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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

IN RE THE ESTATE OF QUENTIN J. PORTER:

**SALMA ASSEMAN Y
Appellant**

V.

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

NO. 314928

RESPONDENT'S AMENDED BRIEF

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I. Introduction and Relief Requested

This appeal concerns the dismissal of a will contest which was filed as an action under the Trust and Estate Dispute Resolution Act (TEDRA). Respondent, the Estate of Quentin Porter (the Estate) respectfully requests that this Court affirm the trial court's dismissal of Appellant Salma Assemany's will contest and affirm the other trial court rulings which Ms. Assemany is appealing. The Estate further requests that it be awarded its attorney's fees and costs before the trial court and for this appeal.

II. Statement of the Issues

A. Did the trial court properly dismiss Salma Assemany's will contest when she failed to produce any evidence that the codicil to Quentin Porter's will was invalid despite having nearly a year to produce such evidence?

B. Did the trial court properly rule that Ms. Assemany had waived any objection to the trial court's jurisdiction over her when she specifically invoked the authority of the trial court to invalidate the codicil to Mr. Porter's will?

C. Did the trial court properly authorize the personal

representative of the Estate to inventory assets of the Estate which are located in New York State?

D. Did the trial court properly consolidate the probate and TEDRA matters when the matters involved the same parties and facts?

E. Should the Estate be awarded its attorney's fees and costs before the trial court and on appeal for defending against Ms. Assemany's baseless will contest?

III. Statement of the Case¹

Quentin Porter died on October 10, 2011. CP at 325. On October 25, 2011 his daughter, Helen Porter, filed Mr. Porter's will with the Stevens County Superior Court. CP at 326. The will was admitted to probate and Helen Porter was named personal representative for the Estate. *Id.* Quentin Porter had died in New York State. *Id.* Approximately a week before his death, Mr. Porter executed a codicil to his will in which he removed a bequest to Salma Assemany. CP at 325. The witnesses to the codicil

¹ Ms. Assemany's Statement of the Case was reasonably factually accurate, but her citations to the record were not in compliance with RAP 10.4(f)'s requirement to cite to the specific page of the record on appeal. Ms. Assemany's citations appear to be to the trial court's docket subject numbers.

described Mr. Porter as clearly understanding what he was doing and that it was clear that it was his idea to change his will. CP at 235, 238. They also reported that no family members were in the room during the execution of the will. *Id.*

On January 24, 2012, Ms. Assemany filed a Petition for an order invalidating the codicil and seeking to remove the probate to New York State. CP at 5-10. Ms. Assemany's Petition specifically invoked Washington's Trust and Estate Dispute Resolution Act. CP at 6 (¶ 2.3 citing RCW 11.96A.040, the TEDRA statute, as a basis for jurisdiction). The Petition alleged that Quentin Porter had executed the codicil as the result of "undue influence, overreaching, and/or fraud in the inducement." CP at 8 (¶ 5.4). Ms. Assemany noted her Petition for hearing on February 28, 2012. CP at 11.

On February 24, 2012, Ms. Assemany renoted her Petition to be heard on March 20, 2012. CP at 14. On March 14, 2013, Ms. Assemany again renoted her Petition. CP at 16. Her Second Amended Notice of Hearing would have had the petition heard on May 22, 2013. *Id.* On May 16, 2013, Ms. Assemany filed a Third Amended Notice of Hearing. CP at 18. This amended

notice would have had the Petition heard on September 18, 2012.²

Id.

During the summer of 2012, the parties engaged in discovery and disputes over the same. CP at 20-64. On September 5, 2012, the Estate answered Ms. Assemany's Petition. CP at 64-68. This answer specifically pleaded that Ms. Assemany's petition "failed to state a claim against Respondent [The Estate] upon which relief can be granted." CP at 67.

On October 5, 2012, the Estate filed a Motion to Dismiss the will challenge. CP at 71-76. On December 7, 2012, Ms. Assemany filed a response to the Motion to Dismiss. CP at 86-97. On December 13, 2012, Ms. Assemany's counsel received a copy of the Estate's Reply Memorandum to the Motion to Dismiss. CP at 174. This Reply Memorandum specifically requested that the trial court dismiss Ms. Assemany's petition because there was "no factual or legal basis for her claims." CP at 185.

Attached to the Reply Memorandum were Ms. Assemany's October 1, 2012, responses to Requests for Admission.

² The record Ms. Assemany designated on appeal is silent as to whether a hearing took place on this date. The trial court docket information appears to indicate that the hearing was renoted a fourth time to be heard on October 23, 2013. *See* Subject No. 19 of the trial court docket.

