

No. 44548-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

v.

MACK JEPSEN, an individual,

Respondent,

BRIEF OF APPELLANT

DAVIES PEARSON, P.C.

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I. INTRODUCTION

Julie Miles, the longtime caregiver and personal representative of decedent Virginia Jepsen, seeks reversal of the trial court's order on reconsideration, which reversed its summary judgment dismissal of an untimely will contest. The trial court had initially properly granted summary judgment, reflecting the tenet that the legislature can establish statutory prerequisites to the superior court's exercise of its jurisdiction. The will contest statute, RCW § 11.24.010 (2011), includes timing and service prerequisites that the challenger, Mr. Jepsen, failed to meet. Nothing in the respondent's motion for reconsideration identified a cure of the defect; as a result, the superior court lacks jurisdiction, and the order granting reconsideration should be reversed so as to reinstate by mandate the dismissal of the will contest proceeding.

II. ASSIGNMENT OF ERROR

The trial court erred by granting Mr. Jepsen's motion for reconsideration even though he failed to satisfy the statutory timing and service prerequisites necessary to invoke the court's jurisdiction.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Under RCW § 11.24.010 (2011), which renders the probate of a will binding and final if no person seeking to challenge the will satisfies certain timing and service prerequisites, does a trial court err if it grants a motion to reconsider its prior dismissal when the challenger failed to satisfy the jurisdictional prerequisites?

IV. STATEMENT OF FACTS

A. Initiation of Probate.

Virginia J. Jepsen executed her Last Will and Testament on July 1, 2009 and died on November 16, 2011. CP 1. The Will named Julie Miles as her Personal Representative. CP 8. On December 20, 2011, the Pierce County Superior Court issued an order admitting the will to probate, declaring the estate solvent, and appointing Julie Miles as the Personal Representative of the Estate to act without intervention of the court. CP 15. On December 29, 2011, the Personal Representative, by and through her attorneys, mailed her Notice of Appointment as Personal Representative and Pendency of Probate to the heirs of the Virginia J. Jepsen. CP 20.

B. Probate Activities of the Estate of Virginia M. Jepsen.

During the administration of the decedent's Last Will and Testament, Mac Jepsen filed a Request for Special Notice pursuant to RCW § 11.28.240 on March 6, 2012. CP 24. On March 21, 2012, counsel for the Estate received a demand from Mr. Jepsen's counsel for a copy of the Inventory of the Estate of Virginia Jepsen. CP 174. On March 28, 2012, counsel for the Estate received a second request for an Inventory from Mr. Jepsen's counsel, as well as an accounting of all property held by Julie Miles for the benefit of Virginia Jepsen. *Id.* On June 18, 2012, a finalized

and executed Inventory and Appraisement was sent to Mr. Dickson. CP 176. The Estate interacted with Mr. Jepsen and his counsel solely on these issues pursuant to its probate obligations in the wake of the Request for Special Notice, not in response to Mr. Jepsen's efforts to initiate a will contest. CP 175.

C. Mac Jepsen's Efforts to Initiate Will Contest.

On March 22, 2012, Mac Jepsen, the adult son of the deceased, filed a Petition to Contest and Invalidate Will with the Pierce County Superior Court. CP 26. Neither Mac Jepsen, nor his counsel, effected service of process of a Summons or a copy of the Petition to Contest and Invalidate Will on the Personal Representative of the Estate; instead, Mr. Jepsen's counsel emailed a copy of the documents to the Estate's attorney on March 22, 2012. CP 26; CP 174. Counsel for the Estate has never consented to acceptance of service of original process on behalf of Julie Miles, and has never been authorized to accept service of original process by Julie Miles; nor has counsel for the Estate has made any written acceptance or admission of service of original process on behalf of Julie Miles. CP 175. More than ninety (90) days elapsed since Mac Jepsen filed the Petition to Contest and Invalidate Will and the personal representative brought a Motion to Dismiss the Petition to Contest and

Invalidate Will For Lack of Jurisdiction or Alternatively for Summary Judgment. CP 54.

