisdiction over the will contest in the superior court as of the filing date." *Id.* at 163.

In the case at hand, there is no dispute that Jepsen filed the will contest in compliance with RCW 11.24.010, satisfying this "jurisdictional" requirement. The next step in the will contest process is to satisfy the personal jurisdiction requirement of the law.

2. *Service of the Petition Can Be Waived.*

The second statutory requirement, service of the petition, is subject to waiver by the personal representative on behalf of the estate. The purpose of the service requirement is to provide notice and to ensure that the court has personal jurisdiction over the personal representative of the estate. *See Kordon*, 157 Wn.2d at 209-10.

The current version of RCW 11.24.010 was enacted in 2007. RCW 11.24.020 was amended in 2006. *Kordon* analyzed these statutes as they

existed prior to 2006. 157 Wn.2d at 208 n.1. Prior to the 2006 and 2007 amendments, RCW 11.24.020 required that a citation be issued and served upon interested parties. *Id.* at 209 n.2. The party contesting the will in *Kordon* filed the petition and mailed it to the personal representative's attorney but did not issue or serve a citation. *Id.* at 208. The petitioner finally served a citation over two years after the will contest was filed. *Id.*

In discussing the failure to serve, the Supreme Court clarified that service of the citation (equivalent to a civil summons) was necessary to obtain personal jurisdiction. Based on the text of the decision below, it is clear that the *Kordon* court is describing the jurisdictional components of the will contest statute. It highlights two sides to the jurisdictional coin: first, the petitioner must satisfy the *subject matter* requirement by timely filing the petition in the proper court, and second, the petitioner must satisfy the *personal jurisdiction* requirement by providing proper notice to the personal representative of the estate:

> A will contest is a statutory proceeding governed by chapter 11.24 RCW. A party contesting a will must file a petition in the court with jurisdiction over the will. RCW 11.24.010. The party contesting the will must then request and serve a citation on all executors, administrators, and legatees of the will. RCW 11.24.020.
>
> A citation is equivalent to a civil summons, conferring personal jurisdiction over a party to a will contest. *See In re Estate of Wheeler*, 71 Wash.2d 789, 795, 431 P.2d 608 (1967). *See also In re Murphy's Estate*, 98 Wash. 548, 553,

> 168 P. 175 (1917) ("A citation is the process designated by the statute in probate proceedings for bringing adverse parties into court. It is the counterpart of the summons in ordinary civil proceedings."). Proper service of process "is essential to invoke personal jurisdiction over a party." *In re Marriage of Markowski*, 50 Wash.App. 633, 635–36, 749 P.2d 754 (1988). Accordingly, under RCW 11.24.020, failure to issue a citation deprives the court of personal jurisdiction over the party denied process.

Id. at 209-10. Further, although the applicable statute did not provide a time frame for issuing a summons, the court held that RCW 11.24.020 "implicitly adopts the requirements of the Superior Court Civil Rules and Title 4 governing civil procedure," specifically the provision in RCW 4.16.170 that filing the complaint tolls the statute of limitations for ninety days, with the result that a citation could be served "any time within the four-month statute of limitations on bringing a will contest or any time within 90 days of timely filing a petition contesting the will." *Id.* at 213.

As mentioned, the petitioner in *Kordon* waited two years after filing the petition to serve her citation. *Id.* Although substantial compliance with the citation requirement could have been sufficient, the petitioner's two-year delay precluded application of that doctrine. *Id.* Accordingly, dismissal of the petition was upheld because the petitioner "failed to satisfy the RCW 11.24.010 statute of limitations." *Id.* at 214.

