

Court of Appeals No. 67378-5-1
San Juan Cause No. 07-4-05016-5

COURT OF APPEALS
DIVISION I.
OF THE STATE OF WASHINGTON

DEAN FREY
Appellant

v.

ESTATE OF MILDRED FREY
Respondent

BRIEF OF APPELLANT

DATED THIS 7 DAY OF September, 2011

LC Delay
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COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

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(1) Advance notice of the hearing on a petition for nonintervention powers referred to in RCW 11.68.011 is not required in those circumstances in which the court is required to grant nonintervention powers under RCW 11.68.011(2) (a) and (b).

(2) In all other cases, if the petitioner wishes to obtain nonintervention powers, the personal representative shall give notice of the petitioner's intention to apply to the court for nonintervention powers to all heirs, all beneficiaries of a gift under the decedent's will, and all persons who have requested, and who are entitled to, notice under RCW 11.28.240, except that:

(a) A person is not entitled to notice if the person has, in writing, either waived notice of the hearing or consented to the grant of nonintervention powers; and

(b) An heir who is not also a beneficiary of a gift under a will is not entitled to notice if the will has been probated and the time for contesting the validity of the will has expired.

(3) The notice required by this section must be either personally served or sent by regular mail at least ten days before the date of the hearing, and proof of mailing of the notice must be by affidavit filed in the cause. The notice must contain the decedent's name, the probate cause number, the name and address of the personal representative, and must state in substance as follows:

(a) The personal representative has petitioned the superior court of the state of Washington for county, for the entry of an order granting nonintervention powers and a hearing on that petition will be held on, the day of, at o'clock, .. M.;

(b) The petition for an order granting nonintervention powers has been filed with the court;

(c) Following the entry by the court of an order granting nonintervention powers, the personal representative is entitled to administer and close the decedent's estate without further court intervention or supervision; and

(d) A person entitled to notice has the right to appear at the time of the hearing on the petition for an order granting nonintervention powers and to object to the granting of nonintervention powers to the personal representative.

(4) If notice is not required, or all persons entitled to notice have either waived notice of the hearing or consented to the entry of an order granting nonintervention powers as provided in this section, the court may hear the petition for an order granting nonintervention powers at any time.

RCW 11.24.010

8, 9, 11

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.

(1) Any personal representative acting under nonintervention powers may borrow money on the general credit of the estate and may mortgage, encumber, lease, sell, exchange, convey, and otherwise have the same powers, and be subject to the same limitations of liability, that a trustee has under RCW 11.98.070 and chapters 11.100 and 11.102 RCW with regard to the assets of the estate, both real and personal, all without an order of court and without notice, approval, or confirmation, and in all other respects administer and settle the estate of the decedent without intervention of court. Except as otherwise specifically provided in this title or by order of court, a personal representative acting under nonintervention powers may exercise the powers granted to a personal representative under chapter 11.76 RCW but is not obligated to comply with the duties imposed on personal representatives by that chapter. A party to such a transaction and the party's successors in interest are entitled to have it conclusively presumed that the transaction is necessary for the administration of the decedent's estate.

(2) Except as otherwise provided in chapter 11.108 RCW or elsewhere in order to preserve a marital deduction from estate taxes, a testator may by a will relieve the personal representative from any or all of the duties, restrictions, and liabilities imposed: Under common law; by chapters 11.54, 11.56, 11.100, 11.102, and 11.104A RCW; or by RCW 11.28.270 and 11.28.280, 11.68.095, and 11.98.070. In addition, a testator may likewise alter or deny any or all of the privileges and powers conferred by this title, and may add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by this title. If any common law or any statute referenced earlier in this subsection is in conflict with a will, the will controls whether or not specific reference is made in the will to this section. However, notwithstanding the rest of this subsection, a personal representative may not be relieved of the duty to act in good faith and with honest judgment.

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I. ASSIGNMENTS OF ERROR

First Assignment Of Error

The trial court erred in finding that the Personal Representative need not give formal notice under RCW 11.68.041(2) to heir Dean Frey of her second petition, a Petition For Letters Of Administration & Nonintervention Powers, as Dean Frey had actual knowledge of it.

Second Assignment Of Error

The trial court erred in finding that heir Dean Frey's consent to granting nonintervention powers to the Personal Representative under her first petition, a Petition For Probate Of Will, Letters Testamentary & Nonintervention Powers, was the equivalent of his consent to the Personal Representative being granted those same powers under her second petition, a Petition For Letters Of Administration & Nonintervention Powers.