D. Procedural History.

The personal representative brought a Motion to Dismiss the Petition to Contest and Invalidate Will For Lack of Jurisdiction or Alternatively for Summary Judgment on October 31, 2012. CP 54. Judge Edmund Murphy of the Pierce County Superior Court granted the personal representative's Motion to Dismiss on November 30, 2012 (CP 231), which Motion was principally based on the plain language of the Will Contest statute, RCW §11.24.010 (2011). CP 54. Mr. Jepsen filed a Motion for Reconsideration on December 10, 2012, which was heard on January 18, 2013. CP 234. Judge Murphy agreed to vacate the November 30, 2012 Order Dismissing the Petition to Contest and Invalidate Will, and allow Mr. Jepsen's will contest to proceed. CP 266.

The Estate of Virginia J. Jepsen, by and through Julie Miles as personal representative of the Estate of Virginia J. Jepsen, filed a timely notice for discretionary review (CP 268), which this court granted on May 20, 2013.

V. STANDARD OF REVIEW

This court reviews de novo issues of statutory interpretation and jurisdiction. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2010); *In re Estate of Kordon*, 157 Wn.2d 206, 209, 137 P.3d 16 (2006); *Crosby v. Spokane County*, 137 Wash.2d 296, 301, 971 P.2d 32 (1999).

In construing a statute, the court's fundamental objective is to ascertain and carry out the intent of the legislature. *State v. Morales*, 173 Wn.2d 560, 567, 269 P.3d 263 (2012). The court construes the meaning of a statute by reading it in its entirety, discerned from the context and the ordinary meaning of the language used, and considering the entire statutory scheme framing the statute at issue. *Id.*; *see also*, *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007). "A will contest is a purely statutory proceeding, and the court must be governed by the provisions of the applicable statute. The jurisdiction of the trial court is derived exclusively from the statute, and may be exercised only in the mode and under the limitations therein prescribed." *In re Estate of Palucci*, 61 Wn. App. 412, 415, 810 P.2d 970 (1991) (quoting *In re Estate of Van Dyke*, 54 Wn. App 225, 228, 772 P.2d 1049 (1989)).

VI. ARGUMENT

The superior court has authority over probate matters in general, but not over this particular will contest, because: (A) RCW § 11.24.010 (2011) establishes unambiguous timing and service prerequisites; (B) the legislature may create procedural thresholds to a court's exercise of its jurisdiction; and (C) neither waiver nor substantial compliance doctrine are available to rescue Mr. Jepsen's will contest from dismissal.

A. RCW § 11.24.010 Establishes Unambiguous Timing and Service Prerequisites.

RCW § 11.24.010 (2011), the statute that is at the core of this proceeding, provides:

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 (emphasis added).

Accordingly, to properly invoke the superior court's jurisdiction over a will contest, the challenger must: (1) file a petition in the proper court within four months of the will's probate (timing requirement); and (2) personally serve the personal representative within ninety (90) days of filing the petition (service requirement). RCW § 11.24.010. Failure to meet these timing and service requirements means the action never commenced, and the will's probate is binding and final. No further action may be maintained.¹

Under the statute, then, Ms. Jepsen's will is binding, final, and not subject to reconsideration. Mr. Jepsen may not invoke the superior court's jurisdiction, since Mr. Jepsen failed to satisfy both conditions precedent to the Court's exercise of jurisdiction, thereby terminating the tolling of the statute of limitations and divesting the Court of any and all authority to proceed on the will contest.

¹ Additionally, CR 4 requires proof of service. No party disputes that Ms. Miles was never personally served, and that Mr. Jepsen cannot provide proof of service.

B. The Legislature May Create Procedural Thresholds to a Court's Exercise of its Jurisdiction.

The Court is called upon to interpret the controlling statute for will contests, RCW ch. 11.24, in determining whether a party wishing to contest a will may invoke the court's jurisdiction. *See, e.g., Kordon*, 157 Wn.2d at 209. This statutory scheme is a creature of the legislature having authority to create procedural prerequisites to a court's ability to hear certain cases, which then act to control the court's exercise of its jurisdiction. *In re Parentage of Ruff*, 168 Wn. App. 109, 117–18, 275 P.3d 1175 (2012); *James v. Kitsap County*, 154 Wn.2d 574, 587–88, 115 P.3d 286 (2005).

