IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Matter of the Estate of MILDRED FREY, Deceased. DEAN FREY, Appellant, v. LORNA FREY, as Personal Representative of the Estate of Mildred Frey, Respondent.	)	No. 67378-5-I DIVISION ONE UNPUBLISHED FILED: November 19, 2012

Cox, J. — Dean Frey appeals a trial court order dismissing his petition objecting to the completion of probate of his mother Mildred Frey's estate. In his sole assignment of error, he argues that the trial court erred in finding that he either consented to or was provided notice of the personal representative's petition for nonintervention powers to administer the estate. We agree with the trial court and affirm.

Mildred Frey died on January 12, 2007. She had five living children at her death: Dean, Lorna, and three other siblings.[1] A handwritten document dated December 6, 2005 and entitled Last Will of Mildred Leonore Frey was found in a file cabinet in Frey's house. The document was witnessed and signed by two individuals. The will bequeathed Frey's residence on Lopez Island to

[1] We adopt the naming conventions of the parties.

Dean. The will also stated: "I also bequeath to Dean difference between ass'd value of BI & Lopez to make equitable the difference in value of my present house on Lopez Island and my former Bainbridge Island, Washington house." The phrase "difference between ass'd value of BI & Lopez" is in much smaller writing and appears to have been written on a separate piece of paper attached to the second page of the will.[2] Frey's remaining personal property was to be divided equally among Frey's four other children.

On March 5, 2007, Lorna filed a copy of the will along with a petition for probate, for letters testamentary, and for nonintervention powers.[3] She also filed copies of consent forms to the grant of nonintervention powers signed by her siblings. On March 9, 2007, Lorna was contacted by the superior court clerk's office. A deputy clerk informed her that Judge John Linde had reviewed the petition and rejected the will from probate. Lorna's petition was returned to her with a post-it note attached to the front stating "Will is apparently handwritten by decedent with alteration. Not valid." The note was initialed "JOL." No order rejecting the will from probate was entered.[4]

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[2] We have before us only a black and white photocopy of the will. However, both parties acknowledge that a separate piece of paper with writing on it was attached to the original will. See clerk's papers at 55 ("Then, Ms. Frey made a handwritten notation on a separate slip of paper and taped it to the surface of the will over the blank space and hand wrote in pencil in the blank to 'see' the attached."); ("The words stuck on were also placed on a separate paper stuck to the will…) (both emphases in original). It is undisputed that the validity of the will is not properly before us, and our discussion of the characteristics of the will is for the sole purpose of outlining the procedural history.

[3] Frey's will named her oldest son Mark as the personal representative, but specified that if he was unwilling or unable, the duty would transfer to her oldest daughter Lorna. Mark filed a declination on March 5, 2007.

On March 22, 2007, Lorna sent an e-mail to her four siblings entitled "Review New Petition." The e-mail included the draft of a petition for letters of administration and nonintervention powers to allow Lorna to administer Frey's intestate estate. It is undisputed that her siblings received this e-mail. There is no indication in this record whether any siblings objected.

The petition asserted that "all of Decedent's heirs and beneficiaries have consented to the grant of Nonintervention Powers in a writing filed with this Court." Lorna filed this second petition on March 23, 2007, without any changes from the draft she e-mailed to her siblings. No consent forms were filed with the second petition. Judge Vickie Churchill signed an order granting the petition and finding that notice of the hearing was not required because the remaining heirs had consented to the grant of nonintervention powers.

Lorna proceeded to administer the estate. On January 24, 2011, Lorna filed a declaration of completion of probate. The declaration specified that Frey's property would be distributed as follows: Dean would be granted the Lopez Island residence; the other siblings would split the estate's remaining financial assets, and all five siblings would receive an equal portion of Frey's household goods and furniture.

[4] "Applications for the probate of a will and for letters testamentary, or either, may be made to the judge of the court having jurisdiction and the court may immediately hear the proofs and either probate or reject such will as the testimony may justify. Upon such hearing the court shall make and cause to be entered a formal order, either establishing and probating such will, or refusing to establish and probate the same, and such order shall be conclusive except in the event of a contest of such will as hereinafter provided." RCW 11.20.020(1).

On February 23, 2011, Dean filed a "Petition and Objection to Completion of Probate." In his petition, Dean requested an accounting as permitted by RCW 11.68.110(2).[5] Dean also objected to the completion of probate on the grounds that: (1) Frey's will was valid and the property should be disposed of according to its terms; (2) Lorna had not given proper notice to all of the estate's creditors; and (3) he had not consented to Lorna's second petition for nonintervention powers.

