Supreme Court No. 97433-I
Court of Appeal No. 78121-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Estate of:

SASSAN SANAI, MD

Deceased.

REPLY TO ANSWER

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I. INTRODUCTION

A petitioner is permitted to file a reply in support of a petition for review under RAP 13.4(d) "only if the answering party seeks review of issues not raised in the petition for review." Astrid Sanai, the Respondent, moved for attorney fees in the Court of Appeals proceedings and was DENIED, after being DENIED in the trial court. See Petition Appendix at Page A-9. She now requests that the denial of attorney fees be reviewed, acknowledging that the Court of Appeal denied fees.

Because the statute states that that "in exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved", in opposing the request for review of the decision by the Court of Appeal and an award of fees in this proceeding, Petitioner may raise any and all "factors" that a court might consider "relevant and appropriate". RCW 11.96A.150.

II. REVIEW OF THE DENIAL OF FEES IS NOT WARRANTED

A. THE ISSUES PRESENTED BY PETITIONER

Petitioner presented three issues, only two of which were argued in the briefing to the trial court and the Court of Appeals. The first issue is:

> Under Washington State's will contest statutes, RCW 11.24.010, RCW 11.28.237, and RCW 11.36.010(6) (the "Will Contest Statutes"), must service of an appointed agent be hand-to-hand delivery as held by the Court of Appeal, or is personal service subject to evaluation under the substantial compliance rule announced by this Court in *Martin v. Triol*, 121 Wn.2d 135, 143, 847 P. 2d 471 (1993), *Wichert v. Cardwell,* 117 Wn.2d 148, 812 P.2d 858 (1991) and Court of Appeals decisions such as *Thayer v. Edmonds,* 8 Wn. App. 36, 39, 503 P.2d 1110 (1972)?

Petition at 1.

The Court of Appeal held that the ONLY form of valid service is hand-to-hand service, and the rule of substantial compliance does not apply. This presents a clear conflict with the cases cited above.

The second issue is:

> Was the Court of Appeal correct in interpreting the Will Contest Statues to lack any requirement for a personal representative to (a) provide notice of the identity of any agent for service of process, (b) provide notice of the address for service of the agent for service of process, (c) provide notice of the address for agent of service of process of the personal representative, or (d) if a non-resident, to maintain any agent for service of process?

Id.

The Court of Appeal clearly held that there is no requirement UNDER THE STATUTE to (a) provide notice of the identity of any agent for service of process, (b) provide notice of the address for service of the agent for service of process, or (c) provide notice of the address for agent of service of process of the personal representative. The Court of Appeal did not address whether a Personal Representative, if a non-resident, could cease to maintain any agent for service of process after being appointed, which is what Astrid did.

The third issue was neither presented to the Court of Appeal in the briefing nor ruled upon by the Court of Appeal. It is as follows:

> As interpreted by the Court of Appeal, do the Will Contest Statutes violate the Fourteenth Amendment right to due process as articulated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983), and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) because a personal representative:
> 1. does not have to maintain or disclose a valid address for personal service of process to the Court or interested parties;
> 2. who is a non-resident does not have to notify interested parties of the identity of any agent for service of process under RCW 11.36.010(6);
> 3. who is a non-resident does not have to disclose a valid address of any agent for service of process under RCW 11.36.010(6) to the Court or to interested parties;
> 4. who is a non-resident does not have to maintain an agent for service of process within the State of Washington or provide notice of the discharge of such agent, resignation of such agent, or a change of address of such agent;
> 5. does not have to provide notice of the relevant deadlines?

Petition at 2.

B. ASTRID'S CONCESSION VALIDATES A SUBSEQUENT CHALLENGE OF THE WILL CONTEST STATUTE ON CONSTITUTIONAL GROUNDS IN FEDERAL COURT

Astrid's new attorneys acknowledge that the third, constitutional, issue was not argued to the Superior Court or the Court of Appeal, and was thus not decided by either, and contend further that it was not sufficiently "manifest" to qualify for review. What Astrid's new lawyers, apparently inexperienced in federal constitutional litigation, do not realize is that this concession validates a successive challenge in a United States District Court of Washington State's will challenge statute if this Court elects not to grant review on Issue 3.

