

No. 67378-5-1

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

DEAN FREY,

Appellant

v.

ESTATE OF MILDRED FREY,

Respondent

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STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. INTRODUCTION

In March 5, 2007, Personal Representative Lorna Frey sought the admission to probate of her mother, Mildred Frey's, handwritten will. The San Juan County Superior Court, John O. Linde presiding, rejected the will due to unattested alterations to the original will.

After immediately informing her siblings of the rejection, on March 23, 2007, Lorna Frey petitioned the Court for letters of administration based on the stated assertion in her petition that no valid will had been found. The Honorable Vicki I. Churchill agreed and entered an order that Mildred Frey died intestate. Judge Churchill also appointed Ms. Frey Personal Representative with non-intervention powers and directed the clerk to issue letters of administration. Ms. Frey proceeded to administer her mother's Estate with close supervision and involvement by all four of her siblings, the heirs at law, including Appellant Dean Frey. On January 24, 2011, she filed a declaration of completion to close the Estate.

On February 23, 2011, nearly four years after the will was rejected from probate, Dean Frey challenged the rejection of his mother's will by filing a petition objecting to Personal

Representative Lorna Frey's declaration of completion and the manner by which she distributed the Estate.

Personal Representative Lorna Frey moved to dismiss the petition, arguing that the underlying challenge to the rejection of their mother's will came too late—nearly four years after the rejection—and well outside of the applicable four-month statute of limitations.

In response, Dean Frey acknowledged that: (1) there is no statutory requirement to give notice of the rejection of a will and (2) Mr. Frey had actual knowledge of the rejection nearly four years before filing the subject petition. Nonetheless, he argued that the trial court should create a notice requirement, analogizing to CR 15 and the requirement in RCW 11.68.041 to give notice when a one applies for non-intervention powers.

The trial court, the Honorable Donald E. Eaton presiding, dismissed Mr. Frey's petition challenging the declaration of completion as an untimely challenge to the rejection of his mother's will. The court concluded that: (1) the will was rejected, if not already rejected by Judge Linde, when Judge Churchill ordered that letters of administration be issued because no valid will existed; (2) no specific notice of the rejection of the will was required by

statute; (3) Mr. Frey admitted that he had actual notice of the court's rejection of the will; (4) Mr. Frey failed to challenge the rejection within the applicable four-month statute of limitations; (5) Mr. Frey's challenge would also be barred by the equitable doctrine of laches; and (6) any argument that Personal Representative Lorna Frey failed to give Mr. Frey notice of her request for non-intervention powers was irrelevant to the court's determination that a challenge to the rejection of the will was untimely.

On appeal, Appellant Dean Frey largely abandons the issues addressed by the court below and instead focuses exclusively on whether Personal Representative Lorna Frey failed to give Mr. Frey required notice of her second request on March 23, 2007 for non-intervention powers to administer her mother's Estate. Indeed, Mr. Frey does not assign error in the trial court's conclusions that Mildred Frey's will was rejected by the trial court on March 23, 2007, that no notice of said rejection was required by statute, that Mr. Frey had actual notice of said rejection, or that Mr. Frey's attempt to challenge said rejection in 2011 was time-barred.

The trial court's ruling dismissing Mr. Frey's challenge to the declaration of completion should be affirmed without further

analysis because the alleged errors in the trial court's ruling would not affect the dismissal or require its reversal.

Additionally, Mr. Frey had given his consent to Lorna Frey receiving non-intervention powers when she petitioned to admit their mother's will to probate. Even if Ms. Frey should have obtained a second consent from Mr. Frey after the will was rejected and it was necessary to request letters of administration, Mr. Frey had actual knowledge of that request by receiving a copy of the petition before the petition was granted and for nearly four years before contesting the declaration of completion. Mr. Frey's challenge to that authority is too late. Further, the application of non-intervention powers caused no harm to Mr. Frey. The alleged harm is a result of the rejection of Mildred Frey's will. Withdrawing the non-intervention powers would not affect that rejection.

Mr. Frey cannot create a requirement to give notice of the rejection of the will through the provision for notice of non-intervention powers. The bottom line is that Mr. Frey knew that his mother's will was rejected in 2007 and that his sister, Lorna Frey, was administering her Estate pursuant to a distribution plan agreed to by a vote of the siblings, and he failed to take any action to

challenge the rejection of the will until 2011, after the applicable four-month statute of limitations expired.