On May 10, 2011, Lorna filed a motion to dismiss Dean's petition. Following a hearing on the motion on June 10, 2011, Dean's petition was dismissed. The trial court reserved on the issue of Dean's request for an accounting but required Dean to renote the motion on this issue by June 24, 2011. The record does not show that Dean pursued this issue. Judge Donald Eaton orally ruled that Dean's attempt to contest the rejection of the will was time-barred under RCW 11.24.010. He further ruled that any failure of Lorna to give notice of the petition for nonintervention powers was harmless.[6]

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[5] RCW 11.68.110(2) provides: "Subject to the requirement of notice as provided in this section, unless an heir, devisee, or legatee of a decedent petitions the court either for an order requiring the personal representative to obtain court approval of the amount of fees paid or to be paid to the personal representative, lawyers, appraisers, or accountants, or for an order requiring an accounting, or both, within thirty days from the date of filing a declaration of completion of probate, the personal representative will be automatically discharged without further order of the court and the representative's powers will cease thirty days after the filing of the declaration of completion of probate, and the declaration of completion of probate shall, at that time, be the equivalent of the entry of a decree of distribution in accordance with chapter 11.76 RCW for all legal intents and purposes." Lorna had already provided an accounting to her siblings dated January 25, 2011. She filed the accounting as an exhibit to her motion to dismiss Dean's petition on May 10, 2011.

[6] Dean provides only an excerpt of the record of the June 10, 2011 proceedings

Dean timely appeals.[7]

NOTICE

Dean assigns error only to the portion of the trial court's oral ruling in which the court found that Lorna did not have to give him formal notice of the second request for nonintervention powers because he had consented or because he had actual knowledge of the request. We hold that the trial court was correct.

A personal representative may petition the court for nonintervention powers, whether the decedent died testate or intestate.[8] Nonintervention powers give a personal representative the ability to administer and settle the estate without intervention of the court.[9] There is a clear statutory preference for the nonintervention administration of an estate in order to simplify and expedite the probate process.[1]

RCW 11.68.041 outlines the notice requirements for seeking nonintervention powers. Except in cases in which the court is required pursuant

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which does not contain a discussion of the notification of creditors.

[7] We directed parties to address whether the June 10, 2011 order of dismissal was appealable as a matter of right under RAP 2.2. Neither party took a position on the issue and the question was referred to the panel. Under RAP 2.2(a)(1), a party may appeal from the "final judgment entered in any action or proceeding." Alternatively, RAP 2.2(a)(3) provides that a party may appeal from "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." The practical effect of the June 10, 2011 order was to close the estate. The denial of Dean's petition could fit within either category and was thus appealable as of right.

[8] RCW 11.68.011.

[9] RCW 11.68.090.

[1] 26B Cheryl C. Mitchell & Ferd H. Mitchell, Washington Practice: Probate Law and Practice § 3.15 (2012).

to RCW 11.68.011 to grant nonintervention powers,[11] a petitioner:

> shall give notice of the petitioner's intention to apply to the court for nonintervention powers to all heirs, all beneficiaries of a gift under the decedent's will, and all persons who have requested, and who are entitled to, notice under RCW 11.28.240, except that:
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> (a) A person is not entitled to notice if the person has, in writing, either waived notice of the hearing or consented to the grant of nonintervention powers; and
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> (b) An heir who is not also a beneficiary of a gift under a will is not entitled to notice if the will has been probated and the time for contesting the validity of the will has expired.[12]

Notice must be either personally served or sent by regular mail at least ten days before the date of the hearing, and proof of mailing of the notice must be by affidavit filed in the cause.[13] The notice must state in substance as follows:

> (a) The personal representative has petitioned the superior court of the state of Washington for . . . . . county, for the entry of an order granting nonintervention powers and a hearing on that petition will be held on . . . . ., the . . . . . day of . . . . ., ..., at . . . . . o'clock, . . M.;
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> (b) The petition for an order granting nonintervention powers has been filed with the court;
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> (c) Following the entry by the court of an order granting nonintervention powers, the personal representative is entitled to administer and close the decedent's estate without further

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[11] A court is required to grant nonintervention powers to a petitioning personal representative when:

(1) the petitioning personal representative is named in the decedent's probated will as the personal representative, or

(2) the decedent died intestate, the petitioning personal representative is the decedent's surviving spouse or surviving domestic partner, the decedent's estate is composed of community property only, and the decedent had no issue: (i) who is living or in gestation on the date of the petition; (ii) whose identity is reasonably ascertainable on the date of the petition; and (iii) who is not also the issue of the petitioning spouse or petitioning domestic partner. RCW 11.68.011(2)(a), (b).

[12] RCW 11.68.041(2).