CP at 198-207. Ms. Assemany admitted that she had "no personal knowledge that any person or persons influenced Quentin J. Porter to remove you [Ms. Assemany] from his Last Will and Testament." CP at 206 (response to Request for Admission No. 35). Ms. Assemany also admitted that she had "no personal knowledge that anyone forced Quentin J. Porter to execute the First Codicil." *Id.* (response to Request for Admission No. 38).

The trial court heard oral argument on the Estate's Motion to Dismiss on December 18, 2012. VRP (December 18, 2012) at 5-22. The Estate again specifically requested that the will challenge be dismissed because Ms. Assemany had presented no evidence to support it. *Id.* at 21-22. The Court took the matter under advisement, *id* at 22, and issued a written ruling on January 14, 2013, CP at 324-331. The Court ruled that Ms. Assemany had shown no factual basis to invalidate the codicil. CP at 331 (Ruling ¶3). It cited Ms. Assemany's admissions that she had no personal knowledge of any undue influence in Quentin Porter's decision to remove Ms. Assemany from his will. CP at 327. The trial court also cited the affidavits of Margaret Paul, CP at 237-238, and Peter Shay, CP at 234-235. CP at 328 (Finding of Fact M). These were

disinterested parties who had witnessed Mr. Porter execute his codicil. *Id.* These witnesses reported that Mr. Porter was clear in his intention to change his will and that no family members were present during the will's execution. *Id.* In addition to dismissing the will contest, the trial court consolidated the probate and TEDRA matters and authorized the personal representative to inventory the assets in the possession of Salma Assemany. CP at 330-331. (Ruling ¶1, 4).

On January 10, 2013, Ms. Assemany filed a motion for reconsideration CP at 268-273. This motion raised no factual issues related to the dismissal; reconsideration was sought on purely procedural grounds. *Id.* On February 8, 2013, the Estate filed a response to Ms. Assemany's motion. CP at 282-293. Ms. Assemany filed her reply to the Estate's response on the same day. CP at 299-305. On February 12, 2013, the trial court heard oral argument on Ms. Assemany's Motion for Reconsideration. VRP (February 12, 2013) at 4-16. The court orally denied the motion, *id* at 16, and issued a written order on February 14, 2013, CP at 333-334. This appeal followed. CP at 321-322.

IV. Law and Argument

A. The trial court properly dismissed Salma Assemany's will contest.

TEDRA grants Washington's Superior Courts plenary power to settle estate disputes. *See In re Estate of Fitzgerald*, 172 Wn. App. 437, 448, 284 P.3d 720 (2012) (citing RCW 11.96A.020 (1),(2) and *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 343, 183 P.3d 317 (2008)), *review denied*, 177 Wn. 2d 1014 (2013). This authority extends to will contests where a party invokes the TEDRA statute. *In re Estate of Kordon*, 157 Wn.2d 206, 211, 137 P.3d 16 (2006). Appellate courts review de novo trial court rulings on will contests. *In re Estate of Black*, 153 Wn.2d 152, 161, 102 P.3d 796 (2004). They review procedural rulings for abuse of discretion and accord significant deference to trial court decisions in TEDRA proceedings. *See Fitzgerald*, 172 Wn. App. at 448.

1. *Ms. Assemany failed to produce any evidence that the codicil to Quentin Porter's will was invalid, despite having nearly a year to produce such evidence.*

A party asserting a will or codicil to a will is invalid has the burden of proving this invalidity by "clear, cogent, and convincing evidence." *In re Riley's Estate*, 78 Wn.2d 623, 656, 479 P.2d 1 (1970). Ms. Assemany's Petition asserted that the codicil to Quentin Porter's will was produced via fraud, undue influence, or overreaching. She later admitted she had no personal knowledge which would suggest this was true. CP at 206. Instead with no evidence to support her claim, she filed a will contest, delayed a hearing on the merits of her claim for nearly a year, and now complains when the trial court dismissed her contest for lack of evidence. Contrary to Ms. Assemany's suggestion in her brief, Appellant's Br. at 19, the Estate does not have the burden to prove the codicil is valid. As the trial court correctly noted, the codicil is presumed valid once it is admitted to probate. CP at 329-330 (citing *Matter of Estate of Lint*, 135 Wn.2d 518, 533-38, 957 P.2d 755 (1998)).

All the admissible evidence before the trial court suggested Mr. Porter's codicil was valid.³ In particular, the affidavits of the witnesses to the execution of the codicil indicate that Mr. Porter clearly understood the nature of his property, that Mr. Porter clearly intended to change his will, and that there were no family members present during the testamentary act. CP 234-238.