After *Kordon* was decided in 2006, the Legislature amended RCW 11.24.010 in 2007 to include the current paragraph relating to service of

the petition upon the personal representative. However, the language of the amendment is consistent with the discussion in *Kordon* and indicates that service under the amended RCW 11.24.010 is still an issue of conferring personal jurisdiction and satisfying the statute of limitations. As mentioned, the will contest statute prior to 2007 did not provide a time frame for serving a citation or summons. *Kordon* clarified that because RCW 11.24.010 specifies a four-month statute of limitations for filing a will contest petition, the petition would need to be served within 90 days of filing under RCW 4.16.170. *Id.* at 213. The 2007 amendment to RCW 11.24.010 codified the decision of *Kordon* by adding the following paragraph specifying the time within which the petition must be served:

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

RCW 11.24.010. The added language is significantly similar to RCW 4.16.170, which provides:

> For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service

> by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 4.16.170.

By codifying the holding of *Kordon*, the Legislature certainly did not intend to change *Kordon's* holding that service of the petition is a matter of personal jurisdiction. 157 Wn.2d at 209-10. The 2007 amendment also implicates the statute of limitations—the very language of the statute clarifies that failure to effect service within 90 days means that "the action is deemed not to have been commenced *for purposes of tolling the statute of limitations*." RCW 11.24.010 (emphasis added); *see also Kordon*, 157 Wn.2d at 214 (petition was dismissed because petitioner "clearly failed to satisfy the RCW 11.24.010 statute of limitations"). Significantly, both of the reasons for the statutory requirement to serve the petition, conferring personal jurisdiction and tolling the statute of limitations, are issues that are waived when the other party fails to raise them as a defense. *See* Section B, *supra*.

In addition to the reasoning in *Kordon*, it is clear that the statutory requirement for serving the petition must be treated differently from the

requirement to file because it is contained in a separate paragraph. *Nickum v. City of Bainbridge Island* analyzed a provision of the Bainbridge Island Municipal Code to determine whether the time for filing an appeal to the hearing examiner was "jurisdictional" (meaning that failure to meet the requirement acted as an absolute bar to the appellant's right to invoke relief) or was a statute of limitations (and therefore subject to equitable adjustment). 153 Wn. App. at 377-78. Noting that a time limit in a statute is not "jurisdictional" when it is separate from other provisions relating to the court's jurisdiction, the court considered equitable factors to determine whether the failure to timely file could be excused. *Id.*

The first paragraph of the will contest statute provides a four-month period to *file* a petition, expressly stating that it must be filed in "the court having jurisdiction." RCW 11.24.010. Nothing in the first paragraph refers to service of the petition. *Id.* In contrast, the second paragraph provides a 90-day window for *service* of a will contest, which is explicitly "for purposes of tolling the statute of limitations." *Id.* Under *Nickum*, only the four-month time limit for filing is an absolute requirement that must be met to enable the petitioner to invoke the court's jurisdiction; the 90-day period for service relates to tolling the statute of limitations and is subject to equitable doctrines such as waiver. Here, Jepsen complied with the absolute jurisdictional requirement by filing the

petition, and the estate waived any defense relating to service or the statute of limitations by failing to raise it in its Answer.

3. Cases Cited by the Estate Are Distinguishable.

The estate generally argues that substantive statutory requirements are strictly applied and suggests that this principle should also cover service of a will contest petition as well. However, the cases cited by the estate in support of this assertion are distinguishable and fail to support this claim.

The estate correctly cites *Ruth v. Dight* for the proposition that the nonclaim statute relating to the filing of claims in decedent's estates is mandatory and not subject to enlargement or waiver. 75 Wn.2d 660, 669-70, 453 P.2d 631 (1969). Although it adopted the discovery rule for medical malpractice, *Ruth* did not extend the rule to the time for filing a creditor's claim against an estate. *Id.* Of course, *Ruth v. Dight* is entirely irrelevant to this appeal, which has nothing to do with the nonclaim statute.

The contestants in *Estate of Peterson* asked the court to apply the discovery rule to their petition for a will contest, claiming that their allegations of fraud with regard to the estate were not discovered until after the four-month period for filing a will contest. *In re Estate of Peterson*, 102 Wn. App. 456, 9 P.3d 845 (2000). The court declined to

extend the discovery rule to extend the time to file a will contest petition. *Id.* at 464. Again, this opinion is not helpful to the estate's argument. Jepsen does not ask the trial court to extend the time for filing the will contest petition, nor does the discovery rule have any application to the case. It is undisputed that the claim was timely filed and done so with the court which had the correct authority to hear the dispute.

