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SEP 18 2013

COURT OF APPEALS
DIVISION III
800 N. WASHINGTON STREET
SPokane, WA 99201

**IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION III**

No. 314928 -III

In re the Matter of:

ESTATE OF QUENTIN J. PORTER, Deceased

SALMA ASSEMANY, Appellant

vs.

**HELEN T. PORTER, Personal Representative of
The Estate of Quentin J. Porter, Respondent**

REPLY BRIEF OF APPELLANT

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1. AMENDED STATEMENT OF FACTS¹

Salma Assemany is a single woman and a resident of Manlius, Onondaga County, New York. **CP 006**. Quentin Porter, a widower, resided with Assemany in her home in New York state for approximately 10 years prior to his death. **CP 006**. Assemany was the companion and confidante to Porter. On October 1, 2002, Porter executed his Last Will and Testament in which the opening paragraph acknowledged his residence as Manlius, New York. In the same Will Porter also stated, at paragraph 3:

All of my personal effects situate in the town of Manlius, with the exception of my gun collection, I give, devise and bequeath to my good friend, Salma Assemany.
CP 127.

Porter had four adult children who are heirs to his estate. They are: Lawrence Porter, Helen Theresa Porter, Patricia B. Cummings and Maribeth Miles. Porter continued to reside in Onondaga County, New York until the time of his death on October 10, 2011. **CP 006**.

On September 29, 2011, Porter being terminally ill was admitted to a hospice facility, known as Francis House, in

¹ The Statement of Facts recited here are identical to those contained in Appellant's opening brief, which used cites to document numbers at the trial court. To avoid confusion, appellant has amended the initial Statement of Facts by referencing the "Clerk's Papers" citation.

Syracuse, New York. **CP 129**. On or about October 2, 2011 Porter executed the First Codicil to the Last Will and Testament of Quentin J. Porter. That Codicil, at paragraph A. stated:

I hereby revoke section a. of the Sixth Article which reads:
. . .

One-third to my friend, Salma Assemany, of Manlius, New York if she survives me. If Salma does not survive, then her share shall lapse and be paid over to my remaining named beneficiaries.

CP 174-249, Ex. 1.

Porter in his Codicil left the provision in his original Will which granted all his personal property situated in Manlius, New York, except his gun collection, to Salma Assemany. **CP 127**. The Codicil also amended that the one-sixth portion of his estate originally granted to Assemany to be bequeathed to his children. **CP 174-249, Ex. 1**. The Last Will and First Codicil were filed for probate in Stevens County Superior Court under Cause No. 11-4-00087-2 on October 20, 2011. **CP 007**. Porter's daughter, Helen T. Porter, was appointed personal representative. **CP 007**. On January 24, 2012 Assemany filed her TEDRA action in Stevens County under Cause No. 12-4-00008-1. **CP 005-010**. That petition requested nullification of the validity of the First Codicil, removal of the probate to New York state, and attorneys fees and costs. **CP 009**.

Assemany initiated discovery in this matter due to the refusal of the estate to release any information concerning the circumstances surrounding Porter's execution of the Codicil to his Will. **CP 307.** The deposition of Helen T. Porter, the Personal Representative and heir of the estate, was taken on July 12, 2012. **CP 307.** Ms. Porter had little information concerning the execution of the codicil, including who drafted it. **CP 307.**

As part of the subpoena duces tecum served upon Ms. Porter, a request was made for her to provide "all medical records of Quentin J. Porter from September 10, 2011 through October 10, 2011." **CP 308-309.** Ms. Porter refused to provide those documents and a hearing was held on August 18, 2012 before Judge Nielson to compel the discovery of that information. **CP 308.** Assemany could not obtain the records because she was not the legal spouse of Porter and the facilities would not release records directly to her. Ms. Porter as the personal representative had the authority to execute releases for that information to Assemany, but refused. **CP 020.** At that hearing, the court declined to order the estate to execute the necessary releases concerning those medical records, indicating that Assemany would have to obtain those through her own efforts. **CP 308.**

Subsequently, and just prior to the hearing subject to appeal in this matter, Ms. Porter provided those medical records through a sealed source filing to the court. **CP 260, fn. 5.** To date, Assemany has not been allowed to review those records.