Under long-established United States Supreme Court precedent, a party who believes that a state statute may be unconstitutional must first ensure that the statute is not interpreted by the State courts in a fashion that would make it constitutional. If the party leaps into federal court first, that party will face *Pullman* abstention. *Railroad Commission v. Pullman Company*, 312 U.S. 496 (1941). For many years it was believed that under *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964), a party could file a lawsuit in the United States District Court and then, if required to seek an interpretation under state law of the effect of the statute, make a reservation of jurisdiction in federal court, called an *England* reservation. However, in *San Remo Hotel, LP v. City and County of San Francisco,* 545 US 323, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005), the United States Supreme Court held that the actual question is one of collateral estoppel under state law. If the plaintiff's constitutional claim was actually litigated and fully and finally determined so that collateral estoppel applies, even unintentionally, the constitutional claims cannot be brought again in federal court; if the claims were not actually litigated or some other exception to state collateral estoppel law applies, then the statute can be subsequently attacked. The other barrier to federal court

jurisdiction, the *Rooker-Feldman* doctrine, does not apply in this situation either. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482-483 (1983) ("To the extent that Hickey and Feldman mounted a general challenge to the constitutionality of Rule 461(b)(3), however, the District Court did have subject-matter jurisdiction over their complaints.") As the Ninth Circuit puts it, so long as the party does not argue that the state court judgment was wrongly decided, a state-court loser may file a constitutional attack on a statute after losing the argument in state court that application of the statute in a particular case was erroneous under state law. *Noel v. Hall,* 341 F. 3d 1148, 1159 (9th Cir. 2003).

It is fully acknowledged that Petitioner did not raise constitutional claims in the Superior Court; that he did not raise them in his opening or reply brief in the Court of Appeals; and that the Court of Appeals did not address any constitutional claim or argument in its opinion. Raising the issue "belatedly" in this Court does not operate to foreclose subsequent adjudication in federal court if this Court denies review, since it will have decided nothing; likewise, the Court of Appeal decided nothing on constitutional grounds.

One "factor" for determining whether attorney fees should be awared, then, is whether it was reasonable and appropriate for Petitioner to raise the constitutional issue at this late stage, and whether the state law issues presented a real question of interpretation.

C. AS THIS IS A JURISDICTIONAL APPEAL RAP 2.5(A)(1) APPLIES.

Astrid argues that review of issues raised at this level is not available under RAP 2.5(a)(3), *citing State v. WWJ Corp.,* 138 Wn.2d 595, 980 P.2d 1257 (1999). This is a case involving validity of service, and thus personal jurisdiction. The trial court ruled it lacked jurisdiction because service was not valid. Under RAP 2.5(a)(1), a trial

court ruling regarding "lack of trial court jurisdiction" can be raised for the first time on appeal.

D. REVIEW CAN BE GRANTED UNDER RAP 2.5(A)(3) AS WELL

Putting aside that RAP 2.5(a)(1) applies, Astrid argues this the issue is not "manifest" under RAP 2.5(a)(3). This Court explained in *WWJ* that:

> McFarland held an error is manifest if it results in actual prejudice to the defendant. An equally correct interpretation of manifest error was given in *State v. Lynn,* 67 Wash.App. 339, 345, 835 P.2d 251 (1992), where the court stated, "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." Under *Lynn*, an alleged error is manifest only if it results in a concrete detriment to the claimant's constitutional rights, and the claimed error rests upon a plausible argument that is supported by the record. To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding.

State v. WWJ Corp., supra, 980 P.2d at 1261.

Thus a "manifest" error is an error that is prejudicial and plausible. The question here, which is one of first impression, is whether the unconstitutionality of the statute is the kind of error covered RAP 2.5(a)(3), since the constitutionality of the statute only arises IF this Court believes that the statute was interpreted correctly.

Astrid's attorneys argue that "if the record of an issue is insufficient to determine the merits of the issue, any error is not "manifest" and review need not occur…Cyrus made *no record* below on his belated constitutional claim." This argument is a non-sequitur. There is no record made of the constitutional claim because it was not raised in the trial court or the Court of Appeal briefing; that's why the issue of RAP 2.5(a) is being discussed. However, the factual record for evaluating the constitutional claim is in the record, and indeed is undisputed:

> An authorization for Sarah McCarthy, in her capacity as attorney for the estate, to act as agent for service of process was filed with the Court. CP 123-5. However, the document filed in the Court was never served on anyone. CP 126; CP 52-56.