Dismissal Dean Frey's untimely challenge should be affirmed on the additional basis of laches. If considered now, his failure to bring these issues forward in a timely manner would result in serious injury to the Estate of Mildred Frey, Personal Representative Lorna Frey, and the Estate's beneficiaries because Personal Representative Lorna Frey has already distributed the Estate's assets, including deeding real property to Mr. Frey, in reliance on her authority as Personal Representative and on the fact that Mildred Frey's will had been rejected.

II. ISSUES FOR REVIEW

Respondent asserts that the issues in the subject appeal are as follows:

1. Should the trial court's dismissal be affirmed without consideration of whether Respondent complied with RCW 11.68.041 in making her second petition to the court to serve as personal representative with non-intervention powers because a decision in Appellant's favor on that issue will not result in reversal

of the trial court's dismissal of Appellant's untimely challenge to the 2007 rejection of his mother's will?

2. Even if the Court considers whether Appellant was entitled to notice of Respondent's petition for non-intervention powers, should the Court of Appeals affirm the trial court's dismissal because Appellant had given prior consent to Respondent receiving non-intervention powers and because Appellant had actual notice of Respondent's second request for non-intervention powers and receipt of same, and failed to take any action to challenge said authority for nearly four years?¹

3. Should the trial court's dismissal otherwise be affirmed based on application of the equitable doctrine of laches?

4. Even if Appellant Dean Frey's attempt to probate his mother's will nearly four years after it was rejected was not time-barred, should the Court of Appeals nonetheless affirm the trial court's dismissal because Appellant already undisputedly received

¹ While Respondent addresses this in greater detail in the Statement of the Case, it is important to note in considering the Statement of Issues that Appellant's assignments of error mischaracterize Judge Eaton's trial court rulings. Contrary to Appellant's representation, Judge Eaton actually acknowledged that Ms. Frey may not have technically provided the notice required by RCW 11.68.041, but the Court found no redressable injury caused by such violation because Mr. Frey had actual notice of the request for non-intervention powers and never challenged the authority until after the distribution was complete. RP at 18:16-21:13.

that to which he was entitled under the will with the exception of the contested provision that was materially altered and is incomplete?

5. Is Respondent entitled to reimbursement of her attorney fees on appeal pursuant to RAP 18.9 for being required to respond to Appellant's frivolous appeal, which fails even to assign error to the trial court's basis for dismissal?

III. STATEMENT OF THE CASE

Mildred Frey died on January 12, 2007. She left a handwritten will signed on December 6, 2005 and witnessed by two individuals believed to be neighbors. The original will was filed with the Court in March 2007. See Clerk's Papers ("CP) at 4-6.

A. Deficiencies in the Will.

In the first full paragraph on the second page, the will states a bequest to Dean Frey, but leaves the substance of the bequest blank:

"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."

CP at 5.

Mildred Frey wrote in pencil in the blank space "see" note and taped to the surface of the will in the blank space a slip of

paper with a handwritten notation. The taped-on slip of paper was taped over what appear to be erasure marks and the remnants of a numerical figure.

Although the will was witnessed on December 6, 2005, there is no indication that the provision taped onto the will was on the will when it was signed and witnessed. Every indication is to the contrary. If the provision was known and intended by Mildred Frey at the time the will was signed, she would have included the provision in the will rather than including a blank. The provision later taped onto the will was not witnessed, as is required by RCW 11.12.020. Because the provision was taped onto the surface of the will, it could have been changed at any time by any person.

While Appellant Dean Frey acknowledged that the taped-on slip of paper attached to Mildred Frey's will cannot be considered part of the will, he asserted below that the will was complete without the taped-on provision. CP at 71 (Opp'n to Mot. to Dismiss at 5). But the provision at issue has a *blank where the subject of the bequest should be*. Mildred could have directed that Dean receive personal property, such as artwork or other items of sentimental value, a share in her other real Estate, or a monetary sum, but she failed to make any bequest to Dean. While that paragraph purports

to explain *the reasoning* behind a bequest, it does not provide for anything to be transferred to Dean. It is evident that the provision was incomplete as written, because Mildred deemed it necessary to tape on a provision later.

The bottom line is that the bequest at issue was materially altered, apparently both by the erasure of a provision, and the taping on of a new provision. Without the alteration, the provision is incomplete because it fails to describe any bequest to Appellant.