As part of further discovery, Assemany took the deposition of Lloyd B. Nickel, who is the husband of Helen T. Porter. **CP 307.** Lloyd Nickel is a licensed attorney in the state of Washington, but not New York. During his deposition, Mr. Nickel refused to answer many questions, asserting the attorney/client privilege, but did admit that he drafted the Codicil of Porter days before Porter's death based upon him being contacted by a relative and discussing Porter's alleged wishes over the telephone. **CP 307.** Shortly after Mr. Nickel's deposition was taken, the estate filed their Answer to the TEDRA petition. **CP 064-069.** A month after filing their Answer, the estate, on October 5, 2012, filed a Motion to Dismiss Will Challenge, Award Fees and Costs, and Preserve Right to Seek Sanctions Pursuant to CR 11. **CP 071-076.** The sole basis of the estate's motion to dismiss was predicated upon the allegation that pursuant to RCW 11.24.020 and 11.96A.100, Assemany was required to serve a citation on within 90 days of filing the TEDRA petition on all legatees, citing *In re Estate of*

Kordon v. Duke, 157 Wn. 2d 206, 209-210, 137 P.3d 16 (2006).

This was the only basis for the request to dismiss. **CP 071-076**. At that point in the time hearing on Assemany's jurisdictional issues and/or a request to invalidate the First Codicil had not occurred.

Almost simultaneously, on October 9, 2012, the estate also filed a motion to show cause why Assemany should not return estate personal property in her possession to the personal representative. **CP 077-081**. For reasons unknown the order to show cause was not executed by the court until December 6, 2012. **CP 084-085**. The only order to show cause that Assemany's counsel received was an unsigned copy on November 30, 2012. **CP 055**. No signed order to show cause was ever personally served on Assemany. **CP 128**.

There were no affidavits or declarations provided at the time the estate's motion to dismiss and the motion to show cause were filed to support either motion. **CP 071-076, 077-081**. On November 30, 2012 the parties agreed to continue respondent's motion to dismiss and order to show cause to Tuesday, December 18, 2012. **CP 083**. On December 11, Assemany filed a response to the motion to dismiss addressing the fact that RCW 11.24.010 and the *Kordon* case did not apply to this situation as the *Kordon*

case only required that the executor or personal representative be served with the citation within 90 days of filing the petition, not the legatees. **CP 104-105**. Assemany had in fact complied with this requirement. **CP 013**. There is no requirement under a TEDRA action that all legatees and devisees be served within a specified time period after filing the petition. **CP 089**.

On December 11, 2012 Assemany filed her own declaration in response to the order to show cause alleging that she was not served with an order to show cause. **CP 128**. She further indicated she was not able to appear in court for health reasons as evidenced by the declaration of her physician, Luke Rigolosi. **CP 123-125, 127**. In her December 11th response to the estate's show cause order, Assemany alleged the show cause was defective for a number of reasons including 1) failure of personal service on Assemany, 2) failure of the estate to have an affidavit or declaration supporting the motion, and 3) that in fact the items requested in the order to show cause were in fact Assemany's property as they all were personal property items situated in Manlius, New York. They had been bequeathed to her under both the Will and First Codicil and did not include a gun collection. **CP 103-106, 127**. Finally, as part of the response, Assemany again

alleged Washington state had no jurisdiction over Porter's property which existed in New York state. **CP 107-108, 130.**

Assemany also raised the fact that the estate had filed the motion to show cause under the TEDRA action and not under the probate matter. **CP 103-105.** Therefore the matter was improperly before the court. The estate responded on December 13, 2012 by filing a motion and order to consolidate the probate and TEDRA cases, and for an order shortening time. **CP 144-148, 168-173.**