> The Personal Representative, Astrid Sanai, served a notice to Petitioner that was file stamped via her attorneys, the Anderson Hunter Law Firm. A picture of the notice is attached as Exhibit 1 to the Declaration of Cyrus Sanai filed on January 3, 2018. CP 56. This notice identified the "Anderson Hunter Law Firm" as the "Attorneys for Personal Representative." Based on this notice, which provided the Anderson Hunter law firm as the only address for service of documents, the Personal Representative was served a copy of the summons and petition by two means and two capacities. First, Astrid and Astrid's agent were served notice by mail in her capacity as an heir as required under RCW 11.24.020 in her capacity as " all persons interested in the matter, as defined in RCW 11.96A.030(5)." RCW 11.24.020 states that "notice shall be given as provided in RCW 11.96A.100." Such notice was given and is undisputed. She was served by mail in New York and to her agent for service of "all papers" on August 30, 2017. Service of notice by mail was admitted by McCarthy; the envelope in question shows a postmark the day after deposit in the mail. *See* McCarthy Decl. ¶4; CP 83-100.
>
> On November 21, 2017 at 1:10 p.m. a copy of the petition and summons on the agent of the Personal Representative at 2707 Colby Avenue #1001Everett, WA 98201. The person deliver the document asked for Sarah McCarthy, and the person accepting the delivery stated that she would take the document for McCarthy. CP 50-51 ¶¶1-2.
>
> Based on the notice furnished by the Personal Representative, the law firm of Anderson Hunter was served with a timely filed will contest petition by personal service on the receptionist, who accepted the package.
>
> According to the Respondent, the package was then left in McCarthy's in-box, and McCarthy physically received the petition package on the 90th day after filing of the petition. CP 83-100.

Opening Brief at 3-4.

The notice of the proceedings also did not provide an address for personal service upon Astrid. CP 56. The other relevant fact is that after being appointed personal representative, Sarah McCarthy ceased to act as counsel to the estate and thus is no longer the agent for service of process. *See* Exh. A and B to Motion for Reconsideration dated May 15, 2019. There is no agent for service of process for Astrid in Washington State, and no address for service of her in Washington State. The notice by which McCarthy ceased to act as attorney and agent for service of process was not served on anyone. This is also undisputed.

The record for evaluating the constitutional claims is thus fully set out in the Court of Appeal briefing.

The next argument is a straight-up misrepresentation of the record. Astrid's new attorneys state that: "Cyrus knew of…McCarthy's appointment." That contention is false. There was no notice provided of McCarthy's appointment, and no finding that Cyrus had knowledge of it until after service upon McCarthy's law firm personnel. All that Cyrus was aware of was McCarthy's identity as a member of the law firm which was counsel to the Estate, which is what Astrid notified. There is no evidence that Cyrus knew that McCarthy, was, personally, the agent for service of process, as opposed to the law firm of Anderson Hunter (which is what Cyrus inferred). Once he was informed of that fact, McCarthy was personally served within 90 days of notice. Service of the petition and associated documents by the process server by handing McCarthy the documents was effectuated on February 15, 2018. CP 11.

E. THE WILL CONTEST STATUTE AS INTERPRETED BY THE TRIAL COURT

The trial court ruled that there is no obligation under the Will Contest Statutes for a personal representative to provide notice of any of the following:

1. a valid address for personal service of process to the Court or interested parties;
2. the identity of any agent for service of process under RCW 11.36.010(6) if the Personal Representative is not a resident of Washington State;
3. a valid address of any agent for service of process under RCW 11.36.010(6) to the Court or to interested parties if the Personal Representative is not a resident of Washington State;
4. the relevant deadlines for filing will challenges.

The Court of Appeals refused to address whether a personal representative who is a non-resident must maintain an agent for service of process within the State of Washington or provide notice of the discharge of such agent, resignation of such agent, or

a change of address of such agent. The Court of Appeals also explicitly ruled that the ONLY method for service is hand-to-hand as follows:

> Cyrus asserts that the service of process statute, RCW 4.28.080, is not relevant to service of will contest petitions under RCW 11.24.01 0. **But since RCW 11.24.010 does not define "personally serve," the court properly looked to the general definition of personal service in RCW 4.28.080 and to case law interpreting that provision. RCW 4.28.080(16) authorizes service on an individual by personal service, which the statute defines as delivery of a copy of the summons to the person**.
>
> …..*Scanlan* involved hand-to-hand, but secondhand, service. The defendant's father was "competent to serve" his daughter and "delivered a copy of the summons and complaint personally" to her when she visited him in person.26 Here, by contrast, the receptionist simply left the documents in McCarthy's in-box and several days later, McCarthy found them.