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II. STATEMENT OF THE CASE

Decedent Mildred Frey died on January 12, 2007. CP.1. On March 5, 2007, one of decedent's children, Lorna Frey ("Lorna"), filed (1) a Petition For Probate of Will, Letters Testamentary & Nonintervention Powers (CP.4), (2) a Declaration of Witnesses to Decedent's Will (CP.5), and (3) the decedent's will (CP.3). Also filed on that date was a Consent To Grant Of Nonintervention Powers signed by another child of the decedent, Appellant Dean Frey ("Dean"). CP.7. In Dean's consent, he waived notice of a hearing on the petition and urged the court to approve the petition to probate the decedent's will. Id.

On March 22, 2007, Lorna communicated to Dean by email (CP.23, p.3, ll.13-15), sending him a draft of a second petition she intended to file, a Petition For Letters Of Administration & Nonintervention Powers, asserting that the decedent had no will. She filed her second petition on March 23, 2007 (CP.11), and on that date the court signed a form order, an Order Granting Letters Of Administration & Nonintervention Powers, stating that the decedent had died intestate, and appointed Lorna Personal Representative ("PR"). CP.12.

No formal notice of either the second petition or order was sent to Dean and the court found it was undisputed that "no formal, legal document was sent to the petitioner by the Personal Representative" (transcript ("TR") of the trial court's ruling from the bench of June 10, 2011; TR.13, 11.19-21). However, Lorna, Dean, and their other siblings discussed the new development and disagreed over how their mother's debts and assets were to be distributed. CP.23, p.3, 1.30 - p.4, 1.29; CP.28, p.2, 1.8 - p.3, 1.19.

On January 24, 2011, Lorna filed her Declaration Of Completion Of Probate (CP.15) and mailed to Dean a Notice Of Filing Of Completion Of Probate & Declaration Of Mailing. See, CP.27, p.5, 11.1-4.

On February 23, 2011, Dean filed a Petition And Objection To Completion Of Probate, asserting that Lorna had not complied with the terms of the decedent's will that had been filed at the outset of the case. CP.17. Lorna moved to dismiss Dean's petition and objection on the basis that Dean's petition and objection were untimely as they were not brought within four months of the court's order of March 23, 2007, per RCW 11.24.010. CP.24, p.6, 11.7-12.

Following a hearing on Lorna's motion, the court ruled from the bench on June 10, 2011, that Lorna's email to Dean of March 22, 2007, was adequate notice to Dean of her second petition (TR.19, 11.1-4), and that he also had actual knowledge that Lorna had filed a second petition asserting that there was no will (TR.14, LL.10-14; TR.19, 11.11-15; TR.23, 11.8, 9).

The court also ruled from the bench that as Dean gave his consent to Lorna being granted nonintervention powers under the first petition (TR.17, 11.1, 2), a second consent need not be obtained from him as to the nonintervention powers Lorna requested under the second petition (TR.19, 11.20-23), so no harm attached to the absence of Dean's consent to the second petition (TR.17, 11.2-15; also see, TR.20, 11.15-18).

The court then ruled that Dean's petition was untimely as he failed to file his objection within the four-month rule of RCW 11.24.010 to the order of March 23, 2007, that rejected the will of the decedent. TR.23, 11.4-11; See, CP.44.

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III. ARGUMENT

A. The Personal Representative Was Required By §.041(2) To Give Dean Frey Formal Notice Of Her Second Petition

Under RCW 11.68.041(2), if a petitioner seeks to obtain nonintervention powers in a probate, notice is to be given to all heirs, and such notice, under §.041(3), is to be "personally served or sent by regular mail."

Notice need not be given, however, when the person otherwise entitled to notice consents to the grant of nonintervention powers. §041(2)(a).

When the PR in the case at hand filed her first petition on March 5, 2007, based on the will, she did not provide notice to Dean; however, she did not need to as Dean had consented to her request for nonintervention powers, along with his request that the court approve the petition to probate the decedent's will.

The PR then filed her second petition on March 23, 2007, and requested the grant of nonintervention powers under that petition. The second petition asserted that there was no will. The difference between the two petitions is obvious: under the first petition the PR would have had to distribute the estate according to the

decedent's wishes, whereas under the second petition the PR was free of that obligation.

The PR failed to provide Dean with notice of the second petition and no consent by Dean to the second petition appears in the record. However, the trial court found that Dean had actual notice of the second petition by reason of receiving an email from the PR of a draft of the second petition, and by reason of discussions he had with his other siblings. TR.19, 11.1-4; TR.14, LL.10-14; TR.19, 11.11-15; TR.23, 11.8, 9.

Dean claimed he was not given notice as required by §.041 (see, CP.27, p.4, 11.1-4); however, the court's ruling as to whether Dean had or was given notice was addressed in the context of whether Dean filed his objection to the Declaration of Completion Of Probate within the four-month rule of RCW 11.24.010, which requires that a person wishing to contest the rejection of a will must do so within four months of its rejection. TR.23, 11.4-11.