The estate filed a reply memorandum on the same date in support of its motion to dismiss and motion for an order to show cause. **CP 174-249.** The reply memorandum contained a number of alleged statements/affidavits attached as exhibits. **CP 208-249.** These alleged affidavits were the first statements of fact sworn under the penalty of perjury that had been filed in the matter. The reply memorandum itself, along with Exhibit 3/Affidavit of Larry Porter, Exhibit 4/Statement of Thomas Miles, Exhibit 5/Affidavit of Maribeth Miles, Exhibit 6/Affidavit of Patricia Porter Cummings, Exhibit 7/Affidavit of Peter B. Shea, and Exhibit 8/Affidavit of Margaret Paul were replete with hearsay and/or did not meet the requirements of sworn declarations or affidavits, and

also contained numerous violation of the Deadman's Statute, RCW 5.60.030. **CP 208-249.**

On December 18, 2012 Assemany objected to respondent's motion for order shortening time and the motion to consolidate the probate and TEDRA actions as being untimely. **CP 133-134.**

On December 18, 2012 Assemany also filed a motion to strike substantial portions of the declarations and affidavits referenced in the estate's reply memorandum. **CP 137-143.**

A hearing was held on December 18, 2012 before Judge Nielson. The estate, in support of its motion, argued from the affidavits attached to its reply memorandum. **Transcript, p. 8, ll. 21-23.** Assemany's counsel informed the court prior to the estate's argument that there had been numerous objections to their declarations/affidavits based both upon the Deadman's Statute and hearsay. The court acknowledged this ongoing objection and continued to hear the argument of the estate. **Transcript, pp. 4-5.** Assemany's counsel argued in response to the specific pleadings that were filed by the estate, i.e., the motion to show cause for Assemany to produce items of personal property, and for dismissal of Assemany's petition based solely on the failure to serve all legatees. **Transcript p. 14, ll. 21-23; pp. 16-20.** All legatees were

served with the TEDRA petition by December 22, 2012. **CP 281.** Counsel for Assemany did not argue in support of the TEDRA petition because that matter was not set for hearing.

Judge Nielson took the matter under advisement and on January 11, 2013 entered Findings of Fact, Conclusions of Law and Ruling stating that 1) the probate and TEDRA actions would be consolidated; 2) the estate's motion to dismiss for failure to serve legatees was denied; 3) Assemany's petition for an order nullifying the validity of the First Codicil to the Last Will and Testament of Quentin J. Porter and requiring removal to New York state was dismissed; and 4) the personal representative was authorized to inventory the personal property in the possession of Salma Assemany to determine the items bequeathed to Salma Assemany and those items bequeathed to other heirs. **CP 259-262.**

Assemany was not prepared for nor did she argue the substantive basis for her petition to invalidate the codicil at the December 18, 2012. That hearing addressed only the show cause proceeding regarding personal property in New York state and dismissal of Assemany's petition solely on the basis of the failure

to provide notice to the legatees. **CP 269-270, 278, 280, 300, 302-305.**

On January 22, 2013 a motion for reconsideration was filed by Assemany. **CP 268-274.** In that motion and accompanying declarations, Assemany again raised the fact that she had not been given an opportunity or proper notice that the hearing on December 18th was to be a hearing on the merits of her petition to invalidate the Codicil and/or object to jurisdiction of the case. **CP 278-280, 306-308.**

The court, on February 14, 2013, denied Assemany's request for reconsideration in its entirety. **CP 319-320.** On March 5, 2013 Assemany filed a notice of appeal to this court seeking review of the Findings of Court, Conclusions of Law and Ruling entered on January 10, 2013 as well as the Order Denying Petitioner's Motion for Reconsideration dated February 14, 2013. **CP 321-334.**

2. Contrary to the assertion of the respondent, Ms. Assemany did not have nearly a year to produce evidence of the invalidity of the codicil.