Appendix A to Petition at A-6, A-8

If this Court does not grant review of issues 1 and 2, then for purposes of this litigation, and the subsequent lawsuit to be filed in a United States District Court, it will be determined by collateral estoppel that the Will Contest Statutes do not require any such notices; a non-resident personal representative may appoint an agent for service of process and then discharge the agent, or not replace the agent, the day after appointment; and the only method for valid service is hand-to-hand, even if the Personal Representative and any agent have changed addresses, secreted themselves, or left the country. Issue 3, then, is whether the Will Contest Statutes, so interpreted, are constitutional.

F. THE DUE PROCESS ISSUES

Assuming that the Court of Appeal interpreted the statute correctly (without regard to issues of constitutionality), the constitutional basis of the argument rests on *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), as interpreted and expanded upon by *City of New York v. New York, N. H. & H. R. Co.,* 344 U. S. 293, 73 S. Ct. 299, 97 L. Ed. 2d 333 (1953), *Hesthagen v. Harby,* 78

Wn.2d 934, 481 P.2d 438 (1971), and *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988).

> In *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950), the United States Supreme Court had before it the provisions of a New York statute concerning the administration of trust estates, which statute permitted notice of the settlement of accounts to be given to the beneficiaries of the trust by publication. In essence, the court held that such a notice was insufficient under the due process clause of the United States Constitution where the names and addresses of the beneficiaries were known to the trustee or could be ascertained by the exercise of reasonable diligence on the part of the trustee. The court went on to hold that under such circumstances written and mailed notice was required. In so holding, the court stated, at page 314:
>
> > An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is **notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections** (citing cases). The notice must be of such nature as reasonably to convey the required information ... and it must afford a reasonable time for those interested to make their appearance....

Hesthagen, supra, at 940-1(bold emphasis added).

The notice in this case which the Court of Appeal found acceptable was NOT "notice reasonably calculated, under all the circumstances, to….afford them an opportunity to present their objections", because the notice was not "of such nature as reasonably to convey the required information" of the address for service of process on Astrid, the exact name of the agent and address for service of process on the agent or the deadlines for will contest. In order to exercise rights to challenge the will, a person entitled to challenge must have notice of a valid address for service of the personal representative. If the personal representative is a non-resident, then the person must be informed of the exact identity of any agent appointed by a non-resident personal

representative and a valid address for personal service on the agent. This is the minimum information required. It is undisputed that no such information was provided.

In addition, the notices do not meet the due process standard for claim bar notices articulated by the United States Supreme Court:

> Section 77 (c) (8) of the Act states that "The judge shall cause reasonable notice of the period in which claims may be filed, . . .by publication or otherwise." 11 U. S. C. § 205 (c) (8). We hold that publication of the bar order in newspapers cannot be considered "reasonable notice" to New York under the circumstances of this case. …..
>
> Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.

City of New York v. New York, N. H. & H. R. Co., 344 U.S. at 296-7.

The Court of Appeal's view that Petitioner could have inquired about the exact identify of the agent for service of process and was charged with knowledge of the deadlines because he was aware of the probate proceedings does not, under *City of New York v. New York, N. H. & H. R. Co.,* excuse the lack of notice of the exact deadlines or the agent for service of process.

These rules of notice apply to state probate proceedings.

> *Mullane v. Central Hanover Bank & Trust Co., supra,* at 314, established that state action affecting property must generally be accompanied by notification of that action: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In the years since *Mullane* the Court has adhered to these principles, balancing the "interest of the State" and "the individual interest sought to be protected by the Fourteenth Amendment." Ibid. The focus is on the reasonableness of the balance, and, as Mullane itself made

> clear, whether a particular method of notice is reasonable depends on the particular circumstances.

Tulsa Professional Collection Services, supra, at 484.

