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[Court of Appeals No. 71732-4-I]

**SUPREME COURT OF
THE STATE OF WASHINGTON**

THE ESTATE OF VIRGINIA J. JEPSEN;
and **JULIE MILES**, Personal Representative,

Appellants,

v.

MACK JEPSEN,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUE

If a petition to contest a will is timely filed under RCW 11.24.010 and the estate files an answer without asserting any objection to service of the petition, has the estate waived the statutory requirement to serve the petition on the personal representative?

II. STATEMENT OF THE CASE

The pertinent facts are described in detail in prior briefing before the Court of Appeals and relating to the Petition for Review. In summary, Respondent Mack Jepsen filed a petition to contest the will of Virginia Jepsen on March 22, 2012. CP 1-3. After discussing the service of the petition with Estate's counsel, the petition and summons were emailed to counsel for the personal representative. CP 42-45. The Estate filed an answer to the petition on April 27, 2012. CP 31-32. After appearing at multiple hearings relating to the will contest and engaging in discovery, the Estate filed a motion to dismiss the petition on October 31, 2012. CP 54-64. The Estate's objection to service was raised for the first time in that motion.

III. SUPPLEMENTAL ARGUMENT

The trial court properly decided on reconsideration to deny the Estate's motion for summary judgment because all issues with service of the will contest petition were waived by the Estate. Prior briefing provides

detailed analysis of the will contest statute and its separate requirements for filing and service, and discusses authority for waiver of statutory requirements such as service. A thorough review of that authority confirms that service of a will contest is viewed the same as service in a civil complaint and therefore, is subject to waiver.

Taken together with the trial court and Court of Appeals rulings, this brief analyzes the language of the required summons that accompanies a will contest petition. Upon revisiting these issues anew, a broader examination of the text of the RCWs at issue reveals additional support for the Respondent's position. By incorporating TEDRA and the form summons in RCW 11.96A.100, the will contest statute confirms that service of a will contest petition is subject to the procedural rules of court, including Civil Rule 12 and its provisions regarding waiver of service by failure to assert the defense in an answer. The trial court should be affirmed, and Jepsen is entitled to an award of attorney's fees.

A. Service of Process Implicates Personal Jurisdiction.

Personal jurisdiction determines who may be subject to the court's authority. "In personam jurisdiction obtains upon the service of process." *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 483, 674 P.2d 1271 (1984). Proper service is a personal jurisdiction issue relating to due process. *E.g. In re Estate of Kordon*, 157 Wn.2d 206,

209, 137 P.3d 16 (2006). It ensures that a party receives notice “reasonably calculated to inform a party of the pendency of proceedings affecting her or her property and provide a meaningful opportunity to participate.” *Dobbins v. Mendoza*, 88 Wn. App. 862, 871-72, 947 P.2d 1229 (1997). In contrast to a court’s subject matter jurisdiction, personal jurisdiction can be waived in several ways. *E.g. Sanders v. Sanders*, 63 Wn.2d 709, 288 P.2d 942 (1964) (waiver by failing to assert affirmative defense); *Kuhlman Equipment Co. v. Tammermatic, Inc.*, 29 Wn. App. 419, 628 P.2d 851 (1981) (waiver by seeking affirmative relief); *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000) (waiver by dilatory conduct).

B. The Will Contest Statute and Required Notice.

The procedure for initiating a will contest includes a filing component and a service component:

If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and **by petition to the court having jurisdiction contest the validity of said will**, or appear to have the will proven which has been rejected, he or she shall file a petition containing his or her objections and exceptions to said will, or to the rejection thereof. Issues respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of the last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or a part of it, shall be tried and determined by the court.

For the purpose of tolling the four-month limitations period, a contest is deemed commenced when a petition is filed with the court and not when served upon the personal representative. **The petitioner shall personally serve the personal representative within ninety days after the date of filing the petition.** If, following filing, service is not so made, the action is deemed to not have been commenced for purposes of tolling the statute of limitations.

If no person files and serves a petition within the time under this section, the probate or rejection of such will shall be binding and final.

RCW 11.24.010 (emphasis added).

In addition, RCW 11.24.020 specifies the form of the notice by referencing the Trust and Estate Dispute Resolution Act (TEDRA) service procedure:

Upon the filing of the petition referred to in RCW 11.24.010, notice shall be given as provided in RCW 11.96A.100 to the executors who have taken upon themselves the execution of the will, or to the administrators with the will annexed, to all legatees named in the will or to their guardians if any of them are minors, or their personal representatives if any of them are dead, and to all persons interested in the matter, as defined in *RCW 11.96A.030(5).

RCW 11.96A.100's outline of procedural rules requires a summons in addition to the filing of a petition. Furthermore, it provides a specific form for the summons.

The statute provides in part: "**A summons must be served in accordance with** this chapter and, where not inconsistent with these rules, **the procedural rules of court.**" RCW 11.96A.100(2) (emphasis added).

The statute, therefore, specifically refers to adherence of the civil rules of the court in its description of the service requirement.

