

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

2011 DEC -6 AM 11:24  
COURT OF APPEALS  
STATE OF WASHINGTON  
FILED

REPLY BRIEF OF APPELLANT

DATED THIS 5 DAY OF December, 2011

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**STATUTES**

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RCW 11.24.010

12, 13

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 11.68.041

16, 18, 20

(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.

## I. REPLY TO INTRODUCTION

In her introduction, Personal Representative Lorna Frey ("Lorna") makes certain statements of fact that mislead. At Respondent's Brief (RB) p.4, ¶2, Lorna asserts that former Judge John Linde "rejected the will;" however, there is nothing in the record to support that assertion.

Likewise, at RB p.4, ¶2, Lorna states that Judge Churchill "agreed" with Lorna's reasoning for petitioning the court for letters of administration; however, there is no evidence that Judge Churchill made a decision on the merits of the issue of whether or not the decedent had a valid will. Rather, Lorna claimed in her form petition that there was no valid will and the judge signed off on a form order.

Lorna asserts that her brother, Appellant Dean Frey ("Dean"), waited "nearly four years" to challenge her completion of the probate. However, Dean filed his objection to the completion of probate less than 30 days after Lorna filed her declaration of completion of probate. If any question can be raised by reason of the passage of time, it is why Lorna would take from March 23, 2007 (when she was

granted Letters of Administration), to February 23, 2011, to decide how to distribute the estate.

At RB p.5, ¶4, Lorna claims that Judge Eaton concluded the will had been rejected by Judge Linde; that is not what Judge Eaton said; rather, Judge Eaton expressly stated that the will was not rejected by Judge Linde, though Judge Linde may have chosen to deal with the will that way. See, Tr.12, ll.14-21. In point of fact, Judge Linde never issued a ruling on the matter of whether or not there was a valid will, and the trial court record contains no such order by Judge Linde.

Further, Lorna implies that Judge Eaton's order from the bench was that Judge Churchill's order of March 23, 2007, rejected the will "because no will existed." Again, Judge Churchill's decision was made not on the merits of whether or not there was a valid will; rather, Judge Churchill signed off on a form order based on Lorna's petition claiming there was no will.

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At RB p.6, ¶2, Lorna claims that Dean "abandons the issues addressed by the court below." That is misleading: most of the issues below had to do with the validity of the will, and the trial court expressly stated that the validity issue is a matter "for a future hearing." TR.4, 1.24 - TR.5, 1.8. With that issue to be held in the future if this appeal is successful, the validity of the will is not at issue now; the only issues before this court concern whether Dean was provided with proper notice, which issue includes the extent of his consent, both of which Dean raised below.

At RB p. 7, ¶2, Lorna claims that the "alleged harm" to Dean was the rejection of the will. That is misleading: Lorna decided to not pursue administering the estate under the will, and instead filed her filing her second petition that led to the rejection of the will. The harm to Dean then took place after four years of waiting to see how Lorna would divide up the estate, when he found he was getting a smaller share than he would have received under his mother's will.

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Lorna raises the defense of laches at RB p.8, ¶2. This defense was raised by the court *sua sponte* at the June 10, 2011 hearing. Neither party briefed the laches issue until Lorna's opposition brief. The application of laches is discussed in this Reply Brief at pp.14-16.

## II. REPLY TO STATEMENT OF THE CASE

Lorna discusses the will itself beginning at RB p.10, ¶4. The form of Article 3 or validity of the will is irrelevant to the issues in this appeal. On the other hand, Dean will address them to preserve his record in this regard.

Lorna's re-states the will's Article 3 in a way that magnifies the spacing of the words in this Article for the purpose of implying that there is a blank that was intended to have been filled by additional words, and so her argument goes, because the words are not there, that means the provision is incomplete.

However, Article 3 reads quite well without the need of additional words: "I also bequeath to Dean to make equitable the difference in value of my present house on Lopez Island and my former Bainbridge Island, Washington house."

The reason for the bequest is then explained in the next sentence, that it was made by reason of equity, as the decedent explains, "My Bainbridge Island house was to have been bequeathed to Dean by prior promise." Dean was thus bequeathed the "difference in value" between the two properties. See, CP.6.

At p.11, ¶1, Lorna claims there is an erasure in Article 3. That is a red herring and has no effect on the will as executed: the decedent wrote the first page of her will in blue ink and the second page in black ink. CP.5, 6. There is nothing in either the will or in any finding of the trial court that any writing in ink was erased.

At RB p.12, ¶3, Lorna claims that Dean's consent to her first petition was not limited to his consent that Lorna probate the will, but may be extended to also apply to her second petition, which was based on Lorna's assertion that there was no valid will. To the contrary, Dean's consent refers *four times* to an attached petition, which is the petition to probate the will (see, CP.13.) It is thus not consistent with such a consent to deem that it could apply to a second and yet unfiled petition claiming the very opposite - that there is no will.