The United States Supreme Court explained that a state cause of action, such as Petitioner's cause of action to invalidate the will and obtain his intestate share, is a protected property interest under the Fourteenth Amendment:

> Appellant's interest is an unsecured claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment. As we wrote in *Logan v. Zimmerman Brush Co.,* 455 U. S. 422, 428 (1982), this question "was affirmatively settled by the Mullane case itself, where the Court held that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." In *Logan*, the Court held that a cause of action under Illinois' Fair Employment Practices Act was a protected property interest, and referred to the numerous other types of claims that the Court had previously recognized as deserving due process protections. See id., at 429-431, and nn. 4-5. Appellant's claim, therefore, is properly considered a protected property interest.

Tulsa Professional Collection Services, supra, at 485.

The next question is whether there was state action allowing a claim for deprivation under the Fourteenth Amendment. US Const. amend. XIV, §1. The Supreme Court explained that that there was state action because of the involvement of the trial court in the operation of the probate system in Oklahoma; every single element mentioned by the Supreme Court in the Oklahoma system is present in Washington State:

> The Fourteenth Amendment protects this interest, however, only from a deprivation by state action. Private use of state-sanctioned private remedies or procedures does not rise to the level of state action. *See, e. g., Flagg Bros., Inc. v. Brooks,* 436 U. S. 149 (1978). Nor is the State's involvement in the mere running of a general statute of limitations generally sufficient to implicate due process. *See Texaco, Inc. v. Short,* 454 U. S. 516 (1982). *See also Flagg Bros., Inc. v. Brooks, supra*, at 166. But when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. *See, e. g., Lugar v. Edmondson Oil Co.,* 457 U. S. 922 (1982); *Sniadach v. Family Finance Corp.,* 395 U. S. 337

(1969). The question here is whether the State's involvement with the nonclaim statute is substantial enough to implicate the Due Process Clause.

Appellee argues that it is not, contending that Oklahoma's nonclaim statute is a self-executing statute of limitations. Relying on this characterization, appellee then points to *Short, supra.* Appellee's reading of *Short* is correct — due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations — but in our view, appellee's premise is not. Oklahoma's nonclaim statute is not a self-executing statute of limitations.

It is true that nonclaim statutes generally possess some attributes of statutes of limitations. They provide a specific time period within which particular types of claims must be filed and they bar claims presented after expiration of that deadline. Many of the state court decisions upholding nonclaim statutes against due process challenges have relied upon these features and concluded that they are properly viewed as statutes of limitations. *See, e. g., Estate of Busch v. Ferrell-Duncan Clinic, Inc.,* 700 S. W. 2d, at 89; *William B. Tanner Co. v. Estate of Fessler,* 100 Wis. 2d 437, 302 N. W. 2d 414 (1981).

As we noted in *Short,* however, it is the "self-executing feature" of a statute of limitations that makes *Mullane* and *Mennonite* inapposite. See 454 U. S., at 533, 536. The State's interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State's limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

Here, in contrast, there is significant state action. The probate court is intimately involved throughout, and without that involvement the time bar is never activated. The nonclaim statute becomes operative only after probate proceedings have been commenced in state court. **The court must appoint the executor or executrix before notice, which triggers the time bar, can be given. Only after this court appointment is made does the statute provide for any notice; § 331 directs the executor or executrix to publish notice "immediately" after appointment**. Indeed, in this case, the District Court reinforced the statutory command with an order expressly requiring appellee to "immediately give notice to creditors." **The form of the order indicates that such orders are routine. Record 14. Finally, copies of the notice and an affidavit of publication must be filed with the court. § 332. It is only after all of these actions take place that the time period begins to run, and in every one of these actions, the court is intimately involved. This involvement is so pervasive and substantial**

that it must be considered state action subject to the restrictions of the Fourteenth Amendment.

> Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that Short indicated was necessary to remove any due process problem. Rather, in such circumstances, due process is directly implicated and actual notice generally is required. Cf. *Mennonite,* 462 U. S., at 793-794 (tax sale proceedings trigger 2-year redemption period); *Logan v. Zimmerman Brush Co., supra,* at 433, 437 (claim barred if no hearing held 120 days after action commenced); *City of New York v. New York, N. H. & H. R. Co.,* 344 U. S. 293, 294 (1953) (bankruptcy proceedings trigger specific time period in which creditors' claims must be filed). Our conclusion that the Oklahoma nonclaim statute is not a self-executing statute of limitations makes it unnecessary to consider appellant's argument that a 2-month period is somehow unconstitutionally short. See Tr. of Oral Arg. 22 (advocating constitutional requirement that the States provide at least one year). We also have no occasion to consider the proper characterization of nonclaim statutes that run from the date of death, and which generally provide for longer time periods, ranging from one to five years. *See Falender,* 63 N. C. L. Rev., at 667-669. In sum, the substantial involvement of the probate court throughout the process leaves little doubt that the running of Oklahoma's nonclaim statute is accompanied by sufficient government action to implicate the Due Process Clause.