B. Rejection of the Will from Probate.

Following Mildred Frey's death, her first choice for Personal Representative, Mark Lewis Frey, declined to serve as Personal Representative. CP at 12. Therefore, her daughter, Lorna Frey, Mildred Frey's first alternate Personal Representative pursuant to Article 2 of her will, petitioned the Court to admit her mother's will to probate and to appoint her as Personal Representative to serve with non-intervention powers. CP at 7-9. Her siblings each executed written consents to allow her to serve with non-intervention powers. CP at 13-16. There was no limitation that said consent was granted solely for probate of the will.

The proposed order admitting the will to probate was returned to Lorna Frey with a handwritten notation by John O. Linde

that the will was invalid due to alterations. It appears that the order, with the notation rejecting the will, was not filed with the Court; Ms. Frey retained the original in her files. The order with said notation was provided to the court in support of the Personal Representative's Motion to Dismiss. CP at 43-44 (Exhibit A to the Declaration of Personal Representative Lorna Frey).

Lorna Frey immediately informed her siblings by telephone or in person of the will's rejection. CP at 38-39 (Declaration of Personal Representative Lorna Frey ¶ 6). Lorna Frey subsequently petitioned the Court for letters of administration and to be appointed as Personal Representative of her mother's Estate, on the basis that there was no valid will. Ms. Frey provided her siblings with notice of her petition. CP at 45-46.

On March 23, 2007, The San Juan County Superior Court, the Honorable Vicki I. Churchill presiding, ordered that letters of administration be issued, appointed Lorna Frey as Personal Representative, and granted her non-intervention powers. CP at 20-21. In doing so, Judge Churchill found that there was no valid will and effectively rejected the will—still on file with the court.

Appellant Dean Frey admits that he had actual notice that his mother's will had been rejected from probate. "At a subsequent

family meeting at Lorna's home, Lorna informed the family that the will had been deemed not legal by a judge in Friday Harbor by reason of the post-it notes." CP at 77 (Declaration of Dean Frey ¶ 12). Attached to the Declaration of Lorna Frey are e-mails with her siblings confirming Dean Frey's understanding and dissatisfaction that the will had been rejected and determined "not legal." See CP at 48. He also did not deny that his sister, Lorna Frey, gave him notice that she was seeking and obtained letters of administration and non-intervention powers.² Further, he participated in the administration of the Estate and communicated with the Personal Representative and the other heirs on a regular basis.

C. Administration of Mildred Frey's Estate.

Despite the fact that the will had been rejected, Personal Representative Lorna Frey proceeded to administer her mother's Estate as her mother's will directed, with the exception of the provision with the unattested taped-on note, based on the majority vote of her siblings, the sole heirs at law and the sole beneficiaries under the will. CP at 40 (Decl. of Lorna Frey ¶10). Appellant Dean Frey continued to assert that he was entitled to an additional

² Mr. Frey asserted in his declaration that he decided, after receiving notice of the rejection of their mother's will, to sign the consent giving Lorna Frey non-intervention powers to serve as Personal Representative. CP at 77 (Declaration of Dean Frey ¶ 13).

distribution. Nonetheless, he never legally challenged the trial court's rejection of Mildred Frey's will or Lorna Frey's authority to act as Personal Representative with non-intervention powers.

Lorna Frey, as Personal Representative, made numerous preliminary distributions, including deeding to Appellant their mother's residence on Lopez Island, the primary asset of the Estate, in October 2007. CP at 49 (Decl. of Lorna Frey, Ex. D). Other distributions were made in 2009 following the sale of the second piece of real Estate held by the Estate. *See id.* At no time during the administration and preliminary distributions did Appellant legally challenge the rejection of the will or the process of administration, which benefitted him by voluntarily providing him with more than he was entitled to under intestate laws.

Personal Representative Lorna Frey filed a declaration of completion on January 24, 2011. CP at 25-27. While no formal accounting was required, she provided an accounting to her siblings. CP at 49-51 (Lorna Frey Decl., Ex. D).

D. Challenge to the Declaration of Completion and Request to Admit the Will to Probate.

It was only after Personal Representative Lorna Frey filed the declaration of completion and gave the requisite notice to her

siblings, the heirs at law, that Mr. Frey legally challenged the failure of the Personal Representative to follow the altered provision of Mildred Frey's will through his petition challenging the declaration of completion. While the petition purported to challenge the accounting of the Personal Representative and the failure by the Personal Representative to publish notice to creditors, in reality, the petition challenged the rejection of the will that occurred in 2007.³

Personal Representative Lorna Frey moved to dismiss the petition challenging the declaration of completion on the basis that it was a veiled challenge to the rejection of Mildred Frey's will, brought *well after* the applicable four-month statute of limitations expired. Mr. Frey asserted in response that the will was not rejected or that he did not have notice of its rejection, all the while admitting that no statutory notice of the will's rejection was required and that he had actual knowledge of the will's rejection.