2. Ms. Assemany had notice that the Estate was asserting that her claim was unsupported by evidence; the trial court had authority to dismiss her claim.

TEDRA requires the trial court to resolve "all issues of fact and all issues of law" at an initial hearing on the merits unless one or both of the parties requests otherwise in a petition or answer. *See* RCW 11.96A.100(8). In this case, it is undisputed that neither party requested that the issues not be resolved in an initial hearing. Ms. Assemany cites several TEDRA cases where there were multiple hearings. Appellant's Br. at 25. But these cases do not support her proposition that the legislature did not mean what it said when it required trial courts to resolve cases on the merits at

³ The Estate concedes that some of the evidence submitted to the trial court may not have been admissible under the Deadman's Statute. However, the trial court specifically stated that it did not consider this evidence. CP at 330. The evidence the court did cite was clearly admissible: Ms. Assemany's admissions and the affidavits of the witnesses to the codicil.

an initial hearing unless a party affirmatively requests otherwise. The first case Ms. Assemany cites, *Estate of Kanyer*, No. 68109-5-I (Wash. Ct. App. Div. 1, July 13, 2013)(2013 WL 3421914), is an unpublished opinion; it should not be considered by this Court. *See* GR 14.1(a). The other two cases are silent as to whether or not the parties requested in their petition or answer that the initial hearing not be on the merits. *See In re Irrevocable Trust of McKean*, 144 Wn. App. 333 and *Estate of Wegner v. Tesche*, 157 Wn. App. 554, 237 P.3d 387 (2010).

After an initial hearing, the trial court may enter an order which resolves "such issues as it deems proper." RCW 11.96A.100(10)(a). TEDRA provides that a party move the court for an order of dismissal at any time. *See* RCW 11.96A.100(9). The Estate asserted that Ms. Assemany's claim was defective on the merits in its answer to Ms. Assemany's Petition. CP at 67. Once the Estate had Ms. Assemany's answers to Requests for Admission, the Estate specifically requested her claim be dismissed as being unsupported by evidence. CP at 185. The Estate made a further request for dismissal on the merits at oral argument. VRP (December 18, 2012) at 21-22. Contrary to Ms.

Assemany's contention, it is perfectly acceptable to move to dismiss a TEDRA action in a reply brief or at any other time. *See* RCW 11.96A.100(9). The trial court properly ruled on the Estate's requests to dismiss Ms. Assemany's Petition on the merits.

3. *Contrary to Ms. Assemany's suggestion, there is no "right to discovery" in TEDRA actions.*

Ms. Assemany specifically invoked TEDRA in her petition. TEDRA's procedural rules replace the normal Civil Rules. *See* RCW 11.96A.090(1)("The provisions of this title governing such actions control over any inconsistent provision of the civil rules."). This is by design. The legislature specifically intended that trial courts be given broad discretion to manage estate disputes, presumably to avoid the exact sort of fishing expedition Ms. Assemany has forced the Estate to defend against for over a year now. *See* 11.96A.020(2)(a trial court "has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.") TEDRA authorizes the trial court to allow discovery. RCW 11.96A.100(9). By implication, this means there is no

independent right to discovery which the court must grant. *See In re Estate of Fitzgerald*, 172 Wn. App. at 447 (construing RCW 11.96A.115 as permitting but not requiring discovery). In addition, TEDRA specifically provides that issues may be decided by affidavit, so no depositions or live testimony were required in this matter. *See* RCW 11.96A.100(7). Having invoked TEDRA, presumably to take advantage of the potential quicker resolution of this matter, Ms. Assemany's should not be heard to complain that TEDRA's procedural rules apply to her.

Where a party has produced uncontroverted affidavits which resolve a factual issue, our Courts have affirmed a trial court's denial of a request for additional discovery. *See Fitzgerald*, 172 Wn. App. at 449-450. (affirming denial of continuance for additional discovery where affidavits conclusively demonstrated there was no issue of fact as to knowledge of creditor; and characterizing the additional discovery request as a "mere speculation and a fishing expedition"). In the present case, the uncontroverted affidavits of the witnesses to the codicil and Ms. Assemany's own admissions conclusively demonstrate that there was no fraud, undue influence, or overreaching in the

execution of the codicil. No additional discovery was needed or warranted. The trial court properly exercised its discretion not to review Quentin Porter's medical records when there was no evidence before the court which would suggest that anything in those records would be probative. Again, all of the uncontroverted evidence before the trial court suggested that the codicil was valid; there was no need for additional discovery.