Whether the question of correct terminology to describe this situation is “subject matter jurisdiction” as to the Court, or is the lack of a party's power to seek relief from the Court, the ultimate answer is that noncompliance with statutory timing and service prerequisites generally prevents a party from “maintaining an action” or “availing itself of the court's jurisdiction.” *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 254 n.9, 228 P.3d 1289 (2010); *Nickum v. City of Bainbridge Island*, 153 Wn. App. 366, 379 n.9, 223 P.3d 1172 (2009). Some courts suggest they “lack jurisdiction” when parties fail to meet statutory prerequisites. *Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 900, 83 P.3d 433

(2004); *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wn. App. 593, 597, 972 P.2d 470 (1999). Regardless of terminology, “all statutory procedural requirements must be met” before the court’s jurisdiction is properly invoked. *Overhulse*, 94 Wn. App. at 597. Otherwise, the court does not effectuate the entirety of the governing statute, and does not carry out the full legislative intent, particularly the last clause of RCW 11.24.010: **“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.”** The provisions of the statute must be harmonized, giving effect to and properly construing each prong. *State v. Young*, 125 Wn.2d 688, 696, 888 P.2d 142 (1995).

While no authority directly addresses whether failure to timely effect service of a will contest petition deprives the superior court of subject matter jurisdiction, the question at issue here turns on a reasonably settled standard. Courts have routinely found substantive statutory provisions for which noncompliance bars further judicial action to be jurisdictional, particularly timing and service requirements; but have found nonbinding “form and content” provisions non-jurisdictional. *Compare, In re Estate of Toth*, 138 Wn.2d 650, 656, 981 P.2d 439 (1999) (trial courts have no jurisdiction to hear and determine petitions filed after the expiration of the statutory time limit), *with Keep Watson Cutoff Rural v. Kittitas Cnty.*, 145

Wash. App. 31, 37–39, 184 P. 3d 1278 (2008), *review denied*, 165 Wn.2d 1013 (2009) (case does not involve issues of timely or proper service, so failure to attach copies of the land use decisions to the petition does not deprive the superior court of jurisdiction).

The Land Use Petition Act (LUPA) provides an analogous statutory bar to untimely court actions. RCW §§ 36.70C *et. seq.* LUPA provides that, “a land use petition is barred and the court may not grant review, unless the petition is timely filed...and timely served.” *Nickum*, 153 Wash. App. at 380–81; RCW § 36.70C.040(2). Even though the statute does not use the word “jurisdictional,” the phrases “is barred” and “may not grant review” demonstrate the legislature’s intent to prevent a court from considering actions that have not satisfied the statutory thresholds, including untimely service. *Nickum*, 153 Wash. App. at 381; *Keep Watson Cutoff Rural*, 145 Wn. App. at 37-38.

Our courts strictly enforce compliance with these two prerequisites. As to timing, the court has ruled that, because the 21-day filing limit under LUPA is unambiguous, it lacks the authority to construe the requirement as flexible. *Lakeside*, 119 Wn. App. at 901. Also, doing otherwise would undermine the legislature’s purposes. *Chelan County v. Nykreim*, 146 Wash.2d, 904, 932–33, 52 P.3d 1 (2002). As to service, parties may not invoke jurisdiction unless they strictly comply with service provisions.

Overhulse, 94 Wn. App. at 597–98. Service on anyone other than the statutorily required person divests the superior court of jurisdiction. *Witt v. Port of Olympia*, 126 Wn. App. 752, 756–57, 109 P.3d 489 (2005). Like timing provisions, the court denies exception to a statutory service requirement because doing so would render the rule a “nullity.” *San Juan Fidalgo Holding Co. v. Skagit County*, 87 Wn. App. 703, 713, 943 P.2d 341 (1997).

Comparatively, “minor procedural faults” may not reach the level of jurisdictional bar. *Cont’l Sports Corp. v. Dep’t of Labor & Indus.*, 128 Wash.2d, 594, 602, 910 P.2d 1284 (1996). *See, e.g., Knight*, 173 Wash.2d at 337–39 (failure to assign error to city council decision was a non-jurisdictional “form and content” fault); *Conom v. Snohomish County*, 155 Wash.2d 154, 118 P.3d 344 (2005) (failure to note an initial LUPA hearing within the seven-day limit did not deprive superior court of jurisdiction); *Keep Watson Cutoff Rural*, 145 Wash. App. 31 (failure to attach copies of the local land use decision was not required by the part of the statute that bars further review). It is pertinent to note that even these cases granting narrow exceptions under some version of substantial compliance recognize that timing and service requirements must be met. *Cont’l Sports*, 128 Wn.2d at 604; *Knight*, 173 Wn.2d at 337–38; *Conom*, 155 Wn.2d at 158; *Watson Cutoff*, 145 Wash. App. at 39.