The estate relies most heavily on LUPA cases. These cases generally hold that failure to meet the statutory deadline for filing and serving a land use petition is an absolute bar to the petitioner's right to relief. *E.g. Nickum*, 153 Wn. App. 366. However, ***none of the cases cited by the estate address the issue of waiver*** of irregularities with service. Such issues would not often be raised on appeal because LUPA itself clearly provides how and when a defense of untimely service of the petition is waived: The defenses of lack of standing, *untimely filing or service of the petition*, and failure to join persons needed for just adjudication *are waived if not raised by timely motion* noted to be heard at the initial hearing, unless the court allows discovery on such issues." RCW 36.70C.080(3) (emphasis added).

LUPA is also distinguishable in that the specific issue presented here (failure to assert the defense in an answer) cannot arise under LUPA. This is because an answer to the land use petition is not required under the

statute. RCW 36.70C.080(6). Thus, language such as that in *Overhulse v. Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 597, 972 P.2d 470 (1999), stating that "[a]ll statutory procedural requirements must be met before [the court's] appellate jurisdiction is invoked," must be understood to apply only in situations where there has been no waiver of the requirements. In light of the clear provision of the statute expressly providing that untimely service of the petition can be waived, it would be untenable to assert that because service of the petition is a mandatory statutory requirement, circumstances implicating waiver must be ignored.

After noting that the Legislature can create procedural requirements to the court's exercise of jurisdiction, Division Three recently held that the statutory requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) "control the court's exercise of its subject matter jurisdiction." *In re Ruff*, 168 Wn. App. 109, 117-18, 275 P.3d 1175 (2012).[2] Based on this holding, the opinion found the order entered by the trial court was void despite the fact that both parties had consented to jurisdiction. *Id.* But the will contest statute is not the UCCJEA and is governed by entirely different policy considerations, and no statute or opinion has declared that the service requirements of RCW

[2] Division One has declined to follow the reasoning of *Ruff*, noting that "[t]he UCCJEA's imprecise use of the term 'jurisdiction' neither erodes nor curtails the constitutionally-endowed subject matter jurisdiction of Washington's superior courts." *In re Marriage of McDermott*, 175 Wn. App. 467, 482 n.8, 307 P.3d 717 (2013).

11.24.010 implicate subject matter jurisdiction. Indeed, the *Kordon* decision explicitly held that service of a will contest petition is an issue of personal jurisdiction, *see* Section C.2, *supra*, so any reliance upon *In re Ruff* is misplaced.

Finally, while the principle discussed in *Tacoma Rescue Mission* and *Nickum* is helpful in confirming that reference to statutory jurisdictional requirements is better understood as a possible limitation on the litigant's right to invoke jurisdiction, the specific facts of those cases are not applicable to Jepsen's will contest petition. *Tacoma Rescue Mission* held that the plaintiff in an unlawful detainer action could not avail himself of the court's jurisdiction because the plaintiff's initial notice to the tenant did not comply with the terms of the lease. 155 Wn. App. at 254-57. *Nickum* addressed the time for filing a petition under LUPA. 153 Wn. App. at 380-82. Neither case addressed which statutory requirements must be met to invoke the court's jurisdiction to hear a will contest.

D. The Facts Presented Here Clearly Support the Estate's Waiver of Any Issue with Service of the Petition under RCW 11.24.010.

Service of process is governed by doctrines of personal jurisdiction. After looking at this issue twice (first on the initial motion for summary judgment and second on the motion for reconsideration) the trial court properly determined that the estate waived that issue. Jepsen's will

contest petition was filed with the court on March 22, 2012. CP 26-28. Jepsen's counsel emailed the petition to counsel for the estate, who verbally stated that he would accept service.[3] CP 119. Jepsen then noted a hearing to get a scheduling order for the will contest petition. CP 158-59. Opposing counsel attended the hearing and discussed the issues at length. *Id.* At the hearing, counsel for the estate delivered the estate's Answer to the will contest petition. CP 108.