The second petition was filed on the same day the court issued its order that served to reject the will; thus, the court's ruling on the issue of notice to Dean of the second petition and the timeliness of Dean's objection to the rejection of

the will turn on the same issue: whether Dean was given the required notice of the second petition.

The notice requirement in §.041 is statutory. Apart from the issue of consent addressed in the next section herein, the exceptions to the notice requirement of §.041 do not apply here.

In all cases under §.041, notice is to be given by personal service or by mail. §.041(3). §.041 contains no provision that permits actual notice to be substituted for such notice. Therefore, the only issue remaining is whether the statute requires notice only of a first petition and not to any subsequent petition filed by a PR.

§.041(2) requires that notice be given in all cases where a PR "wishes to obtain nonintervention powers." There is no provision stating that notice required on an initial petition is then excused for a subsequent petition. Presumably, this is for the reason that once a court has granted such powers there would be no reason for a PR to repeat that request. However, if the PR chooses to re-apply for those powers in the context of a different petition, §.041(2) requires that notice of that request be given.

The PR was thus required to give Dean notice under §.041(3) when she filed her second petition, for letters of administration and nonintervention powers, and it was error to find that the notice requirement was met by Dean's actual notice.

B. Dean Frey's Consent To Nonintervention Powers Under The First Petition Was Not A Consent To Those Powers Under The Second Petition

As stated above, formal notice need not be given to a person otherwise entitled to notice when that person consents to the grant of nonintervention powers. §.041(2)(a).

The court ruled that because Dean had "apparently had no problem with his sister being granted nonintervention powers" under her first petition (TR.17, 11.1-4), there was no significant difference when she sought nonintervention powers under her second petition. TR.17, 11.4-7. The court also stated that while the PR could have gotten his consent a second time, that not doing so was harmless. TR.17, 11.7-15.

The logic of the ruling is that Dean's consent to the first petition may be applied to the second petition because there is no difference between the requests for nonintervention powers of in the two petitions. The issue presented, however, is whether the PR's request for

nonintervention powers under her first Petition for letters testamentary to probate a will, is indistinguishable from her request for those powers under her second petition for letters of administration to probate an estate with no will.

In both cases, the PR requests permission to administer and settle the estate of a decedent without intervention of a court. RCW 11.68.090. But the practical effect of the PR's powers under the two petitions illustrates that the difference is really whether the PR has to distribute the estate according to the decedent's wishes under the first petition, or is free of that obligation under the second petition.

Thus, there is a significant difference in the effect of the powers granted under the two very different petitions, and it is not logical that because Dean consented to the PR having the power to settle the decedent's estate when governed by the will, that he would have equally consented to the PR settling the estate on terms that have nothing to do with the will.

Thus, it was an error to rule that Dean waived his entitlement to notice from the PR of her second petition by reason that he had consented to her first petition.

IV. CONCLUSION

Appellant Dean Frey consented to his mother's will being probated by the PR and therefore consented to the PR being granted nonintervention powers for that purpose. When the PR filed her second petition based on the decedent leaving no will, Dean was entitled to formal notice of that petition under RCW 11.68.041, and his consent to the PR being granted those same powers under her second petition may not be assumed.

Because Dean was not provided with formal notice of either the second petition, which petition was filed on the same day the court entered an order rejecting the earlier filed will, Dean's objection to the PR's declaration of completion of probate should not have been found to be untimely.

Therefore, Dean Frey respectfully requests this court to overturn the trial court's decision to find his Petition And Objection To Completion Of Probate untimely.

Dated this 7 day of Sept.



Lawrence Curt Delay, WSBA #20339
Counsel for Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I.

DEAN FREY,) Court of Appeals No. 67378-5-1
Appellant,) San Juan Cause No. 07-4-05016-5
)
MILDRED FREY,) CERTIFICATE OF HAND DELIVERY
Respondent.)

I hereby certify that I caused to be hand delivered a copy of the documents listed below, concerning the above captioned matter, on this day to counsel at the following address:

Mr. Kathryn Loring
365 E. Spring Street
Friday Harbor, WA 98250

DOCUMENTS:

- BRIEF OF APPELLANT

Dated this 7 day of Sept, 2011.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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LPD
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CERTIFICATE OF HAND DELIVERY

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Appellant,) San Juan Cause No. 07-4-05016-5
)
MILDRED FREY,) CERTIFICATE OF MAILING
Respondent.)

I hereby certify that on this day I caused a copy of the documents listed below, concerning the above captioned matter, to be mailed by U.S. mail, postage prepaid, to the following persons at the following addresses:

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Ms. Nan Frey
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Sedona, AZ 86336

DOCUMENTS:

- BRIEF OF APPELLANT

Dated this 7 day of Sept, 2011.

LC Delay
Lawrence Curt Delay, WSBA #20339

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