³ Petitioner/Appellant Dean Frey initially challenged an alleged failure by the Personal Representative to give notice to creditors, as an attempt to assert a creditor's claim against real Estate sold in 2009, long after the two-year statute of limitations applicable to all creditors' claims elapsed. When Personal Representative Lorna Frey asserted that there was no absolute requirement to publish notice to creditors and that the applicable two-year statute of limitations for all creditors' claims had expired, Mr. Frey withdrew his challenge regarding notice to creditors. CP at 67. Nowhere in his petition did Mr. Frey challenge Lorna Frey's failure to give him notice of her request for non-intervention powers in 2007.

At the hearing on the Personal Representative's motion to dismiss, Mr. Frey asserted for the first time that Personal Representative Lorna Frey erred by failing to give him sufficient notice of her second petition for non-intervention powers made on March 23, 2007. But he asserted that deficiency despite acknowledging that he received notice of that petition by e-mail and that he had actual knowledge that Lorna Frey had been appointed Personal Representative with non-intervention powers.

Personal Representative Lorna Frey asserted that there was no statutory requirement to provide notice of the rejection of a will, that Mr. Frey had actual notice of that rejection and of her request and receipt of letters of administration and non-intervention powers, that challenge of the rejection of the will was time-barred, and that any failure to give notice of the request for non-intervention powers was irrelevant to the challenge to the rejection of Mildred Frey's will.

E. The Trial Court's Ruling.

The trial court agreed with Personal Representative Lorna Frey that challenge to the March 2007 rejection of the will was time-barred, and further held that any failure to give notice of the second petition for non-intervention powers was moot because establishment of that technical violation of the statute did not

provide any basis to admit Mildred Frey's will to probate more than four years after it was rejected:

[T]he first issue is, Was it rejected? And if it was rejected, Was there proper notice? And if there was proper notice, Is the motion to dismiss then appropriate because it's not timely? We need to get over that threshold first.

...
What the petitioner, here, is really asking the Court to do is go back and look at the rejection and decide if it was valid. And if it wasn't valid, then the issue would be can we allow this Estate to close now or do we need to now offer up the will and have it offered for probate in a formal way so the Court can determine whether to admit it?

With all of that said, I conclude that the will was properly rejected. Not by Judge Linde's note, although I think that's a pretty clear indication, unless it's all being made up by the Personal Representative – and there's some suggestion that that could have happened here. But it does appear to be the way Judge Linde chose to deal with it.

But I conclude, and I would find at this time, that when this Court entered the Order Granting Letters of Administration to this petitioner – to this Personal Representative on March 23, 2007, based on the second petition, this Court made a finding that there was no valid will.

The will was in the file. The will had been offered up for probate. The second petition, when it was filed, said on the very first page that there was no – No valid will of decedent has been found.

This Court, on March 23rd, looked at that petition, looked at this file, granted Letters of

Testamentary [sic.], and said the decedent died intestate.

I think we're bound by that. That was the ruling of this Court on March 23rd, 2007. That's a rejection of the will.

...

Now, the problem from there is that the statute doesn't say how to measure the four months from the rejection, and it doesn't say what kind of notice has to be given. And it's not disputed here that no formal, legal document was sent to the petitioner by the Personal Representative. At least it's not on file here. But it's not disputed that the petitioner had actual knowledge that the will had been rejected.

...

In the absence of the statute telling the Personal Representative what it is she's supposed to do by way of giving notice of rejection, I don't know that she can do any better than letting everybody know, as she did, that she had been granted Letters of Administration. That the will had been rejected.

It's clear from the emails back and forth from petitioner that he knew—he, he was concerned that everybody knew – we shouldn't be concerned about what's a legal will. We all knew what Mom's will was. . . . So it's clear to me that he knew that there had been a rejection of the will. And, yet, he waited until the Declaration of Completion was filed some four [years] later.

So on the basis of the Order Granting Letters of Administration by Judge Churchill on March 23rd, 2007, I think this Court effectively, formally made a rejection of the will. I think the Petitioner in this case had notice that that will had been rejected; and that the matter was going to proceed as an intestate matter.