At no point during the hearing were issues of personal jurisdiction or service raised. The estate's answer similarly failed to raise any defense or objections to personal service or jurisdiction. The answer contained affirmative prayers for relief which invoke the authority of the trial court. Last, it also included an introductory statement that counsel for the estate acknowledged that he was acting for and on behalf of Julie Miles in her capacity as personal representative. CP 31-32.

The estate's appearance at the hearing on May 2, 2012 and its answer to the petition had nothing to do with Jepsen's previously-filed Request for Special Notice. Based on these facts, the estate's answer, which failed to raise any defense to service, constituted a clear waiver of the service requirements under the will contest statute. Jepsen's timely filing of the petition, together with the estate's waiver of service, are

[3] Counsel for the estate does not recall agreeing to accept service. CP 175.

sufficient to satisfy all requirements of RCW 11.24.010 for initiating a will contest.

E. Evolving Argument from the Estate.

The arguments from the appellant have evolved over time in this dispute. In the initial summary judgment filing, in fact, the estate presented arguments that agree with Jepsen's argument regarding the issue of personal jurisdiction (and whether it may be waived in a TEDRA action). In the estate's initial motion for summary judgment, it argued that failure to serve was an issue of personal jurisdiction:

> The proper service of the Petition for Will Contest and the Summons on personal representative as required by RCW 11.24.010, is essential to invoke jurisdiction over the personal representative. The **failure to serve the Petition for Will Contest and the Summons on the personal representative deprives the court of personal jurisdiction over the personal representative**.

CP 61 (emphasis added). Later, after receiving briefing from Jepsen discussing personal jurisdiction and waiver regarding the service issue, the estate then changed its argument from a "personal jurisdiction" (waivable, according to its words) to "subject matter jurisdiction" (which is of course, conveniently not waivable). CP 160-62. Now, on appeal, the estate argues that the issue relates to mandatory statutory requirements. As with the estate's prior abandoned arguments, the current argument must also be rejected, for the reasons stated above.

F. Jepsen Is Entitled to an Award of Fees.

Jepsen is entitled to fees incurred on appeal pursuant to RCW 11.96A.150, which provides that the trial court and court of appeals may award costs and fees in its discretion. The circumstances surrounding the estate's waiver of service by failing to assert an objection in its answer are clear. The court should exercise its discretion to allow attorney's fees to Jepsen for responding to this unnecessary appeal.

V. CONCLUSION

The estate would have the court read the will contest statute narrowly and ignore the fact that it tendered an answer to the initial will contest petition. Contrary to the assertions in its brief, answering a complaint or petition is not inconsequential. The estate had an opportunity to claim insufficiency of process and lack of notice and failed to do so.

Jepsen timely filed his petition in the proper court for will contests. This satisfied the subject matter jurisdiction requirements of the statute. Jepsen transmitted the petition to the estate in order to provide notice of the commencement of the action. In response, the estate filed and hand-delivered an answer to the petition which failed to reserve any objection for personal jurisdiction issues. The moment the answer was filed, the estate waived its claim to lack of personal jurisdiction. The purpose of the notice requirement in the statute is to apprise the personal representative

of pending litigation since the individual who would otherwise make decisions for the property at issue (the decedent) has passed away. The statute is not designed to allow for narrow readings to rob litigants of their day in court. Consequently, the court should rule in favor of Jepsen and affirm the trial court.

Respectfully submitted this 16 day of October, 2013.

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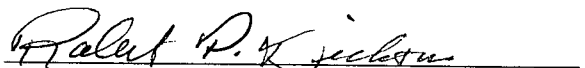

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CERTIFICATE OF SERVICE

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

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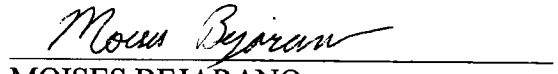

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