B. Ms. Assemany waived any objection to the trial court's jurisdiction over her.

Superior Courts in Washington have jurisdiction "over the probate of wills and administration of estates [...] in all instances, including without limitation [...] (c) when a nonresident of the state dies outside the state." RCW 11.96A.040(1) . It is the appointment of an executor or administrator which grants the court jurisdiction. *In re Pugh's Estate*, 22 Wn.2d 514, 523, 156 P.2d 676 (1945). While the primary probate of a will should generally be in the state where a person was domiciled at the time of death, a will may be probated in any state where the decedent had assets at the time of death. *See In re Estate of Tolson*, 89 Wn. App. 21, 31, 947 P.2d 1242 (1997)(citing Restatement of Conflicts

2d §314, 359). Quentin Porter had assets in Washington State at the time of his death; his will was properly probated here. Ms. Assemany produced no evidence to suggest otherwise. Ms. Assemany is simply incorrect when she claims that there is a question of fact regarding whether the trial court had subject matter jurisdiction in this case.

Ms. Assemany specifically invoked the authority of the trial court to invalidate the codicil to Mr. Porter's will, thus she subjected herself to jurisdiction of the trial court.

The trial court correctly ruled that when Ms. Assemany voluntarily decided to contest the validity of Mr. Porter's codicil here in Washington, she has waived any argument that the Court does not have jurisdiction over her for the purposes of determining other issues related to the Estate. *See In re Stoops Estate*, 118 Wash. 153, 154-55, 203 P. 22 (1922)(a party may not voluntarily invoke authority of a court to decide one issue and then assert that the court has no jurisdiction to decide a necessary collateral issue.

C. The trial court properly authorized the personal representative of the Estate to inventory assets which are in New York State

The trial court properly exercised its plenary over the Estate by authorizing the personal representative in Washington State to inventory assets in New York. While Ms. Assemany is correct that the property in New York is subject to New York law, Helen Porter has an obligation under Washington law to inventory all the assets of the Estate. *See* RCW 11.44.015. Ms. Porter may or may not need to open a probate in New York with regard to Estate assets there, but, as the trial court recognized, she certainly must inventory the assets. The Court's order authorizing Helen Porter to conduct such an inventory is not inconsistent with the trial court's jurisdiction. If Ms. Assemany continues to fail to cooperate with the Estate, it is possible that the Estate may need to request that a New York court enforce the Washington trial court's orders, but such a possibility is not a basis for saying the trial court lacked the ability to enter the orders to begin with. The trial court pointedly did not order Ms. Assemany to do anything and it issued no order with regard to the property in New York State. CP

at 266. The trial court merely authorized the personal representative of the Estate to inventory assets of the Estate. *Id.*

D. The trial court properly consolidated the probate and TEDRA matters; the matters involved the same parties and related facts.

This Court reviews orders of consolidation for abuse of discretion. *State v. Norby*, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Ms. Assemany has demonstrated no such abuse here. While Ms. Assemany complains of the procedures used by the trial court in ordering consolidation, she ignores the trial court's broad discretion, the fact that the probate and TEDRA actions are intimately related, and that such actions are routinely consolidated. *See, e.g. In re Estate of Wegner v. Tesche*, 157 Wn. App. 554, 559 (2010). The case which Ms. Assemany's cites related to consolidation, *Nat'l Bank of Washington v. Equity Investors*, 86 Wn.2d 545, 561, 546 P.2d 440 (1976), was a complicated commercial case where the Supreme Court reversed a trial court's reconsideration of the trial court's prior order of consolidation. Despite Ms. Assemany's efforts to complicate matters, the present cases were simple and related. They involve a will contest and a

dispute over property of the Estate between the same parties. The trial court was well within its discretion to consolidate the matters.

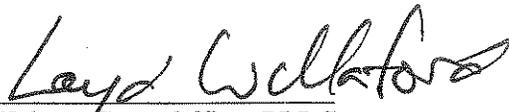
E. The Estate should recover its attorney's fees and costs before the trial court and on appeal for defending against Ms. Assemany's baseless will contest.

TEDRA authorizes this Court to award attorney fees to parties in a TEDRA action. RCW 11.96A.150. The Estate has been forced to defend against a will contest that Ms. Assemany's own admissions make clear had no basis in fact or law. Consequently, The Estate requests that this Court award the Estate its reasonable attorney's fees before the trial court and on appeal.

V. Conclusion

For the reasons stated above, the Estate of Quentin Porter requests that this court affirm the trial court's dismissal of Ms. Assemany's TEDRA petition. The Estate also requests that the Court award it attorney fees and costs for its defense of this matter before the trial court and on appeal.

Submitted this 22nd Day of August, 2013

A handwritten signature in black ink, reading "Loyd Willaford". The signature is written in a cursive style with a horizontal line underneath the name.

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