Ms. Assemany timely filed her TEDRA matter on January 24, 2012. **CP 005-010.** Respondent did not file a formal response to the petition until September 5, 2012. **CP 064-069.** It was only

at that time that Ms. Assemany was aware of their position. Less than a month later, respondent filed its motion to dismiss the Will challenge on procedural as opposed to substantive grounds. **CP 071-076**. It is also noted from the record that Ms. Assemany attempted discovery but was thwarted by assertions of attorney-client privilege by the attorney who prepared the codicil. **CP 307**. Also, from the taking of the deposition of the personal representative it was determined she had little or no knowledge of circumstances or surroundings of the execution of that codicil. **CP 307**. Respondents did not commence their own discovery until September 17, 2012. They served requests for admissions on the appellant. **CP 197-207**.

Ms. Assemany was certainly not sitting on her hands in this matter and was actively pursuing discovery which was made much more difficult by the fact that all substantive factual issues occurred 3000 miles away in New York state. The respondents allege all evidence before the trial court suggested the Will was valid including the affidavits of the witnesses to the execution of the Codicil. There is a more deep rooted problem with this case that exposes that faulty analysis. The motion filed by respondents did not address the issue of the validity of the Codicil at all. Ms.

Assemany had no opportunity to provide evidence to support her contention the codicil was invalid. Moreover, there are no affidavits provided by respondents to support its motion. The only affidavits filed by respondents were “reply” affidavits which did not support their initial motion but were provided to address an issue that was not properly before the court, i.e., whether the codicil was valid.

3. Ms. Assemany had no notice that the motion to dismiss originally set on October 25, 2012 by respondent was a motion to dismiss on the merits.

Nowhere in respondent’s initial documents setting the hearing to dismiss did it indicate the motion was on the merits. The motion was to dismiss solely based on procedural issues and was briefed in that manner. A new legal theory or issue raised for the first time at oral argument and not contained in the original motion should be stricken. The moving party in a summary judgment proceeding has the responsibility of raising all of the issues on which it believes it is entitled to summary judgment. Allowing new issues to be raised in rebuttal materials “is improper because the non-moving party has no opportunity to respond.” *White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4, 8 (1991); *see also Colwell v. Holy Family Hospital*, 104 Wn.

App. 606, 616, 15 P.3d 210 (Div. III, (2001)). There were no verified facts alleged in respondents' motion to support a dismissal on the merits.

The TEDRA statutes anticipate a number of hearings may be held before a full hearing on the merits is addressed.

Any party may move the court for an order relating to a procedural matter, including discovery, and for summary judgment in the original motion, answer, response or reply or in a separate motion, or at any other time.

RCW 11.96A.100(9).

Respondents' motion to dismiss on procedural grounds therefore does not require a hearing on the merits of the petition be held at the same time.

Ms. Assemany properly responded to the motions of respondent, addressing all issues raised in their initial pleadings. The court on its own initiative determined a summary judgment proceeding, on a limited procedural issue, had now somehow become a full hearing on the merits of Ms. Assemany's TEDRA petition. That action by the court deprived Ms. Assemany of her basic due process rights.

It is a fundamental precept of the American concept of due process that litigants be given notice and the opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306

(1950). Due process includes the “right to notice and opportunity to be heard at meaningful time and in meaningful manner.” *Fuentes v. Shevin*, 407 U.S. 67 (1972); *see also Johnson v. Washington Dept. of Fish & Wildlife*, 305 P.3d 1130, 1134 (Wash. Ct. App. 2013). An opportunity to be heard requires a hearing be set that allows the aggrieved party the opportunity to confront witnesses and object to evidence. *Martin v. State Dept. of Licensing*, 175 Wn.App. 9, 306 P.3d 969 (2013).

4. There is a right to discovery in TEDRA actions.

A TEDRA action, like any other matter initiated by filing a summons and complaint or petition is subject to discovery. Respondents themselves engaged in discovery by sending out to appellant requests for admissions pursuant to CR 36. **CP 197-207**. Respondents also indicated to appellant’s counsel that they intended to take the depositions of potential witnesses in New York state. **CP 73**; RCW 11.96A.100(a)(9) specifically provides that “Any party may move the court for an order relating to a procedural matter including discovery...”. Moreover RCW 11.96A.115 clearly allows discovery under normal Superior Court civil rules once a petition has been filed. Such discovery is allowed when

(1) a judicial proceeding that places one or more specific issues in controversy that has been commenced under 11.96A.100 in which case discovery shall be conducted in accordance with the Superior Court civil rules and applicable court rules.