At RB pp.12, 13, Lorna presents a hearsay statement that former Judge John Linde wrote a note stating that the will she submitted was invalid. The note is not a court order, is not of record, and was not retained by the court.

At RB p.13, ¶3, Lorna again argues that Judge Churchill's Order granting letters of administration was a ruling on the merits of whether the will was valid. The only certainty in that order is that it formally rejected the will; but its issuance does not support Lorna's contention that the court made a reasoned decision as to the validity of the will.

At RB p.14, ¶2 to p.15, ¶2, Lorna states that she proceeded to administer their mother's estate as her will directed with the exception of the part that did not give Dean what he was due under the terms of Article 3 of the will. However, in Dean's declaration of May 21, 2001 (see, CP.77, ¶11 - 78, ¶15), he states that at the outset all his siblings agreed to give him what was stated in the will but that only by a later vote of siblings was he given what Lorna and two other siblings (a majority) decided would be his share, and that did not include the bequest in Article 3.

This underscores that Dean knew he was harmed only when Lorna departed from the terms of the will, which was then formalized by her Declaration of Completion of Probate of January 24, 2011.

### III. REPLY TO ARGUMENT

At RB p.24, ¶3, Lorna raises and then strikes down the point that Dean cannot complain he was not given notice that the will was rejected. However, notice of rejection of the will is not Dean's argument here; it is that he was not given notice of Lorna's second petition per §.041(2).

At RB p.26, ¶1, Lorna relies on the trial judge's ruling that even if Dean was not given the notice required by §.041(2), that lack of notice has no bearing on Dean's obligation to object to a will rejection within the four month rule of RCW 11.24.010. However, that lack of notice is critical, for when he was not given notice of the second petition per §.041(2), the trial court lacked jurisdiction to issue a final order of distribution.

In re Estate of Little, 127 Wash. App. 915, 919-21, 113 P.3d 505, 508 (2005), illustrates the point that the four-month statute of limitations of RCW 11.24.010 is tolled when an interested party is not served with notice. In Little, one party claimed the tolling ceased when the heirs had actual knowledge of the probate and were thus barred when they waited more than four months to file suit.

The court described the heirs' action after the expiration of the four month time period as one of starting the probate over again, and at p. 920 the Little court analogized to the governing law derived from the law of vacating judgments. The Little court relied upon Pitzer v. Union Bank of Calif., 141 Wash.2d 539, 552, 9 P.3d 805 (2000), in stating that there is a strong interest, grounded in considerations of finality, in not disturbing the sanctity of a closed estate, but that the interest of finality "must yield to concerns of justice and fairness." One instance in which finality will yield is when a decree of distribution is void and, the court stated, it is void when there is a failure to give notice to a reasonably ascertainable heir entitled to notice.

The court continued at p. 921 by stating that, "The failure to give due notice to heirs as required by statute is a denial of procedural due process that 'amounts to a jurisdictional defect as to them, rendering the decree of distribution void.'" Hesthagen v. Harby, 78 Wash.2d 934, 942, 481 P.2d 438 (1971), cited in Pitzer, 141 Wash.2d at 552, 9 P.3d 805;" and that, "Such a decree can be attacked at any time. ... (citing Philip A. Trautman, Vacation and Correction of Judgments in Washington, 35 Wash. L.Rev. 505, 530 (1960) ('There is no time limit as a judgment entered without jurisdiction is void.'))"

That the absence of proper notice fails to confer jurisdiction on the probate court to make a final order of distribution is also illustrated in In re Elliott's Estate, 22 Wash. 2d 334, 358, 156 P.2d 427, 439 (1945).

In the case at hand, Dean consented to the court's jurisdiction under Lorna's first petition; however, his right of due process entitled him to notice of the second petition Lorna filed. Failure to provide him notice of that, according to Little, amounted to a jurisdictional defect.

At RB p.26, ¶2, Lorna again interprets Dean's claim of lack of notice as applying to the rejection of the will; that is not correct, his lack of notice claim applies to Lorna's filing of the second petition in which claimed there was no will (see, Dean's First Assignment of Error in his Brief of Appellant).

At RB p.27, ¶3, Lorna argues that §.041 does not "specify that separate consents are required where more than one petition is filed." The reference to consent in §.041(2)(a) implicitly requires that the consent applies to the petition that is the subject of §.041(2). If there is a second petition, the issue of consent turns on the nature of the second petition and the scope of the consent.

For example, there would be no need to obtain a separate consent for a second petition if, *arguendo*, the first consent is stated sufficiently broadly so it can apply to a later filed petition and that petition falls within the scope of the earlier filed consent. Thus there is no need for the statute to require the filing of a separate consent in all cases.

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Dean's consent was not broadly stated; by its terms, it applied only to Lorna's first petition based on the will. A second consent from Dean was therefore needed in light of the second petition because that petition was based on the claim that there was no valid will.