The will contest statute uses slightly different language than LUPA, stating that failure to comply renders the probate “final” and “binding.” However, even outside the LUPA context, our courts treat statutory finality as similarly jurisdictional. In *Corona v. Boeing Co.*, for example, the statute provided, “[i]n the event no petition for review is filed as provided herein...the proposed decision and order of the industrial appeals judge shall be adopted by the board and become the decision and order of the board, and no appeal may be taken therefrom to the courts.” 111 Wn. App. 1, 5, 46 P.3d 253 (2002). The *Corona* court concluded that the review was not timely filed, so no additional review was available. *Id.* at 8–9.

In summary, then, under RCW § 11.24.010 (2011), a will challenger must meet jurisdictional timing and service prerequisites to properly invoke the court’s jurisdiction. RCW § 11.24.010 (2011). The contestant must file a petition within four months of the will’s probate or rejection thereof. *Id.* The challenger then has ninety (90) days to personally serve the estate’s personal representative. *Id.* If no person files **and** serves a petition within these limitations, the probate or rejection of the will “**shall be binding and final.**” *Id.*

The court admitted Ms. Jepsen’s will to probate and appointed Ms. Miles as personal representative on December 20, 2011. CP 15. While

Mr. Jepsen filed his petition on March 22, 2012 (CP 26), it is uncontroverted that he never personally served Ms. Miles, nor anyone authorized to accept service for her. Accordingly, the record is devoid of proof of service as required under CR 4. Therefore, Mr. Jepsen failed to meet the statutory prerequisites to invoke jurisdiction, so Ms. Jepsen's will is binding and final. The superior court may not reconsider Mr. Jepsen's will contest.

C. Neither Waiver nor Substantial Compliance Doctrine are Available to Rescue Mr. Jepsen's Will Contest From Dismissal.

Mr. Jepsen's counsel may suggest that the statutory requirements of RCW § 11.24.010 divide into (1) filing a petition to invoke subject matter jurisdiction, and (2) personal service to invoke personal jurisdiction, which counsel may allege Ms. Miles waived by filing a Response in the superior court action that did not assert the want of personal jurisdiction as an affirmative defense. Such an argument ignores the plain language of the statute, and all of the cases cited above, which require compliance with statutory timing and service provisions before a party may invoke the court's jurisdiction when a statute provides finality. For example, the nonclaim statute, RCW § 11.40.010, recites absolute parameters for commencement of claims against estates. The Washington Supreme Court has held that "[t]he nonclaim statute is mandatory and not subject to

enlargement by interpretation; and **it cannot be waived.**” (Emphasis added.) *Ruth v. Dight*, 75 Wn.2d 660, 669-70, 453 P.2d 631 (1969). This Court has extended the ruling in *Ruth* to will contest proceedings. *In re Estate of Peterson*, 102 Wn.App. 456 , 464, 9 P.3d 845 (2000).

The prospect of the application of waiver, equitable extensions, or arbitrary determinations of substantial compliance to the parameters of the will contest statute fail to address the legislative intent of providing a uniform procedure and date certain on which survivors can rely for moving on after the death of a loved one. Our legislature has consistently, and ever more restrictively, applied strict time frames within which to commence will contest proceedings. In its earliest form, the statute permitted will contests commenced within one year. *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 31, 135 P. 494 (1913) (citing Rem. & Bal[1]. Code, §1307 (Pierce’s Code 409 §115). Subsequently, the Legislature reduced the one year period to six (6) months. Laws of 1917, ch. 156, §15. Finally, in 1967, the Legislature restricted commencement of proceedings to its current limit of four (4) months from the date of probate. Laws of 1967, ch. 168, §6.

The will contest statute requires both filing and service, acting in concert, to commence a proceeding. Under the clear, unambiguous language of RCW 11.24.010, the action cannot exist in the presence solely

of filing on the one hand, and the absence of service on the other. “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. Washington courts have repudiated waiver, extensions, or substantial compliance with this and similar statutory schemes. *See, e.g., Peterson*, 102 Wn. App. at 467.