There is no dispute that the petition filed by Ms. Assemany on January 24, 2012 was commenced under RCW 11.96A.100 and therefore ordinary discovery is allowed.

5. Ms. Assemany did not waive objection to the trial court's jurisdiction.

Ms. Assemany did not waive objection to the trial court's jurisdiction over her. A waiver is the intentional and voluntary relinquishment of a known right. *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.3d 94, 106, 297 P.3d 677, 685 (2013) cites *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). No facts in this case support an argument of waiver.

The issue of jurisdiction in regards to subject matter can be alleged at any time in the proceedings. *Bour v. Johnson*, 80 Wn. App. 643, 910 P.2d 548 (1996). The probate of this matter in Stevens County, Washington should have been dismissed in its entirety. "Whenever it appears by suggestion by the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." CR 12(h)(3).

Ms. Assemany preserved any objection by in fact alleging in her original filing, the TEDRA petition, that the court did not have jurisdiction because the assets of the decedent, along with his residence, were located in the state of New York. There is no factual evidence in the record to support the position that “probate” assets of the decedent existed in the state of Washington at the time of his death. The probate of a nonresident’s Will who dies leaving property within the state affects only the property within the jurisdiction and has no effect on the validity of the Will itself beyond the limited purpose of plenary power possessed by the state with respect to property within its domain. *In re Estate of Stein*, 78 Wn. App. 251, 261-262, 846 P.2d 740, 745 (1995). Furthermore, even if probate assets existed in Washington state, the court has jurisdiction only over the assets contained in this state, not over assets in New York state. *Krohn v. Hirsch*, 81 Wash. 222, 142 Pac. 647 (1914).

Respondent and the trial court looked to *Stoop’s*, 118 Wash. 153, 203 Pac. 22 (1922) for the argument that Ms. Assemany has waived her objection to the jurisdiction of this court. Again, *Stoop’s* was not a subject matter case. In that case the parties filed a probate and then requested that the probate be dismissed.

Ms. Assemany has never taken such inconsistent actions. She has consistently taken the position that this court does not have jurisdiction and as such has not waived her objection. Ms. Assemany cannot consent or waive subject matter jurisdiction. *Shoop v. Kittitas County*, 108 Wn. App. 388, 398, 30 P.3d 529, 534 (2001).

The trial court never addressed the issue that Washington state has jurisdiction to hear this probate matter at all. There are no factual findings whatsoever by the court to support its jurisdiction over this probate.

6. The trial court did not have the authority to order Ms. Assemany to assemble property bequeathed to her.

Throughout their brief, respondents ignore the fact that the court erred by granting relief that was not even requested by the respondents in either motion. The first motion was for dismissal for failure to timely serve other legatees with the TEDRA petition. The motion and argument by the respondent does not mention anywhere, including the legal argument section, that this motion was a dismissal on the merits regarding the validity of Mr. Porter's Codicil. Also, there were no declarations/affidavits to support either respondents' motion to dismiss on a procedural issue or to dismiss on the merits. To support a summary judgment, the

moving party must file affidavits which present facts evidentiary in nature. *Johnson v. Recreational Equipment, Inc.*, 159 Wn. App. 939, 247 P.3d 18 (2001), rev. den'd, 172 Wn.2d 1007, 259 P.3d 1108 (Div. I (2011)). The trial court acknowledges that in its ruling of January 14, 2011 that "The proceedings can be by way of affidavits." **CP 263, footnote 4**. No proper affidavits were provided in the motion by respondents. Consequently, the trial court based its decision on a complete lack of live testimony or affidavits. The trial court denied the motion to dismiss because of alleged failure to timely serve all legatees; and that was the only issue before the court.