And, again, the only thing that the petitioner really – the only thing the Court can do with this petition would be to not allow the probate to be completed, based on the Declaration of Completion. And I think the Court has no choice but to allow that to go forward.

There's not been a legitimate challenge here as to why the Court can't allow the Estate to close as a non-intervention probate. That's what the Letters of Administration granted her. There was no contest about that. That's the statutory procedure. There may be a request here for an accounting, and I'll get to that in a moment.

And I would also just say, To the extent that this feels unfair or there's some equitable argument that the petitioner ought to be able to come in at this point and collaterally attack the rejection of the will, again, four years has gone by. I think equitable doctrine of Laches would apply. It's just too late to come in either under the four-month statute or under some equitable argument that this is all unfair. And the Court ought to exercise equitable powers and put a stop to all this.

Report of Proceedings ("RP") at 9:13-17; 12:6-13:24; 14:15-16:9 (Emphasis added).

The trial court also went on to address the irrelevance of the alleged error in failing to give notice of the petition for non-intervention powers.

I would acknowledge that technically I suppose she should have gotten consent a second time, or sent notice that she was applying for non-intervention powers in connection with her second petition. I just don't think that there's much harm that comes out of that.

RP at 17:10-15.

MR. DELAY: Actually, I have a request that has to do with clarification on the notice issue.

THE COURT: Yes.

[Transcription stopped]

THE COURT: Well, there are two separation [sic] issues in the Court's mind. One issue is whether or not he had notice that the will was rejected and, therefore, the matter was going to proceed as an intestacy. And I think the email that Ms. Frey sent to Mr. Frey on March 22nd, 2007 at 10:45p.m., giving him a copy of Petition for Letters of Administration that says in paragraph 2, No will. No valid will of decedent has been found, that's a day before she's in front of the Court saying, Give me Letters of Administration.

So I think he knew she was in here asking the Court to give her Letters of Administration, because there was no valid will. So. And I have the undisputed—I have her declaration, which has not been disputed, that she notified him the next day or that weekend that she had gone to court and gotten the Letters of Administration.

So I think he knew. No question, I conclude that he knew that the will had been rejected and she had been given Letters of Administration to administer intestacy. That's one issue.

The other issue is the issue you raise; that he didn't give—he was not given advance notice of her request for non-intervention powers. Now, the statute does say that there has to be notice unless consent has been given. And I'm just saying as an aside to my ruling, two things:

Number one, what would be the harm if he wasn't given notice of the non-intervention powers? If he knew the will had been rejected; if he knew she was getting Letters of Administration if he had already consented to her serving as Personal Representative; what would be the harm that he wasn't told that when she went back on the second petition, that she was also asking for non-intervention powers?

In addition to which the email that I just referred to, that she sent to him the day before she was in court, I believe it does say she's requesting the Court appoint her as Personal Representative to serve without bottom [sic] and with non-intervention powers.

So my point was simply he didn't get the five days in advance notice that the statute contemplates, but he had information about it. He knew – he had already consented to her having non-intervention powers in connection with the first petition. He knew the second petition she was asking for the same thing. I'm just saying I don't see that as anything this Court could remedy at this point.⁴

And I ask only hypothetically: In a case where there was no will, every [sic]; and you were at this point; and someone comes in and says I never knew she was going to have non-intervention powers, I was never notified – what's the remedy? What do we do? Distributions have been made, bills have been paid. What do we do? I say that only as an aside.

⁴ Appellant inaccurately asserted that Judge Eaton ruled that Personal Representative Lorna Frey provided "adequate notice" of her second request for non-intervention powers in connection with her second petition by emailing the second petition to Mr. Frey. Br. of App. at 9. As quoted above, Judge Eaton actually acknowledged that Ms. Frey may not have technically provided the notice required by RCW 11.68.041, but the Court found no redressable injury caused by such violation because Mr. Frey had actual notice of the request for non-intervention powers and never challenged the authority until after the distribution was complete.

MR. DELAY: Is that a rhetorical question? Because I have a good answer for you?

THE COURT: Well, go ahead and give me your answer, but it is a rhetorical question.

MR. DELAY: It's money. The money is there, and the money can be properly divided.

THE COURT: The lack of notice about non-intervention powers would **not have any bearing on how the distribution took place, as far as I'm concerned.** That's why it's really a non-issue.

RP at 18:16-21:13 (Emphasis added).