The summons must include language substantially similar to example form contained in the statute: “In order to defend against or to object to the petition, you must answer the petition by stating your defense or objections in writing, and by serving your answer upon the person signing this summons not later than five days before the date of the hearing on the petition.” RCW 11.96A.100(3) (emphasis added). The summons at issue here, contains the identical language. CP 29-31.

The requirement that an answer to the petition be prepared and filed is confirmed in subsection (5) of RCW 11.96A.100. Furthermore, subsection (9) of the statute confirms a party’s right to include a motion regarding procedural matters in the answer. Rather than *disclaim* the established civil rules that govern procedure, the will contest statute and TEDRA procedures *affirm* their applicability.

C. Waiver Of Defense Under Civil Rule 12.

RCW 11.96A.100(2) incorporates “the procedural rules of court” to the service procedure for a will contest petition.¹ These procedural rules

¹ Civil Rule 1 states, “These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” (emphasis added)

include Civil Rule 12 regarding assertion of defenses in pleadings. According to these rules, a defense to insufficient service of process *must* be raised in the answer. CR 12(b) (“Every defense ... shall be asserted in the responsive pleading....”). If a responding party fails to object to personal jurisdiction in its answer, it waives that objection thereafter:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or **insufficiency of service of process is waived** (A) if omitted from a motion in the circumstances described in section (g), or (B) **if it is neither made by motion under this rule nor included in a responsive pleading** or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

CR 12(h)(1) (emphasis added); *see also Sanders*, 63 Wn.2d 709; *O’Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 527, 125 P.3d 134 (2004); *see also Corona v. Boeing Co.*, 111 Wn. App. 1, 8, 46 P.3d 253 (2002) (although a party must file and serve within the 30-day appeal period provided for an industrial insurance appeal, “[s]ubstantial compliance with this statute is sufficient to invoke the superior court’s jurisdiction.”)

D. The Estate Waived Any Defense Relating to Service.

Jepsen properly filed a petition and summons to contest the will. On March 22, 2012, counsel for the Respondent sent a copy of the Summons, mirroring the statutory form, with the Petition via email to counsel for the Personal Representative. CP 42-45. The Summons notified the Personal Representative that, “In order to defend against or to object to the petition,

you must answer the petition by stating your defense or objection in writing....” CP 29-30. In accordance with procedural requirements of RCW 11.96A.100(5) and the language in the summons, the Estate filed and served its responsive pleading (answer) to the petition on April 27, 2012. CP 31-32.

The Estate’s answer failed to raise any defense as to insufficiency of service of process, nor did it make reference to *any* issues of personal jurisdiction or insufficiency of service. To the contrary, the answer contained affirmative prayers for relief which invoked the authority of the trial court. It also included an introductory statement that counsel for the Estate acknowledged that he was acting for and on behalf of Julie Miles in her capacity as personal representative. CP 31-32.

In producing its responsive pleadings, the Estate had an opportunity to assert a defense to issues of service and notice. It failed to do so. Civil Rule 12 provides the consequence for that missed opportunity: the Estate waived those defenses.

E. Jepsen Is Entitled to an Award of Fees.

Jepsen is entitled to fees incurred on appeal pursuant to RCW 11.96A.150, which provides that the trial court and court of appeals may award costs and fees in its discretion. The circumstances surrounding the estate’s waiver of service by failing to assert an objection in its answer are

clear. The court should exercise its discretion to allow attorney's fees to Jepsen for responding to this unnecessary appeal.

IV. CONCLUSION

The Estate distorts the intent of the statute by focusing solely on the language of RCW 11.24.010 and by downplaying the significance of its answer. Reading the statutes as a whole, it becomes apparent that service of the petition, as required in RCW 11.24.010, mirrors service of a summons and complaint in any other civil action. RCW 11.24.020 expounds upon the service requirement by confirming that after the petition is filed, notice must be given to the personal representative. For this notice, the statute incorporates the summons outlined in TEDRA. TEDRA's notice provision, in turn, states that the procedural rules of court apply and that the responding party *must* file an answer. Nothing in these statutes disclaims, exempts, or excludes CR 12 from the procedural rules of court that otherwise apply to a will contest or a TEDRA action. The required answer to a will contest petition accomplishes the same purpose as an answer to a civil complaint: confirming the issues that are in dispute and providing a forum for assertion of defenses, whether legal, procedural, or factual. The Estate filed an answer that did not raise any defense relating to service. Under well-known legal principles that have been applied innumerable times in other civil disputes, the Estate waived its objection to personal jurisdiction.

RESPECTFULLY SUBMITTED this 6th day of March, 2015.

DICKSON LAW GROUP PS

A handwritten signature in black ink, appearing to read "Robert P. Dickson", written in a cursive style.

ROBERT P. DICKSON, WSBA 39770
Attorney for Respondent

CERTIFICATE OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the foregoing Supplemental Brief of Respondent to counsel of record as follows:

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MOISES BEJARANO

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*The Estate of Virginia J. Jepsen, et al Appellants v. Mack Jepsen, Respondent
Supreme Court Cause No. 90874-5*

Greetings Clerk:

Attached please find for filing Respondent's Supplemental Brief in the above-referenced matter.

Please call or email with any questions or concerns.

Thank you.

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