Moreover, any response relying on *Kordon* to suggest that service of a will contest petition relates only to personal jurisdiction, separate, distinct, and independent from filing, should concede two salient points. 157 Wn.2d 206. First, *Kordon* addressed an earlier version of the statute in which the service provision was at that time separate from the finality provision. *Kordon*, 157 Wn.2d at 208; RCW § 11.24.020 (1965); RCW § 11.24.010 (1994) (amended 2007). The legislature has now seemingly corrected that potential interpretive quagmire with the 2011 incarnation of the statute by now overtly placing the filing and service particulars, both as to manner and timing, in the same statute, and further by plainly associating the two prerequisites with the resultant finality provision.

Second, even putting aside that important distinction, *Kordon* alone does not resolve the question regarding the jurisdictional nature of the RCW § 11.24.010 (2011) timing and service provisions. In *Kordon*, the will challenger failed to timely serve a citation on the personal

representative, which the court held to, “deprive[] the court of personal jurisdiction over the party denied process.” *Kordon*, 157 Wn.2d at 210. The court referred to the timing requirement as a statute of limitations, but it also suggested that the provision was jurisdictional. *Id.* at 213–14. The court stated in dicta that “substantial compliance with the RCW 11.24.020 citation requirement...may be sufficient,” but went on to hold that it may not “exercise jurisdiction” over a case where the challenger completely failed to meet the requirements, namely the service of the citation. *Id.* at 213–14.

On the instant facts, Mr. Jepsen failed to serve the will contest petition upon the personal representative, which would seem to produce the same result as in *Kordon*: to bar the proceeding. Furthermore, to allow the simple email of the will contest petition to the Estate’s attorney as substantial compliance of the mandated personal service upon the personal representative would be a strained application of any legal norm for original service of process.

In keeping with the standards discussed above, *Kordon* seems to foreclose jurisdiction when timing prerequisites are not met, but perhaps left the door open for substantial compliance with service requirements when deficiencies relate only to form and content. The case cited within *Kordon* for this proposition, *Palucci*, excused mail service without proof

of service where the heirs did not deny they received the service. *Palucci*, 61 Wn. App. at 416–17. The *Palucci* court specifically distinguished that context from one in which the plaintiff never received notice personally, like Ms. Miles in the case at bar. *Id.* There remains no cure for Mr. Jepsen’s complete failure to properly and timely serve Ms. Miles.

VII. CONCLUSION

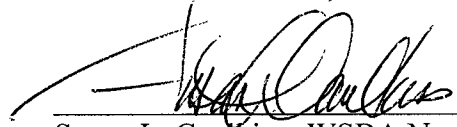
As analyzed above, the will contest statute mandates timely filing and service prerequisites, which a party seeking to challenge the probate of a will must meet before properly invoking the jurisdiction of the court. Mr. Jepsen’s uncontroverted failure to personally serve Ms. Miles within the statutory time limit renders the probate of Ms. Jepsen’s will binding and final. The superior court may not exercise jurisdiction over any further actions seeking to contravene the probated will.

Accordingly, Ms. Miles respectfully requests this court reverse the trial court’s order granting Mr. Jepsen’s motion to reconsider, and reinstate the order granting dismissal.

Further, Ms. Miles seeks, on behalf of the Estate of Virginia Jepsen, an award of reasonable attorney fees and costs incurred in this proceeding and below pursuant to RCW 11.24.050 , 11.96A.150, and RAP 18.1.

RESPECTFULLY SUBMITTED this 17th day of July, 2013.

DAVIES PEARSON, P.C.

A handwritten signature in black ink, appearing to read "Susan L. Caulkins", written over a horizontal line.

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DECLARATION OF SERVICE STATE OF WASHINGTON

I certify under penalty of perjury under the laws of the State of ~~Washington~~ ^{BY DEPUTY} that I caused to be delivered, a copy of the foregoing **BRIEF OF APPELLANT**, via legal messenger service and via e-mail on the 17 day of July 2013 to the following:

Court

Court of Appeals, Division II
Office of the Clerk
950 Broadway Street, Suite 300
Tacoma, WA 98402

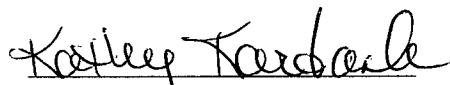
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DATED this 17 day of July 2013.


Kathy Kardash