Following the trial court's dismissal, Mr. Frey chose not to request a further accounting. Lorna Frey therefore filed an amended declaration of completion, updating the amount that the Estate has spent on attorney fees, which no heir challenged. Dean Frey subsequently appealed the trial court's dismissal of his petition challenging the declaration of completion.

IV. ARGUMENT

A. Appellant's Attempt to Collaterally Attack the 2007 Rejection of His Mother's Will Through His Petition Challenging the Declaration of Completion Was Properly Dismissed as Time-Barred.

RCW 11.24.010 unequivocally states that a challenge to the rejection of a will presented for probate must be brought within four

months of the rejection or such rejection is final and any challenge thereto is time-barred.

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.

...

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).

Here, the will of Mildred Frey was rejected from probate on March 23, 2007, if not before, and Mr. Frey did not take any action to legally challenge said rejection until filing his petition challenging the declaration of completion on February 23, 2011. Mr. Frey's attempt to challenge the rejection of his mother's will through that petition was time-barred and the trial court properly dismissed Mr. Frey's petition on that basis.

Mr. Frey does not and cannot dispute there is no statutory requirement to give notice when a will is rejected from probate. Mr. Frey admitted that he had actual notice of the rejection of the will. "At a subsequent family meeting at Lorna's home, Lorna

informed the family that the will had been deemed not legal by a judge in Friday Harbor by reason of the two post-it notes.” CP at 77 (Declaration of Dean Frey at ¶12). Mr. Frey therefore admitted that he was informed of the rejection of the will before July 2007, over three-and-a-half years prior to filing the subject petition/objection. See *id.* at ¶ 13. Further, as described in Lorna Frey’s declaration, Personal Representative Lorna Frey emailed each of her siblings, including Dean, the draft petition for letters of administration on March 22, 2007, which petition contained the assertion that no valid will existed. CP at 45-47 (Declaration of Lorna Frey, Ex. B). And in September 2007, Dean e-mailed his siblings, including Lorna, asserting that the siblings should honor Mildred’s will despite the fact that it had been rejected by the Court. CP at 48 (*Id.*, Ex. C).

The trial court correctly concluded that the actual notice to Mr. Frey was sufficient to trigger the four-month statute of limitations in 2007, was correct. Mr. Frey does not even challenge that conclusion. Mr. Frey’s attempt to challenge the rejection of the will in February 2011 was well beyond the four-month statute of limitations and the trial court’s dismissal should be affirmed.

B. Because Appellant Assigns No Error to the Trial Court's Ruling or Any Issue Dispositive of that Ruling, the Court of Appeals Should Affirm the Trial Court's Dismissal.

As Judge Eaton specifically concluded, whether Personal Representative Lorna Frey failed to give the technical notice required by RCW 11.68.041 to Mr. Frey of her petition for non-intervention powers is irrelevant to and has no bearing on the trial court's determination that Mr. Frey's underlying challenge to the rejection of Mildred Frey's will was time-barred. RP at 18:16-21:13.

Mr. Frey's argument that the requirement in RCW 11.68.041 for notice of a request for non-intervention powers *somehow requires notice of the rejection of Mildred Frey's will* based solely on the fact that the order granting non-intervention powers also had the effect of rejecting the will is nonsensical. The fact that the order granting non-intervention powers also rejected the will in no way links the requirement to give notice of a request for non-intervention powers to a requirement to give notice of the rejection of the will. If Lorna Frey had given formal notice of her second request for non-intervention powers—in addition to the email notice that she provided by sending a copy of the petition—that would not have given Mr. Frey formal notice of the Court's rejection of the will. The two issues are wholly distinct. The statute requiring notice of

requests for non-intervention powers in certain situations does not create a requirement for specific notice of the rejection of the will.

The bottom line is that there is no statutory requirement for specific notice of the rejection of the will and Mr. Frey had actual notice of said rejection. He contested the rejection nearly four years after it occurred, which is well beyond the four-month statute of limitations and therefore was time-barred. RCW 11.24.010. Mr. Frey does not challenge the trial court's conclusion on this issue and the dismissal therefore should be affirmed.

C. Mr. Frey Is Not Entitled to Relief On the Notice Issue.

Appellant Dean Frey gave consent for Lorna Frey to receive non-intervention powers while serving as Personal Representative of their mother's Estate in connection with her petition to admit Mildred Frey's will to probate and receive letters testamentary. CP at 13. Mr. Frey consented to Lorna Frey serving as Personal Representative with non-intervention powers, and that is ultimately the authority she received. As a practical matter, RCW 11.68.041 does not specify that separate consents are required where more than one petition is filed. But further, Personal Representative Lorna Frey gave Mr. Frey notice of her petition and request for non-intervention powers via e-mail.