[13] RCW 11.68.041(3).

court intervention or supervision; and

> (d) A person entitled to notice has the right to appear at the time of the hearing on the petition for an order granting nonintervention powers and to object to the granting of nonintervention powers to the personal representative.[14]

Dean's sole argument on appeal is that he did not receive the notice required by RCW 11.68.041 of Lorna's second petition for nonintervention powers. Lorna argues that she did not have to give notice under the second petition because she had already secured Dean's consent under the first petition. In the alternative, Lorna argues, she satisfied the notice requirement of RCW 11.68.041 by providing Dean a copy of the second petition for nonintervention powers by e-mail.

Because Dean's assignments of error are to the trial court's findings of fact, the standard of review is whether substantial evidence supported those findings.[15] To the extent that Dean also disputes the legal effect of those facts, the standard of review is de novo.[16]

RCW 11.68.041 does not specify whether a personal representative must provide new notice or seek new consent when a subsequent or amended petition for nonintervention powers is filed. We have found no case law involving such a scenario and the parties cite none. However, we believe this situation to be analogous to that contemplated by RCW 11.68.060, in which the

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[14] RCW 11.68.041(3).

[15] Clayton v. Wilson, 168 Wn.2d 57, 62-63, 227 P.3d 278 (2010).

[16] Happy Bunch, LLC v. Grandview N., LLC, 142 Wn. App. 81, 88, 173 P.3d 959 (2007).

nonintervention powers of a personal representative who dies or resigns are not automatically conferred on the successor personal representative. We also agree with Dean that, because his consent form specifically references the petition to which it was attached, the consent was limited to that petition. As a result, once the amended petition seeking nonintervention powers to administer Frey's intestate estate was filed, new consent or notice was required.

Having determined that Lorna did not strictly comply with the statute, we turn to the issue of whether she substantially complied. "We have long recognized procedural requirements directed by the legislature. Strict compliance with these procedures may, however, not always be required. We have held that 'substantial compliance' or satisfaction of the 'spirit' of a procedural requirement may be sufficient."[17] What constitutes substantial compliance with a statute is a matter depending on the facts of each particular case.[18]

The purpose of RCW 11.68.041 is apparent. It is to provide an heir or beneficiary wishing to object to the grant of nonintervention powers to a personal representative the opportunity to do so. Lorna's e-mail to her siblings once Frey's will was rejected was reasonably calculated to inform them that she would proceed to administer Frey's intestate estate with nonintervention powers. Dean had actual notice and the opportunity to be heard on Lorna's petition as far back

[17] Fisher Bros. Corp. v. Des Moines Sewer Distr., 97 Wn.2d 227, 230, 643 P.2d 436 (1982) (citations omitted).

[18] In re Santore, 28 Wn. App. 319, 327, 623 P.2d 702 (1981).

as March 2007. He was in as good of a position as he would have been had the petition been personally served upon him or sent by mail. Yet there is nothing in this record to show he objected to the second petition after receiving notice of it by e-mail. We are satisfied that based on the unusual procedural history in this case and the limited briefing of the parties, Lorna substantially complied with the purpose of the notice provision of RCW 11.68.041.

In his reply brief, Dean argues for the first time that Lorna's failure to provide notice of the petition for nonintervention powers renders the decree of distribution void. Citing In re Estate of Little, 127 Wn. App. 915, 113 P.3d 505 (2005) and Hesthagen v. Harby, 78 Wn.2d 934, 481 P.2d 438 (1971), he contends that, were this case to be remanded, he would not be subject to the four-month statute of limitations for challenging the rejection of Frey's will. Lorna has moved to strike this portion of Dean's reply brief under RAP 10.3(c). We generally do not consider an issue raised and argued for the first time in a reply brief.[19] And because we hold that Dean received adequate notice of Lorna's petition, we need not address whether Little and Hesthagen are relevant to notice of a petition for nonintervention powers.

ATTORNEY FEES

[19] Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Lorna requests attorney fees incurred on appeal pursuant to RAP 18.9(a) on the grounds that Dean's appeal is frivolous. We decline to award fees.

RAP 18.9(a) provides that "[t]he appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." An appeal is frivolous when it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of success.[2] We resolve doubts against finding an appeal frivolous.[21] While we conclude that Lorna provided adequate notice to Dean of her second petition, we cannot say that this appeal is so totally devoid of merit that there was no reasonable possibility of success on appeal. We conclude that an award of fees is not merited.

We affirm the order dismissing the petition objecting to the completion of probate.

/s/ Cox, J.

WE CONCUR:

/s/ Verellen, J.

/s/ Dwyer, J.

[2] Streater v. White, 26 Wn. App. 430, 434, 613 P.2d 187 (1980).
[21] Id. at 435.