IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Estate of: SHIRLEY A. HALLMEYER, Deceased.	No. 39938-5-II UNPUBLISHED OPINION

Van Deren, J. — Melissa Dowd, personal representative of Shirley Hallmeyer's estate, appeals the trial court's denial of her motion to dismiss a petition contesting probate of Hallmeyer's will for lack of jurisdiction because Laura Conway, one of Hallmeyer's daughters and Dowd's aunt, did not (1) actually or (2) substantially comply with RCW 11.24.010 by personally serving Dowd within 90 days of filing a petition challenging Hallmeyer's will. We hold that the trial court erred in denying the motion to dismiss and remand for dismissal of the petition.[1] We also award attorney fees and costs to the estate to be paid personally by Conway.

Facts

Shirley Hallmeyer's will was admitted to probate on November 20, 2008. Dowd is the estate's personal representative. On March 19, 2009, Conway filed a petition contesting

[1] Dowd also appeals the trial court's denial of her motion for reconsideration, which we do not address because we remand for dismissal of Conway's petition challenging the probate of Hallmeyer's estate with Dowd as the personal representative.

Hallmeyer's will. Conway filed the summons on June 10, 2009, and filed the citation on June 11, 2009.

On May 20, 2009, Conway's process server began a series of 19 attempts to serve Dowd with Conway's petition. On June 12, Conway added the summons and citation to the documents to be served on Dowd. On several occasions, a process server spoke with Michael Erickson, who the process server eventually identified as resident in Dowd's home. But Dowd was not present when the process server came to her house and the process server did not leave copies of the petition, summons, and citation with Erickson until June 23, 2009. Erickson delivered these documents to Dowd later the same day.

Dowd brought a motion to dismiss the petition, contending that it was time barred and that the trial court lacked jurisdiction to hear the will contest because Conway had failed to comply with the 90 day personal service requirement of RCW 11.24.010. Conway argued that, even if she had not personally served Dowd within the 90 day statutory period, she had substantially complied with the statute because the process server left copies of the will contest, summons, and citation with Erickson. The trial court denied the motion to dismiss the petition. Dowd then filed an unsuccessful motion for reconsideration. She sought discretionary review, which we granted.

ANALYSIS

I. Actual Compliance

Dowd argues that the trial court erred in denying her motion to dismiss because Conway failed to personally serve her within 90 days of filing the petition on March 19, 2009.[2] We agree that the trial court erred in denying her motion to dismiss.

We review the denial of a motion to dismiss for lack of jurisdiction under CR 12(b)(2) de novo. *In re Estate of Kordon*, 157 Wn.2d 206, 209, 137 P.3d 16 (2006). Our fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, we give effect to that plain meaning as an expression of legislative intent. *Campbell*, 146 Wn.2d at 9-10. We determine the plain meaning of a statutory provision from the ordinary meaning of its language, as well as the general context of the statute, related provisions, and the statutory scheme as a whole. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

Chapter 11.24 RCW governs the procedure for contesting the probate or rejection of a will. RCW 11.24.010 provides:

> 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

[2] Conway filed a response to Dowd's motion for discretionary review but failed to file a timely response brief when the appeal was granted. We denied Conway's motion to file an untimely brief.

> 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.

Under the plain language of the statute, a petitioner must commence an action contesting the probate of a will by filing a petition within the four month statute of limitations after the will has been accepted for probate. Commencing the action then tolls the statute of limitations only if service on the personal representative is accomplished within 90 days of filing the petition. The action to contest the probate is deemed to have not commenced if the petitioner fails to personally serve the estate's personal representative within 90 days after filing the petition. RCW 11.24.010.

Here, Hallmeyer's will was admitted to probate on November 20, 2008. Conway attempted to commence the action by filing a petition on March 19, 2009, within the four month statute of limitations. But she failed to serve Dowd or anyone residing at her residence until June 23, 2009, 96 days after she filed the petition. Thus, Conway's petition is considered to have not tolled the four month statute of limitations for claims against the estate and the trial court erred in denying her motion to dismiss.

II. Substantial Compliance

The trial court apparently adopted Conway's argument that her petition should go forward due to her substantial compliance with RCW 11.24.010, even though she did not serve Dowd, or a resident of her home, within the 90 day statutory period. But in rejecting Dowd's argument that substantial compliance cannot substitute for service within the statute of limitations, the trial court

also erred.

Our Supreme Court, when presented with the question of whether untimely service can constitute substantial compliance with a statute of limitations, compared the situation to substantial compliance by timely but procedurally defective service. *City of Seattle v. Pub. Emp't Relations Comm'n*, 116 Wn.2d 923, 927-29, 809 P.2d 1377 (1991). It held:

> It is impossible to substantially comply with a statutory time limit in the same way. It is either complied with or it is not. Service after the time limit cannot be considered to have been actual service within the time limit. We therefore hold that failure to comply with a statutorily set time limitation cannot be considered substantial compliance with that statute.

Pub. Emp't Relations Comm'n, 116 Wn.2d at 928-29.

More recently, our Supreme Court indicated that substantial compliance with the statute of limitations may apply to actions brought under chapter 11.24 RCW. *See Kordon*, 157 Wn.2d at 213-14.[3] But it again observed that untimely service, such as the petitioner's failure to serve the personal representative more than two years after timely filing the petition, is a "total failure to comply" with a statute of limitations and cannot be substantial compliance. *Kordon*, 157 Wn.2d at 213-14.

Here, Conway failed to personally serve Dowd or anyone at her residence within 90 days of filing the petition. Thus, it was impossible for her to have substantially complied with RCW 11.24.010's tolling provision. We hold that the trial court erred in ruling that Conway substantially complied with RCW 11.24.010.

III. Attorney Fees

[3] After our Supreme Court issued *Kordon*, the legislature amended RCW 11.24.010. *See* Laws of 2007, ch. 475, § 4. Because this amendment expressly incorporated the implicitly incorporated 90 day service requirement in former RCW 11.24.010 (2006), *Kordon* remains applicable to this case. *See* 157 Wn.2d at 213-14.

Dowd asks that we award her attorney fees against Conway under the Trust and Estate Dispute Resolution act (TEDRA), chapter 11.96A RCW. RAP 18.1 allows attorney fees if applicable law authorizes them. RCW 11.96A.150 provides in pertinent part:

> (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.
>
> (2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. . . .

TEDRA expressly supplements chapter 11.24 RCW. *See* RCW 11.96A.080(2).

Here, as Dowd correctly contends, Conway's ultimately unsuccessful will contest and opposition to the motion to dismiss has delayed distribution of the estate's assets to Hallmeyer's beneficiaries. Further, the costs of litigating the motion for discretionary review and this appeal, if deducted from the estate, would have an adverse financial impact on the beneficiaries. An award of attorney fees against Conway will help offset those costs, preserving the estate for Hallmeyer's designated beneficiaries. Thus, we award the estate attorney fees and costs on appeal and order Conway to personally pay them in an amount to be decided upon compliance with RAP 18.1.

We reverse and remand for dismissal of Conway's action to challenge probate of Hallmeyer's will. We award the estate attorney fees and costs against Conway.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Worswick, A.C.J.