But even if Lorna Frey did not technically comply with RCW 11.68.041 because she did not obtain a second consent or give formal notice of her second petition and request for non-intervention powers, Mr. Frey does not contest that he had actual notice of the petition for letters of administration and non-intervention powers before it was filed. Mr. Frey also does not contest that he: (1) had actual notice that Ms. Frey received letters of administration and non-intervention powers; (2) was involved in the Estate administration for several years; (3) received significant distributions; and (4) did not contest Ms. Frey's authority to serve as Personal Representative with non-intervention powers until the hearing on his petition challenging the rejection of the will.

Even if Ms. Frey technically violated RCW 11.68.041, Mr. Frey failed to challenge her authority in a timely manner after receiving notice of her appointment and there was no redressable injury to Mr. Frey when he raised the issue in 2011. The issue is moot and has no bearing on Mr. Frey's untimely challenge to the rejection of Mildred Frey's will.

D. The Trial Court's Dismissal Should Also Be Affirmed Based on the Equitable Doctrine of Laches.

The Court of Appeals may affirm a trial court decision on any

basis, even if not expressly raised by the parties to the trial court. See RAP 2.5(a). The trial court here ruled that it would dismiss Mr. Frey's petition on the basis of laches *in addition to* its other express bases for dismissal. The trial court's dismissal should also be affirmed based on the equitable doctrine of laches.

The equitable doctrine of laches is designed to prevent harm to parties from unreasonable delay in asserting claims. Implied waiver is found where a defendant establishes: "(1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay." *Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978); *Buell v. Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358, 1361 (1972).

Each element of laches is satisfied here. Appellant Dean Frey has not contested that he had actual knowledge of both the rejection of his mother's will and the petition for letters of administration and non-intervention powers sought by Personal Representative Lorna Frey. Nonetheless, he waited almost four years to challenge the rejection of the will or Ms. Frey's alleged

failure to give notice of her request for non-intervention powers. Mr. Frey unreasonably delayed in pursuing these issues.

Because he did not come forward to challenge the rejection of the will or Ms. Frey's authority to serve as Personal Representative with non-intervention powers, she proceeded to administer their mother's Estate, transferring real property to Mr. Frey that he was not entitled to under the intestate administration but which the siblings agreed he should have, and to close the Estate, all without legal action by Mr. Frey. It was not until the Estate had been administered to his advantage and its funds were depleted that he brought the subject challenges.

Mr. Frey's failure to timely assert his claims would injure the Estate and Personal Representative Lorna Frey if he is entitled to make them now, four years after the will was rejected and after the assets of the Estate have been distributed.

E. Even if Considered, Mildred Frey's Will Was Incomplete As a Matter of Law And Appellant Already Received All to Which He Was Entitled.

Appellant asserted below that the will should be probated without the taped-on provision in Article 3. CP at 71 (Opp'n to Mot. to Dismiss at 5). Mr. Frey asserted that even without the taped-on provision, the first paragraph of Article 3 of the will directs that

“Dean should get a sum of money equal to the difference in value between the former Bainbridge Island home and her home on Lopez.” CP at 72 (emphasis added). That assertion misrepresented the subject provision of the will.

The subject provision of the will states: “I also bequest to Dean to make equitable the difference in value of my present house on Lopez Island and my former Bainbridge Island, Washington house.” CP at 5. Then, in the blank space, erasures appear to have been made, over which “see note” is written in pencil, over which the slip of paper at issue was taped. The paragraph purports to explain *the reasoning* behind a bequest, but without the taped on slip, *it does not direct that anything is to be transferred to Dean.*

Without the taped-on slip of paper, which the parties agree did not comply with the will attestation requirements, the provision is incomplete. Mildred may have chosen to insert that a specific sum of money be given, a share in her other real Estate, items of personal property, or other items of sentimental value. The fact is that no bequest that complied with the statutory requirements for executing a will was made by the subject provision, and it is not appropriate to insert a bequest, such as a monetary sum, into the

incomplete provision. Indeed, it is evident that the provision was incomplete as written, because Mildred deemed it necessary to *tape on a provision* in the blank space left for the bequest.