Tulsa Professional Collection Services, supra, at 485-8 (bold emphasis added).

The United States Supreme Court in the extract from *Tulsa* immediately preceding identified the following characteristics of the limitations period as creating state action:

1. The executor (i.e. personal representative) must be appointed by the Court;
2. The appointment triggers the limitations period;
3. Notice must be given to potential claimants;
4. The notice and proof of notice must be filed with the Court.

How does Washington state's procedures compare? In Washington,

1. The personal representative (i.e. the executor of the estate) must be appointed by the Court upon application under RCW 11.20.020.

2. The acceptance of the will to probate or its rejection triggers the four months limitations period under RCW 11.24.010.

3. Notice must be given to potential claimants under RCW 11.28.237.

4. The notice and proof of notice must be filed with the Court under RCW 11.28.237.

Each of the elements demonstrating that state action by Oklahoma occurred in probate sufficient to implicate the Fourteenth Amendment identified in *Tulsa Professional Collection Services, supra,* is also present in Washington State. The Washington State claim deadlines are not self-executing, because the trigger is an action of the Superior Court—the acceptance or rejection of the will to probate. RCW 11.24.010.

As for the contents of the notice, it must include, among other things, the actual deadline to make a claim:

> *See also Memphis Light, Gas & Water Div. v. Craft,* 436 U. S. 1 (1978) (termination of utility service); *Schroeder v. City of New York,* 371 U. S. 208 (1962) (condemnation proceeding); ***City of New York v. New York, N. H. & H. R. Co., supra*** **(Bankruptcy Code's requirement of "reasonable notice" requires actual notice of deadline for filing claims)**.

Tulsa Professional Collection Services, supra, at 484, 487, 488-9 (bold emphasis added).

The notice provisions to potential heirs under the Will Contest Statutes do not meet the minimum due process requirements under *Tulsa Professional Collection Services, supra* and the cases upon which it relies and cites, including *City of New York v. New York, N. H. & H. R. Co, supra* and *Mullane v. Central Hanover Bank & Trust Co., supra.*

It is clear, and undisputed by Astrid, that if this Court does not accept review, there will be future litigation in federal court, which makes consideration of any award of fees to either side premature.

III. FEES SHOULD NOT BE AWARED IN THIS PROCEEDING UNLESS THIS COURT ACCEPTS REVIEW AND ADJUDICATES THE CASE.

Astrid claims fees under a statute which reads as follows:

> (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. **The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.**

RCW 11.96A.150(1) (bold emphasis added)

Astrid claimed fees at each stage of the litigation, and the trial court and the Corut of Appeals, and was denied each time. Though the statute on its face grants unlimited discretion, in fact this Court has imposed rules.

As this Court should now understand, Petitioner has strong argument that the Will Contest statute, as interpreted by the Court of Appeals, violates the Fourteenth Amendment as articulated in *Tulsa Professional Collection Services, supra; City of New York v. New York, N. H. & H. R. Co, supra;* and *Mullane v. Central Hanover Bank & Trust Co., supra.* Petitioner is allowed to raise the arguments of facial invalidity under the United States Supreme Court's overbreadth doctrine in federal court if this Court chooses not to grant review. This doctrine, frequently misapplied by courts, operates as follows:

> [I]t is also important to be clear about the difference between an as-applied and an overbreadth challenge….. The overbreadth doctrine differs from that rule principally in this: …..[a]s we put it in *Ohralik v. Ohio State Bar Assn.*, 436 U. S., at 462, he "attacks the validity of [the statute] not facially, but as applied to his acts of solicitation," whereas the person invoking overbreadth "may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him," *id.,* at 462, n. 20….Where an overbreadth attack is successful, the

> statute is obviously invalid in all its applications, since every person to whom it is applied can defend on the basis of the same overbreadth.
>
> **Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to someone else…**.
>
> The First Amendment doctrine of overbreadth was designed as a "departure from traditional rules of standing," *Broadrick v. Oklahoma,* 413 U. S. 601, 613 (1973), to enable persons who are themselves unharmed by the defect in a statute nevertheless "to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court," *id.,* at 610.
> ….
> Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is substantial, not only as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma, supra,* at 615, **and therefore requires consideration of many more applications than those immediately before the court**.