The same analysis also applied to the show cause motion brought by the respondent. Again the motion was completely void of any factual basis, i.e., declaration, affidavit, or otherwise, to require return of the property requested. The specific prayer for relief of respondents' motion was:

. . .an order requiring Petitioner Salma Assemany to appear personally before this court and show cause why the Court should not be entered *[sic]* requiring Petitioner to immediately return to the Personal Representative the property of the Estate of Quentin J. Porter.

CP 080.

Nothing in that motion indicates that the purpose of the order is for inventory of any assets. That makes sense because the estate already knew what the items were.

No signed affidavits or declarations were supplied by the respondents to support the order to show cause. Statements of alleged facts that do not comport with the rules of evidence should not be considered by the court. *Our Lady of Lourdes Hosp. V. Franklin County*, 120 Wn.2d 439, 842 P.2d 956 (1993). Nor should the court consider unsworn statements of fact submitted to it. *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 300 P.3d 431 (Div. I (2013)). How can Ms. Assemany be expected to respond to motions which do not even address the issues that the court ultimately ruled on?

There was no request in the show cause order for return of business or financial records. The motion is clear that the listed items were to be returned to the personal representative in Washington state because they were estate property. Ms. Assemany's response was that these items did not belong to the estate, they were personal property in Ms. Assemany's possession that had been transferred to her. She was the owner of those items. Somehow, the court completely changed that motion and

granted relief that was not requested. The trial court changed the motion to a) an inventory of assets as opposed to a “return” of assets and 2) added items that were not requested in the motion (business records).

The respondents did not request any type of documents or business records in its motion. The documents or business records are personal property and should remain with Ms. Assemany per both the Will and Codicil. There is a complete lack of citation by the respondents to support their position the show cause order is valid. The court exceeded its authority by granting relief that never was requested.

7. The trial court improperly consolidated the matters.

It is acknowledged that the trial court has wide discretion in consolidating TEDRA action. However, the court must first address the very issues brought under the TEDRA petition to determine whether they should be consolidated. If the court does not have subject matter jurisdiction to probate the estate, it doesn't have the authority to consolidate it with the TEDRA action. CR 12(h)(3).

8. Appellant should be awarded attorney fees.

The fact is that respondents were granted relief on two motions in two situations in which that relief was never requested in those motions. The purpose of a TEDRA action is to allow the parties to review all issues raised in the probate of an estate, including subject matter jurisdiction. Appellant should be allowed her day in court on the substantive issues and the merits of this case. Fees for the appellant are therefore appropriate under RCW 11.96A.150.

CONCLUSION

This is a TEDRA action in which the trial court has granted relief on issues that were not properly before it. The trial court has made a decision on the merits without giving Ms. Assemany the opportunity to present her case. The first basic issue in this case which needs to be addressed, and which the court failed to do, is how can a decedent, domiciled permanently in New York state, with substantially all his property residing in New York state, have his estate probated 3000 miles away in Washington state?

The trial court simply ignored Ms. Assemany's substantive due process rights as well as subject matter jurisdiction issues. This is an estate which should clearly be probated in New York

state, where the decedent resided, where most if not all of the witnesses to the execution of the codicil reside, where all the property of the estate is located, and where some of the heirs reside. The only connection the decedent had with Washington state is that is where the personal representative and two heirs reside. Despite these undisputed facts, the Superior Court of Stevens County has not only determined it has jurisdiction, but has improperly refused to give Ms. Assemany the opportunity to present her case to support the allegations in her TEDRA petition.

Likewise, respondents' motion to return property to Washington state was somehow turned into a request to inventory items not requested in the motion. There simply was no factual basis to support either motion. Respondents failed to provide any declarations or affidavits to support those motions. The ruling of the court to require Ms. Assemany to assemble personal property which she lawfully owns and dismissing her TEDRA petition should be overturned. The probate matter in Stevens County should be dismissed and sent to New York for determination of whether the codicil is in fact valid.

Dated this 18th day of September, 2013.

Respectfully submitted:

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