Also at RB P.27, ¶3, Lorna claims that no second consent was needed because Dean had actual notice; however, that is not how §.041 works - if consent has not been obtained, notice shall be given, and that notice is described in §.041(3): by personal service or notice by regular mail.

At RB p.28, ¶2, Lorna claims that Dean had a duty to timely challenge her authority after she was granted letters testamentary. Lorna presents no authority to support that claim, or even what may be considered timely. §.041 expressly places the burden of notice upon Lorna to give proper notice. There is no statutory duty upon Dean to challenge a lack of notice. In fact, under Little, the probate court lacked jurisdiction over him, so Dean had no obligation to challenge Lorna's lack of notice to him.

At RB p.28-30, Lorna raises the trial court's *sua sponte* discussion of laches. Dean's position is that the doctrine of laches does not apply by reason of the same two issues Dean has raised: whether Dean was given notice under RCW 11.68.041(2) of the second petition, and whether Dean consented to the grant to Lorna of nonintervention powers under her second petition.

According to Brost v. L.A.N.D., Inc., 37 Wash. App. 372, 375-76, 680 P.2d 453, 456 (1984), it is appropriate to apply laches when a party, knowing his rights, takes no steps to enforce them and the condition of the other party has in good faith become so changed that he cannot be restored to his former state.

One time period in question is the 29 days between Lorna's declaration of January 24, 2011, that she completed probate, and Dean's petition of February 23, 2011, opposing her closing the probate. This time frame is at issue on the basis that the January 2011 date is when Dean knew he was harmed.

As Dean filed his petition objecting to Lorna's proposed division less than 30 days later, during which time there was no good

faith change in the condition of the estate, the elements of laches have not been met.

As an aside, Had Dean filed a challenge at the order granting letters of administration, complaining of Lorna's division of the estate, Lorna may well have claimed his challenge to be premature as she had yet made no decision as to how and when to divide the estate. As it turned out, Lorna took four years to finalize her decision.

The other time period is the period between Lorna's second petition of March 23, 2007, and Dean's petition of February 23, 2011. For laches to apply, Dean would have to have knowledge of his rights as of the March 2007 date. That issue turns on whether Dean was entitled to notice of Lorna's second petition per §.041(2). If he is entitled to the notice prescribed by that statute and that notice was not given, which fact was found by the trial court (see, TR. 17, ll. 12,13), it could not be said of Dean that he knew his rights, so laches would not apply.

Likewise, if Dean's consent to the first petition may not be applied to Lorna's second petition, that would mean that he was entitled to notice per §.041(2), and so the lack of

notice to Dean would not give rise to the defense of laches.

At RB pp.30-33, Lorna presents arguments as to what the will provided. As stated earlier, the issue of what the will provided was determined by the trial court to be a matter for a "future hearing" (TR.4, 1.24 - TR.5, 1.8); further, what the will provided is not at issue in this appeal, therefore these arguments are irrelevant.

On the merits of Lorna's argument that Article 3 does not direct that anything be given to Dean, the decedent wrote that Dean was to receive "...the difference in value of my present house on Lopez Island and my former Bainbridge Island, Washington, house." Most obviously, that difference refers to a difference between two dollar values, which on its face is a dollar amount, which is what Dean was to be given.

This reading of Article 3 also does not require any words be added or deleted. Further, neither Dean nor Lorna request that the taped-on bit of paper be given effect, as it does not comply with the will attestation requirements (see, RB p.31, ¶3).

By reason that Lorna admits Dean did not receive the bequest to him under Article 3 (see, RB p.33, ¶1), she and Dean agree that he did not receive all he was entitled to under the will.

At RB pp.33, 34, Lorna requests an award of fees on the basis that Dean's appeal did not assert an error by the trial court in dismissing his petition. As to the issues of notice raised by Dean, Lorna describes them as being unrelated to his petition and not really an issue.

On the contrary, Lorna's lack of notice per §.041(2) is central to this probate, for without proper notice Dean was not properly put on notice of the crucial second petition, and as he was denied his right to procedural due process the trial court did not have jurisdiction to approve Lorna's proposed distribution. Thus, the notice issue is not only highly relevant to this probate, it is also the subject of legitimate inquiry into whether a personal representative must give formal notice to an heir of the filing of a second petition that is fundamentally different from the first.

Lorna does not raise the issue of consent at this point, which is likewise a significant issue and is one of the two issues raised on this appeal.

IV. CONCLUSION

Personal Representative Lorna Frey is not entitled to an award of fees and Appellant 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 5 day of Dec.

  
\_\_\_\_\_  
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DIVISION I.

DEAN FREY, ) Court of Appeals No. 67378-5-1  
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)  
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:

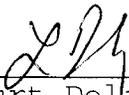
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DOCUMENTS:

- REPLY BRIEF OF APPELLANT

Dated this 5 day of Dec., 2011.

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