Board of Trustees of State Univ. of NY v. Fox, 493 U.S. 469, 485, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)(bold emphasis added).

This case implicates the speech and the First Amendment, specifically the petitioning clause, in addition to its coverage under the Fourteenth Amendment.

This Court should not, and constitutionally cannot, impose attorney fees at this stage of the litigation if it denies review, because the ultimate resolution of the case will not be completed until after the federal lawsuit is completed. Indeed, imposing fees against Petitioner if this Court denies review would unlawfully chill his right to have the constitutionality of the statute determined in a federal forum.

This Court has held that the question of when and whether to award attorney fees depends on whether the litigation has benefited the estate OR the rights of the claimants, and that the decision of the lower courts will not be disturbed absent a showing of abuse of discretion.

> The controlling statute in this case is RCW 11.96A.150. This statute leaves the award of attorney fees to the discretion of the court **and we will not interfere with a trial court's fee determination** unless "there are facts

> and circumstances clearly showing an abuse of the trial court's discretion." *In re Estate of Larson,* 103 Wash.2d 517, 521, 694 P.2d 1051 (1985)….
>
> Here, like *Watlack,* the will dispute involves all the beneficiaries, affects the rights of all beneficiaries, and an award against the estate would not harm any uninvolved beneficiaries….Further, although one party will be unsuccessful in the will dispute, if it is shown that the party had a duty to oppose the will and acted in good faith, under Jolly the party may still be entitled to attorney fees. 3 Wash.2d at 626-27, 101 P.2d 995. Therefore, we affirm the Court of Appeals and remand this issue to the trial court.

In re Estate of Black, 153 Wn.2d 152, 172-3,102 P.3d 796 (2004) (bold emphasis added.

This litigation involves an issue of general importance to all potential beneficiaries and heirs of the decedent. Astrid has made no showing of any abuse of discretion by the trial court or the Court of Appeal in denying her fees. Under *Estate of Black,* the absence of any articulated error by the lower courts bars an award.

IV. GRANTING REVIEW WILL AVOID WHOLESALE INVALIDATION OF PRIOR PROBATES

If review in this case is not granted, Petitioner will file an action in federal court seeking to invalidate the notice provisions of the Will Contest Statutes and issuance of a declaratory judgment that, inter alia, all notices provided to heirs in the past and future which do not include identification of the exact name and address of any agent for service of process, an address at which the personal representative may be effectively served, and the due dates for filing a will challenge are unconstitutional and void, and the relevant probates must be re-opened and new notices given.

Because of the *Rooker-Feldman* doctrine, discussed above, and collateral estoppel, the only attack that Petitioner can make in federal court is wholesale invalidation of the notice provisions of the statute. Petitioner's case will simply be one of the many probates for which parties will have new opportunities to challenge wills.

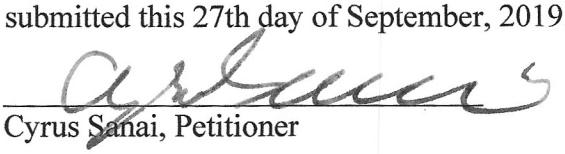
Such broad relief follows from the rule that only a general challenge of the law is permissible; such a general challenge does not allow will not be the subject of this case if review is accepted. Indeed, the logical remedy to apply is what was urged by Petitioner:

this Court should invoke *Hesthagen,* and argue that the claim cut-off period did not start to run until after Petitioner was validly notified that McCarthy was the actual agent for service of process. Because McCarthy was served within 90 days of actual notice that she, personally, was the agent for service of process, if this Court applies *Hesthagen* to this situation, general invalidation of the statute will not arise.

V. CONCLUSION

The Court should deny the request for attorney fees at this time. As discussed above, if the Petition is granted, then the question of whether fees should be awarded depends on whether Astrid can show an abuse of discretion of the lower courts; she has failed to even attempt this in her answer. If the Court denies the petition, then the question of the constitutionality of the Will Contest statute will be evaluated by the federal courts.

Respectfully submitted this 27th day of September, 2019.



Cyrus Sanai, Petitioner

CYRUS SANAI - FILING PRO SE

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