Appellant provided no legal basis to allow the trial court to insert a provision for a monetary request into an incomplete will. In evaluating a will, the court is charged with determining a testator's intent, but the court is not permitted to insert a bequest into an incomplete will in order to obtain a result that the Court believes just. *See In re Estate of Price*, 75 Wn.2d 884, 886, 454 P.2d 411 (1969) (refusing to insert a provision to distribute assets to the issue of the testator's children if a child did not survive him where the testator failed to include that direction and made bequests to his surviving children).

There is absolutely no legal authority to support Appellant's underlying request to unilaterally create or fill in a bequest in an incomplete will. This is not the case of an ambiguous provision in a will; this is an incomplete provision that the testator expressly attempted to complete with an un-witnessed alteration.

Personal Representative Lorna Frey did not only provide Dean Frey with his intestate share of their mother's Estate, as she would have been permitted to do following the Court's rejection of

the will. Based on a vote of the siblings, Personal Representative Lorna Frey administered her mother's Estate to affect the intent of the will except for the altered/incomplete provision. Therefore, it is undisputed that Appellant *has already received that to which he would be entitled under the will* with the exception of the altered and incomplete provision and he would be entitled to no further relief, even if the court determined that the will should be admitted to probate with the exception of the provision at issue.

Under the circumstances, the Court of Appeals may also affirm the trial court's dismissal of Appellant's petition challenging the completion of the administration because it is beyond factual dispute that Mr. Frey already received that to which he was entitled to under the will with the exception of the altered and incomplete provision. See RAP 2.5(a).

F. Respondent is Entitled to Reimbursement of Attorney Fees On Appeal.

RAP 18.9(a) empowers an appellate court on its own initiative or on a motion of a party, to assess sanctions, including attorneys' fees, against a party filing a frivolous appeal. See, e.g., *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987). An appeal is frivolous under RAP 18.9 if it "raises no debatable

issues.” *Id*; *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998); *Andrus v. State Dep’t of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005).

The Court of Appeals in *Andrus v. State Dep’t of Transp.*, 128 Wn. App. 895, 900, 117 P.3d 1152 (2005), held that “the decision to file a court action in this matter was unfounded.” In *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 473-74, 128 P.3d 621 (2005), this Court awarded attorney fees because the appeal was “not based on subtle or even gross distinctions of law,” despite the fact that the trial court analyzed the issues at length. The same is true here.

Appellant Dean Frey has failed even to assert error in the basis for the trial court’s dismissal of his petition challenging the declaration of completion. Instead, Appellant focuses exclusively on an unrelated issue and attempts to create a notice requirement where there undisputedly is none. Mr. Frey’s arguments on appeal “lack any support in the record or are precluded by well-established and binding precedent.” See *Andrus*, 128 Wn. App. at 900. Respondent respectfully requests an award of reasonable attorney fees and costs on appeal in an amount to be determined.

V. CONCLUSION

Because Appellant has failed even to allege error in the trial court's underlying decision, or on any legal issue dispositive of that decision, the Court of Appeals should affirm the trial court's dismissal of Appellant's petition challenging the declaration of completion. Even if the Court considers Appellant's arguments, Appellant cannot establish that there is any specific statutory requirement for notice of the rejection of the will. Appellant admits that he had actual notice of the rejection of the will and failed to challenge it until filing his petition contesting the declaration of completion. The challenge to the rejection is undisputedly untimely and the trial court's dismissal should be affirmed. Finally, the trial court's dismissal of the petition challenging the declaration of completion also should be affirmed pursuant to the equitable doctrine of laches, as Appellant has unreasonably delayed in bringing his challenges, which if allowed to go forward, would result in injury to the Estate and its beneficiaries.

Respectfully submitted this 14th day of November, 2011.


KATHRYN C. LORING, WSBA # 37662
Attorney for Respondent

No. 67378-5-1

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

DEAN FREY,

Appellant,

vs.

ESTATE OF MILDRED FREY,

Respondent.

DECLARATION OF
SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 14th day of November, 2011, via personal delivery, I provided true and correct copies of the following documents:

Respondents Motion for Attorney Fees Pursuant to RAP 18.9(a);
Respondents Brief;
Declaration of Service

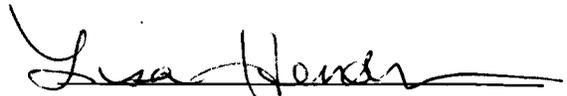
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Signed this 14th day of November, 2011 at Friday Harbor
Washington



Lisa Henderson

ORIGINAL